Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 14
Date: March 26, 2019
File No.: T2220/4217

Between:

T.P.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Colleen Harrington

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I. Introduction

[1] The Complainant T.P. has filed a human rights complaint following two attempts to enroll in the Canadian Armed Forces (CAF). As part of the Tribunal's case management process, the parties have exchanged Statements of Particulars setting out their positions with respect to the complaint, which alleges that the Respondent CAF discriminates in its hiring policies and practices, contrary to sections 10 and 7 of the *Canadian Human Rights Act* (the *Act*).

[2] The Complainant, who was diagnosed with a learning disability as a child, says it is the CAF's policy to refuse to provide accommodations to applicants writing the Canadian Forces Aptitude Test (CFAT). The CFAT is a mandatory screening tool used by the CAF as part of its recruitment process. The Complainant says that, as a result of the CAF's refusal to accommodate his learning disability, he has been unable to enroll in the Armed Forces.

[3] The Respondent's position is that there is insufficient proof that the Complainant provided the CAF with notice of his learning disability or that he requested accommodation relating to this disability prior to taking the CFAT, either in 2009 or in 2014. In the alternative, the Respondent says the CFAT is a *bona fide* occupational requirement.

[4] The Commission argues that, as the CAF's express policy at all times relevant to this complaint has been that no forms of accommodation will be granted or considered with respect to the CFAT, there would have been no point in the Complainant making a request for accommodation, as human rights law does not impose an obligation on a complainant to request accommodation when the respondent's express policy states that any such request will be denied.

[5] Along with their Statements of Particulars, the parties exchanged witness lists, and have provided to one another documents in their possession that they believe are relevant to the issues the Tribunal must consider and decide. These documents are not provided to the Tribunal at this stage of the proceeding.

[6] This Motion by the Commission arose from its request that the CAF disclose and produce further documents. The CAF opposes the Motion. Following receipt of the CAF's submissions in response to this Motion, the Commission revised its request for a production order to include only documents relating to the CAF's draft learning disability policy.

[7] I agree to grant the Commission's request for an Order compelling the CAF to produce documents relating to its draft policy, and to provide the parties and Tribunal with a revised document list setting out those documents over which solicitor-client privilege is claimed.

II. Commission's Motion for the Production of Documents

[8] On June 19, 2018, the Commission made a request for three separate categories of documents from the CAF: the "Initial CHRC Request", the "Research Follow-up Request", and the "Draft DAOD[1] Request". The CAF responded on August 27, 2018, stating its objection to producing the Draft DAOD documents.

[9] On November 9, 2018, the Commission filed a Notice of Motion for an Order compelling the CAF to: i) produce all the documents requested by the Commission in its June 19, 2018 letter and, ii) write to the Tribunal and parties to confirm that diligent searches have been done, and all responsive records have been disclosed.

[10] The CAF says, and the Commission concedes, that it has conducted diligent searches for, and has produced, all relevant documents set out in the Commission's June 19, 2018 letter, except for the documents captured by the Draft DAOD Request, which it objects to producing. I note that the CAF has confirmed its commitment to provide ongoing disclosure of any documents captured by the Initial CHRC Request and the Research Follow-up Request.

[11] The Commission's Draft DAOD Request asked the CAF to produce any documents that: "(i) led to the creation of the Draft DAOD, whether in the form of

[1] I understand DAOD to stand for "Defence Administrative Orders and Directives".

research papers, policy proposals, briefing notes, previous drafts, or otherwise, and/or (ii) record the current status of the Draft DAOD."

[12] The CAF's August 27, 2018 reply to the Commission said it, "objects to producing any further drafts of DAOD Learning Disability policy or draft working papers on the ground of relevance. The DAOD has not yet been finalized, and we are not able to provide an estimated delivery date at this time. We will keep you apprised of any updates and will disclose the final DAOD policy to the Commission and to" the Complainant.

[13] In support of its Motion for the production of the Draft DAOD documents, the Commission relies on subsection 50(1) of the *Act*, Rules 6(1)(d) and (e) of the Tribunal's *Rules of Procedure* (*Rules*), and the applicable legal principles developed and articulated in the Tribunal's case law. The Complainant supports the Commission's Motion, while the CAF opposes the Draft DAOD Request on three grounds: i) relevancy of the documents to the proceeding; ii) solicitor-client privilege; and iii) public interest privilege.

III. Positions of the Parties on the Motion for Production of the Draft DAOD documents

A. Commission

[14] The Commission sets out key principles the Tribunal applies when deciding Motions for disclosure and production of documents, including that documents that are "arguably relevant" must be disclosed. This means there must be a rational connection between the document requested and the facts, issues, or forms of relief identified by the parties.[2]

[15] As part of its initial disclosure of documents, the CAF provided a draft of its learning disability policy *(DAOD 5516-LD, Learning Disability*) that the Commission says, "holds out the possibility" that applicants with learning disabilities may receive

[2] *Turner v. Canada Border Services Agency*, 2018 CHRT 9 at para.25; *Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28 at paras.4-6.

accommodation in the CAF's application process. When the Commission made its Draft DAOD Request in June of 2018, the Respondent declined to produce these documents "on the ground of relevance", without further explanation, aside from saying the policy was not yet finalized. The Commission submits that the requested Draft DAOD documents are arguably relevant to this proceeding because the CAF has stated that, if the Complainant does prove he experienced *prima facie* discrimination, it can prove that the CFAT was a *bona fide* occupational requirement (BFOR).

