Tribunal canadien des droits de la personne

Canadian Human Rights Tribunal

Reference: 2023 CHRT 6
Date: Februry 9, 2023
Case number: T2409/6819

Between:

Joshua Dorais

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Context of the motion

[1] This is a decision of the Canadian Human Rights Tribunal (the "Tribunal") ruling on a motion filed by the Complainant, Mr. Joshua Dorais ("Mr. Dorais"), requesting the reopening of the inquiry to file additional evidence.

[2] This additional evidence consists of 25 emails between Mr. Dorais and different bodies or officers of the Canadian Armed Forces (the "Respondent" or the "Forces") between September 4, 2012, and September 5, 2016. Mr. Dorais argued that these documents are relevant to the remedies that the Tribunal might order regarding his lost wages and job opportunities within the Forces.

[3] The Canadian Human Rights Commission (the "Commission") consented to Mr. Dorais's request and filed its representations on July 13, 2022, while the Forces, which filed its own representations on the same date, firmly objected to it. Mr. Dorais had the opportunity to file a reply, which he did on July 20, 2022.

[4] It is important to note that, in this proceeding, the hearing is currently completed and the evidence of all the parties is now closed. To this effect, the Tribunal held its hearing over a period of 18 days, including two days completely reserved for the final arguments of the parties. This complex hearing was conducted over a long period, between April 6, 2021, and March 10, 2022.

[5] It was only on June 29, 2022, when the Tribunal took its decision under deliberation, that the Complainant formally requested the reopening of the inquiry to file additional documents.

II. Decision

[6] On the following grounds, the Tribunal dismisses Mr. Dorais's motion.

III. Issues

[7] To determine whether Mr. Dorais's additional evidence can be admitted in evidence when the inquiry is closed, the Tribunal must answer the following three quetions:

1. Would the evidence, if presented, probably have changed the result of the inquiry on the complaint?
2. Could the evidence have been obtained before the inquiry by the exercise of reasonable diligence?
3. Do exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit the additional evidence?

IV. Legal bases

[8] To be able to rule on the issue, the Tribunal must first establish the legal bases of a motion to reopen an inquiry to file additional evidence.

[9] It must be conceded that neither the *Canadian Human Rights Act* (R.S.C. (1985), c. H-6) ("CHRA"), nor the *Canadian Human Rights Tribunal Rules of Procedure* (2021), SOR/2021-137 ("the Rules"), nor the former *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (the "Former Rules"), contemplate the reopening of an inquiry in order to admit additional evidence once the evidence was declared closed.

[10] Case law then becomes useful and relevant in the circumstances since it guides us on the legal approach to follow and the legal principles that are applicable in such circumstances.

[11] To this effect, the Tribunal drew the attention of the parties to two decisions in the matter as a starting point, namely *Micheline Montreuil v. The Canadian Forces*, 2009 CHRT 15 ["*Montreuil"*] and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*, [2001] 2 S.C.R. 983 ["*Sagaz"*].

[12] In *Montreuil*, the Tribunal applied the analysis of the Supreme Court of Canada (the "Supreme Court") in *Sagaz*, which confirmed the two-part test applied in *Scott v. Cook*,

[1970] 2 OR 769. At para 20 of *Sagaz*, the Supreme Court confirmed the following two-part test:

> 1) Would the evidence, if presented at trial, probably have changed the result?
>
> 2) Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[13] We must make two distinctions between this instance and the *Sagaz* case; on the one hand, our proceeding concerns human rights and pertains to administrative law and, on the other hand, the Tribunal has not yet rendered its final decision, which has been under deliberation since March 2022. In *Sagaz*, however, the issue concerned a motion for reopening a trial in a criminal matter in which the judge had already rendered his final decision.

[14] Nonetheless, *Sagaz* remains a key Supreme Court decision in the matter of reopening an inquiry. The Court's teachings are useful and relevant in the circumstances of our case and, as will be discussed later, this two-part analysis has been adapted by the various courts to correspond to cases like ours.

[15] The Commission and the Forces drew the Tribunal's attention to the decision rendered in *Marshall v. Membertou First Nation*, 2021 CHRT 36 ["*Marshall"*] by my fellow Member Raymond. More specifically, the Forces mainly base their reasoning on Member Raymond's analysis in that case. The Tribunal will address this question head on.

[16] Two major points allow us to distinguish between *Marshall*, as in *Sagaz*, and our current proceeding. This greatly reduces the relevance and weight to attach to *Marshall*.

