

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2020 CHRT 19

Date: July 6, 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 corporate Respondent, UPS, is seeking documentary production from the Complainant, Ms. Peters, in relation to her complaint of sexual harassment. Some requests are undisputed by Ms. Peters, but parameters are requested, others are contested. There is an overarching disagreement between these parties concerning the redaction of documents and the process to be used to resolve disputed redactions.

[2] The individual Respondent, Mr. Gordon, takes no position. The Canadian Human Rights Commission (the "Commission"), likewise, takes no position respecting the specific requests of UPS, but provided submissions respecting the applicable law.

II. Requests for Production

[3] In relation to the production issues, the parties agree that the documents must be arguably relevant to be produced. The production requests are addressed as follows:

a) All notes and reports related to Ms. Peters' treatment by Dr. Tarek Mohamed Sallamas

i. Introduction

[4] UPS requested disclosure of Ms. Peters' medical file with Dr. Sallamas, a physician in the United States. Disclosure was ordered by the Tribunal and communicated by way of letter on May 15, 2020, in advance of the other disclosure issues. This was to allow additional time for disclosure to be made by Ms. Peters. The parties were advised that reasons for this decision would be provided when the Tribunal's decision respecting the remaining disclosure issues was provided. These are those reasons.

ii. Position of the Parties

[5] Ms. Peters claims that her health was negatively impacted by the discrimination she allegedly experienced. During the period relevant to her complaint, Ms. Peters says that she was in a motor vehicle accident while visiting the United States. Ms. Peters advises that she

saw Dr. Sallamas on one occasion, following the accident, and then returned to Canada where she sought follow-up care from her regular physician. She explains that she has produced the records from her treating physician in Canada, including the records of her assessment following the accident. Ms. Peters objected to being required to produce records from Dr. Sallamas because she believes they are irrelevant and because she only saw him on one occasion. She objects to being required to incur the cost of retrieving records from the United States.

[6] UPS submits that Dr. Sallamas is referenced in Ms. Peters' Statement of Particulars and is thereby relevant. Namely, UPS claims these records are relevant "...to understanding the Complainant's overall functional capacity at the material time as it is related to causation of any disabling conditions as well as her capacity for employment and related mitigation efforts."

iii. Ruling

[7] Ms. Peters claims that her health was negatively impacted by the discrimination she allegedly experienced and has, thereby, placed her health in issue in this complaint. She has also claimed an inability to work because of these alleged health issues. The relevance of the regular treating physician's file in relation to Ms. Peters is not in dispute. The file contains material respecting the motor vehicle accident. Ms. Peters has produced the records respecting the motor vehicle accident in this file and relies upon this to argue that Dr. Sallamas's file ought not to be ordered to be produced. On its face, Dr. Sallamas' file respecting Ms. Peters is arguably relevant too. There is no basis to differentiate these medical records based on relevance. It is the obligation of parties before the Tribunal to produce all arguably relevant documents.

[8] Ms. Peters objected because she only saw Dr. Sallamas once and is concerned about the cost of obtaining these documents from a physician in the United States. Dr. Sallamas may have only seen Ms. Peters on one occasion, but that occasion was significant. He saw her in relation to her immediate health concerns after the motor vehicle accident. Ms. Peters provided no details respecting the alleged issue of cost. The Tribunal

cannot conclude that the cost of obtaining records respecting one physician visit in the United States will be significant.

[9] On May 15, 2020, the documents in question were found to be arguably relevant for these reasons and were ordered to be produced by June 12, 2020. The Complainant has since advised the Tribunal of difficulties encountered in complying with the order on June 12, 2020. Additional directions were provided by the Tribunal on June 16, 2020, respecting implementation of the order. A new date was set of July 6, 2020.

b) All notes and reports related to Ms. Peters' treatment by Dr. Steven MacDonald from January 1, 2011, to present

[10] UPS's request for these documents is not disputed. Disclosure was made by Ms. Peters up to October 2018 and she made a commitment to update disclosure before the hearing. On February 20, 2020, the Tribunal directed that Ms. Peters update this disclosure in the following weeks and renewed Ms. Peters' ongoing obligation to update disclosure prior to the hearing.

c) A copy of the alleged inappropriate text messages received by Ms. Peters from Mr. Gordon

[11] UPS acknowledged that it was advised in October 2018 that Ms. Peters no longer has copies of such messages. UPS has not made further submissions in this respect. There is no need for an order in this regard.

d) All communications with Service Canada and documentation related to any application for Employment Insurance benefits over the period from February 2015 to present, including application for, decision letters, appeal documents, etc.