[16] The Commission says the CAF's objection to producing the Draft DAOD documents "on the ground of relevance" is inconsistent with fundamental human rights law principles regarding the BFOR test established by the Supreme Court of Canada in the *Meiorin* case.[3] In *Meiorin,* the Supreme Court developed the following three-part test, which is routinely applied by the Tribunal when an employer argues under subsections 15(1)(a) and 15(2) of the *Act* that a *prima facie* discriminatory standard is a BFOR:

a) Was the standard adopted for a purpose rationally connected to the performance of the job?

b) Was the particular standard adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose?

c) Is the standard reasonably necessary to the accomplishment of the legitimate work-related purpose? To show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship.[4]

[17] In order to determine if the standard is "reasonably necessary", the Court said that tribunals should ask certain "important questions", such as whether the employer investigated alternative approaches, like testing against a more individually sensitive standard and, if such alternatives were investigated, why they were not implemented.[5] A tribunal should also ask whether the standard is properly designed to ensure that the

[3] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*")
[4] *Meiorin*, *ibid* at para. 54.
[5] *Ibid* at para.65.

desired qualification is met without placing an undue burden on those to whom the standard applies.[6]

[18] The Commission says that, in order to conduct a BFOR analysis in this case, the Tribunal will need to determine whether the CAF has investigated alternative approaches for applicants with learning disabilities and why any less exclusionary standards that may have been identified have not been implemented. The Commission suggests the Tribunal will need to ask: i) why was the Draft DAOD created?; ii) what information did the authors of the Draft DAOD consider in proposing the new and less exclusionary approach?; iii) why could this new approach not have been proposed earlier?; iv) why has it still not been implemented?; and, v) were other less stringent proposals for the accommodation of persons with learning disabilities considered and rejected in the course of developing the Draft DAOD and, if so, why were they rejected?

[19] The Commission says the documents listed in its June 19, 2018 Draft DAOD Request are arguably relevant to such an inquiry, as the Draft DAOD already disclosed contemplates the adoption by the CAF of a less stringent exclusionary standard.

[20] The Commission also argues that, if liability is found, the requested documents will assist the Tribunal to understand the current status of the Draft DAOD, which will be relevant to a consideration of whether or what sorts of public interest remedies should be ordered to prevent the recurrence of discriminatory practices.

[21] The Commission argues that the Draft DAOD documents must be ordered to be produced to permit the Commission and Complainant a full and fair opportunity to present their cases to the Tribunal.

B. Complainant

[22] The Complainant consents to the Commission's Motion and agrees with its submissions. The Complainant notes that the CAF has not provided any explanation or support for its objection to producing the Draft DAOD documents "on the ground of

[6] *Ibid* at para.65.

relevance". He submits that it is patently obvious that the Draft DAOD documents meet the threshold of "arguable relevance".

C. Respondent

[23] Although it originally objected to producing the Draft DAOD documents only on the ground of relevance, in its submissions in response to this Motion the CAF now also argues the documents cannot be ordered to be produced on the basis of both solicitor-client privilege and public interest privilege.

(i) Relevance

[24] The CAF argues that the requested documents are not relevant to the proceedings, because the main issue for the Tribunal's consideration is whether the Complainant has established *prima facie* discrimination. It says that accommodation of his alleged learning disability does not arise on the facts of the case because the Complainant did not disclose that he had a disability or request accommodation before or at the time he completed the CFAT in October of 2014.

[25] It also says that its discussions, proposals and approaches, and the development and timing of the draft DAOD are not relevant to the Tribunal's consideration of whether the CFAT itself is a BFOR, as the CAF has acknowledged that at the time the Complainant completed the CFAT in October of 2014, it did not have a policy on accommodating learning disabilities.

[26] The CAF says even if the Tribunal finds the Draft DAOD documents to be relevant, it objects to their production on the grounds of solicitor-client and public interest privilege.

(ii) Solicitor-client privilege

[27] The CAF claims this privilege with respect to the Draft DAOD documents that contain legal advice, consultations, and recommendations by the Department of

National Defence (DND) and CAF Legal Services Unit, and the Office of the Judge Advocate General. The Respondent points out that solicitor-client privilege, "has extended beyond a rule of evidence to a substantive right that is fundamental to the proper functioning of our legal system and does not require balancing of interests on a case-by-case basis. It is a class privilege which entails a presumption of non-disclosure."[7]

(iii) Public Interest Privilege

[28] The CAF also claims public interest privilege, arguing that the Draft DAOD documents sought by the Commission are the product of the CAF/DND process for developing new policies.