[17] Firstly, Member Raymond questioned the reopening of the complainant's evidence when the presentation of the respondent's evidence had not yet begun. In other words, the record was not closed, and no final argument had been heard (*Marshall* at para 168). This instead meant reopening the complainant's evidence before the respondent began its own defence.

[18] Secondly, the motion for reopening the inquiry was filed by the complainant in a very specific context. The motion was filed in response to a non-suit motion filed by the respondent. The Tribunal understands from *Marshall* that the complainant did not testify at all in his own complaint and, according to the Tribunal, was also underrepresented by his representative. Member Raymond then permitted the reopening of his evidence to remedy this situation before the respondent presented its own evidence (*Marshall* at para 176).

[19] Therefore, the situation in *Marshall* is very different from ours; the Tribunal enjoyed greater leeway to reopen the complainant's evidence because the inquiry was not yet closed, and the respondent had not yet begun presenting its own evidence.

[20] In the Tribunal's opinion, the present situation is closer to that in *Montreuil*, in which the Member conducting the inquiry had also taken his decision under deliberation and had not yet rendered his final decision.

[21] With due regard for the test applied by the Member conducting the inquiry in *Marshall*, it is my opinion that this is not the test to apply in the circumstances in which we find ourselves in the matter of Mr. Dorais. The test in *Montreuil* is the right test in our case, as endorsed by the Federal Court of Canada ("Federal Court").

[22] In 2011, the Federal Court once again addressed this question regarding the reopening of a trial after the presentation of the arguments but before the final judgment is rendered or the reasons are given (see *Varco Canada Limited v. Pason Systems Corp.*, 2011 FC 467 (CanLII) ["*Varco*"]).

[23] In *Varco*, the Federal Court was unequivocal in stating that the case law relating to the reopening of a trial after the reasons have been given (for example, in *Sagaz*) continues to be useful and to give us guidance.

[24] The Honourable Justice Phelan wrote in paragraph 15 of *Varco* that:

> The first point and an overarching aspect is that reopening is a matter of broad discretion but one which should be exercised sparingly and cautiously. Finality of a trial is a critical concept in our justice system – no one appreciates that concept more than a trial judge who is faced with the generally

> unpleasant task of reopening a case on which he or she has commenced writing.

[25] In paragraph 17, the Federal Court continues its analysis by presenting this significant difference with *Sagaz* because, in *Vasco*, the Court had not yet rendered its final judgment. The same distinction was made by the Tribunal in the above paragraphs of this decision.

[26] In so doing, the Honourable Justice Phelan reformulated the first question of the two-part test in *Sagaz*, which was "would the evidence, if presented at trial, probably have changed the result?" He instead asks the following question: "could the evidence, if it had been presented, have had any influence on the result?" According to the Federal Court, this question then requires an analysis of the materiality and relevance of the additional evidence concerned in the motion (*Varco* at para 17).

[27] In addition to this modified two-part analysis, the Federal Court added another consideration, the existence of exceptional circumstances. On this subject, it states that decision makers may exercise their discretionary power to determine whether exceptional circumstances exist that justify setting aside the reasonable diligence criteria, which is provided in the second part of the analysis, or at least reducing its overall importance (*Varco* at para 20). The Federal Court adds that the danger that a court would be misled is an aspect of the exceptional circumstances' consideration.

[28] Still in *Varco*, the Federal Court specifies in paragraph 21 that several factors, such as relevance, necessity, reliability, due diligence and prejudice, are part of the overall analysis made by the decision maker in the context of a motion for the reopening of an inquiry to admit additional evidence (the Federal Court based its decision on *Sanofi-Aventis Canada Inc. v. Apotex Inc.*, 2009 FC 294).

[29] The Honourable Justice Phelan wrote in paragraph 22 of *Vasco* that:

> […] when all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process – the search for the truth through evidence – is an overarching consideration. To some extent that consideration is addressed in the issue of whether a court would be misled.

[30] Recently, the Honourable Justice Lafrenière also addressed a motion for reopening a trial concerning the filing of new evidence after the evidence of the parties was closed, but before the arguments were presented (*Rovi Guides, Inc. v. Videotron Ltd.*, 2021 FC 19 (CanLII) [“*Rovi Guides”*] at para 16). Once again, the Federal Court adopted the Supreme Court’s two-part analysis in *Sagaz*, which repeated the test in *Scott*, indicating that it was just as applicable in the circumstances before it.

