

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 29
Date: September 9, 2022
File No.: T2517/7420

Between:

Giuseppe Clemente

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Marie Langlois

Table of Contents

I.	Motion for disclosure	1
II.	Legal Framework	1
III.	Analysis and decision.....	2
	A. List of documents and privilege documents.....	3
	B. Emails/Documents between April 2016 and December 2016, including but not limited to the emails/documents referenced in the Air Canada Management Notes.....	4
	C. Names and job titles of the Air Canada employees referred to in the Air Canada Management Notes by the short form initials DM, EP, JM, MH, GI, RM and CM	5
IV.	Orders	7

I. Motion for disclosure

[1] This is a ruling on the motion for disclosure of documents filed by Mr. Giuseppe Clemente (the Complainant) on July 11, 2022.

[2] By his motion, the Complainant is requesting that the Tribunal orders Air Canada (the Respondent) to disclose the following:

1. A List of documents and privileged documents;
2. Emails/Documents between April 2016 and December 2016, including but not limited to the emails/documents referenced in the Air Canada Management Notes;
3. The names and job titles of the Air Canada employees referred to in the Air Canada Management Notes by the short form initials DM, EP, JM, MH, GI, RM and CM

[3] The Canadian Human Rights Commission has informed the Tribunal that it agrees that parties have to file their List of documents in accordance with the Rules of Procedures. However, it takes no position on the two other issues raised by the Complainant's motion.

II. Legal Framework

[4] Pursuant to subsection 50(1) of the Canadian Human Rights Act, R.S.C. 1985, c. H-6 (*CHRA*), the Canadian Human Rights Tribunal (the Tribunal) must give the parties a full and ample opportunity to present their case.

[5] On July 11, 2021, the *Canadian Human Rights Tribunal Rules of Procedure* (2021-06-03 Canada Gazette Part II, Vol. 155, No. 13) (*New Rules*) came into force for all new proceedings under the *CHRA*.

[6] According to Rule 2(1) of the *New Rules* these do not apply to matters referred to the Tribunal before the day on which the New Rules came into effect, ie July 11, 2021. However, Rule 2 provides that the *New Rules* will apply if all parties consent to their application.

[7] On July 29, 2021, a letter was sent to the parties by the Registry Office of the Tribunal since the present matter was referred to the Tribunal before July 11th, 2021. In the letter, the parties were asked whether or not they wanted to opt in to the new rules. Only the

Commission informed the Tribunal of its choice for the *New Rules*. Considering that the other parties did not consent to the application of the *New Rules*, the previous Rules i.e. the *Canadian Human Rights Tribunal Rules of Procedures* ((03-05-04) (*Rules of Procedure*)) apply in the present case.

[8] Rules 6(1)d) and 6(1)e) specify that each party shall, amongst other obligations, serve and file a list of all documents in the party's possession, for which privilege is claimed or not, 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.

[9] A copy of the documents referred to in the List must also be provided to the other parties with the exception of the privilege documents, according to Rule 6(4) of the *Rules of procedure*.

[10] The jurisprudence states that if the document at issue is arguably relevant, it has to be disclosed. The standard to determine what is arguably relevant is not a particularly high threshold for the moving party to meet "If there is a rational connection between a document and the facts, issues, or forms of relief identified in the matter, the information should be disclosed....." (*Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28, para 6 (*Brickner*)). However, the demand cannot be speculative or amount to a fishing expedition (*Guay v Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, par. 43). The documents should be identified with reasonable particularity (*Brickner* at para 7) and they have to be in the party's possession, access and/or control (*Clegg v. Air Canada*, 2019 CHRT 3 at para 84 to 88). Therefore, the Tribunal cannot order a party to generate or create new documents for disclosure (*Gaucher v Canadian Armed Forces*, 2005 CHRT 42, at para. 17).

III. Analysis and decision

[11] The Tribunal grants, in part, the motion from the Complainant, for the following reasons.

A. List of documents and privilege documents

[12] The Complainant is asking the Tribunal to order the Respondent to provide a List of documents and privileged documents.