[29] In support of its position, the Respondent has provided a helpful affidavit from Lieutenant Colonel Pierre Sasseville (the "Sasseville Affidavit"), who is the Director, External Review at the Office of the Director General, Integrated Conflict and Complaint Management, Vice-Chief of the Defence Staff. The Sasseville Affidavit says that the CAF disclosed the draft learning disability policy dated December 13, 2017, to the other parties, "for transparency and to provide the parties with current context and an opportunity to discuss any potential resolution of this case", and to provide the Commission with the opportunity to provide feedback on the policy. It is not clear if this invitation to comment was communicated to the Commission at the time it was provided.

[30] The Sasseville Affidavit also notes that there was no CAF policy on accommodating learning disabilities that specifically addressed the CFAT at the time that the Complainant completed the CFAT in October of 2014, although he says the creation of this policy on learning disabilities has been considered and discussed within the CAF and his office at the Directorate of Human Rights and Diversity (DHRD) since 2004. He says the formal initiation of the DAOD development process commenced in 2014 under the direction of the DHRD and a working group that consisted of several

[7] See *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 at paras.2, 34, 38-44.

senior members of the office of the Chief Military Personnel, counsel with the Judge Advocate General and DND/CAF Legal Services, the Director of Mental Health, the Royal Military College, and the Royal Canadian Air Force.

[31] The Sasseville Affidavit says the draft learning disability DAOD is the product of the CAF/DND process for developing new policies or major modifications to existing policies and that the policy development process involves several stages, including initiation, consultation, drafting, review, publication, and promulgation.

[32] He says the policy and its analysis were drafted in consultation with the CAF and its stakeholders and, once drafted, it was subject to review, comments and recommendations internally. He says the draft DAOD continues to be subject to review and will be finalized upon approval by the Commander, Military Personnel Command. Although he cannot provide an anticipated date for formal approval of the DAOD, once finalized, a copy will be provided to the Commission and Complainant.

[33] The Sasseville Affidavit sets out the specific categories of documents the CAF objects to disclosing based on public interest privilege as: records of discussions or decisions, presentations to decision-making committees including the Armed Forces Council, correspondence involving approval of the learning disability DAOD by the Chief of Military Personnel, correspondence among members of the learning disability DAOD working group, information requested and gathered by the working group, organizational documents of the working group, documents produced by the working group, research theses, reports by consultants, drafts of the DAOD, documents related to policy option ranking decisions, legal opinions or advice, documents related to approval of the DAOD, draft learning disability accommodation request forms, and proposed modifications to existing documents to reflect learning disability.

[34] The CAF suggests the advice and recommendations in these documents was made in the expectation of confidentiality and argues that disclosure of these documents would hamper the full and frank discussions required for the CAF's deliberations and policy making, "by introducing concern about public access or scrutiny of the policy development process."

[35] The CAF notes that public interest privilege arises out of the common law rule of evidence related to either national security or the effective conduct of government. “It is not a Crown privilege *per se*, but rather a public interest immunity for the Court/tribunal to weigh. Whether immunity from production is in the public interest requires a balancing of the competing interests that warrant confidentiality on the one hand and disclosure on the other.”[8]

[36] The CAF then refers to access to information and privacy legislation, such as the federal *Access to Information Act*[9] and its provincial counterparts. With respect to the exemptions from disclosing policy advice or recommendations of public servants found in such legislation, the CAF says, “Parliament preserves confidentiality of the advice provided by public servants to ensure full, frank and non-partisan discussion and advice on issues, and to preserve a neutral and effective public service.” It refers to a number of cases in which courts have determined that, under access to information laws, governments must be permitted a measure of confidentiality in the policy-making process, as public scrutiny of the advice given by officials could destroy governmental credibility and effectiveness and impede the free and frank flow of communications within government departments.[10]

[37] Finally, the CAF says that, if the Tribunal rules that public interest privilege applies to the requested documents, there will be no need for a separate proceeding to be brought in the Federal Court of Canada under section 37 of the *Canada Evidence Act*.

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[8] The CAF cites: *Bisaillon v. Keable*, [1983] 2 SCR 60 at 97; *R v. Richards* (1997), 34 O.R. (3d) 244 (ON CA); *Carey v. Ontario*, [1986] 2 SCR 637.
[9] R.S.C. 1985, c.A-1
[10] *John Doe v. Ontario (Finance*), [2014] 2 SCR 3; *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 FC 245; *3430901 Canada Inc. and Telezone Inc. v. Canada (Ministry of Industry*), [2002] 1 FC 421, 2001 FCA 254.

