Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2015 CHRT 13
**Date:** May 29, 2015
**File No.:** T1852/8212

**Between:**

**Brian William Carter**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Attorney General of Canada**

**Respondent**

# Ruling

**Member:** Olga Luftig

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## I. Background

[1] On June 3, 2011, the Complainant filed a complaint ("Complaint") with the Canadian Human Rights Commission ("Commission") against the then Department of Fisheries and Oceans (now Fisheries and Oceans Canada) ("DFO"). The Complainant alleges that DFO discriminated against him by failing and/or refusing to accommodate his disability, treating him in an adverse differential manner by engaging in a discriminatory policy or practice, thereby denying him an employment opportunity, contrary to sections 7 and 10 of the *Canadian Human Rights Act,* R.S.C., 1985, c. H-6, as amended (*"Act" or "Human Rights Act"*). The Complaint was amended so that the Respondent became "the Attorney General of Canada, representing DFO and the Public Service Commission of Canada" ("PSC") (collectively, "Respondent").

## II. The Complainant's Motion

[2] The Complainant has brought a Motion seeking further documentary disclosure from the Respondent. This Ruling groups the requested documents into like categories and analyzes and decides on each category.

## III. Portions of the Complaint relevant to this Motion

[3] The allegations in the Complaint which are relevant to this Motion, are set out below:

i. The Complainant has a medical condition which he states is a disability under the *Act.*

ii. In June 2008, he submitted an application pursuant to Selection Process 08-DFO-IA-NCR-929466 ("the ENG-05 Job Competition) for a not-yet-established ENG-05 position with DFO ("ENG-05 position), without self-identifying as disabled and without requesting accommodation.

iii. In April 2009, after completing the assessment process, which included an interview, DFO placed him in the pool of candidates qualified for the position. The pool had an effective date of April 20, 2009 to October 20, 2010.

iv. The Complainant was told that his interview was just “OK”, and that he would not be considered for the position once it was established.

v. The Complainant felt his disability had hindered him in the interview and decided to self-identify as a person with a disability requiring accommodation. He did so in August 2009. In September 2009, he submitted an “Accommodation Request” form to DFO.

vi. DFO offered to re-do the assessment phase of the ENG-05 Job Competition after it received information on specific appropriate accommodation modes from PSC. DFO asked the Complainant to attend at the PSC Psychology Centre (“PPC”) to be assessed for appropriate modes of accommodation.

vii. The Complainant disagreed and did not attend at PPC. He proposed to DFO that the appropriate accommodation was to appoint him to the ENG-05 position because:

    a. he had successfully already been placed in the pool of qualified candidates based on objective criteria and was not assured of qualifying again;

    b. the “right fit” standard and practice the PSC developed and DFO used and uses in its job competition process to assess candidates is inherently discriminatory against the Complainant and others with his disability;

    c. the employer’s duty to accommodate applies throughout the selection process, up to and including appointment; and

    d. his proposed mode of accommodation would not cause DFO undue hardship and would close a representational gap in the Respondent’s employment equity (“EE”) plan.

viii. DFO declined the Complainant’s proposal.

I will now address the various categories of requested documents, having regard to the above allegations.

## IV. The Disclosure Process

### A. Statutory Law and Tribunal Rules of Procedure

[4] Subsection 50(1) of the *Act* states:

> After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall

> inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

[5] Rule 6 of the Tribunal Rules of Procedure (03-05-05) ("Rules"), requires parties to a complaint to provide a Statement of Particulars ("SOP"), which includes documentary disclosure, names of witnesses,a detailed summary of each witness' proposed testimony ("will-say") and procedures regarding expert reports.

[6] For the purposes of this Motion, Rule 6(1)(d) is particularly relevant. It states:

> Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> (d) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

[7] Rule 6(5) essentially provides that the disclosure obligation is ongoing.

## B. Standard for disclosure of documents

[8] The Respondent's position is as set out below:

- The document must be "arguably relevant" to an issue in the Complaint.
- To be arguably relevant, there must be a nexus or rational connection between the document sought to be disclosed and a fact or form of relief or issue sought or identified by other parties (*Seeley v. Canadian National Railway*, 2013 CHRT 18 (Can LII) ("*Seeley*"), at para. 6.
- Requests for disclosure "…must not be speculative or amount to a "fishing expedition" (*Johanne Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (Can LII) ("*Guay*"), at para. 43.
- The description of the documents should not be too broad or general and should be identified with reasonable particularity (ibid).

