

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2020 CHRT 18

**Date:** June 26, 2020

**File No.:** T2201/2317

**Between:**

**Tesha Peters**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**United Parcel Service Canada Ltd. and Linden Gordon**

**Respondents**

**Ruling**

**Member:** Kathryn A. Raymond, Q.C.

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## I. Introduction

[1] The Complainant, Tesha Peters, filed a motion seeking an Order for further and better particulars and disclosure from the individual Respondent, Mr. Gordon and for documentary disclosure from the corporate Respondent, United Parcel Service Canada Ltd. (“UPS”) on January 17, 2020. On May 25, 2020, the Tribunal provided a decision respecting Ms. Peters’ motion in relation to Mr. Gordon. The parties were advised that a separate decision would be issued with respect to the motion for disclosure from UPS. This is that decision.

[2] The Tribunal has organized Ms. Peters’ requests for disclosure as follows:

- a. The complete personnel file of the individual Respondent, Linden Gordon, including all communications related to his termination from employment;
- b. All communication and documentation concerning the initial investigation into Mr. Gordon’s alleged sexual harassment of Ms. Peters;
- c. Documents related to training for management employees related to sexual harassment and safe and respectful workplace;
- d. Documents related to internal complaints of sexual harassment received by UPS in Canada and by its parent company in the United States;
- e. Documents related to informal investigations into sexual harassment conducted by UPS in Canada and by its parent company in the United States;
- f. Documents related to external litigation of sexual harassment complaints against UPS in Canada and under its parent company; and,
- g. Internal and external reports addressing the effectiveness of UPS training and policies on the supervision of UPS employees.

[3] In relation to the disclosure sought in paragraphs (c)-(g), Ms. Peters clarified that her motion seeks relief through the following specific disclosure:

- i. Documents addressing the changes in policies and practices respecting sexual harassment and respectful workplace over time, sufficient to determine the extent to which practices developed in the United States were adopted by the Canadian company;

- ii. Documents addressing the number of complaints of sexual harassment received by UPS internally and externally in the form of litigation in Canada and under its parent company in the United States;
- iii. Documents addressing the number of informal investigations conducted by UPS Canada and its parent company, the number of investigations that resulted in findings that sexual harassment had taken place, and documentation of the sanction applied, and any compensation awarded;
- iv. Documents addressing the outcome of litigation resulting from external complaints against the Canadian and American parent company regarding sexual harassment; and,
- v. All internal and external consultant reports on the effectiveness of UPS training and policies on the supervision of UPS employees.

#### **a) Overview of the Parties' Positions**

[4] The Canadian Human Rights Commission (the "Commission") and the individual Respondent, Mr. Gordon, take no position in relation to Ms. Peter's motion for disclosure by UPS.

[5] In their submissions, Ms. Peters and UPS initially disagreed about whether UPS has provided some or all of the disclosure sought in relation to paragraphs (a)-(c) in this motion. In her reply, Ms. Peters accepted that UPS had made available disclosure, but with exceptions which are addressed below. In relation to paragraphs (d)-(g), UPS objects to the productions sought by Ms. Peters or asserts that no such documents exist.

#### **b) Overview of What is at Issue**

[6] There is an obligation to disclose arguably relevant documents pursuant to Rule 6 of the Tribunal's *Rules of Procedure*. Disclosure is required when there is a rationale connection between a document and the facts, issues or forms of relief identified by the parties in the case at hand: *Guay v Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para 42; *Telecommunications Employees Association of Manitoba Inc. v Manitoba Telecom Services*, 2007 CHRT 28, at para 4; *Rai v Royal Canadian Mounted Police*, 2013 CHRT 6, at para 28; *Seeley v Canadian National Railway*, 2013 CHRT 18, at para 6; *Yaffa*

*v Air Canada*, 2014 CHRT 22, at para 3; and *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corporation*, 2017 CHRT 5, at para 26.

[7] In relation to Ms. Peters' requests in paragraphs (a)-(c), UPS provided a chart of requests and responses to production demands by the Commission and Ms. Peters, which it says is responsive to these aspects of Ms. Peters' motion. This chart was attached as Appendix "A" to UPS's letter of January 17, 2020. Many of UPS's responses in the chart were that the relevant documents had been produced or that the requested documents do not exist. UPS also made some additional disclosure.

