

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

File Nos.: T1726/8111 and T1769/12411

Member: George E. Ulyatt

Date: April 14, 2014

Citation: 2014 CHRT 15

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I. Complaints & Motion

[1] An inquiry by this Tribunal was requested by the Commission as a result of two complaints alleging discrimination and discriminatory practices contrary to sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*CHRA*").

[2] The first complaint was filed on January 19, 2005 pursuant to sections 7 and 10 of the *CHRA*. The thrust of the complaint is discrimination against the Complainant personally and discriminatory policies, based on age, in various job selection processes with the Respondent.

[3] The first complaint was dismissed by the Commission pursuant to paragraph 44(3) of the *CHRA*. The Complainant applied for judicial review, and on September 27, 2010 the Federal Court allowed the application of the Complainant. As a result of the Federal Court decision, the Commission conducted a second investigation into the allegations, and on August 25, 2011, it referred the matter to the Tribunal.

[4] A second complaint was filed by the Complainant on July 9, 2008, pursuant to section 7 of the *CHRA*, alleging discrimination between 2001 and 2008 due to age and disability, again in various job selection processes with the Respondent. Investigation into the second complaint found that it involved substantially the same issues as the first complaint, and on December 19, 2011, the Commission decided that an inquiry by the Tribunal was warranted.

[5] On June 27, 2012, the Tribunal granted the Complainant's request for both complaints to be heard together.

[6] On January 31, 2013, the Respondent filed a Statement of Particulars, but did not produce any documents listed in its List of Documents.

[7] Disclosure of the Respondent's first batch of documents was by way of a DVD produced on March 12, 2013. The Complainant states that particulars of disclosure, including the names of the candidates in the selection processes, were redacted. Subsequent disclosure on

May 1, 2013 contained the balance of the documents. However, the Complainant states that portions of that material were also redacted.

[8] On August 13, 2013, a case conference was held, during which discussions of the redactions took place. It was agreed that the Respondent was to provide an amended List of Documents addressing the issue of the redactions, and further, was to provide a List of Documents which was more specific and would assist the Complainant's counsel in identifying and organizing the documents.

[9] On September 9, 2013, the Respondent provided the Complainant's counsel with an amended List of Documents.

[10] On October 18, 2013, the Complainant filed a notice of motion making a request pursuant to Rule 3 of the Tribunal's *Rules of Procedure (03-05-04)* for:

- (1) An order that the Respondent disclose redacted portions of all arguably relevant documents it has produced to the Complainant, in accordance with its obligations under Rule 6 of the Tribunal's *Rules of Procedure*;
- (2) In the alternative to (1), an order fixing a date for an *in camera* hearing, where Complainant's counsel can examine the unredacted documents and the Member can determine their relevance, after hearing from the parties;
- (3) An order that the Respondent disclose Corporate Administrative Systems ("CAS") reports for persons appointed to the positions of Custom Inspector and Border Services Officer in Pacific Region (British Columbia and Yukon), for the period between 2001 and 2009, including the date of their hire and age (or birth date);
- (4) An order that the Respondent disclose letters to students notifying them of their appointments to Customs Inspector or Border Services Officer positions in Pacific Region (British Columbia and Yukon), pursuant to the CBSA policy "Student Bridging - Appointment Without Competition", in addition to any documents used by CBSA to assess their qualifications for indeterminate employment;

- (5) That the Tribunal direct the Respondent to explain the basis upon which it claims public interest privilege for each document, or portions of which, it claims is covered by this privilege;
- (6) That the Tribunal fix a deadline of November 8, 2013, for the Complainant to file a written reply to the Respondent's response to the present motion;
- (7) That the Tribunal grant an oral hearing of the present motion.

[11] In support of the motion, the Complainant's counsel filed the Affidavit of Mally McGregor, dated October 17, 2013.

[12] The Respondent filed a response on November 8, 2013 opposing the relief sought and seeking dismissal of the Complainant's motion. The Respondent also filed the Affidavit of Sheila Anderson, affirmed November 7, 2013.

II. Issue 1: Redacted documents

[13] The position of the Complainant is it requires the names of the job candidates in the relevant job processes in order to identify and organize documents related to the Complainant's allegations. The Respondent had proposed and prepared a candidate list where each candidate was assigned a "candidate number". Each candidate was assigned one number, which did not change if there were multiple applications. According to the Respondent, there are 201 names on the list of candidates. The submission would be that the Complainant would be able to identify the candidate name by the corresponding number, which had been entered on the documents in question.

