

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2018 CHRT 9

Date: April 17, 2018

File No.: T1248/6007

Between:

Levan Turner

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: Edward P. Lustig

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I. Background

[1] This case was originally referred to the Tribunal in 2007 and involves a complaint filed in 2005.

[2] The allegations at the heart of the inquiry are that the Respondent in two job competitions in 2003 and 2004 for the position of customs inspector (“the Victoria Process SP-2003-7003” and the “Vancouver Process SP-2003-1002”; collectively “the Selection Processes”) discriminated against the Complainant contrary to section 7 of the *Canadian Human Rights Act* (the “Act”) on the basis of race, national or ethnic origin, age and the perceived disability of obesity.

[3] In the first of my two previous rulings (2017 CHRT 15 the “the procedure ruling”) I have recounted the lengthy procedural history that brought this case back to the Tribunal for the third time in 2017, for reconsideration. In the procedure ruling, I ruled that the reconsideration of the case by me would be by way of a hearing “*de novo*” as requested by the Respondent and opposed by the Complainant.

[4] In the second of my two previous rulings (2018 CHRT 1 “the production ruling”) I addressed a motion by the Respondent that was opposed by the Complainant, for production of documents in the possession of third parties relating to the Complainant’s educational and volunteer background during the period running from 1987 to 1996 that were not considered by the Respondent when it made its decisions in the Selection Processes. I dismissed the Respondent’s motion.

[5] This ruling addresses a motion brought by the Complainant on March 5, 2018 for an order that the Respondent produce the following documents in its possession that the Complainant submits are arguably relevant to a fact, issue or the form of relief sought in the complaint, namely;

(a) Assessment packages in selection processes 2003-1712-PAC-3961-1002 and 2001-CCRA-PAC-3961-1020 for the following candidates: Stephanie King, James Perrin, Cyril Sweetville, Robert Tereposky, Cory Hackett, Betsy Lam, Benjamin Ferguson, Victor Shiu, Dawn Thompson, and Leon Van de Ven;

- (b) Job posting for selection process 2001-CCRA-PAC-3961-1020;
- (c) The application package of Laura Kebble in selection processes 2003-2092-PAC-3961-7012 in Victoria and Vancouver 1002;
- (d) Job contracts and rationale for students bridged from July 20 to September 2004, who the Complainant understands to be Courtney Archer, Navneet Jhooty, Jana Sanderson, Samantha Gutmanis, Laura Dalby, Jason Joy and Jason Dutton;
- (e) Navneet Jhooty's assessment package for the 2003-1712-PAC-3961-1002 process, in which he was found unqualified; and
- (f) Job contracts and rationale for the at least eight students bridged from January to May 2005, who we understand to be Sandy Le, Sharneet Sandhu, Michael Suric, Chris Cooper, Margarit Bratanic, Jasmine Singh (Lal), Hairprit Hair and Tracy Arnsdorf.

[6] The Respondent opposes this motion on the basis that it is untimely and that the documents are not arguably relevant to the central issues in the case before the Tribunal.

[7] In its submissions in this motion the Respondent counsel says that the Respondent has searched for documents requested relating to Vancouver Process SP-2001-CCRA-PAC-3961-1020 and has been unable to locate the same as that selection process commenced approximately 17 years ago and it is unlikely that the documents would have been retained. I accept this submission without any further proof thereof. As such, I will not be able to make any order for the production of those documents.

[8] Following the procedure ruling, the parties agreed to start the hearing initially during the week of December 5th, 2017 and then during the week of April 30, 2018. The hearing in both of those weeks was adjourned as a result of the parties filing the two motions for productions referred to above. I was requested to adjourn the hearing on each occasion until after rulings were rendered. In its submissions in this motion the Respondent blames the Complainant for delay in starting the hearing. The Complainant disagrees. While it was the Complainant who made the adjournment requests the Respondent consented to the requests, albeit with some reluctance concerning delay. In any case, I do not feel it is necessary or useful at this stage to deal with prior delay or untimeliness in this ruling. Instead, I will focus on whether the documents requested are arguably relevant. This ruling is being rendered almost 4 weeks in advance of the next scheduled hearing start

date of May 14, 2018 that was agreed to by the parties. I expect both parties to be ready to start the case on that date.

