Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 22
Date: June 13, 2023
File No(s).: T2401/6019

Between:

Laura Nash

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] This is a ruling issued by the Canadian Human Rights Tribunal (the "Tribunal") deciding the motion filed by the Complainant, Ms. Laura Nash. In her motion, the Complainant asks the Tribunal to summon and enforce the attendance of General Jonathan Vance ("General Vance") and to compel him to testify in the inquiry and produce any evidence that the Tribunal considers necessary for the full hearing and consideration of the complaint, under paragraph 50(3)(a) of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (the "CHRA").

[2] The Canadian Human Rights Commission (the "Commission") was, at first, in favour of Ms. Nash's motion. But, when the Tribunal asked for additional representations, the Commission revisited its position and informed the Tribunal that it no longer took a position on said motion. However, it did provide its comments on the general principles the Tribunal should consider. As for to the Canadian Armed Forces (the "Forces"), they strongly objected to the motion to summon and enforce attendance.

[3] The Tribunal Registry received Ms. Nash's motion to summon and enforce attendance on Friday, January 27, 2023, at 4:01 p.m. Eastern time. This was one business day before the beginning of the hearing, scheduled from January 30 to February 22, 2023.

[4] Since the motion was filed at the last minute before the hearing began, the Tribunal had no choice but to deal with the motion at the commencement of the hearing. That said, the Tribunal had to hear another motion filed by Ms. Nash a few days earlier. Oral representations on the motion to summon and enforce the attendance of General Vance were heard on Tuesday, January 31, 2023.

[5] In their representations, the Forces raised an important argument regarding deliberative secrecy. The Tribunal therefore asked them to file case law authorities in support of their claims. The parties then had the opportunity to make their representations on this subject. Once all this was done, the Tribunal took the motion under advisement the morning of February 1, 2023.

[6] However, that same day, early in the afternoon, Ms. Nash asked to address the Tribunal in confidence to provide it with additional representations regarding her motion to summon and enforce the attendance of General Vance.

[7] The parties met with the Tribunal behind closed doors to discuss how to proceed. They all agreed to Ms. Nash providing additional information by affidavit, under a confidentiality order made by the Tribunal under subsection 52(1) of the CHRA. The issue was eventually resolved several days later, on February 7, 2023, after the Tribunal received all the parties' representations regarding Ms. Nash's affidavit; the Tribunal therefore took the motion under advisement that day.

[8] The hearing moved forward as scheduled. Ms. Nash presented all her evidence, filed her documents and called all her witnesses. The Tribunal therefore had to decide the motion to summon and enforce attendance concerning General Vance right then and there so that Ms. Nash could rest her case.

[9] The Tribunal dismissed Ms. Nash's motion and informed the parties that the reasons would follow in a written decision. This decision constitutes the Tribunal's reasons.

II. Issue

[10] The Tribunal must decide, under paragraph 50(3)(a) of the CHRA, whether it should summon and enforce the attendance of General Vance and compel him to testify in the inquiry and produce any evidence the Tribunal considers necessary for the full hearing and consideration of the complaint. To this end, the Tribunal must consider the fact that Ms. Nash's motion was filed at the last minute, examine the necessity and relevance of General Vance's testimony and assess whether summoning him would undermine the principle of deliberative secrecy.

III. Decision

[11] For the reasons that follow, the Tribunal dismisses Ms. Nash's motion and refuses to summon and enforce the attendance of General Vance as a witness in this inquiry.

IV. Analysis

[12] The Tribunal notes that it is not required to repeat all the arguments made by the parties. It will analyze the motion in light of the arguments of the parties it considers to be necessary, essential and relevant in order to render its decision and explain the reasons for that decision, which must be transparent, intelligible, and justified (*Turner v. Canada (Attorney General)*, 2012 FCA 159, at para. 40; *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*]).

A. Positions of the parties

(a) Complainant

[13] In February 2014, Ms. Nash filed a grievance against the Forces alleging discrimination based on sex and marital status. That grievance ended up before General Vance, who at the time of the grievance was the final authority able to dispose of such a remedy. At the time of the filing of Ms. Nash's complaint, General Vance was also Chief of the Defence Staff in the Forces.

[14] The Tribunal will not repeat the contents of General Vance's decision dated February 27, 2019, concerning Ms. Nash's grievance. For the purposes of this ruling, it is important to understand that the grievance was denied. However, General Vance awarded Ms. Nash an *ex gratia* payment and mentioned that the grievance had drawn his attention to several important issues concerning certain policies and their potential revision to respond to the realities of modern life and family composition.

[15] Ms. Nash asked that General Vance be summoned as a witness so that he could testify regarding his report dated February 27, 2019. Ms. Nash used the word "report", which is not a minor detail, and the Tribunal will come back to this later in this ruling.

[16] In her motion before the Tribunal, she describes General Vance's testimony in the following terms:

> Retired General Jonathan Vance is the author of the Final Policy Grievance Response, and who can speak specially to his own report.

