Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 38
Date: December 8, 2020
File No.: T1817/4712

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: Olga Luftig

Table of Contents

I. The Complainant's motion

[1] Mr. Geevarughese Johnson Itty, also known as Mr. Johnson Itty (Complainant) asks that the Tribunal admit two documents into evidence. The Canada Border Services Agency (Respondent or CBSA) opposes their admission. The Canadian Human Rights Commission (Commission) has not participated in the hearing nor has it made submissions on this motion.

[2] The two documents are:

i. a July 4, 2011 letter from the Respondent's Patti Bordeleau, then Director General, Labour Relations and Compensation Directorate, to a Commission Investigator (Bordeleau Letter), which contains a statement on document destruction related to the Complaint; it is designated as Document A5-25 in Vol. III of the parties' Confidential Joint Books of Documents, (Confidential Joint Book of Documents); and

ii. a February 28, 2012 letter, from Marc Thibodeau, then Director General of the same Directorate, to the Commission's John Chamberlain, Manager, Investigations (Thibodeau Letter), which also contains statements on document destruction and retention related to the Complaint, designated as Document A5-26 in the Confidential Joint Book of Documents.

[3] When this Ruling refers to both letters together, it calls them "the Two Letters".

[4] The Two Letters contain references to the retention, destruction and existence of certain Respondent documents.

II. Context of the Complaint

[5] The Complainant filed the Complaint with the Commission on January 20, 2010. The Commission referred the Complaint to the Tribunal on April 24, 2012.

[6] The Complainant alleges that during the CBSA's Port of Entry Recruitment Training (POERT) program in which he participated from November 24, 2008 to February 5, 2009, CBSA discriminated against him on the grounds of race and national or ethnic origin, contrary to section 7 of the *Canadian Human Rights Act*[1], (the *Act*). He also alleges, on the

[1] R.S.C., 1985, c H-6

same grounds, that the Respondent engaged in systemic discrimination contrary to section 10 of the *Act*[2].

[7] The following is a very brief outline of the context of the Complaint, only for the purposes of this Ruling.

[8] In 2007, the Complainant, a naturalized Canadian citizen born in India, was employed with the Canada Revenue Agency. He applied for the position of Border Services Officer (BSO) with the Respondent. He passed the initial screening and was invited into the nine-week POERT program as a trainee (also called recruit or candidate). There were 16 or 17 trainees in the Complainant's class.

[9] The Respondent evaluates the POERT trainees twice during the program. These evaluations are called Determination Points. Determination Point I (DP-I) occurs after the first set of classes; Determination Point II (DP-II) after the second set. Trainees must pass both DP-1 and DP-II in order to be placed in a pool of those eligible to be hired as BSOs. Trainees are evaluated by CBSA employees who have been trained as assessors (Assessors). The Assessors evaluate behavioural scenarios in which professional actors play the roles of travellers, and POERT trainees act as BSOs.

[10] There is no dispute that the Complainant passed DP-1.

[11] After taking the second set of classes, Assessors evaluated the Complainant in DP-II, which consisted of another set of written tests and behavioural scenarios. During the evaluations, the Assessors made written notes on each candidate's performance.

[12] The Complainant did not pass DP-II and was not placed in the pool of potential BSOs.

[2] The issue of whether the Complainant has brought the Complaint pursuant to subsection 7(a) or subsection 7(b) of the *Act* or both is in dispute. The parties will presumably make submissions on this issue in their closing arguments.

III. Relevant procedural background and hearing chronology to date

[13] First, it is important to mention that the Tribunal has made a series of confidentiality orders in this inquiry (Confidentiality Orders), governing certain documents and testimony about those documents, pursuant to section 52 of the *Act*[3].

[14] The hearing began on August 14, 2017. Both parties were represented by counsel. The Commission did not participate in the hearing. The Complainant closed his case on August 17, 2017. The Respondent closed its case on March 12, 2020.

[15] These delays were due to multiple events, such as the granting of a contested adjournment in August 2017, the necessity for the Tribunal to rule on a motion filed in December 2018 to disclose unredacted documents[4], the time granted to the Respondent to search for documents related to its destruction of certain records related to the Complaint, and the need for the Tribunal to address the Respondent's objection on the admission into evidence of a May 19, 2011 letter from the Commission Investigator to CBSA's Senior Labour Relations Advisor requesting documents and information (the Marked-up Commission Investigator's Letter).[5].

[16] Once this objection was addressed by a Ruling in a letter to the parties dated February 11, 2020 (February 2020 Letter Ruling), the hearing resumed on March 9, 2020 and the Respondent closed its case on March 12, 2020.

[17] During the hearing, the Complainant never sought the admission into evidence of either of the Two Letters, documents A5-25 and A5-26. The Respondent did not question any of its witnesses on them and did not put them into evidence.

[18] On March 12, 2020 the parties jointly requested an adjournment to prepare final arguments and submissions. On the same day, they also submitted that they would attempt

---

[3] The Confidentiality Orders are set out in *Itty v. Canada Border Services Agency*, 2013 CHRT 34; *Itty v. Canada Border Services Agency*, 2015 CHRT 2; and *Itty v. Canada Border Services Agency*, 2017 CHRT 26.

