

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2017 CHRT 27

Date: August 11, 2017

File No.: T2157/3116

Between:

Jane Clegg

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Kirsten Mercer

I. Summary

[1] In light of the broad and systemic nature of the Complaint, and the relatively low bar that is set for production of documents at the disclosure stage, I have determined that the Nance Report is arguably relevant to the issues raised in the Complaint. For the reasons contained herein, I order Air Canada to produce the Nance Report, as well as any additional documents in its power, possession or control that reflect Air Canada's or its employees' input into the drafting of the Nance Report or the implementation of the Nance Report, to the extent that such documents exist, and are not privileged.

[2] The Commission has also requested the further production of documents pertaining to the bid around system for pilot scheduling. Air Canada has advised that no further such disclosable documents exist.

[3] At the request of Pilot XY, who is the subject of the Nance Report, I have also made a series of orders to ensure that Pilot XY's identity is protected in the disclosure and any subsequent reliance on the Nance Report, for the duration of the Tribunal's inquiry into the Complaint.

II. Background

[4] In May 2012, Jane Clegg ("Ms. Clegg" or the "Complainant") filed a complaint with the Canadian Human Rights Commission (the "Commission") against Air Canada, her former employer, alleging adverse differential treatment on the basis of sex in the course of her employment as a pilot ("the Complaint").

[5] The Commission conducted an investigation into the Complaint and issued a report recommending that the matter proceed to an inquiry before the Canadian Human Rights Tribunal (the "CHRT" or the "Tribunal"). On June 15, 2016, the Complaint was referred to the Tribunal for inquiry.

[6] In April 2017, the parties advised the Tribunal that the disclosure process was complete and the matter was set down for a hearing in October 2017.

[7] On April 25, 2017, counsel for Air Canada advised the Tribunal that a June 2014 report drafted by Captain John Nance in the context of another proceeding (the “Nance Report”), which should not have been disclosed, had been inadvertently been produced during the Commission investigation. Ultimately, Air Canada claimed that the document was not relevant to the Complaint, and furthermore, contained confidential information of a non-party.

[8] The Commission and the Complainant both argued that the document was indeed relevant to the Complaint, was properly produced, and indicated that they intended to rely on the Nance Report at the hearing.

[9] The parties were able to agree that Air Canada would withdraw the document and the Commission would bring a motion seeking its production, which it has now done.

[10] In light of the confidentiality issues that had been raised about the individual who was the subject of the Nance Report, who I will refer to as Pilot XY, Pilot XY was given notice of the Commission’s motion. Pilot XY was provided an opportunity to make submissions regarding confidentiality to the Tribunal, which Pilot XY has done.

A. The Complaint

[11] Ms. Clegg alleges that she experienced adverse differential treatment on the basis of sex in regards to a series of specific incidents occurring between July 2009 and April 2013, as well as Air Canada’s response to these incidents.

[12] The Complainant and the Commission also raise a broader, systemic complaint regarding gender harassment of female pilots at Air Canada. Specifically, in her Summary of Complaint, Ms. Clegg alleges widespread experiences of gender harassment among female pilots at Air Canada and “systemic ambivalence that Air Canada displays towards harassment”. Furthermore, at paragraph 20(f)(sic) of Ms. Clegg’s Statement of Particulars, she seeks the broad, systemic remedy of a “modification of the Respondents policies and procedures regarding gender harassment in consultation with the Commission”.

[13] The CHRC alleges systemic discrimination concerns regarding the bid around system employed for scheduling purposes as it applies to female pilots who believe that they have experienced harassment or discrimination.

[14] On the basis of these allegations, and for the purpose of the analysis below, I find that the Complaint alleges systemic discrimination experienced by female pilots at Air Canada on the basis of sex.

B. The Nance Report

[15] The Nance Report was prepared by Captain John Nance in June 2014. Captain Nance was retained by the Air Canada Pilots Association (“ACPA”) to produce the Nance Report in respect of a grievance made by the ACPA against Air Canada on behalf of Pilot XY. Neither Pilot XY nor the ACPA are currently parties to the Complaint.