[17] Ms. Nash argued that this testimony is relevant and necessary with regard to the inquiry so that the Tribunal can dispose of it. She added that the probative value of the evidence he will provide is greater than the prejudicial effects she would suffer if her motion to summon and enforce attendance were rejected.

[18] Ms. Nash explained that General Vance was directly involved in her case because he reviewed the evidence submitted to him in connection with her grievance regarding allegations of discrimination and made a decision based on the review of her file and the evidence presented.

[19] She argued that General Vance is the only person who can testify on this report and on the applicable policies related to the allegations in her grievance. In her view, he is the only person who can testify on the Forces' policies and the harassment that occurred; he is the final authority on policy and, as such, may request changes in this regard.

[20] She added that General Vance would be able to guide the Tribunal and explain his report, in particular by detailing why he had found that there was no discrimination, setting out his reasons for taking so much time before deciding the grievance, and discussing the follow-up he did on policy revisions. Ms. Nash stated that the time that had elapsed before the decision was made is a current issue in her complaint.

[21] She confirmed for the Tribunal that she has not filed an application for judicial review of General Vance's report and claims that his testimony is not intended to prove discrimination.

[22] She believes that, for reasons of procedural fairness and natural justice, and despite the lateness in filing, the Tribunal should grant her motion. She stated that she had decided not to call one of her witnesses, which frees up hearing time that could be reallocated to General Vance's testimony while respecting the fundamental principle under the CHRA that proceedings should be conducted as expeditiously as possible.

[23] She believes that subsection 50(3) of the CHRA gives the Tribunal, which is not a court of law, all the latitude it needs to summon General Vance as a witness at this stage of the proceedings. She argued that the Tribunal is not a review court, and as such will not have to review General Vance's report, and that General Vance could be of assistance to the Tribunal by articulating his position regarding the Forces and their policies and could testify on the long time it took to deliver his report.

[24] She added that her witness is her response to the confirmation of individuals who would testify for the Forces, whose names were also given the Friday before the hearing began.

[25] In the end, on the basis of her affidavit—which is protected by a confidentiality order—Ms. Nash asked the Tribunal to apply a trauma-informed approach. Accordingly, in her view and because of her trauma, mental health issues and fears, there are reasons explaining why she was late in filing her motion to summon General Vance as a witness.

[26] As for deliberative secrecy, the Complainant argued that the Tribunal could intervene and lift the veil of deliberative secrecy with regard to General Vance's decision. The Tribunal will come back to this argument later in its decision.

(b) Respondent

[27] One of the Forces' main arguments is that, when General Vance rendered his decision on Ms. Nash's grievance on February 27, 2019, he was acting as an administrative decision-maker.

[28] They referred the Tribunal to the *National Defence Act*, R.S.C. 1985, c. N-5 ("NDA"), which establishes the process for filing a grievance, with the final authority having the power to deal with the grievance, and the available challenge mechanism, namely, judicial review by the Federal Court.

[29] The Forces therefore argued that it is impossible for the Tribunal to summon General Vance as a witness when he was acting as final authority and an administrative decision-maker in Ms. Nash's grievance. The Forces stated that if the Complainant did not agree with

the decision that was rendered, she should have applied to the Federal Court for judicial review. She then could have challenged the documents consulted by the decision-maker and argued that the decision was not clear and did not meet the minimum requirements for a decision. The Forces added that if Ms. Nash had concerns about the time needed for General Vance to render his decision, she should have applied to the Federal Court for mandamus, which was the appropriate remedy available at that time.

[30] The Forces argued that the parties are not entitled to expect a decision-maker or a judge to explain their decision before another decision-making body. In their view, what Ms. Nash is asking for, to summon an administrative decision-maker as a witness and have him comment on or explain his decision, is quite simply impossible in law. General Vance, as an administrative decision-maker, is protected by deliberative secrecy, and his decision is shielded from any interference. At the Tribunal's request, the Forces filed case law authorities on the concept of deliberative secrecy.

[31] The Forces added that Ms. Nash has had General Vance's decision in her possession since February 2019 and that her complaint before the Commission was filed well before that. They submitted that Ms. Nash had never argued that the decision was discriminatory or constituted harassment, and, in their view, these elements are not before the Tribunal. Nor did the Commission refer the Tribunal to the fact that the time that elapsed before General Vance rendered his decision was itself discriminatory.

[32] All in all, the Forces argued that General Vance's testimony is not relevant to the inquiry. They had announced quite some time ago that they intended to call two persons to speak about policies in the Forces. They argued that Ms. Nash had never mentioned that she wanted to call General Vance as a witness and that her motion was filed at the very last minute. In their view, such a late request amounts to a fishing expedition and may even be bordering on abuse of process.

[33] In the end, the Forces stated that General Vance is now retired and that the lawyers representing them before the Tribunal are not representing him at this stage of the proceedings. Therefore, summoning General Vance as a witness could give rise to a motion to quash the summons to appear, along with the consequences related to it.