[13] The Respondent submits that providing the documents themselves is more efficient than merely providing a List of documents and it would be a time consuming endeavour.

[14] On October 20, 2021, the Respondent provided the Complainant with a bundle of documents of 114 pages, and on May 18, 2022, a bundle of 237 pages accompanied its Statement of particulars. No List of documents were ever provided by the Respondent.

[15] The Tribunal is of the opinion that the List of documents has to be provided to the parties and the Tribunal, as stated by Rule 6(1)d) and 6(1)e).

[16] As a general principle, the *Rules of procedure* are to be interpreted and applied so as to secure the informal and expeditious proceedings, according to Rule 1(1). They are in place to help parties resolve human rights complaints quickly, efficiently, and fairly.

[17] The obligation to provide a List of relevant documents to the other parties and the Tribunal is a simple way to get an overview of what the documents contain and helps the other parties identify if any are missing or are duplicates.

[18] In the present case, over 350 documents were provided by the Respondent to the Complainant in two different instances. It is important that the list be provided, in order to get a clear view of what was provided.

[19] As for the privilege documents, the *Rule of procedure* states that the documents themselves do not have to be provided, of course in order to maintain the confidentiality of the privilege. It is more important so to provide a List and the basis of the privilege sought in order to allow the other parties to get the information and if necessary to dispute the privilege. Without the List of the privilege documents, including the basis for the privilege, the right to defend their case and present their arguments might be infringed.

[20] Therefore, the Tribunal orders the Respondent to serve and file to the parties and the Tribunal:

- A List of documents that are in its possession that relate to a fact or issue that is raised in the complaint, in compliance with Rule 6(1)d) of the *Rules of procedure*;
- A List of privilege documents and the basis for the privilege in compliance with Rule 6(1)e) of the *Rules of procedure*.

B. Emails/Documents between April 2016 and December 2016, including but not limited to the emails/documents referenced in the Air Canada Management Notes

[21] The Respondent disclosed a 10 page extract of the Air Canada Management Notes concerning the Complainant for the period of August 30, 2006 to August 28, 2017 to the Complainant and the Commission. The Respondent also provided them with some Emails and documents corresponding to some of the information in the Air Canada Management Notes. The Complainant observed that no Emails or documents were provided by the Respondent for the period of April 2016 to December 2016. According to his motion, that period corresponds to the gradual return to work of the complainant in both the Radio Room and the Pillow Room.

[22] On August 4, 2021, the Tribunal granted the Complainant's motion on the scope of the complaint determining that the complaint included the bidding process connected to the Radio Room, the determination of whether the Radio Room was a supernumerary position and the incident involving Bonnie Hanson.

[23] In its response to the actual motion, the Respondent argues that to its knowledge, all documents in its possession or control, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by the other parties, have been disclosed to the Complainant and the Commission. However, the Respondent has recanvassed its managers with knowledge of this matter and engaged Air Canada's IT department to assist with document collection. Doing so, it located 13 additional documents during this process, which have been provided to the Complainant and Commission. If any further documents are identified, the Respondent takes the commitment to disclose them promptly.

[24] The Tribunal remarks that the Respondent does not dispute the arguably relevancy of those documents, has provided some and is willing to provide more promptly if any other is identified.

[25] Therefore, the Tribunal does not need to make an order and takes notice of the Respondent's commitment.

C. Names and job titles of the Air Canada employees referred to in the Air Canada Management Notes by the short form initials DM, EP, JM, MH, GI, RM and CM

[26] In his representations, the Complainant mentions that in the Air Canada Management Note for the period between July 2016 and October 28, 2016, some individuals are referred only by their initials. The notes describe discussions and decisions about the retirement of the Complainant and termination of his employment. The Complainant does not know who those individuals are nor their job title. Those initials do not correspond to the list of witnesses provided by the Respondent. He is requesting that those names and their job titles are disclosed.