[12] Ms. Peters agrees to provide the requested documents on the understanding that the production of "all communications with Service Canada" refers to communication related to any application for Employment Insurance.

[13] UPS did not file a reply and has, therefore, not taken issue with this clarification.

[14] The Tribunal considers this clarification to be reasonable and confirms that the disclosure request is to be interpreted as applying to Employment Insurance, which would include applications for sick or unemployment insurance and related documents.

e) All employment related records in respect of Ms. Peters' full period of employment with Costco to present day, including hire letters, pay stubs, T4s, complaints to management about alleged harassment by other employees or Mr. Gordon, and termination or resignation letter, as applicable.

[15] Ms. Peters agrees to provide her employment records from Costco as of 2014, which is the first year in which discriminatory treatment is alleged in her Statement of Particulars. She submits that employment records from Costco prior to 2014 are not relevant.

[16] UPS did not object to this condition.

[17] Ms. Peters is to produce her employment records from Costco commencing in 2014. The Tribunal agrees that records from another employer, prior to the date any alleged discriminatory treatment occurred while Ms. Peters was in the employ of UPS, is not relevant.

f) All records demonstrating mitigation efforts (what search criteria used, including geographic zones, wage ranges, position types, how searched, where applied to, how applied, resume and cover letter used, number of interviews, reason for non-hire, etc.) from February 2015 to present as well as any employment related records from successful efforts, such as hire letters, pay stubs, T4s.

i. Position of the Parties

[18] Ms. Peters agrees to UPS's requests in part. She agrees that she has an obligation to produce existing employment related records within her power, possession or control, including resumes and cover letters submitted to other employers from 2015 to the present and records from both unsuccessful and successful efforts. She agrees that these documents are relevant to the issue of mitigation of her losses through further employment. However, she disputes the arguable relevance of the requests within the brackets in paragraph (f) above: "what search criteria used, including geographic zones, wage ranges,

position types, how searched, where applied to, how applied, number of interviews, reason for non-hire, etc.” She points out that UPS has not provided any case law to demonstrate that the Tribunal has ordered documentary disclosure of this information in relation to a complainant in the past.

[19] Ms. Peters submits that this amounts to a request by UPS that she create records so that this information can be disclosed prior to the hearing. Ms. Peters contends that she is not required to create records and that the Tribunal has ruled that there is no requirement upon parties appearing before the Tribunal to create records in its *Rules of Procedure* respecting disclosure: *Warman v. Canadian Heritage Alliance*, 2006 CHRT 31; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42.

ii. Ruling

[20] The Tribunal agrees that, in the context of documentary production, there is no obligation upon a party to create a record to provide arguably relevant information to another party in the Tribunal's *Rules of Procedure*. Ms. Peters will have an opportunity to testify respecting her mitigation efforts and/or UPS will have an opportunity to cross-examine Ms. Peters on the issue of her mitigation efforts at the hearing.

[21] However, the issue of mitigation of an alleged loss of income through further employment includes the issue of whether the efforts made to mitigate were reasonable. This includes not only efforts made to apply for positions, but efforts made to search for job opportunities. UPS will need to determine whether it agrees that those efforts were reasonable. The Tribunal finds that this information is arguably relevant to allow UPS to understand the full scope of Ms. Peters' mitigation efforts and, thereby, to make a determination respecting its position.

[22] Ms. Peters is to ascertain whether any records of the type requested exist, and, if so, she is to produce them. In other words, her documentary production is to include any existing records she has of her search for job opportunities. If the arguably relevant information sought by UPS is not available in an existing record, Ms. Peters is to so advise the other parties.

g) A full accounting of time periods (by month/year) spent in the United States, Canada and any other jurisdiction from February 2015 to the present, with proof, if requested.

[23] UPS submits that Ms. Peters' whereabouts over the period from February 2015, when she left her employ with UPS, to the present is "...relevant to understanding her treatment, mitigation efforts and what other records may be of potential relevance".

