Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

File No.: T1817/4712
Member: Olga Luftig
Date: January 14, 2015
Citation: 2015 CHRT 2

Table of Contents

Page

I. Introduction

[1] The Complainant has made a motion ("Disclosure Motion" or "Motion") that the Respondent produce:

- "all arguably relevant" documents in the Respondent's possession; and
- an unredacted and complete copy of the Respondent's Simulation Exercise Administration Manual ("the Manual") including certain specified pages, set out below, and any other pages missing from the version of the Manual which the Respondent has already disclosed.

[2] The Respondent uses the Manual in its nine-week Port of Entry Recruitment Training ('POERT") program to administer simulation exercises and evaluate trainees' performance of behavioural competencies during the two testing portions of POERT.

[3] The Notice of Motion requests disclosure of specific pages of the Manual, set out below, with the Complainant's brief general description of their topics. As the Respondent has not raised any issue regarding these descriptions, for the purposes of this Motion, the descriptions are assumed accurate.

a) Pages 20 to 87 and 269 to 277

[4] These pages relate to the D-I testing process of the simulations.

b) Pages 123 to 129

[5] These pages relate to a version of the simulation evaluations called Version B.

c) Pages 137 to 171

[6] These pages make up a chapter related to a version of the simulation evaluation called Version C.

d) Pages 280 to 282 and 284 – 287

[7] These pages are contained in a chapter titled "D-II Recruit Simulation Background Information" related to the simulations evaluation in D-II.

e) Any other pages that may be missing from the Manual.

[8] In paragraph 17 of its Response to the Complainant's Motion, the Respondent states that it has not produced Manual pages 102 to 115. Category e) captures these pages.

II. Grounds for Disclosure Motion

[9] The Complainant's Motion is on the following grounds:

1. Rules 3 and 6 of the Canadian Human Rights Tribunal Rules of Procedure ("the Rules");
2. Subsection 50(1) of the *Canadian Human Rights Act* ("*Act*");
3. The requested pages ("Requested Pages") are arguably relevant and relate to a fact, issue or form of relief sought in the Complaint, specifically, to whether the Respondent has discriminated against the Complainant in the manner alleged.

III. Background of the Complaint

[10] For the purposes of this Ruling only, the following is a very brief and general background summary of the POERT program and the Complainant's history in it.

[11] The Complainant applied to the Respondent to become a Border Services Officer ("BSO"). He passed the initial screening, and the Respondent invited him to be a trainee in the POERT program.

[12] The POERT contains two evaluation stages, called "Determination Points": Determination Point I ("D-I"), administered during the fourth week, and Determination Point II ("D-II"), administered at the end. Trainees must pass the entire POERT program in order to be placed in the pool of those eligible to be hired as BSOs.

[13] The D-I evaluation consists of two written exams and three simulations. Each of the D-I simulations assess seven behavioural competencies: Client Service Orientation; Supporting CBSA Values; Analytical Thinking; Decisiveness; Effective Interactive Communication; Information Seeking Techniques; and Legislation, Policies and Procedures.

[14] During D-I, the Respondent also provides feedback on the competencies of Dealing with Difficult Situations and Self-Confidence. Although these two competencies are not formally evaluated during D-I, they are evaluated at the end of D-II.

[15] The D-II evaluation consists of another set of written tests, a Control and Defensive Tactics Simulation, and three other simulations. The simulations in D-II each assess the same competencies as assessed in D-I, plus Dealing with Difficult Situations and Self-Confidence.

[16] The Complainant passed all the written tests and behavioural competencies evaluations in D-I. He went on to POERT's second component, and was assessed in D-II. The Complainant did not pass all the behavioural competencies in the D-II simulations, and was not placed in the pool of potential BSOs.

IV. Amendment Ruling and Confidentiality Ruling

[17] The Tribunal Ruling cited as *Itty v. Canada Border Services Agency*, 2013 CHRT 33 ("Amendment Ruling"), granted the Complainant's motion to amend the Complaint by adding the phrase "and section 10". Paragraph 1, third sentence of the Complaint. is deemed to read:

> "I believe that the Canada Border Services Agency's ("CBSA's") Port of Entry Recruitment Training ("POERT") program discriminated against me on the

grounds of age, race and national or ethnic origin in my capacity as a candidate for employment as a Border services Officer, contrary to section 7 and section 10 of the Canadian Human Rights Act."

[18] A second Ruling, cited as *Itty v. Canada Border Services Agency*, 2013 CHRT 34 ("Confidentiality Ruling"), orders the parties to keep certain documents confidential. One of those documents is the Manual.