[16] In considering this motion, I initially attempted to render my ruling without reviewing the Nance Report. However, in light of the factual dispute between the parties to this motion on the subject matter of the Nance Report, and the fact that no party had raised an objection to my reviewing it, I determined that it would be best for me to review the Nance Report in order to decide whether it contains information that is arguably relevant to the Complaint.

[17] I have done so, and on the basis of that review and the parties’ submissions, for the purpose of this analysis, I find that (*inter alia*) the following subjects are considered in the Nance Report:

- A general overview regarding developments in air safety since the late 1970’s, with particular emphasis on the impact of human error on flight safety
- The impact of distraction of the flight crew on flight safety including the impact of pornography as a distraction of the flight crew, and more specifically, the unique impacts of pornography on female pilots in a male-dominated industry
- The need for specific attention and support for pilots who may experience distraction from the perspective of flight safety
- The effect of perceived ethnic slurs on flight safety

- The duty of the flight crew regarding sexually explicit material (including pornography)
- An assessment of Air Canada's response to:
 1. Sexually explicit materials systematically found in Air Canada cockpits;
 2. Explicit sexual and/or racist commentary in Air Canada cockpits;
 3. The existence of a hostile or poisoned work environment resulting from any repetitious or cultural incidences of (1) or (2) above.

[18] I agree with Air Canada that the Report was produced in the context of a grievance about pornography in the cockpits of Air Canada aircraft brought by a non-party (ACPA) on behalf of a non-party (Pilot XY). And I further agree with Air Canada that Captain Nance's primary expertise pertains to flight safety and the impact of pilot distraction on flight safety. However, I cannot agree with Air Canada's limited characterization of the Report as being about "pornography in the flight deck and any impact that such pornography may have on flight safety".

[19] My review of the Nance Report indicates that it includes a broader assessment of the culture at Air Canada with regard to sexual harassment and discrimination (of which the display of pornography cockpits may be a part), contemporaneous with the time period of the Complaint.

C. Issues

- Is the Nance Report arguably relevant to the issues raised in the Complaint?
 - a. Should it be disclosed?
 - b. Should other documents pertaining to the Nance Report in Air Canada's power possession and control be disclosed?
- Should any further documents pertaining to the bid around system be disclosed?
- If the Nance Report is ordered to be disclosed, what confidentiality measures ought to be put in place to protect the confidential personal information of Pilot XY?

III. ISSUE 1: Disclosure

A. Law

[20] The Tribunal's authority to order production of a document flows from subsection 50(1) of the *Canadian Human Right Act* (the "Act"), which 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."

and rule 6 of the Tribunal's *Rules of Procedure*, which states:

"(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."

[21] It is well-established by case law, and not in dispute on this motion, 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).

[22] Requests for disclosure "...must not be speculative or amount to a "fishing expedition" (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 ("*Guay*"), at para. 43), but the bar for production of arguably relevant documents is a low one, and the trend

is towards broader disclosure at the production stage (*Warman v. Bahr*, 2006 CHRT 18 at paras 6-7; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, at para 11).

[23] In *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 (“TEAM”), the Tribunal held at para. 4:

The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get information or documents that are or could be arguably relevant to the proceedings. This does not mean that these documents or this information will be admitted in evidence or that significant weight will be afforded to them.

[24] However, it should also be noted that the disclosure of arguably relevant information does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para 5; see also *TEAM* at para. 4).

B. The Positions of the Parties

(i) The Commission’s Position

[25] The Commission submits that both the Report and any documents in Air Canada’s power, possession or control that pertain to the preparation or implementation of the Nance Report (the “Related Documents”) are relevant to the Complaint, including the remedies sought. More specifically, the Commission submits that the Report’s analysis of the importance of an airline’s support (or lack thereof) for its female pilots- particularly those that report harassment or discrimination- is relevant to the Complaint. The Commission cites Air Canada’s use of the bid-around process as an example of Air Canada’s alleged failure to support female pilots.