[31] In *Rovi Guides*, the Federal Court added that the public interest in the finality of litigation is an important consideration in the analysis of this type of motion, since reopening the inquiry has the potential to create an injustice (at para 18).

[32] However, Justice Lafrenière added that the failure of a party to exercise due diligence to obtain evidence before trial is not necessarily fatal; in cases where the interests of justice call for the admission of fresh evidence, the decision maker possesses a residual discretion to admit fresh evidence even if the two-part analysis is not met *(Rovi Guides* at para 27; see also *Brace v. Canada*, 2014 FCA 92 (CanLII) at para 12 [“*Brace”*]).

[33] In *Brace*, the Honourable Justice Stratas warned that this residual discretion should only be exercised with great care and in the clearest of cases. Closer to us, in *Montreuil*, the Tribunal also reiterated this same idea: a tribunal or a court must exercise its discretion to reopen the inquiry sparingly and with the greatest care so that fraud and abuse of the tribunal’s processes do not result (*Montreuil* at para 16).

[34] Based on the teachings of the Supreme Court and the Federal Court, the test on the reopening of an inquiry to allow the filing of additional evidence before the final decision of the Tribunal is rendered is then stated as follows:

1. Would the evidence, if presented, probably have changed the result of the inquiry on the complaint?
2. Could the evidence have been obtained before the inquiry by the exercise of reasonable diligence?
3. Do exceptional circumstances exist justifying the exercise of the Tribunal’s discretionary power to admit additional evidence?

[35] Finally, all these elements fundamentally raise a question of prejudice. When the Tribunal must weigh the real benefits the additional evidence could procure, it must necessarily analyze the disadvantages that this could also create, in addition to considering one of the fundamental principles on which our judicial system is based, the finality of judicial proceedings. It is not simply a question of reopening the inquiry and granting the possibility of simply adding evidence after the proceedings have been declared closed. Nor is it about improving or completing the evidence already presented at the hearing.

[36] Thus, the impacts involved in reopening the inquiry must be assessed, for example, having to recall witnesses or to schedule additional dates to hear the parties, the evidence, and the arguments. The time, costs and resources that will be necessary for both the parties and the Tribunal to complete these steps must also be considered.

[37] Finally, the principles of natural justice include the right of a party to present complete and sufficient evidence in a timely manner. As a corollary, the principles of natural justice also call for the obligation not to take the opposing party by surprise once the die has been cast.

[38] Keeping these legal principles in mind, the Tribunal will analyze this motion.

V. Preliminary remarks

[39] The Forces raised concerns about the fact that Mr. Dorais added to his motion the 25 emails concerned by his request to reopen the inquiry to file additional evidence without having been authorized to do so by the Tribunal. The Tribunal does not intend to linger on this argument.

[40] On the one hand, in its analysis, the Tribunal must assess, in particular, the materiality and relevance of the documents concerned by the request. To do so, it must necessarily consult the documentation in question so that it can render its decision. If Mr. Dorais had not attached the emails concerned by the request, the Tribunal inevitably would have asked him to transmit them so that it could rule on the question and dispose of the motion.

[41] On the other hand, the Forces ask the Tribunal to strike Mr. Dorais's affidavit in its entirety. The Forces consider that the affidavit is a way to provide the context and introduce new evidence concerning the emails for which Mr. Dorais requests the reopening of the inquiry to file them as evidence. However, the Forces base their own representations on this affidavit to defend themselves. It seems counterproductive for the Forces to request that an affidavit be struck, when they rely on this affidavit to defend themselves and produce a response.

[42] Having said this, and contrary to what the Forces claim, the fact that Mr. Dorais filed an affidavit in which he refers to the 25 emails is certainly not a way to introduce evidence without authorization. The affidavit and the 25 emails in question are part of the notice of motion and the record of motion. The affidavit in no case constitutes evidence filed at the hearing and admitted by the Tribunal as such. The 25 emails can only constitute evidence if the Tribunal grants Mr. Dorais's motion and formally admits them as evidence (see, in particular, 50(3)(c) of the CHRA).

[43] Finally, Mr. Dorais already testified on his experience of the recruiting process and the steps he took with different departments in the Forces during his application. If the Tribunal admits the emails in question, they will be assessed in light of Mr. Dorais's testimony at the hearing, subject to additional arguments and the necessity to recall witnesses.

VI. Analysis

[44] Mr. Dorais filed a motion to reopen the Tribunal's inquiry to file additional evidence when the inquiry had been declared closed. More specifically, Mr. Dorais wishes to file 25 emails between him and various bodies and officers of the Forces presented chronologically from September 4, 2012, to September 5, 2016. He believes that these documents will give the Tribunal more context regarding the filing of his application in the Forces. The Commission consents to his request, while the Forces oppose it.