V. Issue in this Motion

[19] Must the Respondent disclose the Requested Pages?

VI. Statutory Law and Tribunal Rules

[20] Section 7 of the *Act* states:

"It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination."

[21] Section 10 of the *Act* states:

"It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

[22] Subsection 50(1) of the *Act* states, in part:

> "…the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations."

[23] For the purposes of this Motion, the relevant portions of Rule 6 state:

> "(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> > (d) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
>
> (5) A party shall provide such additional disclosure and production as is necessary
>
> > (b) where the party discovers that its compliance with 6(1)(d)…is inaccurate or incomplete."

VII. Standard for the disclosure of documents

[24] It is well-established by case law that the standard for the disclosure of documents pursuant to Rule 6(1)(d) and (5) is that the documents be "arguably relevant" to a fact, issue or form of relief sought, or identified by other parties. To be arguably relevant, there must be a nexus or rational connection between the document sought to be disclosed and a fact, issue or form of relief sought or identified by other parties (*Seeley v. Canadian National Railway*, 2013 CHRT 18 *("Seeley")*, at para. 6. Requests for disclosure "…must not be speculative or amount to a "fishing expedition" (*Johanne Guay v. Royal Canadian Mounted Police,* 2004 CHRT 34 ("Guay"), at para. 43.

VIII. Complainant's Submissions

[25] The Complainant submits that the Requested Pages should be disclosed because they:

- directly relate to the main issues in dispute;
- their disclosure will ensure the Complainant has a "full and ample opportunity" to participate in the inquiry in accordance with subjection 50(1) of the *Act;*
- are necessary in their entirety for the Complainant to demonstrate that the Respondent has established discriminatory practices or policies;
- the threshold for arguable relevance is very low (*Guay*, *supra*, at para. 44), and the trend in the jurisprudence is towards more disclosure.

IX. Respondent's Submissions

[26] The Respondent submits that with respect to the Manual, it has already disclosed:

- "all of the Manual materials related to the competencies tested; and
- all of the specifics of the simulations which the Complainant failed and in which the Complainant alleges he was discriminated against" (para. 15 of the Respondent's Response to Motion).

[27] The Respondent groups the undisclosed portions of the Manual into three, and submits they have not been disclosed because they are not relevant to the Complaint. They are:

1. simulation specifics in D-I, including:
   a) those the Complainant passed; and
   b) those the Respondent did not administer to the Complainant's class;
1. D-II simulations which the Respondent did not administer to the Complainant's class;
2. D-II simulations which the Complainant passed.

[28] The Respondent submits that it administered the same version of all simulation exercises to all members of the Complainant's class. Therefore, there is nothing for the Complainant to compare and there is no connection in the simulations not administered to the Complainant's class to the issues in the Complaint.

[29] The Respondent's position on the simulations is that the Complaint is not about the simulations in D-I or D-II which the Complainant passed, but about those simulations in D-II which he did *not* pass [emphasis mine]. The Respondent's submission is that it could not have discriminated against the Complainant in simulations which it did not administer to him. Therefore, anything not directly related to the D-II tests which the Complainant failed is not arguably relevant to the Complaint and need not be disclosed.

X. Analysis

[30] This Ruling will not deal with the Notice of Motion's request that the Respondent produce "…all arguably relevant documents in its possession, with respect to the matters at issue…" Rule 6 already embodies that request, including the Rule's requirement that disclosure be ongoing.

[31] I find that, generally, the Complainant wishes to prove that:

- the Respondent discriminated against the Complainant personally throughout the POERT program on the prohibited grounds of age, race and national or ethnic origin, contrary to section 7 of the *Act;* and
- in the POERT program, the Respondent has established or pursued policies and practices, or either of them, which deprived or tended to deprive the Complainant of employment opportunities on the same prohibited grounds, contrary to section 10 of the *Act*.

[32] I further find, for the purposes of deciding this Motion, that a non-exhaustive list of examples which the Complainant wishes to use to prove the above discrimination is:

1) the Respondent "wanted [the Complainant] to fail" because of his age (Complaint, para. 10), and the Respondent had a policy or practice of age discrimination in the POERT program (*ibid* and Complainant's Statement of Particulars, at para. 34), contrary to section 7 and 10 of the *Act*;
2) in evaluating the Complainant, the Respondent's assessors treated him differently, to his detriment, because they evaluated the Complainant at a higher standard compared to younger, white candidates, contrary to sections 7 and 10 of the *Act*;
3) the behavioural competencies used to evaluate the Complainant and other recruits during the simulations in both D-I and D-II are in and of themselves "highly subjective" (Complainant's SOP, para. 54) and therefore vulnerable to the prejudices of the evaluators, contrary to section 10 of the *Act*;
4) the Respondent's practices in assessing the Complainant's performance of the competencies relied on aspects of the Complainant's age, race, national or ethnic origin, contrary to section 10 of the *Act*.