[27] The Respondent argues that there is no obligation in the *Rules of Procedure* to explain contents of the documents provided and this process is not contemplated by the Rules. He adds that there is no discovery process before the Tribunal such that the Complainant would be permitted to ask for explanations of documents in the manner requested by his motion.

[28] The Tribunal notes that the *Rules of Procedure* provide for the disclosure of documents and production of documents. As stated in *Nur v Canadian Railways*, 2019 CHRT 5, at para 221 and after (*Nur*), the powers and jurisdiction of the Tribunal do not emanate from the *Rules of procedure* but from the *CHRA*.

[29] The *CHRA* provides at paragraph 48.9(2)(e), that the Chairperson of the Tribunal may make rules of procedures governing the practice and procedure before the Tribunal, including but not limited to, rules governing (e)discovery proceedings. As of this day, the Chairperson of the Tribunal has not provided specific rules in the matter. As mentioned in

Nur, “Nonetheless, this does not mean that it cannot exercise its powers and its discretion on this matter”. In fact, the legislator gave the Tribunal broad discretion to create rules of practice (see *Desormeaux v Ottawa-Carleton Regional Transit*, 2002 CanLII 52584), which are not limited in the list in paragraph 48.9(2) of the *CHRA*.

[30] The *Rules of procedure* are to be interpreted and applied so as to secure the informal, expeditious and fair determination of every inquiry on its merits (Rule 1(1)). A Panel may, according to Rule 1(2) amongst other powers, vary from the Rules if doing so achieves the purpose set out in Rule 1(2). Therefore, the rules are not exhaustive nor limitative.

[31] As such, the Tribunal enjoys discretion to decide on an issue of procedure.

[32] The *CHRA* specifies at paragraph 48.9(1) that the proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[33] In light of these principles, the Tribunal is of the opinion that the Complainant should be able to identify the individuals other than by their initials. According to the Air Canada Management Note for the period of April to October 2016, these individuals were involved in the discussions and decisions regarding the retirement or the termination of his employment. His alleged forced retirement or termination of his employment is at the heart of his complaint. The people involved in the discussions and decisions should be identified in order to allow the Complainant to dispute the content of the Air Canada management Note or even decide if he wants to consider them as witnesses, or for other reasons to present his case. Without the identification of the individuals, the right to defend his case and present his arguments may be denied according to section 50(1) of *CHRA*.

[34] The Complainant is asking for 7 individuals DM, EP, JM, MH, GI, RM and CM to be identified with their name and job title. The Respondent did not put forward any evidence or argument of the difficulty or time that would be necessary to identify the individuals. Without evidence or argument on the contrary, the Tribunal believes that the steps and the time needed to identify the individuals cited in the respondent’s administrative management system is not unreasonable. The research would probably be succinct.

[35] Therefore, the Tribunal emits an order to the Respondent to identify the names and job title of DM, EP, JM, MH, GI, RM and CM cited in the Air Canada Management Note that was previously disclosed.

IV. Orders

For the reasons above, the Tribunal grants the Complainant's motion in part, and hereby:

ORDERS the Respondent to serve and file to the parties and the Tribunal within 30 days of the notification of the present decision:

- A List of documents that are in its possession that relate to a fact or issue that is raised in the complaint, in compliance with Rule 6(1)d) of the *Rules of procedure*;
- A List of privilege documents and the basis for the privilege in compliance with Rule 6(1)e) of the *Rules of procedure*;

TAKES NOTICE that the Respondent will provide promptly further documents arguably relevant including Emails or documents for the period of April 2016 to December 2016 if identified;

ORDERS the Respondent to serve and file to the parties within 30 days of the notification of the present decision:

- The names and job titles of DM, EP, JM, MH, GI, RM and CM cited in the Air Canada Management Note previously disclosed.

Signed by

Marie Langlois
Tribunal Member

Ottawa, Ontario
September 9, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2517/7420

Style of Cause: Giuseppe Clemente v. Air Canada

Decision of the Tribunal Dated: September 9, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Matthew Langer, for the Complainant

Aby Diagne, for the Canadian Human Rights Commission

Jackie VanDerMeulen, for the Respondent