[9] The Complainant's position is as set out below:

- In addition to the arguable relevance standard, there should be a higher level of disclosure when there is a higher requirement for procedural fairness. The

Complainant relies on both the Supreme Court of Canada case of *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R.817 (SCC) ("*Baker*") and on the article titled "Disclosure Issues in Administrative Proceedings", by law firm Pinto Wray James, LLP ("Pinto article").

- "The five non-exhaustive Baker factors", as quoted on pages 4 and 5 of the Pinto article are as set out below:

    i. "the closer the administrative proceeding is to judicial decision-making, the more likely…" the required "procedural protections" are closer to those required at a civil trial;

    ii. the nature of the statutory scheme and the enabling statute's terms – if there is no appeal procedure or the decision determines the issue;

    iii. the "greater the impact the decision has, the more stringent are the procedural protections;

    iv. the "doctrine of legitimate expectations is part of the doctrine of procedural fairness; i.e. the tribunal should follow the procedure that an individual legitimately expects; and

    v. the procedures the agency itself chooses, "…particularly where the statute" authorizes the decision-maker the right to "…choose its own procedures".

[10] The Complainant submits that *Baker* factors 5, 4, 3 and 1 apply to the Complaint, as it is a "discriminatory course of conduct type of case" (as discussed in the Pinto article).

[11] The Pinto article at page 5 posits that:

> [I]n practice, an analysis of the disclosure obligation in an administrative proceeding should begin with the fifth *Baker* factor. . . . However, *Baker* reminds us that the tribunal's own rules and procedures are not the final word [in] determining whether the disclosure provided is sufficient to ensure a fair process. It is always open to a party to argue that a heightened level of disclosure is required in light of the remaining *Baker* factors.

## C. Analysis

[12] The administrative decision appealed in *Baker* was made pursuant to the *Immigration Act,* R.S.C. 1985, c. I-2 and the *Immigration Regulations*, 1978, SOR/78-172 (collectively, "*Immigration Act*"). Mavis Baker was ordered deported from Canada. Her application for exemption from deportation was denied in a letter, without reasons.

[13] Mrs. Baker challenged the decision on the basis that she was not accorded procedural fairness. The lack of procedural fairness included that there were no reasons in the letter denying her application.

[14] Mrs. Baker's lawyer later obtained the investigating immigration officer's notes, which the Court found the senior officer had used to make his decision.

[15] Mrs. Baker's "legitimate expectation" was that because of the *International Convention on the Rights of the Child*, Mrs. Baker could legitimately expect that her Canadian-born children's interests would be a primary consideration in the immigration decision (*Baker*, *supra*, at para 8). The *Baker* Court cautioned that the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain (*Baker, supra*, at para. 26).

[16] In what I interpret as an application of the fifth *Baker* factor, the Court placed significance on the Minister of Immigration's Guidelines setting out the criteria which an immigration officer should take into account when making a decision on the type of grounds in the *Baker* situation.

[17] I read the main theme of the Pinto article as being: the higher the level of procedural fairness required in administrative proceedings, the higher the level of disclosure required. I read the secondary theme as being: just because a party or tribunal has complied with that tribunal's own disclosure rules does not mean that it has provided all the disclosure required in the context of the particular proceeding.

[18] It is the Pinto article, and not *Baker*, which links the concept of procedural fairness to the pre-hearing disclosure of documents.

[19] The disclosure at issue in *Baker* was the disclosure of the decision-maker's reasons for his decision, not pre-hearing disclosure within the meaning of Rule 6. The Tribunal gives reasons for the vast majority of its decisions, unless the decision is on consent, which is usually also noted.

[20] With respect to the first four *Baker* factors, the Tribunal is a quasi-judicial administrative body created by section 48.1(1) of the *Human Rights Act.* It is not a court of

civil jurisdiction. The *Federal Courts Act*, RSC 1985, c. F-7, provides for appeals from Tribunal decisions. Subsection 50(1) of the *Act* recognizes the importance of the decision to the parties in a human rights complaint, by providing for the "full and ample opportunity" to present their evidence and make their representations during the inquiry. This is the *audi alterem partem* maxim of natural justice – "hear the other side" - enshrined in the *Act*. The legitimate expectation for parties regarding pre-hearing disclosure in a human rights complaint at the Tribunal is that subsection 50(1) should be followed and interpreted to ensure disclosure in accordance with the Rules and the case law interpreting them.