D. Commission's Reply to the Respondent's Submissions

(i) Relevance

[38] With respect to the CAF's argument that the Tribunal should not need to consider the BFOR argument because the main issue to be decided is whether the Complainant has established *prima facie* discrimination, the Commission says this is not a valid objection to a request for production, as it is not open to a party to presume that the Tribunal will make key rulings in its favour on contested issues. As the CAF has pleaded a BFOR defence, documents that are arguably relevant to that defence must be disclosed, subject only to claims of privilege or immunity.

[39] The Commission also argues that the Respondent has not made more than a bald assertion that the requested documents are not relevant to the BFOR analysis. The Commission disagrees with the CAF's position that it did not have a policy on the accommodation of learning disabilities at the material times, saying that its policy, in fact, was that no accommodation would be provided with respect to the CFAT. In any event, the CAF did not, "provide any further explanation, cite any applicable authorities or engage in any way with the Commission's submissions regarding the meaning and significance of *Meiorin*."

(ii) Solicitor-Client Privilege

[40] The Commission points out that Rule 6(1)(e) of the Tribunal's *Rules* requires each party to deliver a list of all arguably relevant documents for which privilege is claimed. It notes that the CAF has not identified the specific documents it says are covered by solicitor-client privilege and, if the Tribunal agrees that the documents sought pursuant to the Draft DAOD Request are to be produced, the CAF should be directed to deliver updated lists of documents, including a list that identifies the particular documents that are said to be covered in whole or in part by solicitor-client privilege. This would allow the Commission and Complainant to review the list and raise any concerns if they believe the privilege has not been properly claimed with respect to certain documents.

(iii) Public Interest Privilege

[41] The Commission refers to case law in which the Tribunal has held that, where the government wishes to claim public interest immunity, it has two options: i) to make the claim pursuant to common law, in which case the Tribunal may deal with the merits of the claim; or, ii) to certify the existence of a specified public interest pursuant to section 37 of the *Canada Evidence Act*, in which case the Tribunal has no jurisdiction to deal with the issue, and any objections to the claimed immunity must be dealt with by application to the Federal Court of Canada[11]. The Commission notes that, because the CAF does not mention section 37 of the *Canada Evidence Act*, except to suggest that it might later invoke that provision if the Tribunal does not accept its arguments, it appears that the CAF has elected to make its claim as a matter of common law, meaning the Tribunal should rule on the merits of its public interest immunity claim.

[42] The Commission states that the public interest in the administration of justice favours giving litigants full access to all arguably relevant information, although it acknowledges that, in some limited circumstances, the government may claim immunity under the common law from disclosing certain documents on the ground that doing so would harm a specified public interest. However, the onus is on the government to establish the existence of any claimed public interest immunity. In doing so, the government is expected to deliver materials that are as complete as possible in identifying the information at stake, and explaining the nature of the interests that it seeks to protect.[12] A decision-maker may choose to inspect the documents in question if it would be helpful in determining a claim, unless the government can establish that to do so would be contrary to public policy.[13]

[43] The Commission notes that courts considering claims of public interest immunity have established several factors the Tribunal should consider in determining whether or not immunity should be granted, which I will discuss in the Analysis section below.

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[11] *Warman v. Lemire*, 2007 CHRT 37 at para.13. See also *Starblanket v. Correctional Services of Canada*, 2014 CHRT 29 at paras.52-53.
[12] *Carey v. Ontario*, [1986] 2 S.C.R. 637 at para.40.
[13] *Carey*, *ibid* at paras.106-109.

[44] The Commission notes that the CAF has not cited any cases where the Tribunal or a court has applied a class immunity to the kinds of documents sought in this case, in the context of a request for a production order in litigation. Rather, the CAF relies on statutory exemptions in access to information legislation and related case law, which the Commission argues are distinguishable. The Commission points out that the Federal Court of Appeal has indicated that it is important not to confuse statutory access to information schemes with the disclosure of evidence in the normal course of litigation.[14] The Commission says nothing in the access to information legislation suggests that courts or tribunals are to consider or apply the statutory exemptions found in that legislation to other contexts.

[45] The Commission argues that granting the CAF's very broad class-based claim would have far-reaching impacts for human rights cases involving government respondents. The Commission uses as an example the range of cases currently before the Tribunal dealing with the government's delivery of services, such as child and family welfare or policing, to people living on reserves. The Commission notes that these cases have routinely involved the production of government documents that disclose internal advice or recommendations made by public servants with respect to evaluating or possibly reforming government policy.[15] The Commission argues that, if the CAF is successful in claiming broad class-based immunity from disclosing all such documents, even where they are arguably relevant, "a substantial barrier will have been erected to the orderly pursuit of these and other cases", which would frustrate the objectives of the *Act* and would be a significant setback for the achievement of substantive equality.

[46] Finally, the Commission points out that the CAF has already produced the Draft DAOD, which reflects the policy advice and recommendations of public servants, and

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[14] *Ritchie v. Canada (Attorney General),* 2017 FCA 114 at para.47.