[34] Regarding Ms. Nash's affidavit, the Forces generally asked the Tribunal not to consider it, since the information provided by Ms. Nash is not relevant. In their view, the Complainant had countless opportunities to ask the Tribunal to summon General Vance as a witness, which she did not do.

[35] The Forces added that Ms. Nash has been represented by counsel for years in this proceeding and that her fears regarding her safety and the confidentiality of her personal information could have been addressed with her lawyer.

[36] The Forces submit that Ms. Nash's argument, according to which summoning General Vance as a witness is a response to the late filing of the names of two of their witness who were to speak about policy, is baseless. The Forces repeated that they have been announcing their intention to call these witnesses since 2020 and provided a description of their testimony. They merely had to confirm the names of the people coming to testify, which did not affect the nature of the testimony as set out in the summaries of their testimony.

(c) Commission

[37] As was mentioned above, the Commission revisited its position during its arguments. Initially, it supported the Complainant's position and presented arguments in this regard.

[38] After the Tribunal asked for additional representations on the issue of deliberative secrecy, the Commission revised its position and decided to no longer take a position on the motion. Instead, it decided to make general representations to the Tribunal regarding the principles applicable to this matter.

[39] Given this unexpected change, the Tribunal will not refer to the Commission's representations that at the time supported the Complainant's position, since they are now without merit and no longer support its current position. In any event, there is nothing new in the Commission's representations since Ms. Nash essentially repeated them in her own representations.

[40] However, the Commission's additional representations are interesting and nonetheless enlightening to the Tribunal. The Commission noted that it plays a screening role with respect to the complaints it receives. In Ms. Nash's case, the Commission confirmed that there were other internal remedies available to her, more specifically, a grievance resolution process within the Forces.

[41] The Commission stated that its current practice is to defer to these other processes where it is appropriate and expeditious to do so, which is what it did in the case of Ms. Nash. Her complaint was thus held in abeyance while she exhausted these other options. The Tribunal therefore understands that General Vance's decision regarding Ms. Nash's grievance is the culmination of this process.

[42] That said, the Commission decided in the end to reactivate the complaint at Ms. Nash's request. At that point, General Vance's decision had not yet been rendered.

[43] The Commission noted that, in its complaint screening role, the goal was not to determine whether there was discrimination; its role was, rather, to refer the complaint to the Tribunal if there were grounds for doing so. Moreover, the Commission added that, in its review, the Forces did not file a defence. It decided to refer Ms. Nash's complaint to the Tribunal for an inquiry.

[44] In light of the preceding, the Commission argued that General Vance's testimony is, in its view, potentially relevant in terms of both the personal remedies claimed by Ms. Nash and the systemic ones sought in this case. It also considers that the time that elapsed before General Vance rendered his decision is, in its view, another important aspect of the case before the Tribunal.

[45] The Commission added that General Vance will be able to testify in the case and provide the Tribunal with evidence without the Tribunal having to judicially review the decision he rendered in February 2019. According to the Commission, there is a difference between General Vance's role as an administrative decision-maker and his other role in the Forces.

[46] The Commission argued, just as the Complainant did, that the Tribunal could lift the veil of deliberative secrecy and that there are valid concerns regarding breaches of the rules of natural justice in the grievance process leading to General Vance's decision.

[47] The Commission also stated that the affidavit filed by the Complainant could affect the Tribunal's decision on the motion to summon and enforce attendance and on the delay in its filing. Finally, it argued that the Forces did not demonstrate that they would suffer any prejudicial effects if General Vance were called as a witness.

B. Late filing of motion and prejudicial effect

[48] The Tribunal considers that, on its own, this element is grounds enough to dismiss Ms. Nash's motion.

[49] Ms. Nash's hearing was supposed to begin on January 30, 2023, at 9:30 a.m. On Friday, January 27, 2023, at 4:01 p.m., the Tribunal received Ms. Nash's email in which she asked the Tribunal to issue a summons to enforce General Vance's attendance under paragraph 50(3)(a) of the CHRA.

[50] In other words, Ms. Nash's motion to summon General Vance and enforce his attendance was received one business day before the hearing was to start, a few minutes before the Tribunal's offices' closing time. Such a late motion to summon a witness and enforce their attendance is inherently problematic, especially coming from a party represented by counsel.

[51] The Tribunal has rules of procedure, "which guide the parties regarding what they are required and expected to do, to accomplish, and consequences if they fail to comply with such rules" (*Vadnais v. Leq'á:mel First Nation*, 2022 CHRT 38 (CanLII), at para. 7 [*Vadnais*]).

[52] The *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules of Procedure") "set expectations [and] guide the parties regarding each step of the proceedings" (*Vadnais*, at para. 8). They clearly state that a party who intends to call a witness must announce, in advance, their intention to summon the witness and must provide

a summary of the witness's testimony (see paragraphs 18(1)(e), 19(1)(d) and 20(1)(d) and subsection 21(2) of the Rules of Procedure).