[21] In addition to subsection 50(1) of the *Act*, Rule 3 provides the opportunity for a party to bring motions, including for further documentary disclosure. Rule 6 provides for pre-hearing documentary disclosure. The fact that Rule 6(5) makes the disclosure obligation ongoing also ensures procedural fairness.

[22] The *Act* also authorizes the Tribunal to formulate its own procedures – for example, in subsection 48.9(2), the Chairperson is authorized to make rules of procedure governing practice and procedure before the Tribunal. Similarly, subsection 50(3)(e) authorizes the member or panel at a hearing to "decide any procedural or evidentiary question arising during the hearing."

[23] The doctrine of arguable relevance as the standard for the disclosure of documents has been well-established by the case law. "Arguable relevance" means that a document, which may or may not be relevant or admissible in evidence, but which has a connection or nexus to an issue, fact or remedy in the Complaint, should be disclosed in the pre-hearing disclosure process. This case law has interpreted Rule 6, subsection 50(1) of the *Act* and the requirements of natural justice to arrive at the standard of arguable relevance.

[24] I conclude that the *Human Rights Act*, the Rules, the case law interpreting them and the standard of "arguable relevance" provide for the liberal but not unlimited level of pre-hearing disclosure to which parties in a human rights complaint are deemed entitled, so that they have the "full and ample opportunity" to present their case. It is therefore the fifth *Baker* factor – the Tribunal's procedures and standards - which govern the disclosure of documents.

[25] The Complainant also relies on the Pinto article's discussion of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. 22 *("SPPA")* as requiring a higher standard of disclosure in certain situations, including disciplinary hearings.

[26] The *SPPA* is legislation of the Province of Ontario which applies to any administrative proceeding in Ontario in which a hearing is required. The *SPPA* has no jurisdiction over or application to federal administrative proceedings. The *Human Rights Act* is federal legislation which has created the Tribunal as a federal administrative body. The *SPPA* is therefore not applicable in this Complaint.

## V. Emails, Briefing Notes, Minutes, Memos in Table 1 in the Notice of Motion

[27] The Complainant seeks disclosure of all emails, briefing notes, minutes and memos held in official DFO records, including in its information management system and corporate computer email records, during specified time periods, to or from 9 named individuals, many of whom are listed as witnesses by both parties, including documents where the individuals are copied or blind-copied.

[28] The Respondent opposes this request because:

a. it has already disclosed documents which were either in the possession of or created by the individuals in Table 1;

b. the Complainant's request is overly broad, speculative and amounts to a "fishing expedition"; and

c. the Complainant does not identify with adequate specificity the documents he seeks in his request that the Respondent search further in its "corporate records" – this "extremely broad category of documents" is "without any reasonable parameters."

[29] The Complainant replies that the only way he could be more specific would be if the documents requested were already in his possession.

**Analysis**

[30] Rule 6(1)(d) limits disclosure to "documents…that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule."

[31] The fact that records are "corporate records" or "personally held records" is not significant in terms of the disclosure obligation attaching to them. So long as the records are in the possession or control of the Respondent, they are subject to disclosure, provided they are arguably relevant. The fact that the records are stored in the mailbox of an individual employee or elsewhere among that individual employee's records, as opposed to a corporate folder or directory, makes no difference.

[32] The Respondent has apparently already disclosed information that was either in the possession of, or created by, the individuals named in Table 1 and it is unclear what other documents the Complainant seeks.

[33] It is not sufficient for a party to specify time periods, authors or parties with respect to the documents requested. A party requesting disclosure needs to relate its request to facts, issues or forms of relief set out in one of the Statements of Particulars ("SOPs"). The Complainant has not done so.

[34] If the Complainant is able to formulate a more specific request that clearly demonstrates why the disclosure he has received thus far is inadequate and how any further disclosure request complies with Rule 6, then, after submissions from the other parties, the Tribunal would assess and decide on the request.

## VI. Harassment

[35] The Complainant seeks from DFO all documents "related to any harassment investigation or discussion by senior DFO management in regards to Michael Gardiner and/or [the Complainant]." He submits that the Complaint and his SOP allege both the harassment and the Complainant's requests to senior management that the harassment stop.

[36] The Respondent objects on the ground that harassment, within the meaning of the *Act*, is not within the scope of this Complaint - it was not in the summary of the Complaint which the Commission sent to the Tribunal. To include allegations of harassment in the Complaint, the Complainant needs to bring a motion to amend the Complaint.

