Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 5
Date: February 8, 2023
File No.: T2715/9121

Between:

AB

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

CANADIAN SECURITY INTELLIGENCE SERVICE

Respondent

Ruling

Member: Athanasios Hadjis

Overview

[1] The Complainant filed a human rights complaint with the Canadian Human Rights Commission ("Commission") alleging that she was discriminated against while employed by the Respondent, the Canadian Security Intelligence Service ("CSIS"). The Commission asked the Tribunal to hold an inquiry into the complaint.

[2] The Respondent requests that the Tribunal issue a confidentiality order anonymizing the identities of the Complainant and the witnesses in this case, based on the requirements of s. 18(1) of the *Canadian Security Intelligence Service Act*, RSC, 1985. c. C-23 ("*CSIS Act"*).

[3] For the following reasons, I grant the order but subject to certain conditions.

The Respondent's Request for a Confidentiality Order

[4] Section 52(1) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 ("*CHRA"*) states that Tribunal inquiries are conducted in public. This reflects the principle that hearing processes should be held in the open. As the Supreme Court of Canada stated in *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII) ("*Sherman Estate*") at para. 1, the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy.

[5] However, exceptional circumstances do arise where competing interests justify a restriction to the open court principle (*Sherman Estate* at para. 3). Thus, in the present context, under s. 52(1)(a) of the *CHRA*, Tribunal members may take any measures and make any order to ensure their confidentiality of an inquiry if they are satisfied there is a real and substantial risk that matters involving public security will be disclosed.

[6] The Respondent claims that there is such a risk in this case. It points to s. 18(1) of the *CSIS Act*, which reads, in material part:

> (…) **no person shall knowingly disclose any information** that they obtained or to which they had access in the course of the performance of their duties and functions under this Act or their participation in the administration

> or enforcement of this Act and **from which could be inferred the identity of an employee** who was, is or is likely to become **engaged in covert operational activities of the Service or the identity of a person who was an employee engaged in such activities.**
>
> (*emphasis added*)

[7] Section 18(2) provides that a person may disclose this information for several reasons, including "as required by any other law," as stated in the English version of the *CSIS Act*, or "si une autre règle de droit l'exige" in the French version. Section 18(3) goes on to provide that those who contravene s. 18(1) are guilty of an indictable offence or an offence punishable on summary conviction.

[8] The Respondent submits that the disclosure of the names of the Complainant and other current or past CSIS employees mentioned in the Complainant's Statement of Particulars is a potential breach of s. 18. During the inquiry, the parties will by necessity disclose information through documents or testimony that will identify current or past CSIS employees. The disclosure of their identities can cause a real and substantial risk to national security.

[9] The Complainant filed her human rights complaint using her full name. However, she consents to the Respondent's request, subject to several "limitations and practical considerations." To begin with, she points out that s. 18(1) does not extend to all CSIS employees, only those who were or are likely to become engaged in covert operational activities.

[10] Furthermore, she submits that the Tribunal's order should require that individual employees' actual initials be used, and in a consistent manner throughout the hearing process to enable the Tribunal and the parties to identify individual employees and understand their roles and responsibilities, as well as their involvement in events and the drafting of documents. The full title of each employee's position within the CSIS hierarchy should also be given.

[11] Finally, the Complainant asks that the Respondent be required to disclose an employee's full name at the Complainant's request if, for instance, their initials or title alone

are insufficient to identify who they are and their involvement in the events at issue. The parties would undertake not to publicize the information nor submit it to the Tribunal.

[12] The Commission also consents to the Respondent's request, subject to the same conditions outlined by the Complainant. The Commission underscores that it, in particular, may need to have an employee's full identity disclosed to it in some instances, since the Commission will not have the same knowledge and experience about CSIS's operations as the Complainant.

[13] The Respondent objects to the request that actual initials of the individuals' names be used. It submits that they can be adequately identified by references to position titles and dates. Each person would be consistently identified in all documentation with the same random initials or other identifiers. The Respondent also submits that it cannot disclose the full names of employees under any circumstances.

Analysis

[14] As the Tribunal noted in *SM, SV and JR v. Royal Canadian Mounted Police*, 2021 CHRT 35 (CanLII), the analysis of confidentiality requests made under s. 52 of the *CHRA* are informed by the Supreme Court of Canada's test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII) ("Sierra Club"). In *Sherman Estate*, the Court stated at para. 43 that the *Sierra Club* test continues to be an appropriate guide for judicial discretion in such cases. According to the test, as recast in *Sherman Estate* at para. 38, the person asking a court or tribunal to exercise its discretion in a way that limits the presumption that hearings are held in open court must establish that:

A. Court openness poses a serous risk to an important public interest;

B. The order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and,

C. As a matter of proportionality, the benefits of the order outweigh its negative effects.

There is a serious risk to an important public interest

[15] I am satisfied that there is a serious risk to an important public interest if the names of the individuals contemplated in s. 18 of the *CSIS Act* were disclosed. As the Federal Court stated in *Jaballah (Re)*, 2009 FC 279 (CanLII), at para. 20, as a matter of general principle, Canada's national security requires that CSIS officers who engage, or will engage, in operational activities not be hindered or prevented from continuing such activities, or be put at risk, because their identities are disclosed in court proceedings. Reframed in the context of s. 52(1) of the *CHRA*, there is a real and substantial risk that matters involving public security will be disclosed if these employees' identities are revealed.