[24] Ms. Peters asserts that she does not have in her possession or power documents that would be responsive to this request. She submits that there is no legal obligation upon a party to a complaint under the *Canadian Human Rights Act* to create records for disclosure.

[25] For the same reasons as stated above, Ms. Peters is not required to create a record to provide the requested information. However, if she has not done so already, Ms. Peters is to review her passport or any other travel documentation or any documentation respecting work outside Canada that may exist to determine whether it contains any record of her entering or exiting other countries outside Canada over the period February 2015 to the present. If so, she is to produce copies of the relevant pages from her passport, including the photo page, or alternate documentation.

h) A full accounting and proof of expenses claimed in connection with travel to the United States that Ms. Peters asserts is due solely to alleged treatment by Mr. Gordon.

[26] Ms. Peters responds that she has produced any arguably relevant documents related to expenses associated with travel to the United States due to her alleged treatment by Mr. Gordon.

[27] UPS also requests a "full accounting" of travel expenses. This appears to be a request for summarized information and would implicitly involve requiring Ms. Peters to create a record of some type. For the reasons stated above, this aspect of UPS's request is denied.

i) The complete tax returns and assessments for the years 2015 to 2019 from Canada, the US, and any other jurisdiction in which Ms. Peters earned income.

i. Position of the Parties

[28] UPS submits that these documents "...relate to verifying the sources and quantum of income and benefits for the Complainant which may be offset against any award for lost earnings".

[29] Ms. Peters agrees to provide her employment related records, including T4s for the years 2015-2019 and, as noted, records related to unemployment benefits she applied for or received. She submits that documents related to UPS's request for "sources and quantum of income and benefits" will be provided.

[30] However, Ms. Peters objects to the production of her complete income tax returns and tax assessments on the basis that the request is overly broad. She submits that they contain information beyond what is relevant to this case. She argues that her privacy rights should be balanced with her obligation to make disclosure. She suggests that the disclosure she is agreeing to provide will address UPS's entitlement to documentary disclosure and that it is, therefore, not necessary to produce income tax returns.

[31] UPS did not respond to Ms. Peters' position.

ii. Ruling

[32] UPS is entitled to documentary disclosure respecting employment and self-employment related income and benefits, as applicable. The Tribunal agrees that the purpose of this disclosure is to verify the sources and quantum of income and benefits earned by Ms. Peters. The issue to be determined is the appropriate source of this verification.

[33] Ms. Peters has advised that she will produce documents related to employment including sources and quantum of income and benefits, such as T4 forms. Another source of "income" is unemployment insurance. Ms. Peters will be providing documentation to verify

the amount of any unemployment insurance she received. As addressed below, Ms. Peters will be providing documentation to verify any disability payments she received as income replacement.

[34] The Tribunal concludes that UPS's entitlement to disclosure of employment and self-employment related income and benefits is primarily addressed by the disclosure Ms. Peters has agreed to make.

[35] Ms. Peters' income tax returns are likely to contain other information beyond income and benefits received from other employers or through self-employment because additional information is required to be provided to Revenue Canada on these forms. For example, income tax returns require inclusion of interest income on investments. Ms. Peters retains a privacy interest in the information in her tax returns that is not relevant to this case. UPS did not object to Ms. Peters' privacy concerns in reply. The request for the disclosure of tax returns is overly broad and is, therefore, denied.

[36] UPS has requested production of Notices of Assessment from the Canada Revenue Agency in relation to Ms. Peters for the period 2015-2019. These documented assessments provide Revenue Canada's assessment of total income. The calculation of total income includes income from sources other than employment, self-employment income, and income derived from statutes such as CPP and EI. For example, withdrawals from RRSP's are included in total income. The latter would have no apparent relevance to a loss of income claim. Notices of Tax Assessments also contain information that is irrelevant to income, such as RRSP contribution room and any taxes payable. However, a Notice of Assessment does provide an additional "third party" verification of total income. The potential difficulty from a relevance perspective is that this number is derived from all sources of income.

[37] Because Notices of Assessment provide third-party verification of total income, the Tribunal orders that they are to be produced, albeit subject to limitations. Ms. Peters is to produce her Notices of Assessment for the years 2015-2019.

