Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 43
Date: December 22, 2022
File No.: T2457/1420

Between:

Ray Miller

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

International Longshoremen's Association, Local 269

Respondent

Ruling

Member: Colleen Harrington

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I. Overview and Decision

[1] In this Motion for disclosure, the International Longshoremen's Association, Local 269 ("Respondent" or "Union") asks the Tribunal to order Mr. Miller ("Complainant") to produce certain documents that it says are relevant to the remedy of lost wages that the Complainant is seeking, and to whether he mitigated his financial losses. The requested documents fall within three categories: (i) documents proving how much the Complainant earned during the time period for which he is requesting lost wages, and whether he mitigated his losses; (ii) documents from a motor vehicle accident litigation in the Supreme Court of Nova Scotia that the Respondent says relate to the Complainant's claim for lost wages up to the present, and to his ability to work during the time period for which he is claiming wage loss from the Respondent; and (iii) settlement documents from the motor vehicle accident litigation, which the Respondent says will speak to the possibility that the Complainant is seeking double recovery of lost wages for the same time period.

[2] With the exception of the first category of documents, the Respondent's Motion is opposed by the Complainant and the Canadian Human Rights Commission ("Commission"). The Complainant says the motor vehicle accident documents are irrelevant to the allegations of discrimination, and that the settlement documents are subject to settlement privilege. The Commission argues that the Respondent's request for documents is overly broad. It submits that, in addition to being irrelevant and privileged, some documents are subject to the implied undertaking rule.

[3] I agree that many of the requested documents in the first two categories are arguably relevant to a remedy being sought by the Complainant in this human rights proceeding, and to the issue of mitigation. As such, I agree to order the Complainant to disclose certain documents to the Respondent, as set out below.

[4] With regard to the third category of requested documents, I do not find that the Respondent has established the evidentiary foundation to rebut the presumption of settlement privilege that attaches to these documents. As such, I do not agree to order the Complainant to disclose documents relating to the settlement of his motor vehicle accident claim at this time.

II. Issues

[5] In order to determine whether the Tribunal should order the Complainant to produce any of the requested documents to the Respondent, I will consider the following issues:

A. With regard to the documents requested in the first two categories by the Respondent, are these non-settlement privileged documents arguably relevant to a fact, issue or remedy in this complaint? If so, are any documents subject to the implied undertaking rule such that they cannot or should not be disclosed?

B. With regard to the settlement documents requested in the third category, has the Respondent established that an exception to settlement privilege applies in this case such that I should order their disclosure?

III. Analysis

A. Should the Tribunal order disclosure of the documents not subject to settlement privilege?

[6] The Respondent argues that Mr. Miller must disclose the documents requested in the first two categories because they are arguably relevant to the remedies he is asking the Tribunal to award. As Mr. Miller is asking for lost wages both prior to and after the date of his complaint, the Respondent says the documents also relate to his obligation to mitigate any financial losses.

(i) Applicable Legal Principles

[7] Section 50(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [“*CHRA*”] requires the Tribunal to provide the parties with a “full and ample opportunity” to present their case. Sections 18(1)(f), 19(1)(e), 20(1)(e) and 23(1) of the *Canadian Human Rights Tribunal Rules of Procedure,* 2021, SOR/2021-137 require the parties to disclose to one another all documents in their possession that relate to a fact or issue that is raised in the complaint, or to an order sought by any of the parties. This assists the parties to know the case they are facing and to adequately prepare for the hearing.

[8] In deciding whether information ought to be disclosed, the Tribunal must consider whether it is “arguably relevant”. In *Brickner v RCMP*, 2017 CHRT 28 (CanLII) [“*Brickner*”] the Tribunal stated at para 6: “The standard 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 by the parties in the matter, the information should be disclosed” pursuant to the *Rules of Procedure*.

[9] However, the request for disclosure must not be speculative or amount to a "fishing expedition". The documents requested should be identified with reasonable particularity. This means the request should not subject a party or a stranger to the litigation to an onerous and far-ranging search for the documents (*Brickner* at paras 7 and 8).

[10] Also, simply because documents are ordered to be disclosed at this stage of the case management process, this does not mean that this information will be admitted as evidence at the hearing or that significant weight will be given to it by the Tribunal (*Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 (CanLII) at para 4).

[11] The Tribunal in *Turner v. CBSA,* 2018 CHRT 1 (CanLII) concluded that an analysis of the allegations set out in a party’s Statement of Particulars (“SOP”) is of great assistance in identifying the issues and, by extension, the scope of production of arguably relevant documents (para 43).

(ii) Facts, Issues and Remedies Set Out in the Statements of Particulars

[12] The following allegations set out in the SOPs of the Complainant and the Respondent are relevant to this Motion.

[13] The Complainant’s SOP alleges discrimination contrary to sections 7, 9 and 14 of the *CHRA*. He says he was treated in an adverse differential manner in relation to his race by being banned from applying for casual labour out of the Union’s Hiring Hall, referred to as “Bullpen” work. He also says he was not given the opportunity to obtain a position on the “Cardboard”, which offers more stable and reliable work than the Bullpen and, by extension,

access to union membership. A Cardboard is a list of persons who are trained to work in the longshoring industry.

[14] Mr. Miller says that he received only 22 hours of work from the Bullpen in 2015, despite attending there nearly daily looking for work. He says that Caucasian colleagues were chosen for work instead of him. Mr. Miller says that, when he complained about receiving reduced Bullpen hours for 2015, he was told it was because a former Union executive had seen him giving someone a package that was believed to contain illegal drugs in 2001. Mr. Miller says he was never made aware of this allegation against him until he complained in 2015. He says the alleged “drug dealing”, which he denies ever happened, was never documented by the Union or investigated.

[15] Mr. Miller says the Union’s reliance on a negative stereotype about Black men led to him being denied casual labour out of the Bullpen. He alleges it also resulted in his application to the 2015-2016 Cardboard hiring process being denied by the Union. Mr. Miller says he submitted his application for the Cardboard, along with a $75 bank draft made out to the Union. He says the reason he was not considered for the Cardboard relates to his race.