[33] The Complainant does not differentiate between the simulations he passed and those he failed in the allegations he seeks to prove. There is a nexus among all the simulations, the methods used in their assessment and the issues in dispute. All the D-I and D-II simulations administered to the Complainant are therefore arguably relevant, and the Respondent should disclose them.

[34] Paragraph 24 of the Respondent's SOP states that the Complainant passed the D-I simulations component. It also states, in part:

> "While [Complainant] was able to pass, the assessors noted the need for improvements in various areas. In fact, [Complainant] received a mark of "not met" from one of his assessors for the Effective Interactive Communication competency. While Self-Confidence and Dealing with Difficult Situations were competencies not formally evaluated at the D-1 stage, the assessors gave negative

> feedback with respect to both and indicated that [Complainant] would need to improve if he wished to succeed in the D-II evaluation."

[35] The Respondent's position in this Motion is that paragraph 24 simply refers to assessors' comments during D-I about the Complainant's performance of the competencies of Self-Confidence and Dealing with Difficult Situations, and those comments are not arguably relevant because the Complaint is about D-II, not D-I.

[36] Paragraph 14 of the Respondent's SOP describes an aspect of D-I as follows:

> "Candidates are also provided with feedback regarding Dealing with Difficult Situations and Self-Confidence, though these two competencies are not formally evaluated at the D-I stage."

[37] I find that that the Respondent's assessors gave "negative feedback" on the Complainant's performance of these two competencies not as mere side commentary or by chance, but rather because it was a policy or practice of the Respondent to do so, as stated in paragraph 14 of its SOP. There is therefore a nexus between what the Complainant wishes to prove regarding individual and systemic discrimination and those parts of the Manual about the D-I simulations and the methods of assessment.

[38] The portions of the Manual dealing with the D-I simulation components and the methods of assessment are therefore arguably relevant and the Respondent shall disclose them.

[39] The fact that the Respondent did not administer certain simulations to the Complainant's class does not automatically exclude them from being arguably relevant, nor does the Respondent's submission that the same simulations were applied to everyone in the Complainant's class. For example, paragraph 10 of the Complaint alleges that the Respondent failed "[t]wo other older gentlemen" in "other classes" because of a policy or practice of age discrimination, contrary to section 10 of the *Act*. Paragraph 34 of the Complainant's SOP alleges that "[m]any of the other candidates from other classes who did not pass the POERT program were middle-aged like Mr. Itty."

[40] Another allegation the Complainant seeks to prove is that during POERT, the Respondent treated him differently than the other candidates and received unclear feedback about why he did not pass three of the competencies. This suggests to him "…an unreasonable threshold is required in order to meet each of the competencies being assessed" (Complaint, at para. 13).

[41] The Complainant's SOP continues that theme, but names it differently, alleging in paragraph 27 that "[t]hroughout the assessment process…" the Respondent "held" the Complainant to "a higher standard than that applied to other white young trainees" who made serious mistakes but nevertheless passed. On its face, this last allegation deals with the entire assessment process, including those tests which the Respondent did not apply to the Complainant.

[42] There is therefore a nexus between what the Complainant wishes to prove regarding systemic age discrimination and discrimination based on race and those pages in the Manual containing the D-I and D-II simulations which the Respondent did not administer to the Complainant's class.

[43] For all of the above reasons, the Respondent shall disclose all the pages of the Manual hitherto undisclosed, in unredacted form, including those pages of the Manual in the Complainant's Notice of Motion.

[44] I wish to note that the Confidentiality Ruling (*Itty v. Canada Border Services Agency*, 2013 CHRT 34) remains in full force and effect. The Manual is included as one of the documents covered by it, therefore the Confidentiality Ruling also applies to the portions of the Manual hereby ordered disclosed.

[45] I also note that the fact that a document is ordered disclosed does not mean that it is admissible in evidence at a hearing. Admissibility at the hearing is a separate, new issue to be

addressed and decided at the hearing, and for which the test is different than the test for disclosure.

XI. Ruling

[46] The Respondent shall disclose forthwith to the Complainant and the Commission all of the pages of the Manual which the Respondent has not disclosed as at the date of this Ruling, in unredacted form, including, without limitation, the Requested Pages: pages 20 to 87; 269 to 277; 123 to 129; 137 to 171; 280 to 282; 284 to 287; and 102 to 115.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
January 14, 2015