[4] See *Geevarughese Johnson Itty v. Canada Border Services Agency*, 2019 CHRT 31.

[5] See the February 2020 Letter Ruling admitting the Marked-up Commission Investigator's Letter into evidence.

to agree between themselves as to which documents were admitted into evidence. The Tribunal adjourned the hearing.

[19] The parties have since agreed that because in-person hearings are not available during the COVID-19 pandemic and because of other technology issues, and given the anticipated length of their submissions, they would make their closing arguments and submissions in writing. The Tribunal has concurred.

[20] In April 2020, the parties agreed between themselves on all the documents to be included as Exhibits, except regarding the admission into evidence of the Two Letters. The Respondent opposed their admission.

[21] On May 4, 2020, the Complainant made this motion to admit the Two Letters, based on his submissions set out below.

IV. Issue

[22] Should the Tribunal admit the Two Letters, or either of them?

V. Submissions of the Parties

A. The Complainant's Submissions

[23] The following is a summary of the Complainant's submissions in support of his motion.

[24] First, the Complainant explained his understanding of Rule 9(4) of the Tribunal's Rules of Procedure (03-05-04) (Rules), which provides that at the end of the hearing, the Tribunal will remove from the parties' books of documents any documents which were not referred to during the proceedings. This procedure is how the Tribunal explained its standard regarding the evidentiary record in what the Complainant refers to as a "direction" dated January 13, 2017, sent to the parties by the Tribunal Registry Office.

[25] The Complainant then referred to the Ruling in *First Nations Child and Family Caring Society of Canada, et al. v. Attorney General of Canada (for Minister of Indian Affairs and*

Northern Development Canada), 2014 CHRT 2 (*First Nations 2014*) where the Tribunal admitted documents which were not put to any witness, and where the Tribunal also relaxed the interpretation of Rule 9(4). In that Ruling, the Tribunal stated that it could and would admit documents either when introduced through a witness or when counsel referred to it in oral argument (*First Nations 2014, supra,* at para. 75).

[26] The Complainant states that subparagraph 50(3) of the *Act* gives the Tribunal, as master of its own procedure, the authority to admit any evidence that a member or panel sees fit, regardless of whether that evidence or information would be admissible in a court of law. He contends that that this authority and power extends to the admission of a document without the requirement of calling a witness to testify about it, as the Tribunal wrote in *Clegg v. Air Canada,* 2019 CHRT 4 (*Clegg*), at para. 93.

[27] In the context of the Two Letters, the Complainant emphasizes the fact that the Respondent did not disclose them to him until October 18, 2019 pursuant to the 2019 Disclosure Order.

[28] Further, the Complainant explained that it was only when he received the Marked-up Commission Investigator's Letter, a document that is discussed more in depth later in this ruling, that he realized the Two Letters were relevant to the issue of the destruction of records by the Respondent. The Marked-up Commission Investigator's Letter "shed light" on the destruction of some records by the Respondent and mentioned one of the Two Letters. However, the Respondent only disclosed the Marked-up Commission Investigator's Letter on December 4, 2019, which was after its witness Annie Roy testified on November 25, 2019 about the destruction of records. Thus, the Complainant only realized the significance of the Two Letters when he read the Marked-up Commission Investigator's Letter, after Ms. Roy testified.

[29] According to the Complainant, it would be fair for the Tribunal to admit the Two Letters into evidence because:

a) there is no issue as to their authenticity;

b) the timing of the Respondent's disclosure of the Two Letters was long after the Complainant closed his case, and it should not be the Complainant who is prejudiced for not putting the documents to a witness earlier in the hearing;

c) both parties referred to the Bordeleau Letter in their December 2019 submissions regarding the admission into evidence of the Marked-up Commission Investigator's Letter;

d) the Respondent had the opportunity to introduce the Two Letters into evidence during Ms. Roy's testimony and did not do so.

e) It is not unfair to the Respondent to admit the Two Letters because the Respondent had the opportunity to call its own witnesses to "clarify or explain any adverse findings or inferences potentially arising"… from the Two Letters.

[30] Finally, the Complainant argues that the Two Letters are "…directly relevant" to and "…have considerable probative value regarding the spoliation issue".

B. The Respondent's Submissions

[31] The following is a summary of what the Tribunal finds are the Respondent's relevant submissions objecting to the admission of the Two Letters.

[32] Generally, the Respondent submits that the admission of the Two Letters would be contrary to procedural fairness and fundamental justice and would unduly prejudice the Respondent. The relevance of the Two Letters is outweighed by the prejudice their admission would cause the Respondent.

[33] The Complainant seeks the admission of the Two Letters solely for the purpose of asking the Tribunal to draw an adverse inference on account of the destruction of certain POERT records.