[15] For example*, First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada*), 2014 CHRT 2 at para.29-32, 50 and 72-74; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 2 at paras.260-272; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indigenous and Northern Affairs Canada*), 2017 CHRT 14 at paras.42-51; *Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada*, 2013 CHRT 3 at paras.21-30; *Grand Chief Stan Louttit et al. v Attorney General of Canada* , 2017 CHRT 18 at paras.15-18, 36-41, 42-44, 59-61.

which appears to be the same type of document that the CAF now says cannot be produced without causing harm to the public interest: “If the Draft DAOD could be disclosed, so too could the other documents sought.”

[47] The Commission asserts that the Tribunal should reject the CAF’s common law claim of public interest immunity and make the production order requested by the Commission, subject only to claims of solicitor-client privilege.

IV. Issues

[48] Should the Tribunal grant the Commission’s request for an Order compelling the CAF to produce documents relating to the Draft DAOD?

[49] In order to answer this question, I must deal with each of the CAF’s objections to the Commission’s Draft DAOD Request. More precisely, I must consider the following:

i) Are the documents sought by the Commission relevant to this proceeding?

ii) Are the documents protected by solicitor-client privilege?

iii) Are the documents protected by the common law public interest privilege?

V. Analysis

A. Relevance of Draft DAOD documents

[50] The Tribunal has considered many motions for the disclosure and production of documents, through which certain principles have been identified that guide the Tribunal when it must rule on such a pre-hearing motion. The most fundamental of these principles is that all parties have a right to a fair hearing, which requires that the, “affected person be informed of the case against him or her, and be permitted to respond to that case.”[16] As part of this procedural fairness requirement, each party is entitled to be provided with relevant evidence in the possession or care of the opposing

[16] See *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9 at para.53; *Leslie Palm v. International Longshore and Warehouse Union et al*., 2012 CHRT 11 at para.9; *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at para.29.

party.[17] Where there is a dispute as to whether a document must be produced, the principle of "arguable relevance" is applied. In order to be arguably relevant, there must be a rational connection between the documents requested and the facts, issues or forms of relief identified by the parties.[18] The arguable relevance of material must be determined on a case-by-case basis.[19]

[51] The burden of proving the rational connection rests with the moving party, but the threshold for the test of arguable relevance is low and the jurisprudence has acknowledged that the tendency is towards more rather than less disclosure.[20] This does not mean that the request may be speculative or amount to a "fishing expedition".[21] The documents requested must be identified with reasonable particularity and the request must not be too broad or general.[22]

[52] The CAF has not suggested that the Commission's request amounts to a fishing expedition, nor that its request is overly broad. Indeed, the CAF has been able to identify particular documents arising from this request that it objects to producing.

[53] With respect to the CAF's argument that the Draft DAOD documents are not relevant because, in its view, the Complainant cannot establish *prima facie* discrimination, and so there will be no need for a BFOR analysis, I agree with the Commission that this is not a valid objection to a request for production. At this stage, I need only consider whether the requested documents are arguably relevant to a fact, issue or remedy raised by a party. I cannot speculate about whose arguments will ultimately be successful at hearing, nor should a party presume at this stage that the Tribunal will make rulings in its favour on contested facts or issues.

[54] In its submissions, the Commission has set out the types of questions the Tribunal will need to consider in order to determine whether the CAF has investigated

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[17] Rule 6(1)(d) & (e) of the Tribunal's *Rules of Procedure*; *Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 at para.40; *Malenfant v. Videotron S.E.N.C.,* 2017 CHRT 11 at para.26.
[18] *Guay*, *ibid* at para.42; *Warman v. Bahr*, 2006 CHRT 18 at para.6; *Egan v. Canada Revenue Agency*, *supra* note 16 at para.31; *Turner v. Canada Border Services Agency*, 2018 CHRT 1 at para.30.
[19] *Warman, ibid* at para.9.
[20] *Warman, ibid* at para.6; *Egan, supra* note 16 at para.31.
[21] *Guay, supra* note 17 at para.43; *Egan, supra note 16* at para.32.
[22] *Guay, ibid*; *Turner, supra* note 18 at para.25.

alternative approaches for applicants with learning disabilities, and why more inclusive standards that may have been identified have not been implemented. These are the types of "important questions" the Supreme Court of Canada has said that tribunals must ask in order to determine if a standard is reasonably necessary to the accomplishment of the legitimate work-related purpose, which is the third step in the *Meiorin* test. The Tribunal routinely applies the *Meiorin* test when an employer argues under subsections 15(1)(a) and 15(2) of the *Act*[23] that a *prima facie* discriminatory standard is a BFOR. It is the CAF itself that has raised the BFOR defence in its pleadings.