[38] The content on the assessment forms respecting income, which would include any such reference, such as statutory deductions from income (CPP and EI) and total income, is to be disclosed. Content respecting matters other than income received by Ms. Peters

may be redacted by Ms. Peters. However, an explanation of anything redacted is to be provided to the other parties. If the redaction is disputed, the redaction may be addressed through the process directed below.

[39] If Ms. Peters received income other than income derived from employment or self-employment, the total income on the relevant Notice of Assessment will exceed the amounts confirmed by her provision of T4 and related income statements. In that event, Ms. Peters is to provide an explanation of the source of other income to the other parties to account for the difference. If there are any unanticipated or unresolvable issues in this regard, the Tribunal reserves jurisdiction to address them.

j) All complete, unredacted copies of Ms. Peters' medical records involving Dr. Steve MacDonald, Dr. Kelley, and Dr. Tarek Mohamed Sallamas over the period 2014 to present.

[40] Production of these records has been addressed by agreement of the parties and direction of the Tribunal, as recorded above. The issue of whether any redactions to these documents should be removed is addressed below.

k) A complete unredacted copy of Ms. Peters' claims file with Manulife with respect to her short-term disability claims while employed with the Respondent.

[41] Ms. Peters agrees to provide her documentation respecting her short-term disability claim through Manulife. She has identified that her agreement to this is subject to any required redactions, but states that she will identify the reason for any redaction to the other parties.

III. The Redaction Issue

i. Introduction

[42] As indicated above, on January 17, 2020, UPS sought unredacted medical records from three of Ms. Peters' physicians. UPS also requested that unredacted documents be provided in relation to short-term disability. The Tribunal proceeded on the basis that UPS's

objection to existing redactions would be resolved as an aspect of disputes between the parties concerning pre-hearing documentary disclosure. The Tribunal set dates for all pre-hearing motions to ensure that the hearing would proceed when planned.

[43] Resolution of the issues respecting the redactions has been fraught by procedural difficulty. Key aspects of the merits of the issues have not been addressed by UPS as expected by the Tribunal. There is also a dispute between Ms. Peters and UPS concerning the appropriate procedure to be followed to resolve disputed redactions.

ii. Background

[44] The parties engaged in communications respecting disclosure in 2018. Some of the disclosure issues had been resolved. Others stood as refusals to produce.

[45] During a case management conference on December 16, 2019, the parties acknowledged the need to attempt to resolve any disclosure issues amongst themselves. The parties were directed by the Tribunal to attempt to do so. They were also directed to file any pre-hearing motions relevant to disclosure or other issues by January 17, 2020, except for one motion that was to be filed by Ms. Peters on January 10, 2020. Responses to all motions were due on February 7, 2020. Any replies were due by February 14, 2020.

[46] This schedule, set on December 16, 2019, was confirmed at a second case management conference with the parties on January 2, 2020. Summaries of each of the case management conferences, which confirmed the schedule, were sent to the parties on December 18, 2020 and January 24, 2020, respectively. The Tribunal's intent was to ensure that pre-hearing issues would be resolved so that the hearing on the merits could proceed as scheduled.

[47] Ms. Peters filed the motion due on January 10, 2020. She also filed a motion that included her requests for disclosure from UPS on January 17, 2020. In both instances, Ms. Peters filed and served a Notice of Motion and affidavit of service in accordance with Rule 3(1) and Rule 2 of the *Rules of Procedure*. The latter motion respecting disclosure was decided by the Tribunal: *Peters v. United Parcel Service Canada Ltd. and Gordon*, 2020 CHRT 18, unreported decision of June 26, 2020 [*Peters*].

[48] Although UPS had indicated during case management that there were outstanding disclosure requests from Ms. Peters, UPS did not file a motion for disclosure on January 17, 2020. Instead, UPS provided a letter to the parties dated January 17, 2020, copied to the Tribunal, which among other matters, stated UPS's list of outstanding production demands from Ms. Peters. UPS noted that Ms. Peters had declined to make certain production in 2018 on the basis the documents were irrelevant.

[49] UPS did not provide submissions in its letter of January 17, 2020, respecting its requests for production. The letter of January 17, 2020 requested disclosure based on the sole assertion that the requested documents were "arguably relevant, producible but outstanding." UPS did indicate an intent to provide submissions in relation to one request for disclosure, in paragraph (a)(i) of the letter.