The order is necessary and reasonable alternative measures will not prevent the serious risk to the important public interest

[16] As just noted, there is an important public interest in protecting the identity of these individuals from public disclosure. The least intrusive measure to achieve this result is to anonymize their identities while at the same time conducting the hearing in public and issuing a decision that is otherwise unaffected. The fairness of the inquiry will not be affected as long as the other parties are able to know the individuals' identity, and the anonymization of their names will not impede the Complainant's ability to pursue her complaint.

[17] However, the scope of the order should not extend beyond the specific group of employees who require the protection provided by s. 18 of the *CSIS Act*, namely only those who were or are likely to become engaged in covert operational activities. The Respondent asked that the anonymization order apply to the Complainant's name. Based on her position title at CSIS, as described in her complaint and in the parties' Statements of Particulars, I am satisfied that the Complainant is one of those employees.

[18] As for the Complainant's and Commission's request that the employees' actual initials be used, this does present a risk that a third party, with some research, could identify the employee. I am not persuaded, however, that by merely giving title positions and dates, the Complainant and the Commission will adequately be able to know which person is involved in each issue. The legal principles of procedural fairness dictate that at a minimum the other parties be able to learn the identity of the anonymized party in confidence. The

Complainant was already a CSIS employee and both she and the Commission are represented by legal counsel who are subject to an implied undertaking that the information they acquire during the hearing process will remain confidential and only be used internally for the purposes of the hearing.

[19] Accordingly, the Respondent will have to disclose an employee's name to the Complainant or the Commission if they are unable to identify the person from the position or other provided information. It is understood that the Complainant and the Commission will only make such requests when they have exhausted all efforts at determining the employee's identity from the other information.

The benefit of the order outweighs its negative effects

[20] As the Respondent points out, there is an important public interest in preventing the disclosure of these employees' identities and ensuring that they not be put at risk in carrying out the national security operations of CSIS. This important need to protect national security activities outweighs the negative effects arising from the anonymization of the proceedings. The inquiry will still be public. There will be no impact on any decision issued in this case other than the anonymization of certain at-risk individuals' names. The parties will always know who is being referred to either from their personal knowledge and other information or by being given the person's name in confidence.

[21] I therefore find that the three parts of the *Sierra Club* test have been met and that in accordance with the Tribunal's authority under s. 52 of the *CHRA,* a confidentiality order should be granted with the conditions set out below:

Order

[22] I order that:

1. Any information identifying the Complainant or any current or past employee of CSIS who was, is or is likely to become engaged in covert operational activities of CSIS, or any person who was a CSIS employee engaged in such activities (a

"Confidential CSIS Employee") is designated to be confidential information (the "Confidential Information") under s. 52 of *CHRA;*

2. The Complainant will be identified only by the pseudonym "AB" in all documents and pleadings filed with the Tribunal, as well as all correspondence between parties and with the Tribunal, and in all Tribunal Rulings and Decisions, until further order of the Tribunal;
3. Any hard copy documents filed by the parties containing Confidential Information must be placed in a sealed envelope marked confidential and shall not be made part of the public record, provided that a public version of the material from which the Confidential Information is redacted or removed is also filed on the public record;
4. The Respondent may identify any Confidential CSIS Employee in any document filed with the Tribunal solely and consistently by the same random initials or other pseudonym and must include their position title;
5. At the request of the Complainant or the Commission, the full name of a Confidential CSIS Employee must be disclosed where the position title and other provided information alone are insufficient to identify who the employee is and their involvement in an issue;
6. If the full name of a Confidential CSIS Employee is disclosed to the Complainant or Commission, they must keep the information in confidence and cannot publicize it nor include it with any documentation submitted to the Tribunal; and
7. All parties must respect the confidentiality of the information by not referring to any Confidential Information in any public proceedings and by only referring to Confidential CSIS Employees by the random initials or other pseudonyms assigned to them.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
February 8, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2715/9121

Style of Cause: AB v. Canadian Security Intelligence Service

Ruling of the Tribunal Dated: February 8, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Morgan Rowe and Claire Michela, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Sean Gaudet and Adam Gilani, for the Respondent