[55] The CAF has not provided any compelling explanation or argument, or cited applicable authorities, with respect to the Commission's submissions about the meaning and significance of the *Meiorin* test, nor any response to the Commission's argument that the Draft DAOD documents could be relevant to a public interest remedy. It says simply that the development process and timing of the draft learning disability policy are not relevant to the Tribunal's consideration of whether the CFAT is a BFOR, because the CAF has acknowledged that it did not have a policy on accommodating learning disabilities in October of 2014, when the Complainant took the CFAT for the second time. However, the Sasseville Affidavit says that the CAF had been considering and discussing the creation of a learning disabilities policy at the DHRD since 2004, well prior to the Complainant's first application to enroll in 2009.

[56] I agree with the Commission that the types of documents listed in its Draft DAOD Request could assist the Commission and Complainant to respond to a BFOR defence, as well as assist the Tribunal to answer the important questions that may need to be asked if it is required to conduct a BFOR analysis. I am of the view that the Commission

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[23] S.15(1) It is not a discriminatory practice if

(a) Any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;…

s. 15(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement …it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

has established the rational connection necessary for a finding that the requested documents are arguably relevant to the issue of the CAF's possible BFOR defence.

[57] I also agree that, if *prima facie* discrimination is established and the CAF cannot prove the CFAT is a BFOR, the Draft DAOD documents could be of assistance to the Tribunal in determining what sorts of public interest remedies should be ordered, and so are arguably relevant in that regard.

[58] Even if the Tribunal never actually considers either the BFOR defence or remedies during the inquiry into the complaint, the threshold for arguable relevance at this preliminary stage of the proceedings is low and the Commission has met that threshold in this Motion.

[59] Documents that are arguably relevant must be produced, subject only to claims of privilege or immunity, which I will address below.

B. Solicitor-Client Privilege

[60] Solicitor-client privilege is a substantive right and a class privilege that entails a presumption of non-disclosure.[24] Some of the Draft DAOD documents that the CAF objects to producing include "legal opinions or advice", which would likely be protected by this privilege.

[61] However, the Commission is correct that the Tribunal's *Rules* require all parties to exchange lists of all arguably relevant documents for which privilege is claimed. I agree that, as I have found the Draft DAOD documents to be arguably relevant and, as discussed below, not subject to public interest immunity, the CAF must deliver updated lists of documents, including a list that identifies the particular documents it says are covered in whole or in part by solicitor-client privilege.

[24] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, *supra* note 7 at paras.2, 34, 38-44.

C. Public Interest Privilege

[62] The common law recognizes that, in some limited circumstances, governments may claim immunity[25] from disclosing certain documents on grounds that doing so would harm a specified public interest; for example, the public interest in protecting the country from harm to national security or international relations that could be caused by disclosing state secrets[26] or, as is argued in this case, "damage to the process of government decision-making and functioning that could be caused by the disclosure of other government documents."[27]

[63] Such immunity claims, however, can involve conflicts between different public interests that must be weighed by the decision-maker. "Whether the balance falls in favour of disclosure or immunity depends on the circumstances of the particular case."[28] In this case I must consider whether the public interest in the administration of justice, which favours giving litigants full access to all arguably relevant information in order to know the case they are to meet, outweighs the CAF's concern that disclosure of the Draft DAOD documents will hamper its policy development process.

[64] The Commission suggests that the Tribunal should consider the following factors[29] when determining whether public interest immunity should be granted:

a) The probative value of the evidence sought, and how necessary it will be for a proper determination of the issues in the proceeding;[30]

b) The subject matter of the litigation;[31]

c) The effect of non-disclosure on the public perception of the administration of justice;[32]

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[25] Justice LaForest in *Carey, supra* note 12 said at para.38: "The public interest in the non-disclosure of a document is not … a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh."
[26] *Carey, ibid* at para.43.
[27] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (LexisNexis Canada: 2014), at p. 1055, at para. 15.1.
[28] *Ibid* at p.1073, at para.15.46.
[29] These factors are set out in *The Law of Evidence, ibid* at pp.1073-1074.
[30] *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, [1990] B.C.J. No.1552 (BCCA)
[31] *Gold v. Canada*, [1986] 2 F.C. 129 (FCA)
[32] *Carey*, *supra* note 12

d) Whether the claim involves an allegation of government wrongdoing (in which case the claim for immunity may be motivated by self-interest as opposed to a genuine concern for the secrecy of the information);[33]

e) The length of time that has passed since the communications were made;[34]

f) The level of government from which the communications emanated;[35]

g) The sensitivity of the contents of the information (including the extent to which there has been prior publication of some or all of the information).[36]

[65] Most of these factors come from the Supreme Court of Canada decision in *Carey v. Ontario.*[37] In the recent Nova Scotia Court of Appeal case *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia,*[38] the Court noted:

> [43] The "*Carey* factors" have governed rulings on public interest immunity and disclosure of Crown documents: e.g., *Leeds v. Alberta (Minister of the Environment)* (1990), 1990 CanLII 5933 (AB QB), 106 A.R. 105 (Q.B.).

[66] In order to determine whether the CAF has made out its claim of public interest immunity, I will consider the above-listed factors as they apply to the circumstances of this case.