[16] If he is successful in proving discrimination, Mr. Miller would be seeking damages for pain and suffering and for wilful and reckless discrimination. He is also seeking lost wages for one year prior to the date of his complaint, and from the date of his complaint to the present.

[17] Mr. Miller says he is asking for lost wages from the Bullpen for only 1 year, because the Tribunal is only looking into discrimination that occurred in the year preceding his complaint, which was filed in December of 2015. He states that, but for the alleged discrimination, he would have worked the same number of hours out of the Bullpen in 2015 as he did in 2000, which was 761.5 hours.

[18] With respect to lost wages related to the Cardboard competition, Mr. Miller says that, had it not been for the alleged discrimination, there is a likelihood he would have received a Cardboard position in 2015 and that he would have been admitted to the Union by now. Mr. Miller asserts he would have made the average annual salary of the first five Union

members called in the 2015 Cardboard were it not for the discrimination he allegedly experienced. He understands this amount to be $200,000 per year. He is also seeking membership in the Union.

[19] The Union's position in its SOP is that Mr. Miller did not apply for the 2015-2016 Cardboard. It also argues that the Tribunal would not have any jurisdiction to determine whether Mr. Miller would have received a Cardboard position because it is the Halifax Employers Association ("HEA") that has the authority to hire Cardboard members, not the Union.

[20] The HEA is designated under Part 1 of the *Canada Labour Code* to act on behalf of employers in the longshoring industry in the Port of Halifax. Its primary role is to negotiate and administer collective agreements on behalf of longshoring employers. Further to provisions of the collective agreement between the HEA and the Union, the Union plays a role in any Cardboard hiring process, from agreeing to the number of positions to be established, assisting in the distribution of applications, receiving those applications, and then screening, scoring, ranking and referring applications to the HEA for their ultimate decision to hire.

[21] The Union says it does not know if Mr. Miller even had the minimum qualifications for the Cardboard hiring process in 2015-2016, which included proof of grade 12 or equivalent, a clear drivers' abstract, and relevant work experience. Even if he met the minimum qualifications to be screened into the competition by the Union, the Respondent says it is speculative that Mr. Miller would have passed the HEA's extensive testing and training, interviews and criminal record check.

[22] The Union also says Mr. Miller was in a motor vehicle accident ("MVA") on July 3, 2015. It says he commenced an action in the Supreme Court of Nova Scotia seeking damages in relation to that accident. Court records obtained by the Respondent, and filed with its Motion, indicate that he claimed damages for earning capacity as a result of injuries sustained in the accident, and that medical expert reports were prepared. While the action was set down for trial, the matter settled before the trial commenced.

[23] As Mr. Miller was claiming in the MVA action that he sustained injuries causing a loss of earning capacity, the Union requested further information about these proceedings, which Mr. Miller refused to produce. The Union's position is that any reduced earnings capacity he experienced as a result of the MVA would bear on his claim for lost income from the Union in the human rights complaint, both in respect of Bullpen and Cardboard earnings.

[24] The Union says it will also argue before the Tribunal that Mr. Miller has failed to mitigate his damages for lost income by not applying for any subsequent Cardboards or other work.

(iii) The First Category of Documents Requested

[25] The first category of documents requested by the Respondent asks for Mr. Miller's income tax returns and assessments for all years in which he claims compensation for lost wages, and all of the information he was directed to produce with respect to his wage loss claim as set out in the Tribunal's disclosure letter dated July 10, 2020.

(a) Positions of the Parties

[26] The Respondent notes in this Motion, as it did in its SOP, that the Complainant is seeking compensation for lost wages from the Respondent in respect of both the Bullpen and the Cardboard. The Respondent understands that the alleged lost wages would cover the period from 2015 to the present.

[27] While the Respondent says in its Motion that it had received the Complainant's Notices of Assessment for the 2014, 2015 and 2016 tax years, it was awaiting further documentation. In its Reply submissions, the Respondent indicates that the Complainant subsequently provided his income tax summaries for 2017, 2018 and 2019.

[28] The Commission agrees that the income tax returns should be disclosed by the Complainant, as they are arguably relevant. Mr. Miller agrees and says that he has already provided his income tax returns as requested.

[29] However, the Respondent says it is not only his income tax returns and assessments that the Complainant must disclose, but all of the information identified by the Tribunal in its July 10, 2020 letter to the parties, which includes dates of employment and unemployment, proof of all wages or money received, and the amount of any employment insurance, pension or disability benefits received.

[30] The Respondent argues that this information is arguably relevant to both the Complainant's claim for compensation for lost wages and to the issue of mitigation, which it has raised. The Respondent argues that it must be able to test the assertions being put forward by the Complainant in relation to all the arguably relevant documentary evidence related to these issues, and not just evidence that the Complainant wishes to disclose.

(b) Decision

[31] In *Miller v ILA Local 269*, 2022 CHRT 39, I decided that the scope of the complaint before the Tribunal relates not only to the alleged discrimination that happened between April and July of 2015, but that the Tribunal can inquire into the Cardboard competition that Mr. Miller says he applied for in December of 2015, around the time that he filed his human rights complaint. I also ordered Mr. Miller to provide further particulars with respect to his allegations of discrimination relating to the 2015-2016 Cardboard competition.

[32] The Respondent has pointed out that the Union's role relating to Cardboard competitions – as set out in the collective agreement - is limited to receiving and screening the applications to ensure they meet certain minimum requirements. It says it has not received particulars or documentary evidence from Mr. Miller to date indicating that he actually met the minimum requirements such that the Union could refer his application to the HEA to carry out the other stages of the Cardboard hiring process. These include a lashing test, an aptitude test, and several other steps.

[33] Mr. Miller alleges that the Union discriminated against him by failing to process his Cardboard application such that he was not even considered by the HEA for the Cardboard process. If Mr. Miller can prove that he met the minimum requirements to apply for the Cardboard and there was discrimination in the Union's gatekeeping role with respect to the

competition, he will argue that he is entitled to lost wages from the Respondent relating to this competition. The Respondent will be entitled to test the Complainant's request for remedies, including his mitigation efforts, and to ask questions relating to possible double compensation for the same time period. To do so, it must be provided with documents relating to his earnings and job applications during the period for which he is requesting lost wages.