[53] That party has a duty to inform the other parties, and the Tribunal, in a timely manner of their intentions regarding the facts they intend to raise in the proceeding, the remedies sought, the defences they will rely on and the ordinary or expert witnesses who will testify at the inquiry. A summary of their testimony must also be filed (*Vadnais*, at para. 29).

[54] Paragraph 37(b) of the Rules of Procedure is unequivocal and specifically provides for the situation where a person has not informed the parties of their intention to call a witness and has failed to provide a summary of the witness's testimony:

> 37 A party may
>
> …
>
> (b) call a witness at the hearing *only if* that witness was identified and a summary of their anticipated testimony was provided under rule 18, 19, 20 or 21;
>
> [Emphasis added.]

[55] In other words, if a party breaches their duty to announce their intention to call a witness and provide a summary of the witness's testimony in a timely manner, they can *not* have such a witness testify at the hearing. This is precisely the situation Ms. Nash found herself in when she failed to inform the parties and the Tribunal in a timely manner of her intention to call General Vance as a witness.

[56] Rule 9 of the Rules of Procedure sets out the consequences of not complying with the rules:

> 9 If a party does not comply with these Rules, an order of a panel or a time limit established under these Rules, the panel may, on the motion of another party or its own initiative, and having regard to the circumstances, order the party to remedy their non-compliance, *proceed with the inquiry*, dismiss the complaint or make any other order to achieve the purpose set out in Rule 5. [Emphasis added.]

[57] However, Rule 8 of the Rules of Procedure allows a member to dispense with compliance with the Rules of Procedure if doing so achieves the purpose set out in Rule 5 of the Rules of Procedure.

[58] Rule 5 the Rules of Procedure provides that:

> 5 These Rules are to be interpreted and applied so as to secure the informal, expeditious and fair determination of every inquiry on its merits.

[59] In Ms. Nash's case, at no time in three years of case management did she make her intention to call General Vance as a witness known. This is a completely new, and unexpected, motion made at the end of the Tribunal's business hours, the day before the hearing was to start. In holding back this information, Ms. Nash directly prevented the other parties from preparing themselves accordingly and hindered their ability to react to such a motion (*Vadnais*, at para. 31). Such a late motion also does not leave the witness who could be summoned to testify with a reasonable amount of time to react to such a situation.

[60] Ms. Nash's late motion inevitably caught the Tribunal off guard as well. This motion could not be dealt with in the short time allowed, which left the Tribunal with no choice but to consider the motion at the very beginning of the hearing when there was already so much to be done, including dealing with another motion that Ms. Nash had herself filed a few days before the hearing.

[61] The fact that the Tribunal is an administrative tribunal and not a court of law as Ms. Nash and the Commission argue—which would give it the necessary flexibility to summon General Vance in the circumstances—does not, however, give it free rein to completely dispense with the rules of natural justice and procedural fairness either. The Tribunal must comply with its enabling statute and its rules of procedure, as prescribed by subsection 48.9(1) of the CHRA (see also *Vadnais*, at para. 6).

[62] That being said, as the Tribunal noted in *Whyte v. Canadian National Railway*, 2009 CHRT 33, at paragraph 12, a party who files a late request and does not comply with the Rules of Procedure in this regard will also have to show how their request is not prejudicial to the other parties and to the Tribunal's process (see also *Vadnais*, at para. 15).

The Tribunal must necessarily consider the interests of justice when a party files a late request (*Vadnais*, at para. 16).

[63] Ms. Nash made additional representations to explain why she had delayed filing her motion to summon General Vance as a witness. These representations are protected by a confidentiality order. The Tribunal will not disclose sensitive information, but it must nonetheless provide some context so that readers can understand its reasons. The Tribunal has a duty to give reasons that are intelligible, transparent and justifiable (*Vavilov*, mentioned above).

[64] The main takeaway is that Ms. Nash provided explanations that justify, in her view, the lateness in filing her motion to summon General Vance as a witness. According to her, she considered calling this witness more than a year prior to this but, in the end, decided not to do so. She had concerns regarding safety and confidentiality if she had to call him as a witness.

[65] When she learned just before the hearing that her personal information—address, telephone number, ID numbers, etc.—would be protected, she then considered calling General Vance as a witness.

[66] She added that the Tribunal should adopt a procedure that is informed by the trauma that persons involved in the process have experienced. Because of her trauma and mental health issues, she argues that she had reasons explaining her delay in filing her motion.

[67] On the one hand, the Tribunal fully agrees that it should adopt an approach informed by the trauma experienced by the parties involved in its proceedings. The Tribunal strives to reduce as much as possible any trauma that may be experienced—or re-experienced—in a quasi-judicial proceeding such as its own. To this end, the Tribunal always tries to adapt its procedure to each situation and to the parties appearing before it, all while taking into account any trauma the participants may have experienced. It has all the flexibility it needs to ensure that the procedure makes sense for the parties (subsection 48.9(1) of the CHRA).