[8] UPS submits that, once a party's list of documents is provided and specific disclosure requests are answered, unless there is a basis to conclude that a party is not complying with disclosure in good faith, the Tribunal's practice is to accept that the party has made full disclosure at that time. Counsel for UPS confirmed that efforts would be made to address the obligation of UPS to make ongoing disclosure before the hearing and to ensure compliance.

[9] The Tribunal considered whether the chart provided by UPS with its letter of January 17, 2020, responded to paragraphs (a)-(c) of Ms. Peters' motion as suggested by UPS. The chart did not provide a direct response to each of the requests specified by Ms. Peters in her motion in this regard. Likewise, the letter from counsel for UPS of January 17, 2020, to which the chart was appended, did not provide a direct response to these matters.

[10] Upon review of the chart, some of the earlier requests for production made on behalf of the Commission, which predate this motion, overlap with requests in Ms. Peter's motion. UPS indicates in the chart that it made disclosure or provided responses to the requests from the Commission, as applicable.

[11] However, not all of the requests in Ms. Peters' motion in respect of paragraphs (a)-(c) are identical to what the Commission requested. The Commission requested disclosure of staff training on sexual harassment policies since 2010 and of training taken by Mr. Gordon and a witness. Ms. Peters requests the training provided to management employees, in particular, in relation to sexual harassment and respectful workplace. Ms.

Peters requests Mr. Gordon's complete personnel file. The Commission only requested disciplinary records specifically from Mr. Gordon's personnel file.

[12] Following further directions by the Tribunal of February 20, 2020, and February 27, 2020, UPS was given another opportunity to provide submissions and did so on February 28, 2020. UPS took the position that the requests in paragraphs (a), (b) and (c) of Ms. Peters' motion had been complied with, but with one exception. UPS advised that it had not produced Mr. Gordon's complete personnel file as requested in paragraph (a). With respect to the training provided to management employees, UPS clarified that the documents responsive to this request in the possession of UPS in Canada had been produced in responding to the Commission's request.

[13] On March 6, 2020, Ms. Peters filed a reply.

## **II. Paragraph (a): The Personnel File**

### **a) The Parties' Positions**

[14] As has been clarified, production of Mr. Gordon's personnel file is in dispute. UPS submits that production of this file is unnecessary because relevant documents respecting the harassment investigation, discipline, subsequent investigation, and termination of Mr. Gordon by UPS have been produced. It is UPS's position that nothing of arguable relevance remains in the personnel file. UPS also objects to the production of Mr. Gordon's personnel file based on this being unduly invasive of Mr. Gordon's right to privacy.

[15] The Commission requested disciplinary records relating to sexual harassment in Mr. Gordon's personnel file. The Commission's other requests for relevant documents were not predicated upon the assumption that the requested documents would be in Mr. Gordon's personnel file. It is not necessarily the case that all the documents requested by the Commission, such as documentation respecting the harassment investigations, would be maintained in Mr. Gordon's personnel file.

[16] UPS does not indicate whether its prior production of documents following the Commission's requests originated from Mr. Gordon's personnel file or from other files or

sources. UPS does not state whether Mr. Gordon's personnel file was reviewed specifically to confirm that any arguably relevant documents have been produced. Assuming the file contains documents other than those already produced, which seems to be acknowledged in UPS's positions respecting privacy and relevance, UPS did not provide details respecting the contents of that file and their alleged lack of relevance to this case.

[17] In these circumstances, the Tribunal does not agree that production of Mr. Gordon's personnel file is unnecessary because the relevant documents have been produced.

[18] Respecting the merits of the request, Ms. Peters takes the position that there is more than a trivial likelihood that the file contains arguably relevant material. Ms. Peters submits that, as Mr. Gordon is a party to this proceeding and the individual alleged to have sexually harassed her, the relevance of his personnel file is likely enhanced. Ms. Peters further claims that Mr. Gordon's behaviour over the entire course of his employment with UPS is arguably relevant. In responding to the motion, UPS advised that no other employees had made a complaint of harassment against Mr. Gordon. However, Ms. Peters points out, for example, that UPS has not identified whether there are other complaints from colleagues in Mr. Gordon's file that may not mention harassment, but which may be consistent with Ms. Peter's allegations about Mr. Gordon's conduct.

[19] Ms. Peters also submits that only Mr. Gordon is in a position to demand that his personnel file not be disclosed due to privacy concerns. Mr. Gordon has voiced no such objection.