[37] Further, the Respondent submits that because the alleged harassment stopped, the reason it stopped is irrelevant.

[38] The Respondent's position has raised the two following issues: 1. Is harassment within the meaning of the *Act* within the scope of the Complaint?; 2. Even if it is within the scope of the Complaint (which the Respondent denies), why the alleged harassment stopped is not relevant to the Complaint.

**Analysis**

**Is harassment within the meaning of the Act within the scope of the Complaint?**

[39] Paragraph 73 of the Complainant's SOP describes actions the Complainant alleges constitute harassment under the *Act.* Specifically, part of paragraph 73 of the Complainant's SOP states "Contrary to the CHRA [the *Act*]", and after that phrase, footnote 20 is inserted. Footnote 20 quotes subsection 14(1)(c) and section 59 of the *Act.*

[40] In footnote 22 to the first sentence of para. 74 of the Complainant's SOP, the Complainant again quotes section 59 of the *Act* in full, in reference to the alleged lack of response or complicity of senior people at DFO in the intimidation and harassment he alleges.

[41] Section 59 of the *Act* states as follows:

> No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

[42] Subsection 60(1) of the *Act* makes a person who is found to have contravened section 59 "guilty of an offence." Subsection 60(2) provides that a person ". . . guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding

$50,000.00." Other subsections of section 60 prescribe the time limit for bringing a prosecution, the requirement that the Attorney General of Canada either bring the prosecution, or consent to it, and describe the right of an employer or employee organization to bring a prosecution or be prosecuted.

[43] Section 60 is the enforcement section of section 59. If a person is alleged to have threatened, intimidated or discriminated against an individual in the circumstances in section 59, that person must be prosecuted in a court of summary jurisdiction – a criminal court. That court also has the power to enforce the penalty in subsection 60(2).

[44] For the above reasons, I find that the wording of section 60 means that section 59 deals with the criminal concept of threatening, intimidating or discriminating in the circumstances therein. The Tribunal is not a criminal court of summary jurisdiction and does not have the jurisdiction to enforce section 59. This means that in a human rights complaint at the Tribunal, an allegation of harassment or intimidation or discrimination cannot be brought under section 59.

[45] Subsection 14(1) of the *Act* is the applicable subsection pursuant to which a complainant can allege harassment. The Complainant's SOP, at footnote 20, cites subsection 14(1)(c) of the *Act*, which reads as follows:

> It is a discriminatory practice,
>
> (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

[46] In alleging harassment, the Complainant has referred to two sections of the *Act*, one of which, section 59, the Tribunal lacks the jurisdiction to administer and enforce. It is in the parties' interests that they know whether the allegation of harassment is included in this Complaint.

[47] The Tribunal must decide the issue of the scope of a complaint before it can decide on disclosure. Therefore, the Tribunal needs to decide whether the Complaint includes harassment as defined in the *Act*.

[48] I will seek submissions from the parties on whether the Complaint includes a section 14 allegation of harassment, and if not, their positions on amending the Complaint to include it. The timetable for these submissions will be decided at the next Case Management Conference Call.

## VII. Mr. Gardiner's November 25, 2009 email to the Complainant

[49] The Complainant states he sent an email to Mr. Gardiner ". . . describing the problems [Complainant] was experiencing having his Accommodation Request responded to by management." The Complainant alleges that Mr. Gardiner withdrew a November 25, 2009 email ("November 25, 2009 Gardiner email") almost immediately after he sent it to the Complainant in response. The Motion seeks disclosure of the withdrawn email.

[50] The Respondent does not know if its computer system can retrieve a withdrawn email.

### Analysis

[51] The November 25, 2009 Gardiner email may be part of the narrative of the Complaint and may be related to the issue of accommodation. As such, I find that this email is arguably relevant.

[52] The Respondent shall use its best efforts to retrieve the November 25, 2009 Gardiner email. If the Respondent can retrieve the email, the Respondent shall disclose it. If the Respondent cannot retrieve it, the Respondent shall so inform the other parties in writing.

## VIII. Accommodation measures in other job competitions: PSC accommodation records

[53] The Complainant seeks disclosure of all documents on his file pertaining to him regarding accommodation measures in each of the following job competitions:

- Correctional Services Canada: Staffing Process Number 08-PEN-EA-NCR-NHQ-2853.