II. Complainant's Submissions

[9] The Complainant submits that the documents requested meet the low threshold test for establishing arguable relevance as they have a rational connection to the issues in dispute. The Complainant refers to my reasons in the production decision in support of his submissions and quotes the following therefrom:

[39] Ultimately, the above analysis requires the Tribunal to analyse the decision making processes of the entities that conducted the Selection Processes: namely, the selection boards. In other words, if he possessed protected characteristics, was the Complainant adversely impacted by the actions and decisions of the selection boards, and if so were the protected characteristics a factor in the selection boards' actions and decisions?

[40] ... **[T]he Tribunal is required to assess the decision-making process of the selection board in order to determine whether the Complainant's protected characteristics or a combination thereof played a role in that decision making process.**

[41] Viewed from this perspective, **the arguably relevant documents would consist of those that the selection boards had before them**, any documents recording additional information requests by the selection boards, and any supplemental documentation provided in response to such requests.

[49] **The Tribunal is concerned with the information the selection boards had in their possession, and any conclusions the board members drew about the Complainant's qualifications and suitability**, having regard to their communications and interactions with him

[10] Firstly, the Complainant submits that the documents requested from the Vancouver Process SP-2003-1002 fulfill the criteria established by me in the production decision as the majority of the documents are directly related to the eligibility restriction in the job posting for that competition which is the restriction that the Respondent claims was the only reason the Complainant was screened out of the competition after passing the interview. The Complainant maintains that he was screened out after selection board

member Ron Tarnawski recognized his “presence”, allegedly a reference to his skin colour and size.

[11] The Complainant further submits that the Respondent has already acknowledged that the selection board's use of the eligibility restriction is directly relevant to the Selection Processes in issue in the complaint by producing other candidate packages for applicants for the Vancouver Process SP-2003-1002.

[12] The Complainant further submits that the documents requested “... are the documents the selection board members had in their possession when they made the decision to disqualify the Complainant’s candidacy and are relevant to the conclusions they drew about his qualifications and suitability for the position. For example if candidates who should have fallen within the eligibility restriction were interviewed anyway and later offered permanent positions, it would cast doubt on the bona fides of the decision to disqualify the Complainant based on the eligibility restriction, after recognizing he is a large person of colour. The age and qualifications of such candidates would be relevant to issues in dispute as well, as the Complainant has alleged that the employer consistently passed him over for younger less qualified candidates in his pursuit of permanent employment.”

[13] The Complainant further submits that while every document related to the selection board's use of the eligibility restriction is relevant, the Complainant is merely requesting a portion of the material. In particular, the documents are generally candidates who appear, based on documents already disclosed by the Respondent, to have interviewed in the Vancouver 1002 process within the period captured by the eligibility restriction.

[14] Secondly, the Complainant submits that he has raised the issue of age as a ground of discrimination in relation to the Respondent’s student bridging program that allegedly gave preferential hiring opportunities to younger less qualified candidates than the Complainant. As such, the Complainant submits that documents relating to student bridging are arguably relevant to the question of whether his age as well as his race and size (perceived disability) was a factor in the Respondent’s decision to screen him out of the Selection Processes.

[15] The Complainant further submits that evidence of the environment in which the decision to screen him out was made must be scrutinized by the Tribunal to determine whether the “subtle scent” of discrimination was present. The qualifications of the those candidates hired through student bridging, particularly if one of those candidates was found ineligible in the Vancouver Process SP-2003-1002, and the circumstances under which they were hired are directly related to the issues in the case and therefore, arguably relevant. As such, the Complainant requests student bridging documents from 2004, as it was allegedly concurrent with the time he applied in the Selection Processes in issue, and for early 2005, to coincide with the period in which he alleges he should have begun permanent employment but for the discrimination.

III. Respondent’s Submissions

[16] The Respondent submits that the documents requested do not meet the threshold of arguable relevance as there is no rationale connection between them and a fact or issue in the complaint. The Respondent submits that the documents sought are speculative and take the form of a fishing expedition. The Respondent also refers to my reasons in the production decision in support of its submission and quotes the following therefrom:

29. As the Tribunal has already set out in paragraphs 30-34 of the Production Decision, document requests should not be speculative or amount to a fishing expedition and:

The material must be probative and arguably relevant to an issue in the hearing. This is meant to prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming (*Guay, supra*, para. 44.)