[45] As the Tribunal already noted in its instructions to the parties concerning Mr. Dorais's request, a request to reopen an inquiry to file additional evidence when the inquiry is closed

is a rare and exceptional one, for which the Tribunal must exercise its discretion sparingly and with the greatest care (*Montreuil* at para 16).

A. Would the evidence, if presented, probably have changed the result of the inquiry on the complaint?

[46] Regarding the first part of the test, Mr. Dorais considers that the new documentary evidence is relevant and useful for the Tribunal because it highlights the context of the filing of his application in the Forces, his commitment, his efforts and his objectives to join this organization again. He believes that these new elements will exercise a significant influence on the result of the proceeding, among other reasons, because the Edmonton 15 Field Ambulance Primary Reserve had confirmed to him that a nursing position was available in 2015-2016.

[47] Mr. Dorais alleges that the Forces raised doubts regarding the availability of such a position during his cross-examination at the hearing and in their final arguments. According to Mr. Dorais, he accidentally found the emails in his outbox, and not in his inbox, because he remembered having had interactions with Master Corporal Mason Mason in which they discussed the possibility that a nursing officer position was available for him. He adds that the Edmonton 15 Field Ambulance Primary Reserve would not have transferred his application to the recruiting centre if no position had been available for him. He claims that an applicant must check whether a position exists with the Forces Reserve Unit he wishes to join before embarking on the recruiting process.

[48] In a similar vein, the Commission refers to the testimony of Ms. Eastwood who confirmed that there probably was a nursing officer position available.

[49] Finally, Mr. Dorais considers that these emails are important because, during the hearing, the Tribunal heard evidence on the efforts he deployed to obtain a nursing officer position with the Edmonton 15 Field Ambulance Primary Reserve in 2015 and 2016 and the recruiting process both in the Primary Reserve and in the Regular Forces. According to Mr. Dorais, the 25 emails address all this in real time and could influence the Tribunal’s decision on his claim for loss of employment and the related loss wages.

[50] He adds that he does not remember that the Forces raised any problem during the case management process regarding the availability of a nursing officer position. He had no reason at that time to produce documents on this subject. According to his understanding, once the *prima facie* evidence was presented, which was his priority, the Forces then bore the burden of presenting “all other things”, to use his own words.

[51] The Commission agrees with Mr. Dorais. It considers that the documentary evidence is relevant because it makes it possible to support the position that a recruit must confirm, on the one hand, the existence of a position before his application is accepted and, on the other hand, the existence of a nursing officer position with the Edmonton 15 Field Ambulance Primary Reserve. These emails therefore support his claim for loss wages.

[52] The Commission recalls that Mr. Dorais alleged that a nursing officer position was available with the Edmonton 15 Field Ambulance Primary Reserve. This having been said, the Forces argued that Mr. Dorais had not presented evidence on this subject and that he had chosen not to call someone from this Reserve to testify in this regard. The Commission therefore considers that these emails dispose of the question and that this additional evidence could affect the result of this matter.

[53] The Forces claim that Mr. Dorais did not discharge his burden to prove that said documents are relevant and convincing. The Forces consider that the relevance of the additional evidence is unclear, in that the documents do not address the questions of discrimination or remedies. According to the Forces, nothing proves that Mr. Dorais would have received a job offer or a guarantee of employment or that the documents contain information concerning his rank, his salaries, a number of hours or other elements in this regard. Nor did he prove that the persons involved in Mr. Dorais’s recruiting process are the authors of these emails. According to the Forces, Mr. Dorais only wishes to provide the context for his experience of the recruiting process, which he could not have done during his testimony in April 2021. In so doing, the Forces consider that the emails are not useful, that they are irrelevant to the dispute and that their admission would have no significant impact on the outcome of the case.

[54] Firstly, Mr. Dorais argues in his motion that the additional documents he requests to file will offer the Tribunal the context of the submission of his application, highlighting his path, his commitment and his objectives to join the Forces again. The Tribunal notes that these are not reasons for which a reopening of an inquiry may be granted. It is exceptional to allow a party to file additional evidence once their evidence has been declared closed and the inquiry has been concluded. It is not about improving or completing his evidence with elements that are irrelevant or have no major impact that would probably change the result of the inquiry on the complaint.