[50] UPS's list of outstanding disclosure from Ms. Peters included a request for unredacted medical records that had been previously provided and an unredacted copy of Ms. Peters' short-term disability file. UPS did not identify what the disputed redactions in the medical files were or provide submissions respecting the redaction issue.

[51] UPS did provide submissions with its letter of January 17, 2020 responding to requests in Ms. Peters' motion of January 17, 2020 for disclosure from UPS's parent company in the United States. However, the letter of January 17, 2020, and its enclosures, did not clearly address all of the issues raised by Ms. Peters' motion of January 17, 2020, as explained in the Tribunal's decision in *Peters*.

[52] On February 7, 2020, the date set for responses, UPS sent a letter to the Tribunal indicating that responses were enclosed to the two motions filed by Ms. Peters on January 10 and 17, 2020, respectively. Only a response to the motion of January 10, 2020, was enclosed.

[53] Following this, a dispute arose between Ms. Peters and UPS respecting the timing of further procedural steps to address UPS's requests for disclosure and the redacted documents. On February 13, 2020, UPS objected to Ms. Peters not having responded to the list of requested disclosure in its letter of January 17, 2020, so that UPS could file a response on February 14, 2020 (the date set for the filing of any required replies). On

February 14, 2020, Ms. Peters objected to UPS having not filed its motion on time on January 17, 2020 with submissions respecting the disclosure it sought. In part, Ms. Peters declared that UPS had not identified any redacted portions of records that it wished to see. She submitted that the onus was on UPS to establish that her medical records had been inappropriately redacted, and that UPS had not filed submissions in this regard. Ms. Peters objected to UPS's "interpretation" of the timetable, as she would only see UPS's submissions on the date set for reply. The timetable did not afford her an opportunity to respond to submissions in relation to UPS's disclosure requests. Nonetheless, Ms. Peters provided submissions to respond to UPS's disclosure requests, without prejudice to her right to respond to any motion UPS made beyond the time set for doing so.

[54] On February 18, 2020, counsel for UPS sent an email in response advising that there was a misunderstanding respecting the expectation that a motion would be filed by UPS respecting disclosure by January 17, 2020. Counsel advised that it was his understanding that other motions were due on January 17, 2020. Apart from the motion respecting U.S. production issues, counsel for UPS understood that the parties were to identify any other outstanding productions by January 17, 2020, the opposite party was to respond, and the Tribunal would then rule on any disputed production.

[55] In the email of February 18, 2020, counsel provided what was identified as a brief overview of UPS's submissions respecting the list of production requests it sought from Ms. Peters. Counsel for UPS indicated that further submissions would be filed by February 21, 2020, the end of the week. With respect to the issue of redactions, counsel for UPS explained in his email that it was difficult to identify what redactions were potentially relevant because the content was redacted.

[56] Counsel for UPS had indicated that UPS would be in a position to file complete submissions by February 21, 2020. On February 20, 2020, the Tribunal wrote: "To clarify any confusion, the tribunal notes that the intent was that all preliminary motions would be filed by January 17, 2020, with complete submissions, given the need to have all preliminary matters decided so that this matter can proceed to hearing." The Tribunal retroactively approved an extension for UPS to provide further submissions respecting its motion for

disclosure by February 21, 2020. Further dates were set for response and reply to this motion, among other directions.

[57] Paragraph 5 of the Tribunal's letter of February 20, 2020, gave the following direction to assist UPS and the other parties in relation to the redaction issue:

The Tribunal needs to set a process to address any disputed redactions; submissions should address this procedural issue and the redactions themselves; the Respondent can begin by identifying the disputed redactions specifically and explaining why the redactions appear relevant for general reasons and/or reasons based on the remainder of the redacted document in which the redaction appears; the Complainant is to provide sufficient information in its response about the reason for each redaction to enable the Respondent to provide a reply....

[58] UPS's motion for disclosure and removal of redactions was not filed by February 21, 2020.

[59] The Tribunal requested a response from UPS. Counsel for UPS advised that counsel had decided to file UPS's motion on a different date than directed, on February 28, 2020. The reason given was that counsel had decided to file UPS's motion on the same date that he was required to provide responses to other motions. Counsel preferred to file one document.

[60] Because there was no prejudice to the other parties in relation to the hearing dates by reason of a one-week delay, the Tribunal agreed to receive UPS's motion on February 28, 2020. However, the Tribunal was required to set new dates to avoid prejudice to Ms. Peters in relation to UPS's motion. The Tribunal's directions in response to what occurred were communicated to the parties by letter on February 27, 2020.