[68] An approach informed by the trauma experienced by the persons involved is designed to ensure that they feel that the Tribunal’s procedure offers them a safe

environment. Such an approach tries its best to minimize the effects of a proceeding such as ours on these individuals.

[69] On the other hand, a trauma-informed approach does not mean that the parties and the Tribunal do not have to comply with the fundamental principles of procedural fairness and natural justice. The Tribunal is still subject to those principles (subsection 50(1) of the CHRA). Such an approach does not reduce the burden on a party either.

[70] A trauma-informed approach exists side by side with these fundamental principles. So, how can we make sure that the proceeding will have as little impact as possible on the person who has experienced trauma? How can the Tribunal guide them through this process while still upholding the principles of natural justice and procedural fairness for all the parties involved in the inquiry into the complaint? This is clearly a very delicate task.

[71] In our case, the main point raised by Ms. Nash in her affidavit, which is protected by a confidentiality order, is the fact that because of her trauma and mental health issues, she had good reasons for her delay in filing her motion to summon General Vance and enforce his attendance. She had fears regarding her safety and the confidentiality of her information. The Tribunal understands what Ms. Nash has shared and is sorry to hear about what she has experienced and about the fear and worries she has endured and continues to endure.

[72] The Tribunal has no doubt as to the emotions experienced by Ms. Nash and thanks her for sharing them in confidence. That said, the Tribunal's official record shows that protecting the personal information of the parties and individuals involved in the case is not a new issue. The parties and the Tribunal addressed this on September 28, 2022, during a case management conference call.

[73] Beyond Ms. Nash's fears and her individual case, the Tribunal is always mindful of the public nature of its hearings and the voluminous quantity of documents filed in its cases. Accordingly, a great deal of personal information may be found in the public domain. Attempts must be made, to the extent possible, to protect this information, especially when it is not necessary for the public or for the Tribunal in carrying out its mandate to determine whether there was any discrimination.

[74] The summary of the conference call on September 28, 2022, squarely addresses the issue of protecting the personal information of the participants in this inquiry and states the following:

> Member Gaudreault advised that the hearing will be open to members of the public and explained to the parties that it's very important to redact personal information from proposed exhibits to ensure it's not accidentally disclosed. Member Gaudreault also explained that a confidentiality order can be filed if needed.

[75] The goal was to ensure that the personal information of the individuals involved in the case, including that of Ms. Nash, would be protected and that it would not make its way into the public domain without good reason. Such a situation makes more sense where the hearing is held by videoconference and documents are shared with all participants and may also be consulted by members of the public. The Tribunal finds that there is no prejudice to the public in not having access to this personal information.

[76] That said, Ms. Nash did not participate in that call, unfortunately, but her lawyer was present and was aware of the fact that her client's information would be protected. There is no reason to believe that Ms. Nash was not informed of this, as she was represented by counsel and the Tribunal systematically shares summaries of case management calls with the parties.

[77] If Ms. Nash had concerns about her personal information and had understood in September 2022 that everything was going to be protected, the Tribunal and the parties could have dealt with the issue of calling General Vance as a witness months before the hearing.

[78] It is therefore unfortunate that Ms. Nash did not hear the Tribunal's intervention in person in this regard. She would have realized that the Tribunal was fundamentally committed to protecting the personal information of participants, including her own, which could have reduced, as the Tribunal hopes, her stress, fear and concerns. This information may have reassured her enough to raise the issue with the Tribunal and the parties.

[79] Several options could therefore have been explored. Ms. Nash could have shared her concerns and fears confidentially, as she did at the hearing, in a private meeting with the member and the other parties or during a mediation-adjudication session.

[80] Ultimately, the Tribunal must consider that the matter of protecting personal information was addressed more than four months before the hearing began. Therefore, it must conclude that Ms. Nash's motion to summon and enforce attendance, which is based in large part on her being unaware of the possible protection of her personal information, was filed late, just a few minutes before offices closed on the eve of the hearing. Filing such an important motion so late is contrary to the Tribunal's Rules of Procedure.

[81] As for the approach that the Tribunal should adopt, that is, an approach informed by the trauma experienced by its participants, it should be noted that the Tribunal was not made aware, in a timely manner, of the evidence submitted by Ms. Nash in her affidavit. For this reason, the Tribunal could not intervene in this regard and take the necessary steps to support Ms. Nash in what she had experienced and was still going through. It was unable to adapt its procedure to the Complainant's personal circumstances. In other words, the Tribunal could not intervene regarding elements it was not aware of.

[82] Finally, Ms. Nash argued that the probative value of the evidence that General Vance would give before the Tribunal outweighs the prejudicial effects she would be subjected to if her motion to summon and enforce attendance were dismissed, despite its lateness.

[83] First, we will see later on in the analysis that the testimony of General Vance, if he were called as a witness, would inevitably be limited because of the very nature of his role in Ms. Nash's case and her reasons for asking him to testify. These significant limitations necessarily affect the relevance and usefulness of his testimony. The Tribunal will come back to these elements in the next section.