[34] Mr. Miller is seeking lost wages from the Tribunal for the time period of 2015 to the present. It is clear that the documents sought by the Respondent, being not only the tax returns and assessments for this time period, but also other documents the Tribunal directed Mr. Miller to disclose, are arguably relevant to the issues of wage loss and mitigation. They are documents in the possession or control of the Complainant related to a form of relief he is seeking, and so must be disclosed to the Respondent pursuant to section 18(1)(f) of the Tribunal's *Rules of Procedure*.

[35] As such, I order Mr. Miller to disclose to the Respondent and Commission the following documents (or documents containing the following information) for the time period of 2015 to the present: all income tax returns and assessments; dates of employment and unemployment (start and end); proof of all wages or money received or claimed (e.g., salary, employment insurance, disability, pension, etc.), including paystubs and T4s; the amount of employment insurance or disability benefits received; and any other amounts claimed or monies received relevant to this claim that are not otherwise dealt with in this Ruling.

(iv) The Second Category of Documents Requested

[36] The second category of documents requested by the Respondent includes the following information relating to a MVA that occurred on July 3, 2015 and a legal action Mr. Miller commenced in the Supreme Court of Nova Scotia on March 15, 2017 seeking damages caused by that accident, including damages for lost past income and lost future income or earning capacity (Court File Hfx. No. 461499):

a. The transcript of the discovery of Mr. Miller;

b. A copy of any lists of documents filed by Mr. Miller in the action and copies of the documents themselves;

c. All documents relating to the injuries resulting from the motor vehicle accident and the claim for lost wages and future income or earning capacity, including the following:

    i. All expert reports prepared on behalf of Mr. Miller, including the report of Dr. Baker referred to in the court file;

    ii. Any exhibit book(s) and submissions filed with the court by either party;

    iii. Treatment records that Mr. Miller intended to file in evidence at the trial, as referenced in the court records;

    iv. All medical records relating to the injuries resulting from the motor vehicle accident from the date of the accident to the present;

    v. Any documents or correspondence relating to Mr. Miller's claim for compensation for diminishment of earning capacity and loss of past/future income, including documents and correspondence relating to the basis and/or calculation of the claim for diminishment of earning capacity and loss of past/future income, and including correspondence with any insurance company.

(a) Information from the Court File

[37] The Respondent attached to its Motion documents from the Supreme Court of Nova Scotia action commenced by Mr. Miller in 2017 relating to his MVA in July of 2015. A Memorandum from a Date Assignment Conference dated November 29, 2019 indicates that a Settlement Conference, a Trial Readiness Conference and Trial dates were all scheduled in 2020 and 2021.

[38] The Memorandum also states that expert reports were exchanged, including one by a neuropsychologist for Mr. Miller as well as a neurologist for the Defendant.

[39] The Memorandum states that Mr. Miller was discovered and that, among the remedies he was seeking were: Special Damages including "out of pocket expenses and past lost income", and General Damages including "the usual four: non-pecuniary, lost future income or earning capacity, valuable services and possible future medical expenses".

[40] On June 23, 2020, the Court issued a Consent Dismissal Order, noting that the claim was dismissed in its entirety on a without costs basis to all parties. Mr. Miller does not dispute that his MVA action settled.

(b) Positions of the Parties

[41] The Respondent argues that there is a clear and direct nexus between the requested documents relating to the injuries sustained by the Complainant in the MVA on July 3, 2015 and his claim for compensation for lost wages from the Union.

[42] The Respondent says that, in asking the Tribunal to order lost wages for the years 2015 to the present, the Complainant has implied he was fit to work during this time. It argues that, to claim lost wages for this period, Mr. Miller must demonstrate that he was able to work and was not incapacitated or restricted by any physical or mental conditions. However, the Respondent says that the Complainant's MVA lawsuit asserted that he could not work during some portion of this time period due to injuries he sustained in the accident. It argues that these two claims are, at least to some degree, inconsistent.

[43] As Mr. Miller has put his capacity to work in issue in this proceeding by claiming damages for lost wages, the Respondent submits that he has thereby waived any right to privacy he may have in his medical documents. It says that any injuries suffered in the MVA could have impacted his earnings capacity as a longshore worker. As such, it argues that the material sought is at least arguably relevant to the remedies he seeks from the Tribunal. In addition, as the Complainant is not entitled to be compensated twice for the same earnings loss, the Respondent argues that the material is also arguably relevant to the issue of mitigation.

[44] The Complainant and Commission argue that the documents requested by the Respondent related to his MVA court proceeding are irrelevant to his human rights complaint. Mr. Miller says his car accident was completely separate and distinct from his human rights complaint against the Respondent, with different facts, parties and injuries. He submits that the Respondent has failed to meet its onus of establishing that the requested medical documents are relevant to "questions of discrimination before the Tribunal".

[45] Mr. Miller says the Union does not need his confidential medical records to know the case against it and to have the full opportunity to present its case. He says the "documents it seeks are not central to the issue of whether there was discrimination that prevented Mr. Miller from working", and that the proceeding is not all about lost wages.

[46] The Commission says the central issue in this case is whether anti-Black discrimination prevented the Complainant from being employed in the Port, and not whether the injury he sustained in the MVA prevented him from working as a longshoreperson. It says the claim of overlap between the allegations in the complaint and the MVA action remains speculative. The Commission argues that the Respondent cannot request disclosure of all documents from a separate legal proceeding simply because it may shed light on his working capacity from 2015 onwards.

[47] The Commission and Complainant assert that the Respondent is embarking on a fishing expedition. The Commission says that, in particular, the request for all of the medical records related to the MVA action is overly broad in scope and is irrelevant to the issues at play because, unlike in *Sanghera v Munn Enterprises,* 2018 BCHRT 156 (CanLII) ["*Sanghera*"], cited by the Respondent, Mr. Miller did not put a medical condition at issue in his complaint. The Commission argues that medical records are deeply personal and private and should only be disclosed when relevant and necessary. It goes on to assert that a complainant's healthcare records are subject to disclosure only when a complainant is attributing blame to a respondent for any of their health problems, which is not the case here (citing *Palm v International Longshore and Warehouse Union, Local 500 et al*., 2012 CHRT 11 (CanLII) at para 19).