- DFO: Staffing Process Number 10-DFO-INA-NCR-939827.
- Department of Transport ("Transport"): Staffing Process Number 09-MOT-IA-OTT-69796.
- The Complainant also seeks disclosure of all documentation held by the PSC's Personnel Psychology Centre ("PPC") pertaining to accommodation measures for the Complainant, including "all PSC analysis documents to support the accommodation measures that were ever proposed for or offered to the Complainant."

[54] The Complainant's position is that these documents are arguably relevant to counter the Respondent's allegation that the Complainant refused to participate in the accommodation process. The documents will also provide "insight" into how the PPC determines appropriate accommodation and will allow a more informed argument as to whether the PPC can in fact determine accommodation measures, as related to the test established in *British Columbia (Public Service Employees Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) ("*Meorin*"). This disclosure will also justify the Complainant's decision not to request assessment accommodation. Further, the disclosure will address the "right fit" standard or practice and when and how individuals can be most reasonably accommodated with respect to it.

[55] The Respondent opposes this request because whether the Complainant was accommodated in other job applications is not relevant to the accommodation issue in this Complaint. That issue is whether the Respondent reasonably accommodated the Complainant in the ENG-05 Job Competition.

[56] I find that these requested documents are arguably relevant to the issues of accommodation and "right fit", as well as being arguably relevant to PSC's and PPC's procedures and involvement with accommodation measures.

[57] The Respondent shall disclose the above-named documents, to the extent that it has not already done so.

## IX. Complainant's signed self-identification form

[58] The Complainant self-identified as a person with a disability in September 2009. He has disclosed an unsigned copy of the form. He seeks disclosure of the signed form to use as evidence. The Complainant consents to the release of the form he signed.

[59] The Respondent's position is that it cannot release the signed form because the fact that someone signs the form is confidential, pursuant to subsection 9(3) of the *Employment Equity Act,* S.C. 1995, c. 44 ("*EE Act*"). Further, the Respondent does not dispute ". . . that the Complainant self-identified as a person with a disability." The Respondent also submits that the fact that Complainant did so is not relevant to the issues in the Complaint.

[60] I find that the fact that the Complainant self-identified as a person with a disability is arguably relevant to the factual allegations in the Complaint. As the Complainant has consented to the release of the form to him, he has waived confidentiality to that extent. For completeness of the record, it would be preferable that the signed form or a true copy thereof is disclosed to the Complainant.

[61] Therefore, the Respondent shall disclose the signed form or a true copy thereof to the Complainant, if reasonably possible. The Complainant shall cooperate with the Respondent by signing any consent the relevant authority may require to release the form.

## X. DFO's "Strategic Plan for the Implementation of the Employment Equity Management Action Plan (EE MAP) for 2008 – 2011"

[62] The Complainant requests disclosure of a copy of the above-named document. The Respondent submits that it is not aware of this document and that it has disclosed to the Complainant a copy of a document titled "Employment Equity Management Action Plan – January 2008 to March 31, 2011."

[63] The Respondent shall make a search for the document the Complainant requests, and if the Respondent cannot find it, the Respondent shall provide written confirmation to the parties that it does not have the document in its possession or control.

## XI. Applications and resumes for 2 named candidates for ENG-05 position

[64] The Complainant seeks disclosure from DFO of the applications and resumes of Tracey Clarke and Darren Gould, two of the unsuccessful candidates in the ENG-05 Job Competition, in order to correlate screening results.

[65] The Respondent's position is that this information is not relevant - the issue in the Complaint is whether the Respondent failed to accommodate the Complainant by not appointing him to the ENG-05 position. The information requested does not assist the Complainant in establishing a *prima facie* case of discrimination. The only information required to do that sets out the "Complainant's qualifications and that of the successful candidate" (Respondent's Response to Motion, paras. 37-38). The test for establishing a *prima facie* case of discrimination in this Complaint ". . . is whether the Complainant was qualified and not hired, and whether someone no better qualified was subsequently appointed to the position." (*Ibid*)

### Analysis

[66] The Respondent does not specifically cite *Shakes v. Rex Pax Limited* (1981), 3 C.H.RR.D/1001 (Ont.Bd.Inq.) ("*Shakes*") as authority for its position. But *Shakes* articulates the test for the establishment of a *prima facie* case as posited by the Respondent. The Commission also intended to rely on the *Shakes* line of jurisprudence: ". . . particularly in connection to the comparative test." (Commission's SOP, at para. 59)

[67] The Federal Court of Appeal has cautioned against using the *Shakes* test "automatically", ". . . in a rigid or arbitrary fashion in every hiring case: rather, the circumstances in each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate" (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 18, quoting *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3 ("Premakumar"), at para. 77). The phrase "either of the tests" refers to both the *Shakes* test, and the test in *Israeli v. Public Service Commission* (1983), 4 C.H.R.R. D/1616. *Israeli* stands for a different test for *prima facie* case, to be applied in different circumstances.