[32] The Tribunal has required a party to show that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document is related to the dispute (*C.E.P.U. v. Bell Canada* 2005 CHRT 34, para. 11).

[33] In *Gaucher v. Canada* 2005 CHRT 42, the Tribunal reiterated that the threshold for arguable relevance is low,

observing that the tendency is now towards more, not less disclosure. However it also repeated the caveat that it is important that a disclosure request not amount to a fishing expedition (para 11). The Tribunal also specified therein that parties are not required to create documents for disclosure (para. 17).

[34] In *Warman v. Bahr*, 2006 CHRT 18, the Tribunal held that:

"[7] The first step in determining whether a document is arguably relevant is to identify the facts that are in issue in the case. The question to be asked is this: what facts must be proved in order to establish or defend against the case before the Tribunal?"

[...]

[9] ... The arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case ...

[17] Firstly, the Respondent submits that there is no probative value to the candidate packages being requested in Vancouver Process SP-2003-1002. The process was a large external recruitment where an individual candidate was not in competition with other applicants. There was no limit on the number of positions available. A candidate was only required to establish to the satisfaction of the selection board that they met the eligibility criteria for the position. Having access to the candidate packages of other candidates will not assist the Tribunal in assessing the decision-making process in relation to the Complainant's candidacy in the Vancouver Process SP-2003-1002 and whether his protected characteristics played a role in the decision-making process that found him ineligible pursuant to the eligibility restriction.

[18] The Respondent further submits that it is of no assistance to the Complainant's case for the Respondent to produce the candidate documents requested related to a number of candidates who participated in both the Vancouver Process SP-2001-1020 (where the documents are no longer available) and the Vancouver Process SP-2003-1002. There is uncontradicted evidence that there was no formal tracking by the Respondent of individual candidates from selection process to selection process; which selection processes a candidate applied in; nor the date upon which a candidate

interviewed in a particular competition. Other candidates who participated in the Vancouver Process SP-2001-1020 and attended a first interview in the Vancouver Process SP-2003-1002 were also screened out of the latter competition because they fell within the eligibility restriction like the Complainant.

[19] The Respondent further submits that the candidate package for Laura Keble in the Selection Processes are of no relevance as she was found not to be qualified in the 2003 Victoria competition and was therefore not interviewed in that competition. As such, the eligibility restriction did not apply to Ms. Keble and she is not an appropriate comparator.

[20] Secondly, the Respondent submits that the documents relating to student bridging between July, 2004 and May, 2005 are not probative as they all post-date the Complainant's candidacy in the Victoria selection process that he was found to be unqualified for and the Vancouver selection process that he was found to be ineligible for. As such, these documents would fall outside of the time frame when the selection boards made their decisions in those two competitions on December 18, 2003 and April 26, 2004 and would not have been before them when they assessed the Complainant's candidacy and rendered their decisions in either process.

IV. Complainant's Reply

[21] The Complainant submits that the Respondent's submissions referred to in paragraphs 17 and 18 are an attempt by it to give evidence that has not yet been produced to the Tribunal at the hearing *de novo* that I am to hold in the reconsideration of this matter, in accordance with the procedure decision. The Complainant submits that the extent to which other candidates were, or were not, screened from the Vancouver selection process 2003-1002 on the basis of the eligibility restriction, is highly relevant to the issue of whether the disqualification of the Complainant on this basis was discriminatory. By disclosing documents earlier this year that relate to applicants that were screened out of the 2003-1002 competition, the Complainant submits that the Respondent has already conceded that these documents are relevant.

[22] The Complainant further submits that the Respondent's submissions related to the candidate package for Laura Keble referred to in paragraph 19 above are another attempt by the Respondent to give evidence that is not before the Tribunal. Moreover, the Complainant submits that the application of the eligibility restriction is a matter for the Tribunal to determine at the *de novo* hearing.

[23] The Complainant further submits that the documents relating to student bridging is evidence of systemic discrimination and is highly relevant to the question of whether an individual complainant was subject to differential treatment.

V. Issue

[24] Are the documents requested by the Complainant to be produced by the Respondent, as described in paragraph 5 above (with the exception of the documents referred to in paragraph 7 above) arguably relevant and should an order for their production be made?