[34] Further, the Respondent believes that the Tribunal's earlier Rulings in this inquiry suggest that the Two Letters are not part of the record. The Respondent argues that it was entitled to rely on those Rulings when it decided how to present its case. According to the Respondent, if the Tribunal admitted the Two Letters at this stage, it would amount to changing the scope of the Complainant's allegations and this would be fundamentally unfair and prejudicial to them.

[35] The Respondent also relies on Rule 9(4), which provides that a document in a book of documents does not become evidence until it is introduced at the hearing and the Panel accepts it (Respondent's underlining). The Respondent stresses that the Two Letters were never introduced at the hearing.

[36] Therefore, according to the Respondent, the fact that the parties' counsel merely referred to Document A5-25 in their written submissions in a previous motion is not sufficient to admit it into evidence. The Respondent submits that in the Tribunal's February 2020 Letter Ruling, the Member stated that she had not taken Document A5-25 or the submissions made in connection to it into account in arriving at the Ruling, and specified that it was not in evidence.

[37] The Respondent made the following comments on the Complainant's reading and interpretation of *First Nations 2014, supra*:

a) The Complainant described the decision in First Nations 2014, supra, out of context. In that inquiry, in mid-hearing and before calling its evidence, the respondent advised that it had found approximately 50,000 documents which were potentially relevant and which the respondent needed to disclose. This is totally different from the current inquiry, since the evidentiary portion of the hearing is over.

b) The Caring Society made a motion asking that all the respondent's newly-found documents be admitted into evidence for the truth of their contents without the need for any witness to identify or authenticate them, and that the Tribunal declare that Tribunal Rule 9(4) did not apply to the proceedings (*First Nations 2014, supra*, at para 58).

c) The Tribunal refused to admit the documents *en masse* [as a group], and decided it would continue to deal with the admission of documents on a case-by-case basis. The Tribunal declined to dispense with the requirements of Tribunal Rule 9(4), but did relax those requirements by expanding the modes by which a document would be deemed "introduced" into evidence.

d) However, at the same time, the Tribunal recognized that those relaxed requirements could lead to procedural unfairness to the other parties (*First Nations 2014*, *supra,* at para

76). Therefore, the Tribunal needed to "ensure the observance of natural justice principles" (*ibid*). The Tribunal could order "appropriate curative measures" (*ibid*, at para 77) for any prejudice so created. Those curative measures could include "…calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness…" (*ibid*).

[38] The Respondent further submitted that the Complainant quoted *Clegg, supra,* out of context when he submitted that *Clegg* stands for the proposition that no witness is required in order for the Tribunal to admit a document into evidence. The Tribunal in *Clegg* acknowledged that the liberal interpretation of the Tribunal's evidentiary scheme has permitted it to dispense with the calling of a witness for the purposes of authenticating a document, and cited *First Nations 2014* (*Clegg, supra*, at para 93). Nevertheless, one of the reasons the *Clegg* Tribunal went on to exclude the document at issue was that admitting the document without having the author testify about it would be unfair to the respondent in that inquiry (*Clegg, supra*, at para 95).

[39] In the within situation, the Respondent does not dispute the authenticity of the Two Letters and therefore explains that the statement in *Clegg* that a witness is not always required to authenticate a document is not relevant here.

[40] The Respondent also maintains that the Complainant would have been able to put the Two Letters to CBSA's witness Ms. Roy if he had wanted to do so at the time. Indeed, the Respondent disclosed the Two Letters to the Complainant on October 18, 2019. The Respondent provided the Will-say statement of Ms. Roy on November 16, 2019 and she testified on November 25, 2019.

[41] Ms. Roy testified about the Respondent's document retention and destruction policy and about the Respondent's actions in complying with the Tribunal's 2019 Disclosure Order. The topic of her testimony was not a surprise to the Complainant as the Respondent had given her Will-say statement to the Complainant, which specified that she would be testifying about the retention and disposition of the records of the Complainant's classmates. Nevertheless, the Complainant did not ask Ms. Roy any questions in cross-examination about the Two Letters even though he had the opportunity to do so. That was the

Complainant's counsel's strategic litigation decision, and he must accept it at this stage of the inquiry.

[42] The Respondent adds that by failing to put the Two Letters to her in cross-examination, the Complainant deprived Ms. Roy of the opportunity to address them. The Complainant's failure to put the Two Letters to her in cross-examination also meant that in re-direct examination, the Respondent did not have the opportunity to ask Ms. Roy to clarify, expand on or explain her answers about the Two Letters.

[43] The Respondent also submitted that during her testimony, Ms. Roy "…suggest[ed] that an adverse inference" because of the destruction of certain documents "… is not warranted." She was a credible witness, and nothing could lead the Tribunal to discredit her. The Respondent argues that in order to draw an adverse inference from the destruction of certain documents, the Tribunal would have to disbelieve Ms. Roy. The Respondent adds that it would be "…fundamentally unfair to discredit" Ms. Roy's testimony when she did not have the opportunity to address the Two Letters on which the Complainant seeks to base his argument.

C. The Complainant's Reply submissions

[44] A summary of the Complainant's Reply submissions is set out below.