#### **b) Ruling on the Personnel File**

[20] Regarding UPS's submission respecting privacy concerns, Mr. Gordon had notice of this request and did not object to the production of his personnel file. There is no suggestion that the file contains content that could have attracted additional privacy concerns for Mr. Gordon, such as irrelevant medical or health information. There is no basis to withhold the file for privacy reasons in these circumstances.

[21] As indicated above, it is not clear that all arguably relevant documents have been produced from Mr. Gordon's personnel file. There is no specific information available to the

Tribunal respecting the contents of Mr. Gordon's personnel file or confirmation that its contents have been reviewed for arguable relevance beyond investigating the Commission's requests. The file could reasonably be expected to include performance-related documents respecting Mr. Gordon's conduct at work that do not amount to discipline. The file could also possibly contain documents which do not use the word harassment, but which concern management style, as an example, and are arguably relevant.

[22] UPS is to review Mr. Gordon's personnel file and produce any documents arguably relevant to Mr. Gordon's conduct, behaviour and performance in the workplace to Ms. Peters by Friday, July 10, 2020.

### **III. Paragraphs d), e) and f): Information Relevant to Other Instances of Sexual Harassment**

[23] UPS objects to the production of information in its possession or control relevant to any other instances of sexual harassment in Canada. UPS also objects to the productions sought by the Complainant regarding United Parcel Service of America, Inc. ("UPS-US") which is the American parent company of UPS. This is addressed separately below.

#### **A. UPS-Canada**

##### **a) Introduction**

[24] Ms. Peters requests documents addressing the number of complaints of sexual harassment received by UPS internally and externally in the form of litigation in Canada, documents addressing the number of informal investigations conducted by UPS, the number of investigations that resulted in findings that sexual harassment had taken place and documentation of the sanction applied, and any compensation awarded, as well as documents addressing the outcome of litigation resulting from external complaints regarding sexual harassment.

[25] Ms. Peters believes that it can be inferred that this type of documentation exists. Of relevance here is UPS' statement in response to the motion that it "does not believe that any



complaints of sexual harassment have proceeded to litigation in Canada.” Ms. Peters claims that UPS does not deny the existence of the other documents mentioned above.

[26] The Tribunal notes that there is no evidence from UPS that these documents do not exist.

**b) Objection: No Allegation of Systemic Discrimination**

[27] UPS submits that, through the requests for disclosure respecting other instances of alleged or proven sexual harassment, Ms. Peters is trying to change her complaint into an inquiry into systemic sexual harassment, much like a Royal Commission. UPS claims that Ms. Peters’ Statement of Particulars do not support an inquiry into systemic discrimination.

[28] UPS asserts that Ms. Peters’ complaint does not allege systemic harassment at UPS’s workplace and only makes a brief reference to sexual harassment being “...a major problem for this company, which has been failing in its efforts to address it”. UPS submits that no evidentiary foundation was provided in the complaint and that no particulars were provided by Ms. Peters. UPS points out that there is only one other reference to systemic discrimination by Ms. Peters, in Ms. Peters’ Reply Particulars of April 13, 2018, which asserts a “record of discrimination and harassment.”

[29] UPS notes that neither the Commission’s Particulars of February 18, 2018, or its Reply Particulars of March 27, 2018, allege systemic discrimination or plead any facts in support of this allegation.

[30] UPS submits that “there is simply no foundation upon which the Tribunal can treat this complaint as one of systemic harassment which might warrant the broad disclosure now sought by the Complainant.” UPS relies upon *Desmarais v Correctional Service of Canada*, 2014 CHRT 5 (“*Desmarais*”) and the Supreme Court of Canada’s decision in *Moore v British Columbia (Education)*, 2012 SCC 61 (“*Moore*”).

[31] As there is no claim of systemic discrimination, UPS submits that the documents requested are irrelevant and unnecessary and that their disclosure would constitute a fishing

expedition. UPS also argues that their disclosure would place onerous production obligations upon the corporation.

[32] Ms. Peters agrees with UPS that she is not alleging systemic discrimination. Ms. Peters says that her complaint alleges that sexual harassment is a widespread and well-known issue within UPS. She argues that the documents she seeks are relevant because she will be arguing that UPS is vicariously liable for Mr. Gordon's conduct. She points out that UPS is advancing a defence pursuant to section 65(2) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act"). UPS will be attempting to establish that it did not consent to the alleged sexual harassment by Mr. Gordon and that it "exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof."