[14] The Complainant's counsel wrote a letter dated January 13, 2014 indicating that the proposed solution was not satisfactory, and argued as follows:

First of all, given that the normal rule would be to disclose everything that is relevant as a matter of principle these items ought to be disclosed. If they were disclosed pursuant to the normal rule, then we would have relevant documents which included the names and which would make it far easier to prepare for the case. Without these names on the

documents in question, a laborious and time-consuming process will be necessary in order to correlate each document to a name. Given that the normal rule at the production stage is disclosure, we should not be put through that prejudice when there is clearly no evidence of harm at this point.

Second, the Complainant already has in his possession many of these documents which include these persons' names. If the Respondent is truly concerned about the confidentiality of that information, then the issue will have to be addressed in a confidentiality order from the Tribunal in any event. Otherwise, the Complainant may very well use the documents that he has with these names and then we will end up with some documents with names and some without. This makes little sense going forward.

Finally, in some cases, the actual name may be relevant. For example, Mr. Hughes may have some very specific concerns about how a particular candidate was treated based upon his knowledge of that person's name. Moreover, we may wish to put questions in cross-examination to other witnesses which relate to the names of these candidates. It is inevitable that the names would therefore be disclosed in this proceeding and therefore that confidentiality order will be needed in any event.

[15] The Tribunal also heard brief oral arguments from the parties on the issue of redactions on a conference call on February 20, 2014. In particular, the Tribunal requested that, in addition to the authorities already submitted, the parties address the issues raised in *Grand Chief Stan Louttit in a representative capacity on behalf of the First Nations of Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada*, 2013 CHRT 3; and, *Emmett v. Canada Revenue Agency*, 2013 CHRT 12 [*Emmett*].

[16] At the case conference on February 20, 2014, oral submissions were made addressing the issue of redactions and the variety of orders the Tribunal could make. The Respondent and Complainant agreed that the candidate names not be redacted subject to an appropriate order from the Tribunal as to confidentiality, similar to that found in *Emmett* at paragraphs 71-74. The balance of the personal information would remain redacted.

[17] Inasmuch as the parties have agreed on this issue, I order:

The parties and their representatives to keep confidential all information regarding the identity of job candidates involved in the selection processes at issue in these complaints.

[18] As a further precaution, I would note that during the hearing process, although the names of the job candidates would be open, the Tribunal will ensure whenever possible that their names not appear in a decision.

III. Issues 2, 6 & 7: Request for *in camera* hearing; to fix a deadline for filing a reply to the motion; and, to have an oral hearing on the motion

[19] In light of the proceedings and ruling on issue 1 above, it is unnecessary to address issues 2, 6 and 7 of the Complainant's motion. If such is not the case, the Complainant is to notify the Registry within seven days and request further clarification. The Respondent shall have five days to respond to the Complainant's request.

IV. Issues 3 & 4: Disclosure of Corporate Administrative Systems ("CAS") reports and student appointment letters

[20] In the Complainant's motion, he made a request for CAS reports and student appointment letters. The Complainant argues these reports and letters are relevant to the section 10 aspect of the first complaint and provide age-related circumstantial evidence from which the Tribunal may draw inferences of discriminatory conduct and practices.

[21] The Respondent says the motion for disclosure was the first notice it received that the Complainant was seeking production of these documents. While it has begun the process of marshalling the required documents, it says producing these documents will take some time. Before an order is made, it asks that it be given an opportunity to review the requested documents, obtain the advice of counsel, and then consider and develop a position as to the relevance of these documents and whether any privilege might apply.

[22] The Complainant confirmed at a case conference on February 20, 2014 that the request for these documents remains a live issue, but that they may not be required prior to the hearing dates on May 21-23, 2014.

[23] Therefore, considering the Respondent has been on notice of the Complainant's request for these documents since October 18, 2013, it should be able to provide a response thereto by May 1, 2014. If the Complainant wishes to provide a reply, he can do so by May 12, 2014. If need be, the Tribunal will deal with arguments on this point at the commencement of the hearing on May 21, 2014.

V. Issue 5: Public interest privilege

[24] At the February 20, 2014 conference call, the Complainant confirmed that this aspect of the motion has been complied with. Therefore, no ruling is necessary.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
April 14, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1726/8111 & T1769/12411

Style of Cause: Chris Hughes v. Canada Border Services Agency

Ruling of the Tribunal Dated: April 14, 2014