[55] The Tribunal consulted Mr. Dorais's documents, which it numbered from JB-168 to JB-192. A simple review of these documents shows, first and foremost, that certain emails are redundant and duplicate each other. Indeed, it must be added that the relevance and usefulness of the emails Mr. Dorais requests to file are questionable.

[56] Nothing in what was consulted by the Tribunal in the documents listed as Exhibits JB-168 to JB-192 is a great surprise. Some documents concern email exchanges between Mr. Dorais and other officers within the Forces, in different departments, while he was attempting to discover whether a nursing position was available. Other exchanges are simply automated responses by the application filing system or follow-ups on the progress of his application within the Forces, which greatly diminishes their usefulness and relevance.

[57] Moreover, it must be noted that Mr. Dorais already testified on the matter and was cross-examined on these aspects. Also, other witnesses, including Ms. Eastwood, provided their understanding of the question of whether an applicant must undertake preliminary steps to determine if a position is available before submitting his application.

[58] This having been said, the reliability of the emails is not called into question. But it must be recognized that the evidence adduced at the hearing through the various testimonies already addressed this question in whole.

[59] Therefore, in our case, this is not additional evidence that could probably change the result of the inquiry. Rather, Mr. Dorais attempts to support, with undisclosed additional evidence, the evidence that had already been submitted by testimony during the hearing.

[60] The emails do not constitute documents that were unknown to everyone; the documents were identified by Mr. Dorais through his own mailbox. Instead, the documents only corroborate his own testimony adduced at the hearing.

[61] In so doing, the Tribunal considers that the answer to the question “would the evidence, if presented, probably have changed the result of the inquiry on the complaint?” is no.

B. Could the evidence have been obtained before the inquiry by the exercise of reasonable diligence?

[62] Mr. Dorais stated that this new evidence could not be obtained by the exercise of reasonable diligence before the hearings. To this effect, he states that it was on May 9, 2022, that he discovered the 25 emails in question dated between September 4, 2012, and September 5, 2016, when he was in his car consulting his mailbox to pass the time. He explained that he found this evidence while scrolling through his sent items and not his inbox.

[63] Mr. Dorais stated that if he had been represented by counsel, this person could also have assisted him in preparing his case.

[64] He also added that, when the Commission had made to the Forces a request for disclosure concerning the filing of his application, particularly the emails they might have had thereon, the Forces responded that these emails could not be produced. Instead, the Forces invited him to disclose such emails between him and the Forces’ employees if he had access to them. Mr. Dorais considers that the Forces’ efforts in the disclosure were as mediocre as his.

[65] In the same vein, the Commission alleged that the Forces indeed did not disclose these emails between its employees and Mr. Dorais. Moreover, the paper version of Mr. Dorais’s recruitment file was destroyed by the Respondent in March 2020. To this effect, the Commission refers to the testimony of Ms. Eastwood, who explained that she did not receive a request to hold Mr. Dorais’s recruitment file in order to preserve the evidence due to the existence of a pending dispute. She confirmed that the file was destroyed by

subordinates. However, the Commission specified that, as Ms. Eastwood indicated, in the former computer system, the policy would have been to print the emails and add them to the recruitment file.

[66] The Forces argued that Mr. Dorais did not provide reasonable explanations concerning the significant delay in producing this evidence. Since Mr. Dorais mentioned that he found these emails on May 9, 2022, when he was scrolling through his emails on his phone to pass the time, the Forces then stated that he had control and possession of these documents at all revelant times to these proceedings.

[67] The Forces add that, in April 2021, during the cross-examination of Mr. Dorais, he noticed that they raised doubts regarding the availability of a nursing officer position in their organization. In a letter dated June 23, 2021, the Forces had stated that the dispute would focus on the actions and decisions of the medical officer who made the decision regarding his recruitement and not on the application process of the recruitement centre itself. In this correspondence, the Forces had invited Mr. Dorais to file the emails he had in his possession between him and the organization's various employees that he considered relevant. The Forces believe that Mr. Dorais must thus have been advised to search through his emails to find exchanges regarding the recruitment process if he thought that these emails were relevant to the dispute. Contrary to Mr. Dorais's claims that their efforts to produce their employees' emails were mediocre, the Forces stated that they distributed the emails relevant to the dispute. They did not concede that the recruitement centre's emails were in fact relevant.

[68] The Forces also argued that the Former Rules, which apply in this instance, provide that it is the right of all parties to an inquiry to have a full and ample opportunity to be heard; arguments and evidence must be disclosed and presented in a timely and efficient manner (Rule 1 of the Former Rules).