[48] The Respondent submits that the Complainant and Commission have erred by arguing that the MVA action documents should not be disclosed because they are not "relevant and necessary" to the human rights complaint, as this is the test to apply to determine whether an exception should be made to settlement privilege. It says that, since the MVA action documents addressed in this section were prepared in anticipation of trial, they are not subject to settlement privilege.

[49] The Union submits that the Tribunal need only determine that these requested MVA documents are arguably relevant to a fact, issue or remedy sought by a party and says in this case, they are arguably relevant to a remedy sought by the Complainant. It notes that the claim for lost wages does not have to be the “central” issue in the complaint. That is irrelevant for the purpose of disclosure.

[50] The Respondent argues that, in order to claim lost income during the relevant period of time, either from the Bullpen ban or the alleged Cardboard application, Mr. Miller must have been capable of working to earn that income. It says if he was not capable of working, he has not lost income and cannot request the Tribunal to award lost wages.

[51] The Union argues that all documents relating to the physical and/or mental impact of the MVA on Mr. Miller, or that would have been prepared in support of his claim for damages for lost wages and loss of future earning capacity in the lawsuit, are at least arguably relevant to his claim for lost wages in the human rights complaint. This includes the requested expert medical reports, which Mr. Miller intended to introduce as evidence in court.

[52] Finally, the Commission made the argument that the documents requested by the Respondent should not be disclosed because they are subject to an implied undertaking of confidentiality to the Court. The Commission suggests that the implied undertaking rule applies to prevent Mr. Miller from disclosing documents in this proceeding that he produced in his Court action.

[53] The Respondent submits that the Commission has incorrectly interpreted the implied undertaking cases, noting that the cases the Commission relies on confirm that the rule applies only to the party who *receives* the evidence on discovery. It does not apply to the Complainant’s own documents or to documents that have been filed in court (*Juman v. Doucette* [2008] 1 S.C.R. 157 at para 4; *Sanghera, supra*. The Respondent says the Commission’s submission that there is a blanket protection against the disclosure of all evidence produced on discovery would amount to a new privilege, which is well beyond the scope of the implied undertaking rule.

(c) Decision

[54] I agree with the Respondent that many of the requested MVA action documents are arguably relevant to a remedy sought by the Complainant in this matter.

[55] For the most part I do not view the Respondent's request for the MVA documents to be a fishing expedition. The Respondent is correct that there is some intersection or overlap between the two proceedings that is not speculative but is supported by the information set out in the Court documents provided by the Respondent and in the Complainant's SOP.

[56] In his MVA action Mr. Miller was claiming that the injuries he suffered in an accident on July 3, 2015 impaired his ability to earn an income by the time he filed his Court claim in 2017. There is clearly an overlap in the time period in which income loss is claimed between the MVA action and the human rights proceeding.

[57] According to his SOP, Mr. Miller is seeking lost wages for one year prior to the date he filed his human rights complaint in December of 2015, for not being dispatched from the Bullpen for alleged discriminatory reasons. He is also seeking lost wages from the date of his complaint to the present for the Union's alleged discriminatory treatment related to the 2015-2016 Cardboard competition. He alleges that, but for the Union's discriminatory treatment, he would have become a member of the Cardboard in 2015 and would have been earning wages in the amount of $200,000 per year. Thus, he is seeking wage loss from the Tribunal from 2015 to the present.

[58] In requesting the Tribunal to order this wage loss, Mr. Miller has put his capacity to work in issue. It is implied in his human rights complaint against the Union that he was able to perform longshoring work for at least some of this time period, which overlaps with the time period in which he claimed in the MVA action that his injuries impaired his ability to earn an income. The Court documents show that Mr. Miller sought information from the Union about his employment in the Port for the purposes of his MVA action.

[59] I agree that there is an apparent inconsistency between the positions Mr. Miller took in his MVA action and his position in this proceeding, which the Union is entitled to explore

and receive disclosure about. The Respondent has the right, pursuant to section 50(1) of the *CHRA*, to know the case it has to meet and to challenge the Complainant's allegations.

[60] While it may be unusual to be seeking documents from a MVA injury action in a human rights case involving racial discrimination, this is not fatal to the request. There is no requirement for the human rights proceeding to be "strikingly similar" to the proceeding from which the documents are sought, as the Complainant argues. Documents at the disclosure stage of the Tribunal's proceedings may be sought from many different sources. The only requirement to order their disclosure is that they be "arguably relevant" to a fact, issue or remedy advanced by a party in the case.

[61] The rational connection between most of the MVA documents sought and a form of relief identified by Mr. Miller is clear. The overlapping requests for lost income in both proceedings and the implication that, by seeking lost wages in the human rights proceeding, he was capable of working as a longshoreperson during the same time period makes many of the requested MVA documents arguably relevant to the remedy advanced by the Complainant, as well as to the issue of mitigation of his financial losses.

[62] I agree with the Respondent that the "relevant and necessary" test the Commission and Complainant argue should apply to the non-privileged MVA documents is not the correct test to determine whether these documents should be ordered to be disclosed. That test applies to the settlement documents I deal with in the next section of the Ruling.

[63] I also do not agree with the Commission that the documents the Respondent is seeking from the MVA action are subject to the implied undertaking rule. The Union has asked for disclosure of documents and evidence either produced by the Complainant in his MVA action or filed with the Court in that proceeding, including his oral discovery. It has not asked for any documents produced by the Defendant during the discovery process in the MVA action.

[64] In *Schober v. Tyson Creek Hydro Corporation*, 2014 BCCA 12 (CanLII), the British Columbia Court of Appeal noted that the implied undertaking rule does not allow a party to resist disclosure of its own documents and transcripts in a second action, stating:

> [25] Further, the undertaking does not relieve a party of the obligation to disclose its own testimony in prior litigation with respect to the matters in issue in current litigation, or to permit a party to shield such information from discovery.