[61] These directions included a caution by the Tribunal. The parties were reminded that no party is permitted to not comply with a procedural direction of the Tribunal. Rule 1(5) of the Tribunal's *Rules of Procedure* states that, unless the Tribunal grants an extension, all time limits, including those for motions, are peremptory. The parties were directed by the Tribunal that prior approval of any requested changes or clarification, as applicable, of the filing deadlines is a requirement. The parties were further advised that it should not be presumed that approval will be granted to extend deadlines. The Tribunal highlighted the

importance of case management and deadlines in achieving organization, certainty for the parties and avoiding delay. Lastly, the Tribunal pointed out that UPS's late filing created an additional problem, as it forced Ms. Peters' counsel to file a further separate document. As indicated, this caution was sent to the parties on February 27, 2020 in an emailed letter.

[62] On February 28, 2020, UPS did not file and serve a formal Notice of Motion and affidavit of service in accordance with Rule 3(1) and Rule 2 of the *Rules of Procedure*. UPS sent a letter with submissions in respect of its motion for disclosure in a Schedule C attached to its letter. The submissions in Schedule C reproduced the list of alleged outstanding disclosure in its letter of January 17, 2020, the self-described "brief overview" of its submissions by email of February 18, 2020 and contained additional submissions on the merits. Schedule C was identified as being responsive to the Tribunal's directions. Counsel for UPS apologized for any confusion.

[63] The Tribunal considered UPS's letter of February 28, 2020, in relation to UPS's requests for production from Ms. Peters, addressed above in this decision.

[64] UPS advised that Schedule C was specifically responsive to the Tribunal's directions of February 20, 2020, at para 5, quoted above, respecting what was required from UPS concerning the redaction issue. The Tribunal had directed that UPS identify the specific disputed redactions and explain their relevance for general reasons and/or reasons based on the remainder of the redacted document in which the redaction appears. The Tribunal gave this direction because every line in a medical record cannot be assumed to be arguably relevant to a human rights complaint. In this case, three sets of medical records were alleged to contain improper redactions for relevance.

[65] UPS provided general submissions respecting its entitlement to unredacted medical and other records, asserting that the production of unredacted medical records is required by procedural fairness where a complainant puts their health and inability to work in issue in a complaint: *Palm v. I.L.W.U., Local 500*, 2012 CHRT 11 and *Yaffa v. Air Canada*, 2014 CHRT 22. However, UPS did not identify the specific redactions or make submissions explaining why the specific redactions should be unredacted.

[66] UPS ended its submissions in Schedule C as follows: "...with respect to the Tribunal's direction that the Respondent identify redactions, relevance and reasons regarding the production of medical records, it is respectfully submitted that such an effort is premature and potentially unnecessary." UPS also says that Ms. Peters had advised that further medical records would be provided and postulates that these could be redacted. UPS claims that the issue "...will likely arise again and require another determination by the Tribunal".

[67] With respect to the former statement by UPS, there had been no prior suggestion by UPS that its request for production of unredacted documents was premature. No explanation was provided for why this was now asserted. It was also not explained why this aspect of the motion would be potentially unnecessary. With respect to the latter statement by UPS, there had been no initial determination made by the Tribunal in relation to existing redactions.

[68] Ms. Peters filed a response on March 13, 2020, describing UPS's decision to decline to identify the redactions or to make submissions regarding their relevance as "unfortunate". Ms. Peters disagrees with UPS's general reliance upon case law to the alleged effect that there is no entitlement to redaction. She points out that UPS did not provide any case law to this effect. She submits that it is appropriate for a party to redact portions of documents that are not arguably relevant: *Walden v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2018 CHRT 20, at para 10; *Khouri and Khouri v. Virgin Mobile Canada*, 2019 CHRT 26, at para 60 and *Clegg v. Air Canada*, 2019 CHRT 3. As examples, Ms. Peters says that medical information about other people or health issues that are not alleged to have been caused by the actions of a respondent will be irrelevant and that it would be appropriate to redact such information to balance the right to disclosure with a complainant's privacy rights.