[45] The Complainant's intent is to ask the Tribunal to determine whether spoliation has occurred and to argue that the Tribunal should draw an adverse inference from the destruction of the records at issue. Further, subject to the Tribunal admitting them, the Complainant intends to include the Two Letters in his final arguments and submissions thereon.

[46] The Complainant further submits that the Tribunal is the entity which is authorized to make findings on the Respondent's conduct and that, as such, Ms. Roy's opinions or conclusions about that conduct are not determinative.

[47] The Complainant also submits that neither party has filed its final arguments and submissions, so if the Two Letters are admitted into evidence, each party will have the opportunity to address the relevance and weight the Tribunal ought to give the Two Letters.

[48] The Complainant contends that the Respondent's destruction of documents has long been an issue in this Complaint, as the Tribunal noted in its 2019 Disclosure Order. Therefore, the Complainant submits, admitting the Two Letters which contain references to that document destruction would not enlarge the scope of the Complaint. The Two Letters are relevant to the long-standing issue of the Respondent's destruction of some of the records of the Complainant's classmates.

[49] The Complainant also states that the Tribunal's February 2020 Letter Ruling did not decide the admissibility of either of the Two Letters.

[50] Regarding the alleged undue prejudice to the Respondent if the Two Letters were admitted because Ms. Roy did not have the opportunity to address them, the Complainant argues that Ms. Roy was neither the author nor the recipient of the Two Letters, and that it cannot be presumed that she could have testified about them. Further, the Complainant states that Ms. Roy did not testify to any involvement in the 2011-2012 destruction of the specified records of the Complainant's classmates. Therefore, because Ms. Roy was not directly involved in the destruction of these documents, the Complainant believes the admission of the Two Letters does not require a finding that Ms. Roy is not credible in order for the Tribunal to decide whether to draw an adverse inference from the evidence or to decide the evidentiary issue of spoliation.

VI. Analysis

A. The Complainant's submission that the Two Letters should "remain in the record"

[51] In his motion materials, the Complainant's counsel submitted in several places that the Two Letters should "remain" in the record (e.g., at page 3) and that they be "retained in the record" (e.g., at page 7). I don't know whether this is a misunderstanding, an error or a misnomer. Whatever it is, the Tribunal notes that the Complainant has motioned to admit

the Two Letters precisely because they are *not* part of the record. In fact, the Tribunal's February 11, 2020 Letter Ruling specifically pointed out to the parties that notwithstanding that they both referred to the Bordeleau Letter as an "Exhibit" in their December, 2019 submissions on whether the Tribunal should admit the Marked-Up Commission Investigator's Letter, the Bordeleau Letter was not in evidence as at that date. Therefore, it was not part of the record and cannot "remain" a part thereof unless and until the Tribunal rules otherwise.

B. Preliminary Remarks on Common Law Admissibility

[52] In both his initial submissions and in his reply in this motion, the Complainant has submitted that the Tribunal ought to admit the Two Letters because they fall within two exceptions to the common law rule against hearsay evidence. However, admissibility rules which stem from the common law generally are not applied strictly in the Tribunal's proceedings.

[53] I find that these are the relevant provisions of the *Act*:

Subparagraph 50(2) of the *Act* states:

> (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determine the matter."

Subparagraph 50(3)(c) of the *Act* states:

> (3) In relation to a hearing of the inquiry, the member or panel may
>
> > (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;"

Subparagraph 50(4) of the *Act* states:

> (4) The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privileged under the law of evidence.

Subparagraph 50(5) of the *Act* states:

> (5) A conciliator appointed to settle the complaint is not a competent or compellable witness at the hearing.

[54] Therefore, I find that Subparagraphs 50(2), 50(3)(c), 50(4) and 50(5) of the *Act* work together to authorize the Tribunal to admit evidence unconstrained by the rules of admissibility which govern the admission of evidence in courts of law, subject to the restrictions in subparagraphs 50(4) and 50(5).

[55] In *First Nations 2014, supra*, the Tribunal pointed out that the discretion provided to it by subparagraph 50(3)(c) of the *Act* "…allows the Tribunal to receive and accept hearsay evidence" (at para 68).

[56] That wide latitude is subject only to the limitations that such hearsay evidence:

a) would be inadmissible in a court of law because of any privilege under the law of evidence;

b) is not proposed to be given by a conciliator appointed to settle a complaint; and

c) does not interfere with the Tribunal's "overarching" duty of procedural fairness as set out in subparagraphs 48.9(1) and 50(1) of the *Act* (*ibid,* at para 67).

[57] Therefore, in this Ruling, the Tribunal does not address the Complainant's arguments with respect to hearsay in relation to the admissibility of the Two Letters.

[58] Although the Complainant's hearsay arguments are not relevant to the admissibility of the Two Letters, provided that the Two Letters are admitted into evidence, the Complainant's hearsay arguments may be relevant in relation to the weight the Tribunal ought to give the Two Letters.

C. The determinations the Tribunal needs to make in this Ruling

[59] I find that in the circumstances and at this stage of the hearing, when both parties have ostensibly closed their cases, the following are the questions the Tribunal needs to answer to rule on the Complainant's motion:

(i) Were the Two Letters already introduced into evidence at the hearing?