[65] I note that the Tribunal has previously concluded that documents exchanged in its pre-hearing disclosure process are protected by an implied undertaking of confidentiality to the Tribunal. This means that any documents Mr. Miller is required to produce in this proceeding may not be shared or used by the Respondent for another purpose or proceeding. At this stage of the proceeding, the documents are not provided to the Tribunal and so do not become part of the Tribunal's official record either. It is only if the documents are eventually filed as exhibits at the hearing that they would become part of the Tribunal's public record and would no longer be subject to the implied undertaking of confidentiality.

[66] I will deal with each of the requested MVA action documents as they were listed by the Respondent in its Motion.

a. The transcript of the discovery of Mr. Miller

[67] Mr. Miller has asserted that there is no discovery transcript from the Court proceeding, so this request is moot. However, the Respondent points out that the Court documents indicate that he was discovered, and so a transcript should be producible as Mr. Miller has "control" over the recording of his examination for discovery and can request a copy of the transcript. The Respondent has offered to pay for the transcript.

[68] The Respondent argues that the examination for discovery under oath would address the basis for Mr. Miller's claim for lost wages and loss of future earning capacity resulting from the MVA in July of 2015. This overlaps with the period for which he is claiming to have been able to work as a longshoreperson and is claiming lost wages from the Union.

[69] I agree that, given the clear potential for overlap in the time periods for which lost wages were sought in the MVA action and this proceeding, the discovery transcript is arguably relevant to this remedy sought by the Complainant, which raises the issue of his capacity to work, as well as to the issue of mitigation. I agree to order its production, with the Respondent paying the cost of its preparation.

b. A copy of any lists of documents filed by Mr. Miller in the action and copies of the documents themselves

[70] At this time, it is unclear exactly what documents were filed in the MVA action and so the documents cannot be identified with reasonable particularity. Given the overlap in the requested remedies in both proceedings, it is likely that, if any documents were filed with the Court prior to the settlement of the action, at least some would be relevant to Mr. Miller's lost wages claim in the present proceeding.

[71] As such, I agree to order Mr. Miller to produce the list of documents only. If, upon review, the Respondent wishes to request the production of certain documents on the list that it argues are arguably relevant to the complaint, it can request disclosure from the Complainant. If disclosure if refused, the Tribunal can be asked to determine the request.

c. All documents relating to the injuries from the MVA and the claim for lost wages and future income or earning capacity. Specifically, the Respondent requests:

    i. any expert medical reports that were prepared on Mr. Miller's behalf;

    ii. any exhibit book filed with the court by either party;

    iii. Mr. Miller's treatment records that he intended to file in evidence at the trial;

    iv. all of his medical records relating to the injuries resulting from the motor vehicle accident from the date of the accident to the present;

    v. any documents or correspondence relating to Mr. Miller's claim for past and future income loss, including correspondence with any insurance company.

[72] Although the Complainant and Commission argue that none of the Court documents sought by the Respondent should be ordered to be disclosed, they particularly take issue with the request for medical records. They argue that these documents are deeply personal and private and should only be disclosed when "relevant and necessary". As stated above, this is not the test to apply to the request for documents that are not subject to settlement privilege.

[73] It is very clear from the Tribunal's case law that, when determining whether to order documents to be disclosed at this pre-hearing stage of the proceeding, the Tribunal must determine whether a document is arguably relevant. As the Tribunal stated in *Brickner*,

arguable relevance is not a very high standard to meet. If there is a rational connection between a document and the facts, issues or forms of relief identified by a party, the information should be disclosed. Only one of the three – facts, issues, or remedies – need be implicated in the request for disclosure, not all three of them.

[74] In *Loboda v CNR*, 2021 CHRT 40 (CanLII), the Tribunal agreed that the complainant was required to disclose all arguably relevant medical records from her healthcare providers that related not only to the facts and issues in her complaint, but also to the financial compensation she was seeking as a remedy (para 47). The Tribunal concluded that, because the complainant made a claim for lost wages as part of her complaint, "these issues are now part of the case, she cannot refuse to disclose arguably relevant documents relating to them. These documents are arguably relevant, for example, to calculating any compensation the Tribunal may order or to analyzing the question of mitigation of damages" (para 46).

[75] The Commission argues that Mr. Miller should not have to disclose private medical records in this proceeding because he is not alleging discrimination on the basis of disability and because he is not attributing blame to the Union for the health problems that are the subject of the medical documents being sought. This is, however, a complaint alleging discrimination in employment in which the Complainant is seeking lost wages. Part of the time Mr. Miller is seeking lost wages from the Tribunal includes the period from July 3, 2015 – the date of the MVA that is the subject of the Court action – to the present.

[76] The evidence provided by the Respondent, being the Supreme Court of Nova Scotia documents, confirms that Mr. Miller was seeking past lost income, future lost income, and earning capacity as remedies from the Court. The Court issued a Consent Order requiring the Union to produce any and all employment files of Mr. Miller. The Consent Order states that Mr. Miller "was employed through the [Union] around the time of the" MVA. Mr. Miller was seeking information about his employment history in the Port, including hours of work, for the purpose of his MVA claim. This information was obviously relevant to the issues in dispute in that lawsuit, and presumably to his claim for lost wages and loss of future earning capacity.

[77] Similarly, I accept that there is a rational connection between the documents relating to lost wages or an inability to work that are sought from the MVA action and the request for lost wages from the Union that Mr. Miller is seeking in his human rights case. The documents are arguably relevant to the remedy he is seeking from the Tribunal and so should be disclosed.

[78] Mr. Miller argues that the Union does not require his confidential medical records to know the case against it and to have the full opportunity to present its case. He also argues that the arguable relevance threshold for disclosure cited by the Union is not enough to order disclosure and that, if the Tribunal were to order disclosure on this basis, this would create a chilling effect on the willingness of victims of human rights violations to seek redress.

[79] The Tribunal has previously determined that, where confidentiality or privacy is at issue with respect to medical documents, these interests are overridden by a respondent's right to know the scope of the complaint against it as required by section 50 of the *CHRA* (see *Egan v Canada Revenue Agency*, 2017 CHRT 33 (CanLII) at para 34). The Tribunal engages in a balancing of the interests involved in deciding whether medical documents are arguably relevant.