[68] The Federal Court of Appeal reiterated the need for flexibility in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2005 FCA 154 (Can LII). The Court essentially stated that the test for whether a complainant has made out a *prima facie* case in an employment case should be flexible and not formulaic. The Court considered *Shakes* as only an example of the guidance provided by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC) ("*O'Malley*"), which sets out a more general and flexible test for the establishment of a *prima facie* case of discrimination.

[69] Further, this Complaint is not just about whether there was discrimination within the meaning of subsection 7(b) of the *Act* and issues regarding accommodation. It is also about whether, within the meaning of section 10 of the *Act*, the policy or standard of "right fit" is systemically discriminatory against the Complainant and those who share his disability.

[70] The Complainant's position is that this information will allow him ". . . to correlate the candidates' screening results to the essential and asset qualifications", which he can use for his "right fit argument" (Complainant's Reply to Respondent's Response to Motion).

[71] The Complainant has linked these documents to the "right fit" issue in the Complaint and they should be disclosed to him subject to their confidentiality, which I consider appropriate to protect as set out below.

[72] Other than their names, I direct the Respondent to redact any other personal identifying information from each of the resumes and applications, including, without limitation, dates of birth, addresses, telephone numbers, email addresses, Social Insurance Numbers, work phone numbers and addresses. The Respondent shall then disclose the redacted versions of the applications and resumes of Tracey Clarke and Darren Gould to the Complainant and the Commission.

## XII. Executive Performance Agreements related to Employment Equity

[73] The Complainant seeks executive performance agreements ("Executive Performance Agreements" or "Agreements") and/or documents pertaining to compensation ". . . related in any way to Employment Equity, for Michael Gardiner and Derek Buxton for the years 2008/2009 and 2009/2010." The Complainant "wishes to see" whether the named individuals ". . . had specific EE objectives to achieve and whether they received recognition in any way (including financial)" or "brownie points" for achieving those objectives and whether they "were incentivized in regards to [the EE appointee, a woman] but not in regards to the Complainant" (Complainant's Notice of Motion and Complainant's Reply to Respondent's Response to Motion).

[74] The *Lincoln* case, specifically paragraphs 26 and 27 thereof, is the basis for the Respondent's position that "any issues" the Complainant has raised with respect to the *EE Act* and the Respondent's obligations under it ". . . are irrelevant to the context of this complaint. The Federal Court of Appeal has clearly stated that the *EE Act* operates independently from the [*Human Rights*] *Act*." (Respondent's Response to Motion, at para. 33)

[75] Specifically regarding the Executive Performance Agreements, the Respondent objects to their disclosure on the grounds that they are irrelevant to the issues in this Complaint, because the successful candidate in the ENG-05 Job Competition did not belong to any Employment Equity ("EE") group. I note that the foregoing statement seems to conflict with the Respondent's SOP, which I discuss below. Even if incentives existed, they would have had no effect on the selection process.

### Analysis

[76] The complainant in *Lincoln* relied upon the *EE Act* for a specific purpose:

> . . . He [complainant] also argues that both the Tribunal and Dawson J. erred by not addressing his contention that the failure of the respondent to comply with section 5 of the *Employment Equity Act*, S.C. 1995, c.44 itself supported the existence of a *prima facie* case of discrimination. (*Lincoln*, *supra*, at para. 11)

Paragraph 13 of *Lincoln* says in part:

> The final issue concerns the relevance of the *Employment Equity Act* in the context of a complaint under section 7 of the Canadian Human Rights Act . . .

[77] I conclude that paragraph 27 of *Lincoln* stands for the proposition that the fact of a respondent's non-compliance with the *EE Act* is not itself determinative of discrimination within the meaning of section 7 of the *Human Rights Act*.

