

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Denise Seeley

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway

Respondent

Ruling

Member: Michel Doucet

Date: July 18, 2013

Citation: 2013 CHRT 18

[1] Denise Seeley, (the “Complainant”) brings a motion for disclosure of documents and information that is in the possession of the Canadian National Railway (“CN”). She argues that these documents and information are needed for her to be able to calculate the outstanding compensation owed to her by CN for lost earnings arising from the Canadian Human Rights Tribunal’s (the “Tribunal”) decision of September 29th, 2010. In this decision, the Tribunal found that CN had discriminated against the Complainant in violation of the Canadian Human Rights Act (“CHRA”). More specifically, the Complainant seeks an Order that CN produce information confirming the applicable effective mileage rate for 2007 to 2010 and that it produce the year-end statements of earnings for four (4) employees, which she argues are the appropriate comparators for each years.

[2] In its decision, the Tribunal, had ordered CN to compensate the Complainant for, *inter alia*, lost wages and benefits in the following terms:

[183] The complainant seeks compensation for all wages and benefits lost pursuant to s. 53(2)(c) of the *CHRA*. Considering my conclusion as to the date of reinstatement, I order that the Complainant be compensated for all loss of wages and benefits from March 1st, 2007 to today. The parties are ordered to calculate the amount of wages owing using the formula provided for in the Collective Agreement. In regards to extra payments that a road Conductor could receive, since it would be difficult for the Tribunal to set an amount, it is ordered that the parties establish this amount by looking at the extras that were paid for the period to a Conductor with similar seniority working in the terminal, assuming that that Conductor had no unusual absences. The parties could, for example, take into consideration the extra payments that were paid to the employee who was set up in Jasper in March 2006.

[3] There is a fundamental disagreement between the Complainant and CN regarding the proper methodology that should be used for calculating the amount of lost earnings owed. There is also a fundamental disagreement between the parties as to the appropriate comparators to be used. According to the Complainant, the comparators used by CN are not appropriate because the employee used had unusual absences and different qualifications that directly impacted his earnings. The Complainant’s position is that the comparators offered by CN are not appropriate because they are either qualified as engineers or not qualified as Conductors Locomotive

Operators (“CLO”). She submits that, based on a review of the seniority list provided by CN of potential comparators, four (4) other employees are the appropriate comparators because they have similar seniority than her and, to “her knowledge”, they are qualified CLOs. She also submits that none of these employees are qualified as engineers or have had unusual absences during the relevant time.

[4] CN categorically refutes these allegations. According to CN, the employee closest to the Complainant in terms of seniority, who does not have “unusual absences”, is the employee who is mentioned, as an example, in the Tribunal’s decision. CN states that this employee is the appropriate comparator and that when he was absent from work, the next employee on the seniority list was used. It argues that the comparison CN used was “more advantageous” to the Complainant. CN further submits that the employee it used as a comparator had no “unusual absences”.

I. ISSUE

[5] The issue in this motion is whether the Tribunal ought to order disclosure of the information and documentation sought by the Complainant.

II. DECISION

[6] The standard for disclosure of documents is arguable relevance to the issues in the proceeding. In other words, the Complainant must establish that there is a nexus between the information or documents sought and the issues in dispute: *Guay v Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para. 42. The arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case: *Warman v Bahr*, 2006 CHRT, 18, at para. 9. Furthermore, the Tribunal has made it clear that a request for disclosure “must not be speculative or amount to a ‘fishing expedition’” : *Guay v Canada, supra*, at para. 43.

[7] In the instant case, although the information sought might at first glance seem relevant, I do not believe that the order sought should be granted. Having read the parties' arguments on this motion, it is obvious that the motion for production of documents is nothing more than a side issue to the main question. What is at stake in this motion is the issue on its merit. In their briefs, both parties have argued facts which go to the merits of the case without any supporting affidavits and without either party having had the opportunity to cross-examine the other party's witnesses on their evidence.

[8] I see no reason at this time to order the disclosure sought by the Complainant. The matter should proceed before the Tribunal on its merits. CN will then have the onus of establishing that the methodology used for calculating the amount of lost earnings owed to the Complainant is appropriate and respects the Order made by the Tribunal. The Complainant will have full opportunity to discredit CN's approach either by bringing forward its own evidence or by cross-examining CN's witnesses. Should the Complainant succeed in establishing that CN did not use the appropriate methodology, it would then be up to the Tribunal, in accordance with the evidence, to make the appropriate order directing how the parties should approach the matter.

[9] It is abundantly clear from reading the parties' submissions that they have a fundamental disagreement on the material facts surrounding the issue before the Tribunal. It would be inappropriate for the Tribunal, on a preliminary motion for disclosure of documents, without having had the opportunity to hear the evidence, to come to a conclusion that would have an impact on the merits of the issue.

[10] For these reasons, the motion for disclosure of information and documents is, **at this time**, denied.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
July 18, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1355/8508

Style of Cause: Denise Seeley v. Canadian National Railway

Ruling of the Tribunal Dated: July 18, 2013

Appearances:

Meryl Zisman Gary, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

William Hlibchuk, for the Respondent