[69] They add that subsection 50(1) of the CHRA provides that they had the right to receive a notice and be given a full and ample opportunity to appear, present evidence and make representations. Considering the delay caused by Mr. Dorais, the Forces argue that

it would not be expeditious to allow him to use the process in this manner to file new evidence.

[70] Moreover, although the Forces consider the emails in question not relevant or convincing, they allege that Mr. Dorais knew that he had the obligation, according to the Rules, to disclose the documents relevant to his dispute (Rules 6(1)(d),(4),(5) and 9(3) of the Former Rules). If Mr. Dorais believed that these documents were relevant, the Forces consider that he could have listed them on his list of documents and disclosed them. They add that Rule 9(3) of the Former Rules prevents a party from relying on undisclosed evidence. The only exception is if this meets the objectives set out in Rule 1(1) of the Former Rules and if this is authorized by the Tribunal, it will then offer the other parties the possibility of replying to it.

[71] The Forces believe that Mr. Dorais did not show reasonable diligence and had full latitude to provide the documents he considered relevant. As such, during the July 2021 hearing, when he disclosed emails relating to the recruitment process, he should have searched through his mailbox diligently to find the 25 emails.

[72] On this subject, the Forces draw the Tribunal's attention to *Whyte, Kasha v. Canadian National Railway*, 2010 CHRT 6 (CanLII) [*Whyte*], opining that the Tribunal, in that case, had dismissed the respondent's request to reopen the inquiry on the simple basis that the respondent had access to the information in question before and during the hearing and that it could have obtained it by showing reasonable diligence. They also refer to *Canada (Human Rights Comm.) v. Canadian Broadcasting Corp.*, 1994 CanLII 18406 (CHRT), in which the Tribunal also dismissed the respondent's request to reopen the inquiry because the respondent could have obtained the evidence if it had acted with reasonable diligence. As in these cases, the Forces argue that the lack of reasonable diligence on Mr. Dorais's part should prevent the reopening of the inquiry.

[73] In view of the parties' arguments, the Tribunal considers that, indeed, Mr. Dorais's additional documentary evidence could have been obtained well before the inquiry, or at least during the inquiry, if he had acted with reasonable diligence, because those emails were in his Outlook sent items or inbox.

[74] The way the documents were found by Mr. Dorais—while he was in his car, passing the time, scrolling through his emails in his Outlook mailbox—supports the idea that the email exchanges between him and the various bodies and officers of the Forces were *easily traceable* and could have been disclosed well before the hearing, or at least during the hearing. For that reason, reasonable diligence could have enabled him to disclose this documentation to the other parties.

[75] However, even if Mr. Dorais indicated that he had not really understood that the question regarding his previous search for a nursing position in the Forces was in dispute, he nonetheless was able to testify on this subject and inform the Tribunal of the steps he undertook. He was able to share his memories of his exchanges with various agents of the Forces and name them. Mr. Dorais had the opportunity during the hearing to file the documentation that pertained to his testimony, which he did not do.

[76] In his representations, he shared his memory that, during his cross-examination, when he was answering questions about the Edmonton 15 Field Ambulance Primary Reserve, the question of emails concerning recruiting with the Reserve came up. Again, in his representations, Mr. Dorais also mentioned that, during his cross-examination, he thought that it might be too late to file certain documents that he had in his possession.

[77] Mr. Dorais did not ask the Tribunal for authorization to file the emails in question concerning the preliminary steps he undertook with the recruitement centre and the Edmonton 15 Field Ambulance Primary Reserve. The only exhibits filed to this effect are JB-136 and JB-137, namely the exchanges with Ms. Mason of the recruitement centre.

[78] This presupposes that Mr. Dorais remembered that emails were exchanged between him and various officers of the Forces. However, he does not explain why he did not take reasonable steps to search for and recover them in his own mailbox.

[79] Nonetheless, he filed Exhibits JB-136 and JB-137. These two exhibits are email exchanges between him and Ms. Mason. These exhibits fall within the period when Mr. Dorais was trying to find out whether there was a nursing position available. However, he did not attach any of the other emails falling within the same relevant period.

[80] The Tribunal is surprised that Mr. Dorais also included Exhibits JB-136 and JB-137 in this request to reopen the inquiry but marked them as Exhibits JB-189 and JB-190. However, the Tribunal finds that they are indeed the same emails as those that were filed at the hearing, under Exhibits JB-136 and JB-137.