[84] Second, a motion to summon and enforce attendance filed so late would inevitably have consequences in terms of the hearing and its conduct. In that vein, the Commission argued that the Forces had not demonstrated any prejudicial effects.

[85] On this point, it should be noted that was difficult to find common dates when both the Tribunal and the five lawyers in this case, as well as a handful of paralegals providing support, would all be available. The case was scheduled to last 18 days, months before it began. In light of this difficulty, it was absolutely necessary that the hearing start as scheduled and follow its course, without interruption. It should also be added that the Tribunal and the parties quickly realized that they would run out of time, as the allotted 18 days would not be enough to finish the hearing.

[86] In addition, the Complainant confirmed that she had not yet communicated with General Vance and did not have his contact information. This means that she asked the Tribunal to summon and enforce the attendance of a witness without the slightest idea of when he would be available, where he was or whether he would contest his summons.

[87] If the Tribunal had summoned General Vance on such short notice, it would have been necessary to suspend the hearing while the Complainant took steps to find him, serve the summons on him, pay for his witness fees and, possibly, take time to prepare him. And yet there was no guarantee that General Vance, first, could be found and, second, would be available to attend the hearing on the dates that had been scheduled months before it began. All this could have happened within the space and with advance notice of only a few working days, when the Tribunal and the parties had been preparing this case for many months, even years.

[88] In the case at hand, the prejudicial effect and the interests of justice would suggest dismissing the motion, or otherwise risk interrupting the 18-day hearing that had been scheduled months ago and all the necessary preparations for the witnesses, lawyers, paralegals, the Tribunal and its staff, in order to be ready to proceed. The Complainant did not satisfy the Tribunal that the delay in filing such a motion to summon and enforce attendance was justified and that the prejudicial effect could be corrected, even though she had decided not to have her doctor testify.

[89] The Tribunal also acknowledges the importance of finishing this case as expeditiously as possible. Moreover, Ms. Nash stated multiple times that the proceeding was long and clearly expressed her desire for the case to be over. If Ms. Nash’s motion had

been granted, the Tribunal finds that this would have had, without a shadow of a doubt, an effect on the hearing and the management of the evidence and that this would have drawn out the proceeding.

[90] Once again, the Tribunal is sensitive to what Ms. Nash has gone through and understands her fears and concerns. However, it must be noted that, in filing her motion at the last minute, she took the other parties and the Tribunal by surprise, which meant that no one was able to anticipate such a request and prepare themselves accordingly. This is also contrary to the Tribunal's Rules of Procedure and the principles of natural justice and procedural fairness.

[91] Therefore, it was not in the interests of justice to allow this motion and have to suspend the proceeding or postpone it to give Ms. Nash time to do what she intended to do. The entire system would have been affected, and that is in nobody's interest.

[92] Finally, Ms. Nash explained that the delay in filing her motion to summon General Vance as a witness was her response to the Forces' late filing of the names of their witnesses who were going to testify about the Forces' policies. The Tribunal is not persuaded by this argument.

[93] The Forces informed the Tribunal and the parties long ago that they were going to call two witnesses to speak about their policies, but this in itself was not a problem in the proceeding. According to Ms. Nash's affidavit, it appears that the main reason she was late in seeking a summons for General Vance was, rather, related to her fears and concerns regarding her safety.

[94] It should be added that the Complainant also has the burden of making out a *prima facie* case of discrimination. Ms. Nash's primary role is to present to the Tribunal *all* the evidence required to support her arguments and allegations. Ms. Nash therefore had to identify, in advance, the witnesses she needed, which includes any witness who could have testified on the allegations relating to the Forces' policies, and summon them in a timely manner, regardless of the witnesses announced by the Forces.

[95] In addition, General Vance was not a mystery witness or totally unknown because Ms. Nash already knew of his involvement, since he rendered his decision in February 2019. On this point, she admitted having considered the option of calling him as a witness more than a year ago. Accordingly, the Tribunal is not persuaded by Ms. Nash's argument that summoning him was a response to the Forces' late filing of its list of witnesses. It is unfortunate that this motion was not filed in a timely manner.

[96] In conclusion and for these reasons, the Tribunal dismissed Ms. Nash's motion. That said, other elements also favour dismissing her motion, and this will be discussed in the next section of this decision, in particular with regard to the relevance and necessity of General Vance's testimony.

C. Necessity, relevance and deliberative secrecy

[97] Paragraph 50(3)(a) of the CHRA provides that the Tribunal has the power to summon and enforce the attendance of witnesses it considers necessary for the full hearing and consideration of the complaint. In the French version of the CHRA, subsection 50(3) states:

> (3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir :
>
> > a) d'assigner et de contraindre les témoins à comparaître, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables à l'examen complet de la plainte, au même titre qu'une cour supérieure d'archives;

[98] The English version reads as follows:

> (3) In relation to a hearing of the inquiry, the member or panel may
>
> > (a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;

[99] Although the wording is not exactly the same in the two versions—testimonies considered "indispensables à l'examen complet de la plainte" in the French version versus

“necessary for the full hearing and consideration of the complaint” in the English version—the same meaning emerges: the testimony must be necessary and relevant with regard to the complaint.