If not, I will have to answer the following questions to decide whether to admit them into evidence:

(ii) Are the Two Letters relevant to an issue in the Complaint?

(iii) If the answer to (ii) is yes, will the admission of the Two Letters cause undue prejudice to any party?

(iv) If the answer to (iii) is also yes, can the prejudice be cured?

[60] In ruling on this issue, I will also rely on Subparagraph 50(1) of the *Act*, which states that "…the member or panel conducting the inquiry…shall give all parties… a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations." In other words, the Tribunal must give all the parties a full and ample opportunity to present their case.

(i) Were the Two Letters already introduced into evidence at the hearing?

[61] As set out above, the Complaint argues that the Two Letters are actually already part of the evidence. Rule 9(4) of the Rules states that "except with the consent of the parties, a document in a book of documents does not become evidence until it is introduced at the hearing and accepted by the Panel."

[62] In 2019, I was required to rule on the admission of the Marked-up Commission Investigator's Letter. In their written submissions, both parties' counsel referred to the Bordeleau Letter as an "Exhibit". The Complainant submits that this reference to the Bordeleau Letter is sufficient for the Tribunal to admit it into evidence.

[63] In support of this submission, the Complainant submits that in accordance with Tribunal's Rule 9(4), the Tribunal's practice at the end of a hearing is to remove from the Books of Documents "…any documents not referred to during the proceedings."

[64] The Complainant states that the Tribunal communicated that "standard regarding the evidentiary record" in the Tribunal Registry Office's January 13, 2017 letter, which he called a "direction" (Registry Office Letter) The Registry Office Letter discussed the logistics at a hearing around the filing of exhibits and authorities, including the number of copies of exhibits, the binding of exhibits and authorities, the numbering of exhibits and so on. I think

it is reasonable to find that in making this argument, the Complainant relies on the following part of the Registry Office Letter: “At the conclusion of the hearing, or when asked, the Registry Officer will bring to the parties’ and the Tribunal Member’s attention any documents that have not been referred to during the hearing or that were marked for identification but not entered in evidence…”.

[65] With respect, I find incorrect the Complainant’s interpretation of how Tribunal Rule 9(4) functions at the end of most Tribunal hearings regarding which documents are or are not in evidence as exhibits.

[66] After the above-quoted portion, the Registry Office Letter goes on to state, in effect, that the Tribunal Member hearing the case, in consultation with the parties, determines the course of action the Tribunal will take regarding any documents which were not referred to during the hearing, and it is the Member who will “determine” whether any such document forms part of the evidentiary record.

[67] In other words, just because a document was not referred to in the hearing, or conversely, just because it was, does not mean that it is respectively not admitted or admitted into evidence. It is up to the Member to decide whether it becomes part of the evidentiary record. It is not automatic that reference to the document during the hearing makes it part of the evidentiary record, nor is it automatic that not referencing the document excludes it from the evidentiary record. That is up to the Member to decide.

[68] In furtherance of the same submission that it is whether a document is “referred to” in the hearing which decides whether it is part of the evidentiary record, the Complainant submitted that in *First Nations, 2014, supra,* the Tribunal considered the meaning and scope of the phrase “referred to”.

[69] My reading of *First Nations, 2014* is that it was not “referred to” which the Tribunal considered, but rather the word “introduced”, as used in Tribunal Rule 9(4) (*First Nations, 2014, supra*, at paras 58a, b, c and 74). It was for that word that the Tribunal fashioned a more relaxed interpretation to expand the meaning of when a document had been “introduced”, in the circumstances of that case, where there were potentially thousands of documents at issue. The Tribunal relaxed its interpretation of Rule 9(4) but declined to

completely dispense with its application to the documents in question and decided it would continue to deal with the admission of documents on a case-by-case basis.

[70] I find that in the same way as counsels' oral submissions, comments and arguments in and of themselves are not *evidence,* counsels' written submissions and arguments are also not evidence that is "referred to" [my italics].

[71] I therefore conclude that simply because a document was mentioned in a counsel's written submissions, as the Bordeleau Letter was, does not equate to that document being introduced into evidence at the hearing in accordance with Tribunal Rule 9(4). Nowhere did the Registry Office Letter state that the mere fact that a document has been "referred to" in the hearing mean that it is part of the evidentiary record. The Registry Office Letter is not inconsistent with the requirement that Tribunal Rule 9(4) governs; the Registry Office Letter acknowledges that it is the Member's decision as to whether a document which was not "referred to" at the hearing is part of the evidentiary record. Nothing in the Registry Office Letter abrogates from the requirements of Tribunal Rule 9(4).

[72] I thus conclude that the Two Letters had never been introduced into evidence at the hearing.

(ii) Are the Two Letters relevant to an issue in the Complaint?