[81] The Tribunal wonders why Mr. Dorais did not distribute all of the emails between him, the Forces, its officers and the recruitment centre when he filed Exhibits JB-136 and JB-137. The Tribunal could have addressed such a request in due course, at the hearing.

[82] Therefore, the evidence that Mr. Dorais requests to file is not new, and the Tribunal is not convinced that it involves documents whose existence Mr. Dorais had no knowledge. As the Tribunal has already explained, Mr. Dorais was a party to these conversations with the Forces and remembers these exchanges with the Forces, their officers and the recruitment centre. As mentioned, he already filed similar documents in the same relevant period. It was then his responsibility to conduct his research diligently and find the documents that supported his claims.

[83] Regarding the argument that Mr. Dorais was not represented, it must be noted that, although not represented, Mr. Dorais was able to bring his case to a conclusion. The Tribunal understands very well that he was not represented by counsel in the proceedings and that the services of a lawyer or legal advisor are useful and desirable. However, this service is not accessible to everyone.

[84] Nonetheless, we cannot claim that Mr. Dorais's representation by counsel would necessarily have led to the discovery, distribution or filing of the emails in question in the record of the Tribunal. The presence of a lawyer and what could have then occurred remain speculative.

[85] Moreover, the Tribunal notes that, throughout the proceedings, Mr. Dorais had shown that he was able to understand the Tribunal's procedures and the obligations he had to meet; this includes notably the disclosure of the documents that were arguably relevant to the case.

[86] He was able to produce his statements of particulars, disclose the documents arguably relevant to his dispute, create his list of exhibits for the hearing, summon his witnesses, etc. Although not represented and without legal training, Mr. Dorais showed the necessary and appropriate skills and abilities to develop a general understanding of his rights and obligations in our quasi-judicial process.

[87] It must also be mentioned that the Commission participated in the hearing. Although it did not represent Mr. Dorais, the Commission supported him throughout the proceedings, a consideration that should not be ignored.

[88] The Tribunal must support unrepresented parties in proceedings so that they understand what they must accomplish and are able to present their case meaningfully (subsection 50(1) of the *CHRA*; see also Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, CJC 2006, at https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf, upheld by the Supreme Court in *Pintea v. Johns*, 2017 SCC 23).

[89] However, not being represented does not give carte blanche to a lighter onus or burden of proof for the party without a lawyer or legal advisor, to the detriment of the burden that must be met by the opposing parties, either. This would necessarily create unfairness in the proceeding if it were the case.

[90] Here, Mr. Dorais's documents were in his possession and easily accessible with a simple search through his emails. It also seems that he was aware that emails might exist; he filed some emails between him and Ms. Masson under Exhibits JB-136 and JB-137, which are repeated in Exhibits JB-188 and JB-189 relating to this motion. These documents could have been distributed prior to or, at least, during the hearing (*Whyte*, *supra*). It was Mr. Dorais's responsibility to conduct his research in advance with sufficient diligence and to share the documents that were arguably relevant to the case. Therefore, the Tribunal holds that the second part of the test is not fulfilled.

[91] The question at this stage is whether the person requesting the filing of evidence after both the evidence and the inquiry are closed acted with reasonable diligence to obtain

the evidence. Mr. Dorais bore the burden of convincing the Tribunal that he acted with reasonable diligence to obtain said evidence, which he failed to prove.

[92] The question of the destruction of Mr. Dorais's recruitment file, raised by the Commission, will be addressed in the exceptional circumstances section below because the Tribunal considers that this is where the analysis of this point is most suitable.

C. Do exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit the additional evidence?

[93] The Commission considers that the Tribunal has the residual discretion to reopen the inquiry, even if it concluded that the reasonable diligence test was not met. It believes that the fact that a government organization does not preserve the evidence well after the dispute began constitutes exceptional circumstances justifying the exercise of the Tribunal's discretionary power to reopen the inquiry.

[94] The Commission believes that the Forces failed in their diligence to preserve the hard copy of Mr. Dorais's recruitement file. It stated that, as Ms. Eastwood confirmed, the emails would have been placed in Mr. Dorais's recruitement record. These emails might also have been found in the mailboxes of the employees in question, but the Forces did not present evidence that its employees had been contacted to check whether they had access to these emails.

[95] The Commission adds that there will be no prejudice for the Forces if these emails are admitted because they should have been in their possession. It believes that, in so doing, the integrity of the inquiry is maintained, the additional delay is mitigated and, in circumstances where the final decision has not been rendered yet, the interests of justice and procedural fairness regarding the reopening of the inquiry take precedence over the principle of finality.