[69] Ms. Peters says that she has reviewed the medical records and can only identify one document that contains a partially redacted paragraph. This is Dr. MacDonald's report of November 14, 2017. She agrees to remove the redaction.

[70] UPS did not file a reply.

iii. The Tribunal's Procedural Concerns

[71] Despite the motion schedule having been confirmed on two occasions in writing by the Tribunal, which included confirmation on December 18, 2020 that the schedule was for disclosure issues, UPS did not serve and file its motion for requested disclosure on January 17, 2020, as directed. UPS said that this was due to a misunderstanding.

[72] UPS undertook to provide submissions for its motion on February 21, 2020, leading to retroactive approval by the Tribunal of an extension until February 21, 2020. UPS did not file submissions on that date.

[73] The parties were cautioned by the Tribunal the day before, on February 20, 2020, that prior approval for any extensions was required, as dates for motions are peremptory. The importance of case management and deadlines was explained.

[74] No request was made to the Tribunal by UPS for a further extension beyond February 21, 2020. This was contrary to Rule 3(1), the directions of the Tribunal, and the Tribunal's caution of February 20, 2020.

[75] UPS advised, in response to an inquiry by the Tribunal, that it would file its submissions on February 28, 2020. On February 28, 2020, UPS filed submissions.

[76] UPS advised that Schedule C to its letter of February 28, 2020 was specifically responsive to the Tribunal's directions of February 20, 2020, at para 5. However, UPS did not identify the redactions or provide submissions explaining their individual relevance to the Tribunal, as the Tribunal had directed. Submissions were made to the effect that the general production of unredacted documents was required. UPS asserted that identifying the redactions, their relevance and reasons was premature, but also potentially unnecessary. UPS stated that it would likely need to be addressed in the future but seemed to imply that the issue had been determined by the Tribunal. While not providing the requested information to the Tribunal, UPS sought to preserve its opportunity to object to any redactions.

[77] Seen as a cumulative series of events, UPS has not adhered to the Tribunal's procedural directions. UPS did not file its motion or submissions on time on several

occasions. UPS did not make a motion or a request for an adjournment of the February 21, 2020 date for its motion, despite being directed to file on that date and the Tribunal's caution of February 20, 2020 respecting the need for prior approval by the Tribunal of any extension and related comments. UPS did not file submissions as directed respecting the redaction issues on February 28, 2020 and UPS failed to specifically identify the individual redactions it disputes.

[78] The practical effect of declining to identify the redactions was to create a potential indefinite adjournment of the resolution of an issue that the Tribunal understood had been outstanding since 2018, without the Tribunal's permission. UPS maintained throughout that Ms. Peters' medical records from three physicians had been redacted. Based on the information that had been provided to the Tribunal, disputes over redacted documents needed to be resolved given pending hearing dates for the merits of the complaint.

[79] The Tribunal sets the process for deciding complaints through its *Rules of Procedure* and through procedural directions to ensure fairness and the orderly, effective and efficient progress of cases before it. Non-adherence to Tribunal directions by any party has detrimental effects on the proceeding. This must cease. The Tribunal trusts that it will have the full commitment of all parties in this regard, going forward.

iv. Ruling on Redactions

[80] Ms. Peters identified one redaction in one set of medical records. UPS did not file a reply and, therefore, did not dispute the fact that there was only one redaction.

[81] Ms. Peters has agreed to remove the one redaction. The Tribunal thus concludes that no documentary redactions need to be resolved.

IV. Procedural Decision Respecting Future Redactions

[82] It is possible that no issues of redaction will arise in relation to any further production of medical records by Ms. Peters or with respect to the production of her short-term disability

file, or any other documents. If Ms. Peters does wish to redact any document, Ms. Peters is to clearly mark the redaction and advise the other parties of the reason for the redaction.

[83] UPS took the position that redacted medical or disability records respecting Ms. Peters should be disclosed to UPS counsel for initial determination, subject to a confidentiality order. This was for the stated purpose of reducing or eliminating the extent of disputed redactions requiring determination by the Tribunal.

[84] The Tribunal has considered UPS's submissions respecting the proper process to resolve any future dispute about redactions. There is a pre-existing right to privacy over one's medical records. It is not appropriate for disputed redactions to be reviewed by counsel for the opposing party, as is suggested by UPS. This is the role of the Tribunal.