[73] Now that I have determined that the Two Letters were not admitted into evidence at the hearing, I must determine if they should be admitted. The first question to answer is whether the Two Letters are relevant to an issue in the inquiry. The question of whether the Two Letters or either of them have "considerable probative value regarding the spoliation issue" is not a finding that the Tribunal should make in this Ruling, but rather should be determined in the final Decision on the merits. Considering that the Tribunal must take all relevant evidence and final arguments into account in deciding the probative value of the Two Letters, I am reserving my decision on the spoliation issue to the final Decision.

[74] It is sufficient to admit the Two Letters if the Tribunal concludes that they are or are likely to be relevant to an issue in the inquiry, so long as their admission does not unduly prejudice the Respondent, "…according to the rules of procedural fairness and fundamental

justice developed in administrative law…" (*Dhanjal v. Air Canada,* 1996 CanLII 2385 (CHRT) (*Dhanjal)*, at page 5, quoted in *Clegg, supra*, at para 71).

[75] In the 2019 Disclosure Order, I found that the Respondent's disposal of certain records of the Complainant's POERT classmates in DP-II had been and continued to be an issue in the inquiry (*2019 Disclosure Order, supra*, at para 70).

[76] Since that finding was made, the Complainant has confirmed that in his final arguments, he will ask the Tribunal to draw an adverse inference from the destruction of those documents, and in addition, has verbally notified the Respondent at the hearing in November, 2019 and in writing, and confirmed in this motion, that he will also ask the Tribunal to make findings around "spoliation" because of that destruction. He seeks the Two Letters' admission into evidence as further support for these requested findings.

[77] The Respondent does not dispute that those records were destroyed. It called its witness, Ms. Annie Roy, to testify about the Respondent's document retention and destruction policies and about its document search pursuant to the Tribunal's 2019 Disclosure Order.

[78] Therefore, I find that the destruction of the documents continues to be an evidentiary issue in this inquiry.

[79] There is no dispute that the Two Letters contain statements about the destruction of documents related to the Complainant's attendance at POERT.

[80] I therefore conclude that the Two Letters are relevant to the evidentiary issue in this Complaint arising from the destruction of certain documents about the Complainant's POERT classmates in DP-II.

(iii) Will the admission of the Two Letters prejudice any party?

[81] The Respondent submitted that admitting the Two Letters into evidence would prejudice the Respondent by changing the scope of the Complainant's allegations.

[82] I find that the evidentiary issues which the Complainant will raise around the destruction of the documents do not expand the grounds of discrimination alleged in this Complaint, nor are they something new to the Respondent.

[83] Indeed, I find that the Respondent has known for much of the inquiry that the document destruction would be an issue. The Respondent has also been aware for a long time of the Complainant's intention to ask the Tribunal to draw an adverse inference from that destruction, and since November, 2019, has known of the Complainant's intention to ask the Tribunal to make findings regarding "spoliation". Therefore, in terms of knowing generally that the destruction was an issue, there is no prejudice to the Respondent.

[84] I therefore conclude that the admission of the Two Letters would not change the scope of the Complaint nor prejudice the Respondent on that ground.

[85] There is no dispute that the Respondent disclosed the Two Letters to the Complainant on October 18, 2019, pursuant to the 2019 Disclosure Order. There is also no dispute that on November 16, 2019, the Respondent provided the Complainant with the Will-say for Ms. Roy's testimony. Ms. Roy testified on November 25, 2019.

[86] I find that the disclosure of the Two Letters on October 18, 2019 combined with Ms. Roy's Will-say on November 16, 2019 gave the Complainant enough time to prepare to question Ms. Roy about the Two Letters in cross-examination on November 25, 2019.

[87] Annie Roy testified that she was the lead person in the Respondent's search for documents pursuant to the 2019 Disclosure Order. I find that the Two Letters were a result of that search and were placed in one of the Joint Books of Documents which both parties had at the hearing. Ms. Roy's Will-Say anticipated that she would testify about the "… retention and disposition of the POERT [documents at issue] of the Complainant's classmates".

[88] Ms. Roy testified about the Respondent's document destruction and retention policies and her search for documents pursuant to the Disclosure Order, which directed the Respondent to search for documents about the document destruction at issue. The Two Letters refer to document destruction and retention. They were relevant to that issue. The

Complainant had the opportunity to put the Two Letters to Ms. Roy in cross-examination, but did not do so. The Respondent proffered no other witness to specifically testify about the topic of document retention and destruction.

[89] In this context, I do not find persuasive the Complainant's submission suggesting that it was only when the Respondent produced the Marked-up Commission Investigator's Letter, which was *after* [my italics] Ms. Roy's testimony, that the Complainant realized the significance of the Two Letters.

[90] I find that at the hearing in November 2019, in the context of the Two Letters, the Respondent was entitled to proceed in the re-direct examination of Ms. Roy as it did, based on the fact that the Two Letters were not in evidence. I also find that notwithstanding that the Two Letters were the Respondent's documents, the Respondent had no obligation to ask Ms. Roy questions about them in direct examination and no obligation to enter them into evidence.