[96] The Forces alleged that the reopening of the inquiry to file new evidence will create additional costs and delays. They added that, in the normal course of proceedings, the parties would have had the opportunity to present arguments to reply to the evidence filed.

If this opportunity was afforded, the probative value of Mr. Dorais's documents must be assessed.

[97] The Forces added that they will suffer prejudice with the admission of these documents because their defence of record was based on the presentation of the details by Mr. Dorais, the documents disclosed, and the testimony presented. The Forces argued that unless Mr. Dorais can prove relevance, the compelling effect of the documents and their probative value, it would be contrary to the interests of justice to admit them as evidence after the conclusion of the inquiry. Finally, they argued that, in light of the opposing factors, which are significant, the truth-seeking principle does not require the admission of this evidence to confirm other evidence.

[98] In the case at bar, do exceptional circumstances exist justifying the exercise of the Tribunal's discretionary power to admit additional evidence even though the inquiry is closed? The Tribunal answers in the negative.

[99] Considering that the documents in question would probably not change the result of the inquiry, that their materiality and relevance are doubtful, and that Mr. Dorais could have easily had access to them by consulting his Outlook mailbox, the Tribunal does not believe that the circumstances justify that it uses its discretion to admit the additional documents.

[100] Indeed, the fact that Mr. Dorais's recruitment file was destroyed in a precarious manner by agents of the Forces when a dispute was in progress or anticipated is insufficient, in the case at bar, to justify that the Tribunal use its discretion to admit these documents.

[101] The Tribunal notes that good faith is presumed in law (*Robinson v. Canadian Armed Forces*, 1991-07-04, T.D. 9/91, at p. 19; *Nur v. Canadian National Railway Company*, 2019 CHRT 5 at para 139; *Valenti v. Canadian Pacific Railway*, 2017 CHRT 25, para 26 (table); *Bhasin v. Hrynew*, 2014 SCC 71).

[102] It is incumbent on the party that raises the bad faith of another party to prove its existence. Nothing in the evidence, nor in the representations of the Commission or of Mr. Dorais, convinces the Tribunal that the Forces, or its officers, destroyed Mr. Dorais's recruitment file intentionally or in bad faith, or by showing gross negligence.

[103] Ms. Eastwood came to testify openly before the Tribunal on the destruction of the file and explained the circumstances leading to its destruction. She indeed recognized that this should not have occurred and that gaps exist in the file retention procedure in the event of a dispute. Ms. Eastwood admitted that there were lessons to be learned from the situation and that corrections are necessary.

[104] Even though Mr. Dorais's recruitment file—which *potentially* could have included the emails in question—was indeed destroyed, *the emails nonetheless were in Mr. Dorais's possession well before the beginning of the Tribunal proceedings*. As previously explained, these documents were *easily traceable and accessible* to Mr. Dorais with a simple search through his mailbox.

[105] Regarding prejudice, the Tribunal notes that granting a request to add evidence after an inquiry was declared closed is an exceptional measure. It is not just a question of adding evidence after the fact, once the die has been cast, without any other formality. It is in the interests of justice and the sound administration of our judicial systems that, once the inquiry is declared closed, the courts and the tribunals may take the record under deliberation and render a decision with the evidence filed at the hearing. This respects the finality principle (*Varco* at para 15). The reopening of an inquiry is inherently a breach of these principles, and the Tribunal must be very cautious and only grant this type of request *in rare and clear cases*.

[106] In the present case, truth seeking does not trump the principle of finality of judicial proceedings, considering the prejudice in terms of the time and costs that will be caused by the reopening of the inquiry, that the importance and relevance of the documents are doubtful, that the documents would probably not change the outcome of the inquiry and that Mr. Dorais could easily have had access to them by acting with reasonable diligence.

VII. Decision

[107] For these reasons, the Tribunal dismisses the Complainant's request.

Signed by

Gabriel Gaudreault
Member of the Tribunal

Ottawa, Ontario
February 9, 2023

Canadian Human Rights Tribunal

Parties

Court record: T2409/6819

Title of the case: Joshua Dorais v. Canadian Armed Forces

Date of the decision of the Tribunal: February 9, 2023

Motion addressed in writing without appearances by the parties

Written representations:

Joshua Dorais, on his own account

Caroline Carrasco and Christine Singh, for the Canadian Human Rights Commission

Cynthia Lau and Samantha Gergely, for the Respondent