[100] In other words, there must be a connection between the evidence that a party is seeking through the testimony of a witness and a fact, a question of law or a remedy (*Dorais v. Canadian Armed Forces,* 2021 CHRT 13 (CanLII), at para. 21; *Schecter v. Canadian National Railway Company,* 2005 CHRT 35 (CanLII), at para. 21).

[101] First of all, the Tribunal has already concluded that Ms. Nash had delayed in summoning General Vance as a witness in the proceeding and that she did not provide sufficient justification for the Tribunal to dispense with its Rules of Procedure and the rules of natural justice and procedural fairness.

[102] This delay must also be analyzed in light of the probative value of the potential testimony of General Vance, if he were called as a witness. The fact of the matter is, as the Tribunal will explain in the paragraphs below, that General Vance’s testimony would be fundamentally limited, given the nature of his involvement in Ms. Nash’s case, which would consequently affect the necessity and relevance of his testimony.

[103] It seems clear to the Tribunal that Ms. Nash is trying to summon General Vance not as a mere ordinary witness who could testify regarding facts of which he had knowledge that are relevant to the hearing. Rather, Ms. Nash is trying to summon him as a witness so that he can testify regarding the decision he rendered on February 27, 2019, concerning the grievance she filed against the Forces in 2014.

[104] In other words, Ms. Nash is trying to summon General Vance in his capacity as an administrative decision-maker and as the final decision-making authority in the decision to deny her grievance on February 27, 2019. To this end, the Tribunal does not have the power to summon this individual, who as an administrative decision-maker is protected by deliberative secrecy.

[105] The Tribunal notes that, in her motion to summon and enforce attendance dated January 27, 2023, Ms. Nash summarized the testimony of General Vance in clear terms, as follows:

> Retired General Jonathan Vance is the author of the Final Policy Grievance Response, and who can speak specially to his own report.

[106] The summary of his testimony is unequivocal: Ms. Nash wants General Vance to be summoned as a witness to speak to his "report" dated February 27, 2019.

[107] That said, when the Tribunal looked at General Vance's "report", as Ms. Nash describes it, this raised several questions. In this "report", it is clearly stated that the "decision"—by General Vance—is final, without appeal within the Forces and binding, in accordance with the *National Defence Act*, R.S.C. 1985, c. N-5 ("NDA"). It is also stated that his "decision" is not subject to appeal or review by any other court, except for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7, ("FCA").

[108] It is also mentioned that an application for judicial review may be made to the Federal Court within 30 days of his "decision", in accordance with subsection 18.1(2) of the FCA (see C-109 – Decision of J.H. Vance, General, dated February 27, 2019, at pages 15 and 16).

[109] Now, the Tribunal finds that Ms. Nash tried to redirect the problem by describing the document produced by General Vance as a "report". It is obvious to the Tribunal that the document produced by General Vance is not a "report" but a decision. General Vance acted as an administrative decision-maker and ruled on a grievance for which he produced a decision. Counsel for the Complainant had a hard time accepting this obvious fact, despite the Tribunal's questions and interventions to this effect to make her understand the true nature of the document produced by General Vance.

[110] Thus, and if the Tribunal accepts the summary of General Vance as produced by Ms. Nash, the reason she is asking the Tribunal to summon General Vance is so that he can testify about his decision regarding her grievance. In other words, Ms. Nash wants to ask him questions related to his decision dated February 27, 2019, in which he denied her grievance.

[111] The arguments presented to the Tribunal also confirm, on a balance of probabilities, that the only reason General Vance intervened in Ms. Nash's case is related to the filing of her grievance. Ms. Nash did not make any other arguments that would allow the Tribunal to come to a different conclusion or demonstrate that General Vance, apart from the grievance, had a role to play in the allegations relating to her complaint. Therefore, except for the grievance filed by Ms. Nash in 2014, there is nothing to demonstrate that General Vance, the Chief of the Defence Staff, would have had any involvement in her case.

[112] General Vance, in rendering his decision denying Ms. Nash's grievance, was acting as an administrative decision-maker. In *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII) [*Laval*], the Supreme Court reiterated that a judge cannot be required to explain or account for their judgment or decision. Demanding that a decision-maker, or a judge, be summoned to testify as a witness to explain how and why they made their decision is a direct attack on judicial independence (*Laval*, at para. 57).

[113] Also in *Laval*, the Supreme Court noted that deliberative secrecy also protects the deliberations of administrative tribunals or decision-makers but that the protection is not as watertight as it is for judges in courts of law (*Laval*, at para. 58). On this point, in *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC) [*Tremblay*], the Supreme Court stated the following at page 966:

> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.