[33] Ms. Peters submits that UPS is relying on the existence of its policies and procedures in relation to sexual harassment for purposes of the consent and due diligence aspects of its defence. Ms. Peters says that UPS has disclosed its policies and procedures but has not disclosed whether these policies and procedures work effectively, and with what result, in relation to founded complaints.

[34] In short, Ms. Peters claims that the extent to which sexual harassment is a widespread and well-known issue within UPS is relevant to a section 65(2) defence, including UPS's knowledge of the effectiveness of its policies and procedures and its alleged lack of knowledge of Mr. Gordon's alleged harassment. Ms. Peters requests disclosure to demonstrate that her experience is not isolated to support her argument that UPS consented to and did not exercise due diligence to prevent the sexual harassment she says that she experienced.

### **c) Ruling on Issue: No Allegation of Systemic Discrimination**

[35] The parties agree that when analyzing the arguable relevance of documents, the correct approach is to consider the Statement of Particulars of all parties, including each party's theory of the case: *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corporation*, 2017 CHRT 5.

[36] UPS's knowledge respecting the effectiveness of its policies and procedures has been placed in issue by Ms. Peters through the allegation in her complaint and Reply Particulars of April 13, 2018, that UPS has been failing in its efforts to address sexual harassment. This is not a case where there is an absence of any reference to an issue in a complaint.

[37] UPS relies upon the absence of particulars of this allegation to submit that this aspect of the motion should be dismissed. The absence of particulars is a different issue, one which is addressed by Rule 9 of the Tribunals' *Rules of Procedure*.

[38] The Tribunal is not persuaded that the brevity of the reference to a lack of effective management of sexual harassment can lead to the conclusion that these requests are outside the complaint, irrelevant, and that Ms. Peters is engaging in a fishing expedition.

[39] UPS's knowledge of the effectiveness of its policies and procedures has also been placed in issue by UPS's reliance upon its policies and procedures in its response to the complaint, as addressed below. UPS's policies and procedures are not outside the complaint.

[40] Ms. Peters has clarified that she is only advancing an individual complaint which is confined to her alleged experience and that she is not alleging systemic discrimination.

[41] In any event, an individual complaint does not prevent the Tribunal from considering evidence of systemic discrimination, if such evidence exists, for contextual purposes. In *Moore*, the Supreme Court of Canada confirmed, at para 64, that "...the Tribunal was certainly entitled to consider systemic evidence in order to determine whether [the complainant] had suffered discrimination." This is not the same thing as holding "...an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether [the complainant] was discriminated against" as occurred in *Moore*, where the court correctly stated that the "Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission."(Ibid.)

[42] The Tribunal has considered the breadth of Ms. Peters' requested relief. Documentary disclosure from UPS outside the Complainant's immediate worksite is required if the documents sought are arguably relevant. In the case of this individual complaint, UPS' policies and procedures apply to UPS employees across Canada. There is no suggestion of any local or regional differences in UPS's policies and procedures. The fact that the policies and procedures of a federally regulated corporate respondent apply to all its employees in Canada does not in and of itself broaden a request for disclosure respecting those policies into a complaint of systemic discrimination. An inquiry by the Tribunal into systemic discrimination would involve an inquiry into the merits of other complaints and pre-hearing disclosure of documents relevant to the merits of those complaints. That is not what is sought here. This remains an individual complaint that is defended by UPS based on policies and procedures implemented by UPS on a national basis. The potential "breadth" of the request related to the use and effectiveness of UPS's policies is unavoidable.

[43] The Tribunal does not agree that this aspect of Ms. Peters' motion should be dismissed on the basis that her requests transform the complaint into one of systemic discrimination or that the breadth of the request is excessive and irrelevant in these circumstances. The issue of relevance is further addressed immediately below.

#### **d) The Issue of Relevance: The Section 65(2) Defence**

[44] As stated in cases such as *Turner v Canada Border Services Agency*, 2018 CHRT 9, at para. 16, and *Brickner v Royal Canadian Mounted Police*, 2017 CHRT 28, at paras 410, the threshold for arguable relevance is low. For disclosure to be ordered, there must be a rational connection between a document and the facts, issues or forms of relief sought by the parties in the case.