[80] It is well accepted that the Tribunal must consider each case on the basis of its own unique facts. The facts of this case are admittedly somewhat unusual, but that does not change Mr. Miller's obligation to produce documents that are arguably relevant to a remedy that he has raised in this complaint.

[81] Given that part of his claim in the MVA action related to loss of earning capacity and lost wages due to injury, any medical report filed with the Court in preparation for the trial is arguably relevant to his claim for lost wages in the current proceeding, as well as to the issue of mitigation. As such**,** I agree to order Mr. Miller to produce the expert report prepared on his behalf by the neuropsychologist Dr. Baker, which is referred to in the Court file. If Mr. Miller filed any other expert reports with the Court, those should also be disclosed.

[82] However, I decline to order Mr. Miller to produce any other medical records or documents at this time unless they were filed with the Court in the MVA action in anticipation of the trial. Requiring Mr. Miller to obtain and produce all medical records that may relate to

his MVA claim or that he intended to file with the Court, but that were not ultimately filed would, in my view, be subjecting Mr. Miller and his medical providers to what could be an onerous and far-ranging search for the documents.

[83] So long as the requirements of natural justice and the *Rules of Procedure* are respected, the Tribunal may deny a motion for disclosure where the probative value of the documents sought would not outweigh its prejudicial effect on the proceedings, particularly where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry (*Brickner* at paras 7 & 8; see also s.48.9(1) *CHRA*).

[84] With regard to the request to produce any exhibit book(s) and submissions filed with the Court by both Mr. Miller and the Defendant, as it is unknown if an exhibit book or submissions were filed by either party, this request remains overly broad and non-specific. As with the request for the list of documents and the documents themselves, I agree to order the Complainant to produce a list of any exhibits filed by either party with the Court. If, based upon a review of the list, the Respondent is of the view that any documents are arguably relevant to this proceeding, it may request that Mr. Miller to produce them. If production is refused the Respondent may ask the Tribunal to determine the request.

[85] With respect to the broad request for “any documents or correspondence relating to Mr. Miller’s claim for compensation for diminishment of earning capacity and loss of past/future income, including documents and correspondence relating to the basis and/or calculation of the claim for diminishment of earning capacity and loss of past/future income, and including correspondence with any insurance company”, this does not appear to relate to documents that were filed with the Court in preparation for the trial. Rather it describes a broad catch-all category of “any documents or correspondence” not captured by any of the previous paragraphs. As this request for documents is not identified with reasonable particularity, I decline to order the Complainant to comply with this request.

B. Should the Tribunal order disclosure of the settlement documents?

[86] In its third category of requested documents the Respondent seeks disclosure of a copy of any settlement of the MVA action and/or insurance claim.

(i) Positions of the Parties

[87] The Respondent argues that it is entitled to receive information about the settlement between the parties to the Court action even though such information is subject to settlement privilege. It submits that this case meets the test for disclosure of a settlement agreement as set out in *Palm v. International Longshore and Warehouse Union*, *Local 500*, 2011 CHRT 12 (CanLII) ["*Palm*"]. In particular, the Respondent argues that the settlement is both relevant and necessary in the circumstances of this case to objectively determine what compensation the Complainant received for lost earnings for the same period of time he is seeking lost earnings from the Respondent.

[88] Mr. Miller submits that his involvement in a MVA is not relevant to the questions of discrimination that are before the Tribunal and so the doctrine of settlement privilege should not be abrogated by the Union's desire to embark on a fishing expedition. He argues that any documents sought by the Respondent that were made and used with a view to negotiating a resolution of his MVA dispute should not be disclosed.

[89] Both Mr. Miller and the Commission refer to section 50(4) of the *CHRA*, which prohibits the Tribunal from admitting or accepting as evidence anything that would be inadmissible in court by reason of any privilege under the law of evidence, which includes settlement privilege.

[90] All parties refer to *Sable Offshore Energy Inc. v Ameron International Corp*., 2013 SCC 37 (CanLII) ["*Sable Offshore*"], in which the Supreme Court of Canada confirmed that an exception to settlement privilege applies "when the justice of the case requires it" (para 12), including when "a competing public interest outweighs the public interest in encouraging settlements" (para 19).

[91] Both Mr. Miller and the Commission argue that the Respondent has not established a competing public interest in this case that outweighs the public interest in encouraging settlement.

[92] The Respondent argues that it has established a competing public interest, being the prevention of the double recovery of lost wages during the same time period. "The double

recovery rule is a widely acknowledged exception permitting disclosure of documents otherwise protected by settlement privilege" (*Brown v Cape Breton (Regional Municipality)*, 2011 NSCA 32 (CanLII) ["*Brown v Cape Breton*"] at para 74). It points out that the Supreme Court in *Sable Offshore* stated that "preventing a plaintiff from being overcompensated" has been found to be among these "countervailing interests" (para 19, referring to *Dos Santos Estate v Sun Life Assurance Co of Canada*, 2005 BCCA 4 (CanLII) ["*Dos Santos*"]).

[93] The Respondent refers to *Dos Santos*, in which the BCCA applied the double recovery rule and agreed with the defendant that the only way to establish objectively what the plaintiff actually received in compensation for lost earnings under a settlement agreement was to apply the double recovery exception to the documents that would otherwise have been protected by settlement privilege. The Court found both relevance and necessity were established. The Court also addressed the argument that requiring disclosure would put a chill on settlement negotiations:

> [38] I have also considered whether recognizing an exception in this case would place a chill on settlement negotiations. I do not believe it would. As in other cases where settlement agreements may have a direct effect on the rights and responsibilities of third parties, the parties to that agreement must be mindful that the confidential nature of their agreement will not be upheld so far as it affects those other parties. …

[94] Mr. Miller notes that, while there are limited exceptions to settlement privilege, the party contesting that privilege has the burden of establishing an exception. If they cannot produce sufficient evidence to rebut the presumption, settlement privilege applies (*Brown v Cape Breton* at para 23). He argues that the Respondent has not produced sufficient evidence to establish an exception to settlement privilege, having only established that Mr. Miller was in a car accident for which he sought compensation.

[95] The Commission concedes that preventing a plaintiff from being overcompensated can constitute an acceptable competing public interest for the purpose of overriding settlement privilege. However, it argues that the potential for double recovery in this case is not apparent.