[26] The Commission also specifically seeks documents pertaining to the bid around system employed by Air Canada for scheduling pilots and flight crew, including any gender

analysis or other analysis that Air Canada has undertaken of the system and how it is used.

[27] Finally, the Commission submits that the Report and the Related Documents would be relevant to the systemic remedies sought by the Commission as they would assist the Tribunal in understanding the steps already put in place by Air Canada to address the concerns raised in the Complaint.

(ii) The Complainant's Position

[28] The Complainant echoed the Commission's submissions and concluded that the Air Canada Nance Report is not only relevant but essential to the Complaint as it provides expert opinion and evidence of the consequences of gender harassment on flight safety. Ms. Clegg further submits that the Report provides evidence pertaining to the inevitable career loss of female pilots who report harassment and are not properly supported by their company.

(iii) The Respondent's Position

[29] Air Canada argues that the Report is limited in its scope to the issue of pornography in the cockpit of Air Canada planes, and as such has no relevance to an inquiry into Ms. Clegg's Complaint, the bid around system or scheduling more generally. Air Canada further submits that the Report is about flight safety, which is not (in its submission) a significant issue in the Complaint.

[30] Air Canada further submits that the Report and the Related Documents are not disclosable as they are not arguably relevant to the Complaint, or (to the extent that any such documents exist and are disclosable) they have already been produced.

[31] With regard to the request for documents pertaining to the bid around mechanism, Air Canada submits that, to the extent that such documents exist and are not privileged, all such documents have already been disclosed.

C. Analysis

[32] As I have noted above, I find that the Complaint that was referred to the Tribunal includes a broad allegation of systemic discrimination against female pilots at Air Canada. Furthermore, both the Complainant and the Commission are seeking systemic remedies against Air Canada to address, among other things, policies and procedures regarding gender harassment.

(i) The Nance Report and Related Documents

[33] In light of the broad nature of the Complaint, I find that several aspects of the Nance Report are arguably relevant to the issues before the Tribunal. Without anticipating or limiting the parties' arguments on this matter at the hearing, issues such as:

- the need for specific attention and support for pilots who may have experienced harassment;
- the various duties of the flight crew regarding sexist jokes, comments or materials; and
- an assessment of Air Canada's response to:
 1. sexually explicit materials systematically found in Air Canada cockpits;
 2. explicit sexist commentary in Air Canada cockpits;
 3. the existence of a hostile or poisoned work environment resulting from sexist incidents

could be arguably relevant to the allegations and remedies sought in the Complaint.

[34] The motion for disclosure of the Nance Report and Related Documents passes the threshold for arguable relevance and the requested information should be disclosed. There is a rational connection between the information requested and the facts, issues and remedies identified in the Complaint. The request cannot be characterized as a fishing expedition as the information to be disclosed would provide the parties with a full and ample opportunity to present their cases.

[35] As such, the Nance Report and the Related Documents, to the extent that such documents exist, and are not privileged, should be disclosed by Air Canada if they have not already been produced, subject to the terms of my Orders below.

[36] It is important to note that this order pertains to the production of documents at the disclosure stage of this proceeding, and is not intended to represent any determination whatsoever of the admissibility of the Nance Report or the weight that could be afforded to it at the hearing, in the event that it is admitted, particularly in the event that it is admitted in absence of any *viva voce* evidence from, or cross examination of, Captain Nance by Air Canada.

(ii) Documents Pertaining to the Bid Around System

[37] The Commission has requested any documents analysing or investigating why co-pilots engage in altering their schedules to fly with certain captains, or bidding around, including any data, and/or gender analysis of data, in respect of the number of co-pilots who bid around.

[38] With regard to the documents requested by the Commission pertaining to the bid around system, it is my view that any such documents would easily meet the threshold for disclosure in this matter. Any such documents should have already been produced or (pursuant to r. 6(1)(e) of the Tribunal's *Rules*) should be included in Air Canada's list of relevant documents over which privilege is claimed.