[45] Ms. Peters' alleges that she informed her supervisor that she was being harassed by Mr. Gordon. Ms. Peters alleges that her complaint did not lead to investigation or action by UPS. The Tribunal wishes to clarify that the investigations that occurred referenced throughout this decision were conducted after Ms. Peters left the employ of UPS. Ms.

Peters alleges that UPS had knowledge and did, thereby, consent to the harassment and did not engage in due diligence to prevent the harassment from continuing or take action to ameliorate its effects.

[46] UPS takes the position that it did not consent to what Ms. Peters says occurred, as UPS had no knowledge that harassment was alleged to be taking place. UPS asserts that the existence or perception of harassment was not communicated to UPS by Ms. Peters.

[47] UPS's Statement of Particulars confirms that UPS relies upon section 65(2) of the Act and, in this regard, upon its policies and procedures. In UPS' Statement of Particulars filed March 16, 2018, at paras 4 and 5, UPS asserts the following:

4. ...At all material times, UPS Canada had policies prohibiting the misconduct complained of, that it trained its employees on these policies, actively enforced them and made it an express provision of the policies that nobody was exempt.

5. In all of the circumstances, UPS Canada had no knowledge of the impugned conduct at the material time nor could it have known about it, never consented to it, made it clear to all of its employees that any such conduct amounted to a breach of its policies and procedures, exercised all due diligence to prevent the impugned conduct from being committed, and subsequently, took steps to mitigate or avoid the effect thereof.

**e) Ruling on Issue of Relevance: The Section 65(2) Defence**

[48] There is a link or nexus between UPS's defence pursuant to section 65(2) of the Act that it had no knowledge of Mr. Gordon's conduct, and, therefore, did not consent, its defence that it exercised due diligence through its policies and procedures and Ms. Peters' position that UPS's lack of knowledge of her allegations of sexual harassment was the result of policies and procedures that do not work. Policies and procedures that do not work could logically cause an employer to either not know that harassment was allegedly occurring in the workplace, or, to know of its potential existence but not take appropriate action.

[49] When an organization relies upon policies and procedures as a defence, it is implicitly understood that the organization reasonably believes that they are effective. If the policies and procedures respecting sexual harassment or the training respecting those

policies and procedures was known by UPS to be inadequate, that would be relevant to UPS's knowledge and, therefore, arguably relevant to its defences that it did not consent and that it met the standard of due diligence.

[50] There is a rational connection between documents which disclose the number of internal complaints, the number of internal investigations, the number of findings of sexual harassment, and the results in those instances with the issues raised by a section 65(2) defence. There is a rational connection between utilization of policies and procedures respecting sexual harassment and their effectiveness and the extent of any experience with applying those policies. Effectiveness has a number of components. Utilization is one of them. Outcomes that address sexual harassment when sexual harassment is found to have occurred is another.

[51] The Tribunal agrees with the Tribunal's comments in *Young v Via Rail Canada Inc.*, 2019 CHRT 2 at paras 60-62 ("*Young*"). While made in the context of a motion for non-suit, the Tribunal noted that it is required to assess both the Complainant and the Respondent's acts and omissions in determining whether discrimination occurred. The Tribunal in *Young* noted that:

...detailed evidence of a Respondent's actions, policies and procedures may be required in order to determine whether it exercised due diligence in the circumstances. This information may not be accessible to the Complainant – particularly (as in this case) where the Respondent's actions pertain to the disciplinary record or employment file of another employee, not a party to the proceeding.

[emphasis added]

[52] In this case, UPS' acts and omissions in relation to its defence, including its policies and procedures, will require assessment in the context of a section 65(2) defence at the hearing. Any documents in the possession or control of UPS respecting the utilization and the related results of its policies and procedures are arguably relevant but are not accessible to Ms. Peters. The fact that she does not have access to these documents does not transform her request into a fishing expedition. Disclosure of arguably relevant documents to which a complainant does not have access is required. The issue is whether the documents are arguably relevant. These documents are arguably relevant.

**f) Objection: Onerous Disclosure Obligations**

[53] The Tribunal has determined that documents which address utilization and statistical information respecting the application of policies respecting sexual harassment and the actions taken in response to proven complaints are arguably relevant. The Tribunal also considered UPS' submissions that Ms. Peters seeks broad relief and that any order for disclosure will place onerous disclosure obligations upon UPS. However, UPS did not provide details respecting the practical difficulties it alleges it will encounter. Accordingly, the Tribunal considered Ms. Peters' specific requests for disclosure in the context of UPS' general position.