[96] Both the Commission and Complainant argue that the *Palm* case on which the Respondent relies is distinguishable. In that case, the Tribunal concluded that Ms. Palm's

five human rights complaints were interconnected and “strikingly similar” (para 8). They all involved discrimination in the same workplace and alleged gender discrimination during the same 2-month period. The potential for double recovery was apparent. In this case the Respondent is requesting settlement documents from the MVA action to prevent any potential double recovery in the human rights proceeding. The Commission argues that, because the two separate legal proceedings involve utterly distinct legal issues, any potential for overlap is speculative.

[97] The Commission argues the present case is similar to *Yaffa v Air Canada*, 2016 CHRT 4 (CanLII) [“*Yaffa*”] where the Tribunal concluded the potential for overlap remained speculative and declined to order production of the settlement documents. The Tribunal determined that, even though both proceedings were human rights complaints that took place at the same airport and involved similar allegations of racial discrimination, the 2 complaints being compared in *Yaffa* did not display the same “interconnectedness” as the 5 complaints in *Palm* did. The Tribunal went on to state: “This 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” (para 30).

[98] The Commission argues it is even more difficult in this case to establish interconnectivity between the MVA action and the human rights complaint. It submits that the Respondent has failed to provide sufficient evidence about the degree of overlap of the period for which lost wages is being claimed, and whether any injuries sustained by Mr. Miller in the MVA would have prevented him from working as a longshoreperson, either casually from the Bullpen or in the Cardboard

[99] The Commission says the fact that the MVA action and the human rights complaint involve events that occurred around the same time in 2015 does not provide a sufficiently high threshold to displace the compelling public policy underlying settlement privilege.

[100] In the alternative, the Commission argues that, since the Respondent’s arguments relate to potential double indemnity, the request for the MVA action documents, including

settlement documents, is premature. It argues that it is simply not feasible to determine the level of certainty required to refute the presumption of privilege at this point in this proceeding.

[101] The Respondent disagrees with the Complainant and Commission and reiterates that settlement privilege is a “class privilege” to which there are exceptions. The threshold for an exception is relevance and necessity (*Brown v Cape Breton* at para 62). Relying on the Supreme Court’s decision in *Sable Offshore*, the Respondent argues that the requirement of necessity is met when the disclosure of settlement documents is necessary to prevent a party from being overcompensated or compensated twice for the same loss or injury.

[102] The Respondent argues that there is a clear potential for double recovery in this case, given the temporal overlap of the claims for lost wages during the period from 2015 through to at least the settlement of the MVA action in 2020 (and possibly beyond given the claim for lost earning capacity). It says it is highly likely that the settlement of the lawsuit included compensation in relation to the claims of lost wages and loss of earnings capacity. The Respondent submits that these circumstances establish the evidentiary foundation for both the relevance and necessity of disclosure of the settlement documents.

[103] The Respondent argues that the only way to objectively determine the amounts already received for wages during the relevant period of time is by disclosure of the settlement in the MVA action and related documents. It suggests that, even if the settlement agreement itself does not identify an amount relating to lost wages and earning capacity claims, the correspondence between the parties and other documents relating to the settlement would provide an indication of the breakdown contemplated by the parties in arriving at a lump sum settlement.

(ii) Decision

[104] The Commission and Complainant rely on section 50(4) of the *CHRA* to argue the Tribunal should not order the production of the settlement agreement in the MVA proceeding. However, the admissibility of evidence is not at issue at this stage of the

proceeding. The issue here is whether any settlement agreements entered into by the Complainant in his MVA action, or documents prepared for the purpose of settlement, should be produced to the other parties to assist them to prepare for the hearing of the complaint.

[105] In the previous section of this Ruling I decided that, because of the overlap in the time periods for which lost wages are sought in both proceedings, between July 2015 and the present, some of the documents from the Court file relating to the MVA should be disclosed because they are arguably relevant to the issue of lost wages sought by the Complainant in this proceeding. It is accepted that the threshold for arguable relevance is not particularly high, for the purposes of pre-hearing disclosure (*Brickner* at para 6). However, the case law is clear that the threshold for requiring the production of documents to which settlement privilege attaches is higher, and I do not find that threshold has been met in this case at this time.

[106] In *Sable Offshore*, the Supreme Court of Canada recognized the importance of settlements and settlement privilege in the administration of justice, noting that settlements "allow parties to reach mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation" (para 11). The Court agreed that there is an overriding public interest in favour of settlement as it saves parties the time and expense of litigating disputed issues and reduces the strain on an overburdened justice system.

[107] However, as with other class privileges, while there is "a *prima facie* presumption of inadmissibility", exceptions to settlement privilege will be found "when the justice of the case requires it" (*Sable Offshore* at para 12). The party contesting the privilege has the burden of establishing that an exception applies.

[108] The British Columbia Court of Appeal in *Dos Santos* held that the test for discharging the burden to establish an exception "should not be set too low. The public policy behind settlement privilege is a compelling one" (at para 19). To be considered an exception, it must be shown, on a balance of probabilities, that "a competing public interest outweighs the public interest in encouraging settlement" (para 20).

[109] While there is clearly an overlap in the time period for which the Complainant seeks lost wages in both proceedings, the exact overlap is unknown. The Court documents confirm that Mr. Miller was in a MVA on July 3, 2015, that he filed his lawsuit against the person who hit him on March 15, 2017 and, in his lawsuit he asked the Court to award lost wages and loss of earning capacity as a result of his injuries suffered in the 2015 accident. The Complainant acknowledges that the Court action settled in 2020, but it is unknown what was included in the settlement agreement. If lost wages were included, the exact time period for such compensation is unknown.

[110] The Respondent indicates that Mr. Miller's tax returns for 2017, 2018 and 2019 report no income, and speculates that this means either that he was not capable of working in those years and/or that his living expenses were covered by settlement monies from his MVA action.

[111] The Court documents indicate that Mr. Miller's medical expert is a neuropsychologist. It is unknown whether his alleged injuries from the MVA were physical or mental, and whether they occurred immediately and were ongoing from the time of the accident or they developed later on. By requesting lost wages relating to the Cardboard competition in the human rights proceeding, this implies that Mr. Miller was capable of working for at least some period of time following his alleged application to the Cardboard. However, this remains to be determined at the hearing.