[114] Accordingly, there is an exception to the principle of deliberative secrecy in the case of an administrative decision-maker. It should come as no surprise that the Complainant did indeed argue that the Tribunal should apply this exception and lift the veil of deliberative secrecy since General Vance's decision-making process did not, in her view, comply with the rules of natural justice. The Tribunal does not intend to dwell much on this argument.

[115] The Tribunal notes that General Vance's decision is not subject to review except by a supervising court, in this case, the Federal Court, in accordance with section 29.15 of the NDA. It is not the Tribunal's role to supervise the decision-making process or the decision itself of General Vance in his capacity as final authority in the grievance process. The Tribunal is in no way in a supervisory position with respect to this decision or the decision-making process. General Vance carried out the mandate conferred upon him by his enabling statute, decided Ms. Nash's grievance in his capacity as an administrative decision-maker and denied her application.

[116] Thus, it is up to a supervising court to determine whether the decision-making process of an administrative tribunal or decision-maker did not comply with the rules of natural justice and procedural fairness. As an administrative tribunal, the Tribunal does not have this power over a decision rendered by another administrative decision-maker.

[117] In a similar vein, all the case law filed by the Forces regarding deliberative secrecy concerns supervising courts when they perform a superintending or reforming function in respect of decisions by decision-makers from lower courts or other bodies (see for example *Timm v. Canada*, 2019 FC 36 (CanLII); *Laval* and *Tremblay*, mentioned above; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 (CanLII), [2001] 1 SCR 221).

[118] In those decisions, the Supreme Court or the Federal Court, as the case may be, took a position, as supervising court, on the issue of the deliberative secrecy of a board or a board member, that is to say, an administrative decision-maker just like the Tribunal.

[119] Now, the Tribunal has no trouble seeing how the Federal Court or the Supreme Court, in performing its superintending function, could lift the veil of deliberative secrecy of an administrative decision-maker because of serious fears that the decision-making process did not comply with to the rules of natural justice and procedural fairness. However, neither the Complainant nor the Commission offered any arguments or authorities that would demonstrate that the Tribunal, as an administrative decision-maker, has the power to lift deliberative secrecy in respect of another administrative decision-maker when there is no supervisory or superintending relationship between them.

[120] Consequently, if the Tribunal intervened to determine whether General Vance's decision and his decision-making process complied with the principles of natural justice, this would necessarily amount to the Tribunal assuming the role of a supervising court or tribunal. This is nothing short of an indirect challenge of General Vance's final decision before our Tribunal when judicial review by the Federal Court was the right path to take if the Complainant had grounds to contest the decision.

[121] That being said, all the issues related to the decision-making process followed by General Vance, including why the decision sat untouched on his desk for nearly two years, why he took so much time to render his decision and how the system could have been more compassionate and flexible in its treatment of Ms. Nash, as stated in his decision, etc.—in short, everything to do with General Vance's decision, directly or indirectly—is fundamentally protected by deliberative secrecy. The Tribunal does not have the authority to lift this veil and cannot summon General Vance to provide details regarding his decision-making process or his decision.

[122] Accordingly, since General Vance is protected by deliberative secrecy, what remains of his testimony if he cannot comment, directly or indirectly, on his decision dated February 27, 2019, concerning Ms. Nash's grievance? Clearly, it must be concluded that there is not much left.

[123] Ms. Nash argued that General Vance could testify, in broader terms, about the Forces' policies at issue in her complaint before the Tribunal. Once again, and according to what was presented to the Tribunal, the only reason General Vance intervened in Ms. Nash's case is in relation to her grievance. That General Vance would speak about general polices in the Forces, without being able to tie them to Ms. Nash's personal circumstances, makes his testimony less relevant. If he had to tie the implementation of a policy or the application of policy to the Complainant's situation, in the end, it would come down to doing exactly what he did in his decision of February 27, 2019, since in his decision, he highlights Ms. Nash's allegations and the application of several Forces policies, policies that are also at issue in her complaint before the Tribunal.

[124] Therefore, Ms. Nash did not present any probative arguments allowing the Tribunal to conclude that the rest of General Vance's testimony is sufficiently relevant and necessary with regard to dealing with the complaint. Moreover, the probative value of the rest of General Vance's testimony on the Forces' policies, in general, without being able to tie them to his decision regarding Ms. Nash's grievance, does not outweigh the risks in violating deliberative secrecy. Accordingly, the Tribunal is not satisfied that it would be necessary to summon this witness and enforce his attendance pursuant to paragraph 50(3)(a) of the CHRA.

V. Order

[125] For all these reasons, the Tribunal dismissed the Complainant's motion.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
June 13, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2401/6019

Style of Cause: Laura Nash v. Canadian Armed Forces

Ruling of the Tribunal Dated: June 13, 2023

Motion dealt with orally with appearance of parties

Appearances:

Natalie MacDonald, for the Complainant

Julie Hudson and Christine Singh, for the Canadian Human Rights Commission

Lorne Ptack and Taylor Andreas, for the Respondent