[85] Parties are to determine whether there is any dispute concerning the redaction of a document upon its receipt. If any redaction is disputed, the disputing party is to serve and file a motion to address the redaction(s) in conformity with the *Rules of Procedure* and is to do so within five business days, not including the date of receipt of the redacted document.

[86] The responding party is to file any response within five business days thereafter and, at the same time, is to send the disputed document in both its redacted and unredacted form to the Tribunal as attachments to an email marked "Confidential: For Review by the Tribunal Only". That email is not to contain any comment. It is not to be copied to the other parties. Each page of the attachment is to be marked confidential.

[87] The disputing party may provide a reply, if necessary, within 3 days following the date of receipt of the response.

[88] The Tribunal will render any required decision to ensure that the hearing proceeds on the hearing dates commencing in September.

V. Order

[89] Unless an alternate date is specified in the paragraphs below, the Tribunal orders the following disclosure be made by Ms. Peters to UPS by **Monday, July 27, 2020**:

1. All notes and reports related to Ms Peters' treatment by Dr. Tarek Mohamed Sallamas by **Monday, July 6, 2020**;
2. An unredacted copy of the redacted document from Dr. Steven MacDonald's medical file concerning Ms. Peters is to be provided by **Monday, July 13, 2020**, and disclosure of all notes and reports related to Ms. Peters' treatment by Dr. Steven MacDonald from January 1, 2011, to present is to be updated by **Friday, July 31, 2020**, and thereafter, before the hearing, if there are any further records;
3. All communications with Service Canada and documentation related to any application for Employment Insurance benefits over the period from February 2015 to present, including application for, decision letters, appeal documents, etc.;
4. All employment related records beginning in 2014 in respect of Ms. Peters' employment with Costco to present day, including hire letters, pay stubs, T4s, complaints to management about alleged harassment by other employees or Mr. Gordon, and termination or resignation letters, as applicable;
5. All records demonstrating mitigation efforts (what search criteria used, including geographic zones, wage ranges, position types, how searched, where applied to, how applied, resume and cover letter used, number of interviews, reason for non-hire, etc.) from February 2015 to present as well as any employment related records from successful efforts, such as hire letters, pay stubs, T4s;
6. If she has not done so already, Ms. Peters is to review her passport or any other travel documentation or any documentation respecting work outside Canada that may exist to determine whether it contains any record of her entering or exiting other countries outside Canada from February 2015 to the present. If so, she is to produce copies of the relevant pages from her passport, including the photo page, or alternate documentation;
7. Employment related records related to UPS's request for sources and quantum of income and benefits, including T4s for the years 2015-2019 and records related to unemployment benefits received;
8. Notice of Assessments for the years 2015 to 2019 from Canada, the US, and any other jurisdiction in which Ms. Peters earned income. The content on the assessment forms respecting income, which would include any such reference, such as statutory deductions from income (CPP and EI) and total income, is to be disclosed. Content respecting matters other than income received by Ms. Peters may be redacted by Ms. Peters. However, an explanation of anything redacted is to be provided to the other parties. If the redaction is disputed, the redaction may be addressed through the process directed below. If Ms. Peters received income other than income derived from employment, the total income on the relevant Notice of Assessment will exceed the amounts confirmed by her provision of T4 and related

income statements. In that event, Ms. Peters is to provide an explanation of the source of other income to the other parties to account for the difference.

9. A complete copy of Ms. Peters' claims file with Manulife with respect to her short-term disability claims while employed with UPS.
10. If any document is redacted and the redaction is disputed, the disputing party is to serve and file a motion to address the redaction(s) in conformity with the Rules of Procedure and is to do so within **five business days of receipt** of the redacted document, not counting the date of its receipt. The responding party is to file any response within **five business days thereafter** and, at the same time, is to send the disputed document in both its redacted and unredacted form to the Tribunal as attachments to an email marked "Confidential: For Review by the Tribunal Only". That email is not to contain any comment. It is not to be copied to the other parties. Each page of the attachment is to be marked confidential. The disputing party may provide a reply, if necessary, within **three days following the date of receipt of the response**.

[90] The Tribunal reserves jurisdiction to address any issues respecting implementation of its orders.

Signed by

Kathryn A. Raymond, Q.C.
Tribunal Member

Halifax, Nova Scotia
July 6, 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: July 6, 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