[112] The Complainant sought information from the Union about his employment as part of his MVA action, but this does not clarify exactly when he was seeking lost wages in the Court action. This information may be revealed in the non-privileged information that I have ordered to be disclosed, such as Mr. Miller's discovery transcript.

[113] I agree with the Commission that this case is more similar to *Yaffa* than to *Palm*. In *Palm*, the complaints, including those that settled, arose from a common fact situation, including the time period for the alleged discrimination. While the complaints were not identical, they were "strikingly similar" (para 8). The Tribunal stated that it was "not a situation giving rise to discrete allegations of discriminatory conduct engaged in by disconnected respondents" (para 7). The evidentiary record supported the request for settlement

documents in that case. The same cannot be said in the present case, at least not at this time.

[114] In *Yaffa*, the case that had settled was a human rights complaint and had involved similar allegations of discrimination by CBSA as was alleged against Air Canada. However, the Tribunal declined to order the production of the CBSA settlement agreement because, while there was a potential for overlap, it was not clear whether the complainant continued to experience the psychological effects of the incidents giving rise to the CBSA complaint at the time of the alleged discrimination by Air Canada. The Tribunal found that Air Canada had not established sufficient evidence to rebut the presumption of settlement privilege at the pre-hearing stage at which the settlement agreement was requested.

[115] The Tribunal in *Yaffa* noted that the situation may change after the hearing commences and the Complainant provides his evidence. It stated that, "if and when an appropriate evidentiary foundation had been laid", it 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" (para 28).

[116] The Tribunal in *Yaffa* was cautious, and correctly so, given the importance of settlement privilege to the justice system. 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" (*Sable Offshore* at para 13). As the Supreme Court stated, "Settlement privilege promotes settlements" (*ibid* at para 12).

[117] An exception to settlement privilege cannot be made simply because it will give a party "some tactical advantage from disclosure" (*Sable Offshore* at para 30). A proper analysis of a request for an exception to settlement privilege asks "whether the reason for disclosure *outweighs* the policy in favour of promoting the settlement" (*ibid*, emphasis in original).

[118] My finding that there is an overlap between the time periods in both proceedings for which lost wages are sought met the threshold for *arguable relevance* such that I have agreed to order certain non-privileged documents to be disclosed from the MVA proceeding.

However, I do not agree that the threshold is met in this case at this time to make an exception to settlement privilege. The case law is clear that an exception should only be made where the documents sought are both relevant and necessary in the circumstances of the case to achieve a "compelling or overriding interest of justice" (*Dos Santos* at para 20).

[119] Preventing overcompensation has been found to be a competing public interest that outweighs the public interest in encouraging settlements (*Sable Offshore* at paras 12 and 19). In *Yaffa*, it was noted that "the Tribunal has in the past been vigilant in guarding against the possibility of double recovery" (para 29). However, as the risk of double recovery of lost wages in this case remains speculative at this time, I do not find that the Respondent has established the evidentiary foundation required for the Tribunal to agree to override the public interest in settlement privilege.

[120] In *Palm*, the Tribunal accepted that the potential for double recovery was apparent due to the striking similarity of the complaints. In the present case, the Respondent argues that it is "highly likely" that the settlement of the MVA lawsuit included compensation in relation to the claim for lost wages and loss of earning capacity and that there is "clear potential" for double recovery in this case, given the temporal overlap of the claims. This does not reach the level of certainty required to rebut settlement privilege because I cannot conclude that the settlement documents meet the requirements of relevance and necessity at this time.

[121] The Respondent argues that, even if the settlement agreement itself does not identify an amount relating to lost wages and earning capacity claims, the correspondence between the parties and other documents relating to the settlement would provide an indication of the breakdown contemplated by the parties in arriving at a lump sum settlement. This is speculative and strays into the territory of a fishing expedition.

[122] The Tribunal's conclusion in *Yaffa* is applicable to this case: "at the current stage of proceedings, it is simply not possible to ascertain the extent or degree" of the connectedness between the proceedings "with the level of certainty that is required to rebut the presumption

of settlement privilege" (para 30). As in *Yaffa*, while overcompensation is a possibility in this case, its reality must be established before settlement privilege can be rebutted.

[123] I would dismiss the Respondent's Motion for the production of the settlement documents, without prejudice to its right to present a similar motion after probative evidence has been adduced regarding the connection between income loss in relation to the MVA and Mr. Miller's allegations of discrimination by the Union. Such evidence must specifically address the degree of overlap of the period for which lost wages is being claimed in both proceedings, and whether any injuries sustained by Mr. Miller in the MVA would have prevented him from working as a longshoreperson, either casually from the Bullpen or as a member of the Cardboard.

IV. Order

[124] The Tribunal hereby orders that the Complainant produce the following:

1. For the time period 2015 to the present, all of the following documents (or documents containing the following information):
    i. all income tax returns and assessments;
    ii. dates of employment and unemployment (start and end);
    iii. proof of all wages or money received or claimed (e.g., salary, employment insurance, disability, pension, etc.), including paystubs and T4s;
    iv. the amount of employment insurance or disability benefits received; and
    v. any other amounts claimed or monies received relevant to this claim that are not otherwise dealt with in this Ruling;
2. Mr. Miller's discovery transcript from the MVA action;
3. Mr. Miller's list of documents from the MVA action;
4. The expert report prepared on Mr. Miller's behalf by the neuropsychologist Dr. Baker, which is referred to in the Court file. If Mr. Miller filed any other medical or expert reports with the Court, those should also be disclosed;
5. The lists of exhibits filed with the Court by both Mr. Miller and by the Defendant in the MVA.

[125] The Tribunal also orders that the Respondent pay for the cost of preparing Mr. Miller's discovery transcript from the MVA action.

[126] Timelines for production of the documents will be established in separate correspondence from the Tribunal.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
December 22, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2457/1420

Style of Cause: Miller v. International Longshoremen's Association, ILA Local 269

Ruling of the Tribunal Dated: December 22, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Michael Dull, for the Complainant

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