VI. Applicable Legal Principles

[25] In my recent ruling in *Egan v. Canada Revenue Agency* 2017 CHRT 33, at paragraphs 29 to 32 inclusive on pages 8 and 9, I reviewed the applicable legal principles in motions for production that are also applicable to this case. In paragraph 40 of that ruling at page 10, I summarized the principles as follows:

[40] As noted above, the jurisprudence for determining disclosure requests generally relies on the following criteria:

- Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case.
- To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession and care of the opposing party prior to the hearing of the matter.
- Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case they are up against and, therefore, adequately prepare for the hearing.

- For that reason, if there is a rational connection or nexus between a document and the facts, issues or forms of relief identified by the parties in the matter, the document should be disclosed pursuant to sections 6(1)(d) and 6(1)(e) of the *Rules*.
- The party seeking the disclosure must demonstrate that the nexus exists and the documents are probative and be arguably relevant to an issue in the hearing, which is not a particularly high standard.
- The request for disclosure must not be speculative or amount to a "fishing expedition". The documents should be identified with reasonable particularity.
- The disclosure of arguably relevant documents 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.

[26] In addition, the paragraphs of the production ruling referred to in paragraphs 9 and 16 above are also applicable to this case and should be read in conjunction with paragraphs 27 to 31, inclusive, paragraph 35 and paragraphs 36 to 38, inclusive, of the production ruling which are also applicable and provide the proper context.

VII. Analysis

[27] As noted above, in the production ruling at paragraph 40, I reiterated the point that was first made in this case by the Federal Court in *Turner v. Canada (A.G.)*, 2017 FCA 2, at paragraph 70 that the "... Tribunal is not sitting as a selection board nor is it exercising appellate jurisdiction in respect of the decisions of such boards. Rather, the Tribunal is required to assess the decision-making process of the selection board in order to determine whether the Complainant's protected characteristics or a combination thereof played a role in that decision-making process". As also noted above, I went on to hold at paragraph 41 of the production ruling that: "Viewed from this perspective, the arguably relevant documents would consist of those that the selection boards had before them..." Further, at paragraph 49 of the production ruling I held that: "The Tribunal is concerned with the information the selection boards had in their possession, and any conclusions the board members drew about the Complainant's qualifications and suitability..."

[28] In essence, I dismissed the Respondent's motion in the production ruling on the basis that the documents requested by the Respondent could not have affected the decisions of the selection boards which are the subject of the complaint, as they were not in the possession of the selection boards and the contents thereof could not therefore have been known to the selection boards in their decision-making process. I am adopting the same rationale in this ruling as a guide to determining whether the documents requested are arguably relevant and need to be produced.

[29] Using this guide, I find that the Complaint has satisfied the test that the documents he has requested respecting the Selection Processes are arguably relevant and need to be produced by the Respondent. Those documents were in the possession of the selection board and the contents thereof could have been known to the selection board when it made its decision in the Vancouver Process SP-2003-1002. Further, I agree with the Complainant's submissions that there is a rationale nexus between the documents requested from the Selection Processes and the issues in the case, particularly the application of the eligibility restriction to the Complainant and the relationship thereof to his protected characteristics or a combination thereof, notwithstanding the Respondent's submissions regarding the nature of the process in the competitions.

[30] Using this guide, I find that the Complainant has not satisfied the test that the documents he has requested respecting student bridging in 2004 and 2005 are arguably relevant and need to be produced by the Respondent. Those documents were not in the possession of the selection boards and the contents thereof could not have been known to the selection boards when they made their decisions, as they post-dated the decisions.

[31] For the foregoing reasons, the motion is allowed in part.

VIII. Order

[32] That the Respondent immediately produce all of the following documents requested by the Complainant, namely:

- a. Assessment packages in the selection process 2003-1712-PAC-3961-1002 for the following candidates: Stephanie King, James Perrin, Cyril Sweetville, Robert Tereposky, Cory Hackett, Betsy Lam, Benjamin Ferguson, Victory Shiu, Dawn Thompson, and Leon Van de Ven;
- b. The application package of Laura Kebble in the Selection Processes; and
- c. Navneet Jhooty's assessment package for the 2003-1712-PAC-1712-PAC-3961-1002 process.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 17, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1248/6007

Style of Cause: Levan Turner v. Canada Border Services Agency

Ruling of the Tribunal Dated: April 17, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

David Yazbeck, for the Complainant

Graham Stark, for the Respondent