[91] At no point did the Complainant try to deal with the Two Letters, even though he had the opportunity to do so. When the hearing resumed in March, 2020, I find that the Complainant could have sought to deal then with the Two Letters and their admission into evidence, particularly in light of the February 11, 2020 Letter Ruling's statement that the Bordeleau Letter was not in evidence. The Complainant did not do so.

[92] In *First Nations, 2014, supra*, The Tribunal recognized that prejudice could arise if a party sought to rely on "…evidence during its final argument that was not introduced according to…" the relaxed application of the Rule, and because of that, the Tribunal might take "…appropriate curative measures…" in the interests of safeguarding procedural fairness (*First Nations, 2014, supra*, at para 58.d). Those curative measures included permitting the recall or calling of witnesses, bringing additional documentary evidence and adjourning the hearing, thereby giving the party prejudiced the opportunity to respond (*ibid).*

[93] The Respondent cites *Browne v. Dunn*, 1893 CanLII 65 (*Browne v. Dunn*) in support of its submission that Ms. Roy gave a reasonable explanation of why the documents were destroyed, and further, that in order to make the findings the Complainant seeks, the Tribunal would have to find untruthful Ms. Roy's testimony that she saw nothing in the

Respondent's conduct during its 2019 document search pursuant to the 2019 Disclosure Order intentionally seeking to harm the Complainant's case. The Respondent submits that the Complainant did not raise the Two Letters to Ms. Roy in cross-examination, which he was bound to do by the principle found in *Browne v. Dunn*, *supra*. The Respondent submits that if the Complainant had raised the Two Letters with her, this would have given Ms. Roy the opportunity to explain or clarify her testimony, and it would have given the Respondent the opportunity to clarify or explain her testimony in re-direct examination.

[94] In his reply, the Complainant submits that it is not necessarily correct that the Tribunal must find Ms. Roy's credibility lacking in order to make an adverse inference from her testimony about the document destruction. Therefore, the Complainant contends that the principle in *Browne v. Dunn, supra* does not apply.

[95] I find that what is usually referred to as the rule in *Browne v. Dunn* is a principle of trial fairness and fairness to witnesses. To summarize, *Browne v. Dunn* stands for the concept that if a party intends to impeach the credibility of a witness' testimony on a point, then the party must put the proposed impeaching testimony to that witness, to give the witness a chance to explain or clarify his or her testimony.

[96] For the purposes of this Ruling, I do not think it appropriate or necessary to enter into an analysis of Ms. Roy's testimony and its credibility. The question in this part of the analysis is whether any party would be prejudiced if the Tribunal admitted the Two Letters. I find that the *Act* itself contains provisions that the Tribunal ought to apply natural justice (Section 48.9(1), and procedural fairness principles in giving the parties a full and ample opportunity to present their evidence and make representations (Subparagraph 50(1) of the *Act)*. The Tribunal has decided cases which apply those provisions, such as in *First Nations, 2014, supra,* and I find that they provide the guidance and precedent to decide the issue of whether admitting the Two Letters into evidence will prejudice any party.

[97] I note that parties are entitled to know the case they have to meet (*First Nations 2014*, *supra*, at para 73). This is a fundamental principle of natural justice and of procedural fairness.

[98] The Complainant wishes to use the Two Letters during his final argument and submissions to support his requests that the Tribunal draw an adverse inference from the destruction of certain of the Respondent records, and that the Tribunal make findings with respect to “spoliation”. Ms. Roy testified about the Respondent’s policy on retention and destruction of documents and the search for documents pursuant to the 2019 Disclosure Order. The Two Letters were produced as a result of that search, and the Complainant had them available in a Book of Documents. The Complainant did not ask Ms. Roy anything about the Two Letters during her cross-examination and did not seek to have the Two Letters admitted into evidence. Therefore, the Respondent did not know that the Complainant would later seek to have them admitted into evidence in order to rely on them in final argument, and conducted itself accordingly during its re-direct examination of Ms. Roy – specifically, Respondent counsel did not ask her any clarifying or explanatory questions about the Two Letters because he and the Respondent assumed they were not in evidence. Neither Ms. Roy nor any other Respondent witness had an opportunity to address the contents of the Two Letters.

[99] In other words, the Respondent did not know the case it had to meet with respect to the Two Letters. I find this contrary to natural justice and procedural fairness. I therefore conclude that the Respondent would be unfairly prejudiced if the Two Letters were introduced into evidence at this stage and if submissions were made thereon only at the final argument stage.

[100] The Complainant’s reply submits that Ms. Roy was neither an author nor recipient of either of the Two Letters, and therefore, it cannot be assumed that she knew anything about them. Respectfully, I find that it also cannot be assumed that she did not know anything about them. The reason it cannot be assumed is because Ms. Roy did not have the opportunity to address them in cross-examination. Flowing from that circumstance, the Respondent did not have the opportunity to ask Ms. Roy any questions about them in re-direct examination. There is therefore no evidence of what she did or did not know about the Two Letters.

[101] For the above reasons, I conclude that the Respondent would be unduly prejudiced by the admission of the Two Letters into evidence.

(iv) Can the prejudice be cured?