[78] The application of paragraph 27 of *Lincoln* to human rights cases was discussed in *Khiamal v. Canada*, 2009 FC 495 ("*Khiamal*"). That complainant sought to introduce into evidence statistical data the respondent collected pursuant to the *EE Act*. The Tribunal did not permit him to do so.

[79] The Federal Court distinguished the way the complainant wished to use ". . . statistical data contained in the Employment Equity Report" from the way the complainant in *Khiamal* wished to use the *EE Act.* The Court found that the *Khiamal* complainant:

> . . . [Was not] speaking to the operation or enforcement of the [EE Act]. It is the inference that may be drawn from the data which is of significance. The weight to be attributed to it is to be determined by the Tribunal. Whether the statistical data submitted by the [complainant] was relevant to the issue and supported the allegation of discrimination is a finding to be made by the Tribunal. (Khiamal, supra, at para. 96)

[80] Similarly, in *Kanags Premakumar v. Air Canada*, 2002 Can LII 23561 (CHRT) ("*Premakumar*"), then Tribunal Chairperson MacTavish admitted statistical data into evidence with respect to ". . . the extent to which visible minorities were represented within the [respondent company's] workforce." (*Premakumar*, *supra*, at para. 62)

[81] *Khiamal* and *Premakumar* are cases which stand for the proposition that paragraph 27 of *Lincoln* should be interpreted in accordance with its terms, and not so broadly as to automatically exclude any and all Employment Equity evidence on the basis that it is irrelevant to a complaint under section 7 of the *Act*. Such evidence, if admitted by the Tribunal, must be evaluated as to credibility and weight by that Tribunal.

In his Complaint and in his SOP, the Complainant includes EE in his outline of events and factual allegations. For example, in paragraph 30 of his SOP, he states how he described to the Respondent and ". . . provided the rationale for why [Complainant's] request to be

selected from the qualified pool for the employment position would constitute reasonable accommodation and assist the Respondent in meeting its EE objectives."

[82] In its SOP, the Respondent's list of witnesses names Heather McDonald (Skaarup), describing her in part as ". . . the successful EE candidate in the ENG-05 appointment process." The Respondent also lists Kenneth Hill as a witness, describing him as ". . . the successful non-EE candidate in the ENG-05 competition." In its SOP, the Respondent also counters the Complainant's EE argument.

[83] It seems to me that Employment Equity is a part of the narrative of this Complaint.

[84] Having said that, this Tribunal does not have jurisdiction to decide whether the Respondent is in compliance with its obligations under the *EE Act,* or with the 2008-2011 EE MAP*,* or any other policy under Employment Equity (*Lincoln*, *supra*, at para. 27). This Tribunal also does not have jurisdiction to remedy breaches of the *EE Act* (*Ibid*).

[85] It appears from the Complainant's Notice of Motion that the basis of his belief that these executives were receiving "bounties" or "brownie points" or incentives for meeting EE objectives is a statement from the Coast Guard's Strategic Human Resources Plan 2009-2012 that "[I]mproving diversity" will be a ". . . commitment in the executive performance agreements of all Directors General . . . and they will need to demonstrate concrete evidence of their efforts to recruit designated group members" (Complainant's Notice of Motion, at footnote 1).

[86] With respect to whether the Executive Performance Agreements are arguably relevant to the Complaint**,** and therefore should be disclosed**,** the issue in this request is the nature of the documents sought.

[87] My understanding of what the Complainant wishes to establish from the Executive Performance Agreements is that in its implementation of the *EE Act*, specifically in increasing a perceived under-representation of women, the Respondent adversely affected and discriminated against the Complainant and others sharing his disability. This is not the same as seeking to establish non-compliance with the *EE Act,*the EE MAP or EE policies in order to establish a *prima facie* case.

[88] In this context, I conclude that those portions of the Executive Performance Agreements related to employment equity are arguably relevant to an issue in the Complaint.

[89] However, to require disclosure of these Executive Performance Agreements in their entirety is not arguably relevant to the issue and is unnecessarily intrusive of the privacy and confidentiality of the individuals' personnel files. Only the Employment Equity-related portions are arguably relevant.

[90] Therefore, I direct the Respondent to redact all portions of the Executive Performance Agreements, including, without limitation, monetary amounts, leaving intact only each individual's name, the year or years the Agreements are in effect and all Employment Equity-related portions. The Respondent shall then disclose the redacted versions of the Executive Performance Agreements to the Complainant and the Commission.