[67] (a) The first factor is "the probative value of the evidence sought". I have already concluded that the Draft DAOD documents are arguably relevant to both a possible BFOR analysis and public interest remedy. Therefore, I agree that the probative value of the Draft DAOD documents is considerable. Satisfaction of this criteria favours disclosure of the documents.

[68] (b) The second factor is the "subject matter of the litigation", which the Commission says weighs in favour of full disclosure. It describes the complaint as involving allegations of discrimination on the basis of disability, both by refusing a

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[33] *Ibid*
[34] *Ibid*
[35] *Ibid*
[36] *Ibid*
[37] *Ibid* at paras. 79-84.
[38] [2018] N.S.J.No.448, 2018 NSCA 83

substantively equal opportunity to be considered for employment, and by adopting a general policy of refusing any form of accommodation when writing the CFAT. The Commission says that these are important matters of quasi-constitutional human rights that involve systemic issues of broad public importance. I agree that the documents sought are directly related to the subject matter of the litigation, thus weighing in favour of disclosure.

[69] (c) and (d) The Commission also argues that, as the CAF is both the immunity claimant and the named respondent, non-disclosure would have a negative effect on perceptions of the administration of justice. The complaint does involve an allegation of government wrongdoing, in the form of discrimination in its hiring policies and failing to accommodate people with learning disabilities. I am of the view that non-disclosure of these documents could indeed negatively affect the public's perception of the Tribunal's hearing process, as denying access to the requested documents could impact the ability of the Commission and Complainant to respond to all issues raised in the proceeding. Both of these factors favour disclosure of the documents.

[70] (e) With respect to the "length of time that has passed since the communications were made", in this case there appear to be ongoing discussions relating to the creation and approval of the learning disability policy. The case law suggests that, in situations where a decision is pending, particularly a high-level (for example Cabinet) decision, this could weigh in favour of non-disclosure.[39] However, I believe it is important to consider the "nature of the policy concerned"[40] when considering this factor. The Supreme Court in *Carey* said the following:

> … [T]he level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making

[39] See, for example, *Nova Scotia Provincial Judges' Association v Nova Scotia (Attorney General),* 2018 NSSC 13, at paras.177-178; *Carey*, *supra* note 12 at paras.79 and 83.
[40] The motions judge in *Nova Scotia Provincial Judges' Association v Nova Scotia (Attorney General*), *ibid,* describes the "nature of the policy concerned" as the "first *Carey* factor" (at para.144). The Nova Scotia Court of Appeal upheld the motion judge's consideration and application of the *Carey* factors (*supra* note 38 at para.46).

> process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussions and planning at the development stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest in involved.[41]

[71] In this case, we are dealing with a policy that, while important, is fundamentally a personnel policy that will ultimately be approved by the Commander, Military Personnel Command. To quote Justice LaForest in *Carey*, "it is hardly world-shaking."[42] The CAF cannot provide a timeline as to when final approval will happen, and the policy has apparently been in the development stage for approximately five years. I appreciate that the CAF is a large and hierarchical organization, but I am not persuaded that the ongoing nature of the decision-making with respect to this policy weighs significantly in favour of non-disclosure of the documents.

[72] (f) On a related note, in terms of the "level of government from which the communications emanated", I agree with the Commission that it appears the documents requested were, for the most part, created by or under the direction of a working group, in consultation with stakeholders, although, as the Commission notes, even Cabinet-level documents are not automatically exempted from disclosure where the public interests being invoked relate to "candour" or government efficiency.[43] This factor favours disclosure of the documents.

[73] (g) Finally, with regard to "the sensitivity of the contents of the information", I note that the CAF has already disclosed a draft of the learning disability policy to the other parties. While it claims in its submissions that this was done to help facilitate settlement discussions or to invite feedback from the Commission, it was produced as part of the disclosure and exchange of documents in preparation for hearing, and not as part of settlement discussions.

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[41] *Carey*, *supra* note 12 at para. 79.
[42] *Ibid* at para.82.
[43] *Ibid* at paras.79-83.

[74] Also, as the Commission points out, the CAF is not alleging that the specific content of the documents would cause harm if disclosed. It is not arguing that, by producing the documents relating to the draft learning disability policy, national security would be threatened, or that there would be harm to international relations. Rather, the CAF has asserted a broad class-based claim of immunity over policy advice or recommendations developed by government or public servants in the expectation of confidentiality. It argues that the documents are deserving of immunity from disclosure because the public servants or others who contributed to the drafting of the policy expected their advice and recommendations would remain confidential, and providing them to the other parties in this proceeding would hamper the full and frank discussions the CAF requires to make its policies by introducing concern about public access to, or scrutiny of, the policy development process.