[102] I have concluded that the Two Letters are relevant to these evidentiary issues and that the Tribunal should admit them into evidence. However, I have also concluded that their admission into evidence would be prejudicial to the Respondent given that the Complainant intends to utilize them in his closing argument and submissions, but the Respondent has not had an opportunity to respond to their contents by having a witness testify about them.

[103] There are two documents at issue in the within motion. That number is obviously nowhere near the thousands of documents which were at issue in *First Nations, 2014, supra.*

[104] In *First Nations, 2014,* the issue was the complainant's request for the admission into evidence of potentially up to 100,000 documents mid-hearing for the truth of their contents, newly found by the respondent. This admission request was not in compliance with Tribunal Rule 9(4). This was proposed after some of the complainants' witnesses, including Dr. C. Blackstock, had completed their testimony. Dr. Blackstock had not had any of those documents available to her when she testified months before; the complainant intended to recall her to testify about at least some of the newly disclosed documents. In addition to objecting to the proposed manner of the admission of those documents, the respondent asked the Tribunal to "…define the parameters of witness recall" (*First Nations 2014, supra*, at para 58).

[105] In doing so, the Tribunal first determined what, in the circumstances of the case, was the purpose of recalling Dr. Blackstock. The Tribunal decided that it was "…to place the witness in the same position that she would have been in, had she benefitted from the entirety of the Respondent's disclosure" (*First Nations 2014, supra*, at paras 58e. and 79). The Tribunal stated that this was to remedy "…any prejudice caused to the Complainants … as a result of the Respondent's late disclosure" (*ibid,* at para 79). The Tribunal then stated that in addition to speaking to those documents, "Dr. Blackstock, and any other witnesses the Complainants wish to recall…" were entitled to "…speak to …any issues arising" as a result of their testimony about the late-disclosed documents (*ibid*).

[106] In this motion, although the parties have ostensibly closed the evidentiary portion of their cases, they have not begun their final arguments and submissions. I find that the

evidentiary part of the hearing can still continue in these circumstances. I conclude that the prejudice to the Respondent can be cured by permitting the Respondent to either recall its witness Annie Roy or by permitting the Respondent to call another witness to testify about the Two Letters and any issues arising from them.

[107] The purpose of recalling Ms. Roy or calling another Respondent witness is to permit the Respondent to have the witness address the contents of the now admitted Two Letters, in order to cure the prejudice to the Respondent which would result if the Two Letters were admitted into evidence without giving the Respondent an opportunity to address them through a witness.

[108] If the Respondent chooses to recall Ms. Roy or call a different witness to testify about the Two Letters, while I do not wish to be unduly restrictive or proscriptive about the parameters of that testimony, I must also take into account that this hearing has been ongoing over a very long period, that the parties had ostensibly closed the evidentiary portion of the hearing, and that we are talking about a small number of documents. There must therefore be some parameters around the testimony of the proposed witness in the interest of bringing this hearing to a close, while at the same time ensuring that the parties have the full and ample opportunity to present their cases.

[109] Therefore, the direct examination, cross-examination and any re-direct examination of the witness recalled or called should be related to the issue of document retention and destruction of documents related to Mr. Itty's POERT classmates, and should reference only the Two Letters and any other already admitted documents that deal with that issue.

[110] I conclude that the Respondent will have the opportunity to call one witness of its choosing to address the Two Letters and any issues arising therefrom.

VII. Orders

[111] The Tribunal orders that Documents A5-25 and A5-26 in Joint Book of Documents Volume III marked "CONFIDENTIAL" are admitted into evidence as respectively, Exhibit A5-25 and Exhibit A5-26.

[112] Within one month of the date of this Ruling, the Respondent shall advise the Tribunal and the other parties in writing:

a) whether it wishes to recall Ms. Annie Roy or tender another witness to testify about the Two Letters and any matter directly arising from such testimony;

b) if the Respondent provides the Tribunal and the parties with such written notice for a witness *other than Ms. Roy*, then it shall attach thereto a will-say statement for the witness named therein, in accordance with Tribunal Rule 6(1)f.

[113] Forthwith after the Tribunal and the parties are in receipt of the Respondent's written notice described above, the parties and the Tribunal shall make such arrangements as are necessary in the circumstances for an electronic, remote hearing for the testimony of the Respondent's witness, including if available, Communication Access Realtime Translation (CART) services.

[114] The Respondent shall have the opportunity to directly examine the witness; the Complainant shall have the opportunity to cross-examine the witness, and the Respondent shall have the opportunity for re-direct examination of the witness, in accordance with the parameters described in paragraphs 106 through 110 of this Ruling.

[115] In accordance with Tribunal Rule 3(2)(d), the Tribunal hereby reserves jurisdiction to make such additional orders as are necessary in respect of this motion.

Signed by

Olga Luftig
Tribunal Member(s)

Ottawa, Ontario
December 8, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1817/4712

Style of Cause: Geevarughese Johnson Itty v. Canada Border Services Agency

Ruling of the Tribunal Dated: December 8, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Champ & Associates - Paul Champ and Bijon Roy, for the Complainant

David Aaron, for the Respondent