**g) Ruling on Issue: Onerous Disclosure Obligations**

[54] The Tribunal is satisfied that the request for disclosure of any documents that address the number of internal complaints of sexual harassment received by UPS is sufficiently specific and narrow. It is not a request for broad relief. The request targets utilization of UPS' policies and UPS' knowledge of utilization.

[55] Ms. Peters does not request disclosure of all documents that are relevant to complaints that have been received, only documents that count or assess the number of complaints.

[56] Similarly, with respect to documents that count or address the number of informal investigations undertaken into complaints of sexual harassment, a request for their disclosure is reasonably focused and is not a request for broad relief.

[57] The same can be said of documents that record or address the number of complaints or investigations where it has been confirmed that sexual harassment occurred.

[58] For these cases, Ms. Peters requests disclosure of any documents that show the outcome of the case in terms of any sanctions or compensation. The Tribunal understands that, if there have been a number of complaints where sexual harassment has been found, this latter request could involve a significant effort to retrieve documents respecting individual complaints. However, there may be existing documents that record or address the

outcomes in cases where sexual harassment has been found. It is reasonable to expect that UPS's Head Office, its Human Resources Department or the relevant UPS department will be able to identify whatever documents may exist, if they exist, in this regard. To be clear, UPS is not under an obligation to create documents to provide this information.

[59] If UPS has not already collected information in documentary form that records the outcomes in relation to individual complaints, individual complaints will need to be reviewed for relevant documents. However, the disclosure required only concerns complaints where a finding of sexual harassment was made. There is no evidence to suggest that this would be an overly burdensome task and the Tribunal is not prepared to make any assumption in this regard.

#### **h) Ruling on UPS-Canada**

[60] Accordingly, the Tribunal directs that UPS disclose any documents within its power, possession or control in Canada that record or address the number of sexual harassment complaints, the number of informal investigations, the number of complaints or investigations where it was confirmed that sexual harassment occurred and any documents showing the outcomes of those cases/sanctions where sexual harassment was found, including any compensation provided. This disclosure is to be made by UPS for the period beginning three years before Ms. Peters left UPS' employ until her complaint was referred to the Tribunal. If there are documents over which privilege is claimed, these documents are to be identified. If documents that record the outcome in relation to identified individual complaints are what is available to be produced by UPS, those documents are to first be redacted of identifying personal information. This disclosure is to be produced to the Complainant, subject to any claim of privilege, by Friday, July 31, 2020.

#### **i) Paragraph (f): Requests respecting Litigation**

[61] Ms. Peters seeks disclosure of UPS's documents relevant to the number of complaints received via external litigation in Canada in paragraph (f) and respecting the outcomes in those cases. On January 17, 2020, UPS took the position that these



documents were irrelevant and a burdensome request. UPS also stated that to the best of its knowledge, no allegations of sexual harassment in the workplace had been litigated to an outcome and that cases that settled would be subject to settlement privilege. On February 28, 2020, UPS stated its belief that no complaints of sexual harassment had proceeded to litigation in Canada.

[62] UPS asserts that any settlement of litigation or of employee complaints would be subject to settlement privilege and would not be producible. Ms. Peters did not take issue with the application of settlement privilege to these documents.

[63] The Tribunal has considered all of UPS's responses. UPS most recently stated its belief that no complaints had proceeded to litigation. As this is not expressed to be a certainty, and since this is a matter that is capable of being determined, UPS is to either confirm whether this is the case, or, if this cannot be done, provide the basis for its belief to the other parties. If it is determined that documents do exist that address the outcome of any litigation that did not settle, those documents are to be produced by Friday, July 31, 2020.

## **B. The American Disclosure Requests**

### **a) Introduction**

[64] Ms. Peters' motion states that she seeks the following disclosure from UPS-US:

- a. Documents addressing the number of complaints of sexual harassment received by UPS-US internally and externally in the form of litigation in the United States;
- b. Documents addressing the number of informal investigations into sexual harassment conducted by UPS-US, the number of investigations that resulted in findings that sexual harassment had taken place, and documentation of the sanction applied and any compensation awarded;
- c. Documents addressing the outcome of litigation resulting from external complaints of sexual harassment against UPS-US; and,
- d. Documents addressing how policies and practices respecting sexual harassment changed over time, sufficient to determine the extent to which practices developed in the United States were adopted by the Canadian company.