[75] The Commission notes that class-based claims of public interest immunity are less likely to succeed than content-based claims, especially where, as in this case, they are based on what the courts have described as the "candour argument".[44] While the Supreme Court of Canada has not completely foreclosed the candour argument, it has said that, "it is very easy to exaggerate its importance".[45] The Court was doubtful that, "the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts."[46] The Commission argues that, "the CAF's broad candour argument should not suffice to establish immunity in this case."

[76] When one considers the types of documents that the CAF is objecting to producing – documents such as records of discussions or decisions, presentations to committees, correspondence among members of the working group and the information requested and gathered by the working group, as well as its organizational documents, research theses, reports by consultants and draft learning disability accommodation

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[44] *The Law of Evidence, supra* note 27 at p.1076: "Government often argues that disclosure of a certain class of communications would have a chilling effect on the candour and frankness of discussion and debate between members of the government."
[45] Carey *supra* note 12 at para.46.
[46] *Carey, ibid* at para.46.

forms, and other drafts of the DAOD – it is difficult to see how denying their disclosure could be more important than ensuring a fair hearing before the Tribunal. I fail to see how documents leading to the development of a policy on accommodating applicants or members of the CAF who have learning disabilities deserve equal protection with documents containing state secrets.

[77] The CAF's concern about public scrutiny of its policy development process is premature, given that any documents ordered to be produced will only be provided to the other parties to this proceeding at this time. The Tribunal does not receive copies of the documents unless they become evidence at hearing, at which time the CAF may wish to request that certain documents remain confidential in accordance with subsection 52(1) of the *Act*.

[78] I agree with the Commission that public interest immunity claims before this Tribunal are properly made and decided on the basis of the *Act* and common law principles. The CAF has not supported its argument for public interest immunity over the requested documents with case law or authorities, nor has it addressed the factors considered above. Rather, it has relied on authorities related to access to information regimes, which address different interests than a human rights proceeding. Where, as here, a respondent asserts public interest immunity in a Tribunal proceeding, the Tribunal must balance the respondent's alleged public interest considerations against both the complainant's interest in asserting his or her quasi-constitutional human rights and the public interest in redressing and eradicating discrimination. The Tribunal must consider subsection 50(1) of the *Act*, which guarantees all parties a, "full and ample opportunity … to appear at the inquiry, present evidence and make representations." Full and proper disclosure is a critical precondition to ensuring compliance with subsection 50(1). As such considerations do not arise in the access to information context (with its different competing interests), the two regimes cannot be conflated. While the CAF can be afforded procedural protections in this proceeding, such as limited production of the documents and the possibility of a confidentiality order, in the access to information context it is presumed that the requested information will be widely circulated or published.

[79] As the Commission points out, the Tribunal has previously ordered the production of government documents that disclose internal advice or recommendations made by public servants relating to government policy, and I am not of the view that the circumstances of this case warrant a departure from the Tribunal's determinations in those cases.

[80] In conclusion, I do not agree that ordering the Draft DAOD documents to be provided to the other parties at this stage would harm the public interest in ensuring full and frank discussions in the CAF's deliberative and policy-making processes, or otherwise harm the effective conduct of government. After weighing all of the factors above, I conclude that the public interest in the administration of justice, favouring full access to the parties to all arguably relevant information to know the case they have to meet, outweighs the CAF's interest in preventing public scrutiny of its policy development process. As such, I order the Draft DAOD documents to be produced, subject only to solicitor-client privilege, as discussed above.

[81] For the foregoing reasons, the Commission's revised Motion is allowed.

VI. Order

i) That the CAF deliver to the Tribunal and the other parties, updated lists of documents, including a list that identifies the particular documents that it says are covered in whole or in part by solicitor-client privilege.

ii) Subject only to solicitor-client privilege, that the Respondent immediately produce the following documents requested by the Commission, namely:

> Any documents that led to the creation of the Draft DAOD, whether in the form of research papers, policy proposals, briefing notes, previous drafts, or otherwise, and that record the current status of the Draft DAOD. This includes, but is not limited to, records of discussions or decisions, presentations to decision-making committees including the Armed Forces Council, correspondence involving approval of the learning disability DAOD by the Chief of Military Personnel, correspondence among members of the learning disability DAOD working group, information requested and gathered by the working group, organizational documents of the working group, documents produced by the working

group, research theses, reports by consultants, drafts of the DAOD, documents related to policy option ranking decisions, documents related to approval of the DAOD, draft learning disability accommodation request forms and proposed modifications to existing documents to reflect learning disability.

iii) The parties may only use the documents produced by virtue of this Order for the purposes of this proceeding and must not provide them to any outside person or entity.

iv) Disclosure of these documents does not mean that they will be admissible as evidence at hearing, and any issues in this regard shall be dealt with during the hearing. If the CAF wishes to object to any information contained in these documents becoming part of the public record, it should also raise this at the hearing pursuant to subsection 52(1) of the Act.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
March 26, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2220/4217

Style of Cause: T.P. v. Canadian Armed Forces

Ruling of the Tribunal Dated: March 26, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Tom Beasley, for the Complainant

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