IV. ISSUE 2: Confidentiality of Pilot XY

A. Law

[39] The *Canadian Human Rights Act* provides the Tribunal with the authority to make a confidentiality order in the appropriate circumstances.

[40] Section 52(1)(c) of the *Act* stipulates that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if the Tribunal is satisfied that there is a real and substantial risk that the disclosure of matters will cause

undue hardship to the persons involved and that this outweighs the societal interest in a public hearing.

B. The position of the parties

(i) Pilot XY's Position

[41] Pilot XY submits that disclosure of the Nance Report raises serious concerns about the confidentiality of Pilot XY's personal information ("Identifying Information") and could cause her undue hardship.

[42] Although the Nance Report was produced in the context of a grievance by the ACPA on behalf of Pilot XY, that issue was been resolved as between those parties and it appears that the Nance Report was never made public.

[43] Pilot XY has an ongoing employment relationship with Air Canada and is concerned that any disclosure of her Identifying Information may cause her undue hardship. As a result, Pilot XY has requested that the Tribunal take various measures to protect her confidentiality, including:

- Redaction of the Nance Report to remove Identifying Information;
- Destruction of any unredacted copies of the Nance Report;
- Continued anonymization of Pilot XY;
- Non-disclosure of the Report and Identifying Information by the Tribunal;
- Limits on disclosure of the Nance Report;
- Standing in any future motions or proceedings concerning the Nance Report.

(ii) The Commission's Position

[44] The Commission is supportive of measures that would protect the Identifying Information of Pilot XY.

[45] No other party made submissions with regard to the confidentiality protections requested by Pilot XY. As such, Pilot XY's request is unopposed.

C. Analysis

[46] Pilot XY is not a party to the Complaint, and (with the possible exception of the fact that she is a female pilot at Air Canada) her Identifying Information is not relevant to this proceeding. Furthermore, her requests for confidentiality protections are reasonable and are unopposed.

[47] The Tribunal is empowered to take any measures necessary to ensure the appropriate balance between confidentiality and the societal interest in a public hearing.

[48] I am convinced that the need to protect Pilot XY's confidentiality outweighs the societal interest in the full disclosure of this aspect of the hearing process, and I find that an order protecting Pilot XY's confidentiality is warranted under these circumstances.

V. Order

A. Disclosure

[49] Exercising my discretion within the purpose of the Tribunal's *Rules of Procedure*, I make the following orders:

1. Air Canada shall produce the Nance Report, as well as any additional documents in its power, possession or control that reflect input by Air Canada or its employees into the preparation or implementation of the Nance Report, to the extent that such documents exist, and are not privileged, subject to the Confidentiality Orders below.
2. Air Canada shall provide this information to the parties within three (3) weeks of the date of this decision.

B. Confidentiality

[50] Exercising my discretion within the purpose of the Tribunal's *Rules of Procedure*, I make the following orders:

1. The party who is the subject of the Nance Report shall be referred to as *Pilot XY* in all further submissions, discussions, rulings or decision over the course of this inquiry.
2. Air Canada shall disclose a copy of the Nance Report wherein all Identifying Information (exclusive of Pilot XY's gender) has been redacted in a manner consistent with the submissions of Pilot XY.
3. The Commission and the Complainant shall destroy any unredacted copies of the Nance Report in their power, possession or control.
4. The Tribunal Registry Office shall retain one copy of the unredacted Nance Report, which shall be filed under seal and which shall not be disclosed.
5. Any further motion regarding the Nance Report shall be made on Notice to Pilot XY, who will also have standing to make submissions to the Tribunal with regard to the continued protection of her confidential information.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
August 11, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T257/3116

Style of Cause: Jane Clegg v. Air Canada

Ruling of the Tribunal Dated: August 11, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Jane Clegg, for the Complainant

Daniel Poulin, for the Canadian Human Rights Commission

Karen M. Sargeant, for the Respondent

Pilot XY, on her own behalf