[91] I conclude that documents related to compensation with respect to these individuals and EE are not arguably relevant. What is arguably relevant is whether there were incentives with respect to a certain EE group or groups, not the amounts of any financial incentives. As well, it would be unnecessarily intrusive to disclose the particular individuals' financial details.

## XIII. The Complainant's request regarding the determination of arguable relevance

[92] In his Reply to the Respondent's Response to Motion, the Complainant requests that Respondent counsel, Commission counsel or Tribunal or Commission staff be ordered to decide what is arguably relevant. The Tribunal does not have jurisdiction to order Commission staff to provide services. Tribunal staff does not provide legal advice, which is what the decision about arguable relevance entails. The usual procedure regarding disclosure is for a party which is represented by counsel, to gather all documents related to a complaint, pursuant to its counsel's instructions, and for counsel to decide what is arguably relevant. Counsel are officers of the Court. As such, they must

abide by not only the rules of their own governing professional body and the Court or Tribunal rules, but they must also conduct themselves ethically towards the other parties and the Court or Tribunal. Counsel also have a professional responsibility to explain the rules of the Court or Tribunal to their clients, and advise them of the consequences of breaching those rules. In the circumstances, it is not necessary to make this type of order.

## XIV. Disclosure and Admissibility

[93] With respect to the documents that this Ruling orders disclosed, I wish to note that this does not mean that they are automatically admissible into evidence at the hearing. The standard for admissibility of documents at the hearing is different than that for disclosure.

## XV. Confidentiality Ruling

[94] The Confidentiality Ruling previously issued for this Complaint remains in effect.

## XVI. Ruling

[95] The Respondent shall make its best efforts to retrieve the November 25, 2009 email which Mr. Michael Gardiner sent to the Complainant and then withdrew. If the Respondent can retrieve the email, the Respondent shall disclose it to the other parties. If the Respondent cannot retrieve the email, the Respondent shall inform the other parties in writing.

[96] With respect to:

a. Correctional Services Canada Staffing Process Number 08-PEN-EA-NCR-NHQ-2853;

b. DFO Staffing Process Number 10-DFO-INA-NCR-939827; and

c. Department of Transport Staffing Process Number 09-MOT-IA-OTT-69796,

to the extent that the Respondent has not already done so, the Respondent shall disclose all documentation on each of the foregoing files pertaining to Brian William Carter in regards to accommodation measures in the identified job competition.

[97] To the extent that the Respondent has not already done so, the Respondent shall disclose all documentation held by the Public Service Commission and its Personnel Psychology Centre pertaining to accommodation measures for Brian William Carter, including, without limitation, all Public Service Commission and Personnel Psychology Centre analysis documents to support the accommodation measures that were ever proposed for or offered to Brian William Carter.

[98] If reasonably possible, the Respondent shall disclose the Complainant's signed form dated September 2009, in which he self-identified as a person with a disability with respect to the ENG-05 Job Selection Competition. The Complainant shall sign any consent the relevant authority may reasonably require to release the form.

[99] The Respondent shall search for a document titled "Strategic Plan for the Implementation of the Employment Equity Management Action Plan (EE MAP) for 2008 to 2011" and if it cannot find it, the Respondent shall provide written confirmation to the Complainant and the Commission that the Respondent does not have the document. If the Respondent can find the document, the Respondent shall disclose it.

[100] The Respondent shall redact from the applications and resumes of Tracey Clarke and Darren Gould, which they used to apply for the ENG-05 position, all personal identifying information, except for their names. For the purposes of this Ruling, "personal identifying information" includes, without limitation, dates of birth, addresses, telephone and fax numbers, email addresses, Social Insurance Numbers, employer names, employer phone numbers and addresses.

[101] The Respondent shall then disclose to the other parties the redacted versions of the said applications and resumes.

[102] The Respondent shall redact from the Executive Performance Agreements of Michael Gardiner and Derek Buxton for the years 2008/2009 and 2009/2010 everything

except each individual's name, the year or years to which each Agreement applies, and all parts related to Employment Equity, which shall remain intact, provided that if there are any monetary amounts related to the Employment Equity parts, the Respondent shall also redact such amounts.

[103] The Respondent shall then disclose the redacted versions of the Executive Performance Agreements to the other parties.

[104] Timelines for the disclosure in this Ruling shall be discussed and dealt with in the next Case Management Conference Call.

*Signed by*

Olga Luftig
Tribunal Member

Ottawa, Ontario
May 29, 2015