**b) UPS's Position**

[65] UPS relies upon the submissions that it made in relation to UPS-Canada in respect of these requests. UPS also provided specific submissions respecting the requests for American documentation.

[66] UPS states that it is a separate corporation from UPS-US, established in Canada over forty years ago with its own Board of Directors, management, human resources and legal team. UPS submits that it has its own policies, and that these policies have been applied in the context of the statutory and legal framework in Canada.

[67] UPS asserts that there is no claim by Ms. Peters that UPS-US is at fault or is a part of any alleged systemic discrimination or harassment by UPS. UPS states that there is no evidence that UPS-US exercises any control over measures taken by UPS to comply with the Act.

[68] UPS points out that the United States is a different jurisdiction with its own statutory and legal framework. UPS argues that mere corporate relationships cannot ground production demands across national and legal boundaries. UPS submits that the American experience of UPS-US has no rational connection or nexus to a fact, issue or form of relief identified by the Complainant in this proceeding. UPS asserts that policies and "...practices in an entirely different country and legal jurisdiction are far removed from this necessary linkage." UPS submits, therefore, that these documents are not arguably relevant.

**c) Ms. Peters' Reply**

[69] Ms. Peters' submissions in reply include that UPS has offered no evidence in support of its position that UPS is a separate corporate entity with its own policies that are unique to Canada.

[70] Ms. Peters refers to a 2011 UPS "Policy Book" which was disclosed by UPS. Ms. Peters submits that the content of this Policy Book provides support for her assertion that UPS-US has a degree of control or influence over UPS. Ms. Peters quotes from a section of the book called "Our History":

UPS's service territory is divided into regions... Each region is divided into districts and/or countries. Each district and country is, in turn, divided into divisions and operating areas.

[71] Ms. Peters appears to rely upon the reference to countries as supporting her assertion that UPS-US is relevant. Ms. Peters also says that in a sexual harassment case in Iowa, U.S.A., involving UPS-US, the Supreme Court of that State identified UPS as a "multinational" company.

[72] Ms. Peters highlights that some of the policies disclosed by UPS do not indicate whether they are specific to UPS or are procedures incorporated from UPS-US. Some refer to UPS Canada while others refer to UPS, or include a generic logo used by UPS-US and UPS. Ms. Peters suggests that there is a lack of clarity respecting which policies and procedures come from UPS-US as compared to UPS. She argues that UPS is relying upon policies and procedures that appear to have been adopted from UPS-US and, thereby, has put the interaction between UPS-US and UPS in issue.

[73] Ms. Peters also says that there have been highly publicized cases in the United States involving findings of sexual harassment by UPS-US. She submits that this adds to the arguable relevance of the documents sought.

[74] Ms. Peters clarifies that she is not making an extraterritorial request but rather is seeking documents in the power, control and possession of UPS. She adds that the Act requires disclosure based on power, control or possession and does not impose a geographical restriction.

#### **d) Ruling on UPS-US**

[75] Ms. Peters clarifies that she is seeking production of documents within the control of UPS. UPS has made disclosure of policies and procedures within its power, possession, or control as they exist in Canada. The Tribunal has concluded that it is not appropriate to require UPS to make inquiries of UPS-US to provide policies that "reside" exclusively in the United States, which were not present in Canada at the time relevant to this complaint in paper or electronic form.

[76] The policies that have been produced by UPS may be specific to Canada or may be of general application on an international basis. In my view, where the policies came from or where they apply outside of Canada is irrelevant. What is relevant is the identification of what policies were applicable to Ms. Peters at the time material to Ms. Peter's complaint.

[77] Ms. Peters' motion sought documents addressing how practices and policies changed over time, sufficient to determine the extent to which practices developed in the United States were adopted by the Canadian company. How these policies were developed is not germane to what allegedly happened to Ms. Peters. What matters is what is stated in the applicable policies, how they were applied and UPS's knowledge of their effectiveness.

[78] This complaint is against UPS. UPS-US is not mentioned in the complaint or in any of the Statements of Particulars filed by the parties. UPS-US is, therefore, a corporate entity outside the parameters of the complaint.

[79] Because there is no suggestion in the complaint that UPS-US was involved, the corporate relationship as between UPS-US and UPS is irrelevant. Accordingly, UPS's failure to provide evidence to prove that the corporations are separate, and that UPS-US does not exert control over UPS, is not material. What is relevant is whether UPS in Canada, whether a separate legal entity from UPS-US or not, discriminated against Ms. Peters. This Tribunal only has the jurisdiction to exercise its authority to determine liability and provide a remedy, assuming such is warranted, within Canada.

[80] Quite apart from these considerations of relevance and jurisdiction, whatever complaints have occurred and whatever litigation has ensued involving UPS-US, the Tribunal cannot assume that the statutory and legal framework between Canada and the United States respecting sexual harassment is the same. Ms. Peters has not established that they are the same or even the degree to which they are similar. There is no basis on the record before the Tribunal to conclude that utilization of sexual harassment policies within UPS-US, or the number of informal investigations in the United States or that

litigation and related outcomes in the United States correlates with the Act and, specifically, with a defence pursuant to section 65(2).

[81] Ms. Peters requests respecting UPS-US are denied and her motion in this respect is dismissed.

#### **IV. Paragraph (g): Documents Relevant to Assessment of Training and Policies**

[82] Paragraph (g) requests internal and external reports addressing the effectiveness of UPS training and policies on the supervision of UPS employees. On January 17, 2020 UPS stated that no such consultants' reports exist. On February 28, 2020, this was stated as a belief. UPS is to clarify to the other parties whether the existence of these documents has been determined one way or the other, and, if this is a statement of belief, provide the basis for its belief to the other parties. In the event UPS determines that it has documents that involve internal assessment of its training and policies, those documents are relevant and are to be produced by Friday, July 31, 2020.

#### **V. Ongoing Obligation**

[83] The parties agree that there is an ongoing obligation to disclose arguably relevant documents pursuant to Rule 6 of the Tribunal's *Rules of Procedure*. Counsel for UPS properly undertook to make a full review of available disclosure at least four weeks before the hearing to verify compliance. The Tribunal directs that this occur on or before Friday, July 31, 2020.

#### **VI. Order**

[84] For the reasons provided above, the Tribunal orders the following disclosure by UPS:

1. UPS is to review Mr. Gordon's personnel file and produce any documents arguably relevant to Mr. Gordon's conduct, behaviour and performance in the workplace to Ms. Peters and the other parties by Friday, July 10, 2020.

2. UPS is to disclose any documents in Canada in the power, possession or control of UPS that record or address the number of sexual harassment complaints, the number of informal investigations, the number of complaints or investigations where it was confirmed that sexual harassment occurred and any documents showing the outcomes of those cases/sanctions where sexual harassment was found, including any compensation provided. This disclosure is to be made by UPS for the period beginning three years before Ms. Peters left UPS' employ until her complaint was referred to the Tribunal. If there are documents over which privilege is claimed in whole or in part, the claim of privilege over specific documents in whole or in part is to be identified by UPS and the basis for the claim explained. If documents that record the outcome in relation to identified individual complaints are what is available to be produced by UPS, those documents are to first be redacted of identifying personal information. This disclosure is to be produced to Ms. Peters and the other parties, subject to any claim of privilege, by Friday, July 31, 2020.
3. UPS is to either confirm whether any internal or external complaints in Canada have proceeded to litigation, or, if this cannot be confirmed, provide the basis for its belief to the other parties. If it is determined that documents do exist that address the outcome of any litigation that did not settle, those documents are to be produced to Ms. Peters and the other parties by Friday, July 31, 2020.
4. UPS is to clarify to the other parties whether internal and external reports addressing the effectiveness of UPS training and policies on the supervision of UPS employees exist or not, and, if this cannot be confirmed, provide the basis for its belief to the other parties. In the event UPS determines that it has documents that involve internal or external assessment of its training and policies, those documents are relevant and are to be produced by Friday, July 31, 2020.

[85] The Tribunal reserves jurisdiction to provide any further directions should there be any unanticipated issues with implementation.

*Signed by*

Kathryn A. Raymond, Q.C.  
Tribunal Member

Halifax, Nova Scotia  
June 25, 2020

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2201/2317

**Style of Cause:** Tesha Peters v. United Parcel Service Canada Ltd. and Gordon

**Ruling of the Tribunal Dated:** June 26, 2020

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

David Baker, Laura Lepine and Claire Budziak, for the Complainant

Sasha Hart and Ikram Warsame, for the Canadian Human Rights Commission

Seann D. McAleese, for United Parcel Service Canada Ltd.

Linden Gordon for himself