Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MINISTER OF PERSONNEL FOR THE

GOVERNMENT OF THE NORTHWEST TERRITORIES,

AS EMPLOYER

Respondent

RULING ON THE DOCUMENTS IN THE SIXTH PRIVILEGED DOCUMENTS LIST

Ruling No. 11

2001/11/13

PANEL: Paul Groarke, Chairperson

Athanasios Hadjis, Member

Jacinthe Théberge, Member

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I. INTRODUCTION

[1] The Complainant and the Commission issued a Notice of Motion on September 24, 2001, challenging a number of documents in the Sixth Privileged Documents List filed by the Respondent. The list is dated August 2, 2001 and has been entered as Exhibit R-135.

The relevant documents have been identified by row numbers in the Notice of Motion and can be found at rows 7005 - 7021 and 7023 - 7038, inclusive.

[2] The Respondent has refused to disclose the documents on the basis that "settlement discussions", "internal documents prepared for the general purpose of litigation" and "internal documents relating to [the] collective bargaining process" are privileged. The basis of the claims regarding specific documents is set out in an affidavit by Gerald Lewis Voytilla, the Comptroller General and Secretary of the Financial Management Board of the Government of the Northwest Territories. The affidavit was sworn on September 24, 2001 and is similar to the affidavits provided on previous motions.

[3] The Respondent subsequently reconsidered its position and has now withdrawn its claim of privilege with respect to a number of the documents. On October 17th, Mr. Karayannides appeared before the Tribunal and advised us that the Respondent was willing to waive its claim of privilege with respect to the documents at rows:

7007;

7011;

7012;

7013, with the exception of the fourth and fifth pages in;

7014;

7015;

7016, with the exception of the fourth page in;

7017, with the exception of the last 11 pages;

7018, with the exception of the last page;

7019;

7020;

7021;

7023;

7026, with the exception of pages 12 and 13;

7027;

7029;

7032;

7033;

7034;

7035; and

7037.[(1)]

We have accordingly restricted ourselves to an examination of the remaining documents.

[4] The Respondent has provided the Tribunal with copies of the documents. These documents are contained in three volumes, and sorted by tab number. The Tribunal has also had the benefit of written submissions from the parties. In its Submissions, the Complainant raises a number of legal arguments. In each case, however, it has essentially asked us to restrict the scope of the Respondent's claim of privilege, in the interests of full and open disclosure. In our view, most of the issues that this raises are a matter of judgement.

[5] There are two preliminary points that should be mentioned. The Respondent has made two or three claims of privilege with respect to most of the documents. As a technical matter, we have rejected some of these claims. As long as the documents in question were subject to one of the privileges, however, we have chosen not to discuss the matter. The point is moot.

[6] The Tribunal also wishes to advise the parties as a point of information that it has not taken the position at any time that documents may be privileged or otherwise protected from disclosure, "merely because they contain admissions against interest", as the Complaint writes in paragraph 61 of its written submissions. While this issue was mentioned in the Notice of Motion and the written submissions, it was never pressed in argument and we gather that the Complainant merely desires some reassurance on the matter.

II. DISCUSSION

[7] The Complainant has argued that Mr. Voytilla's affidavit is insufficient. This seems of little concern in the immediate instance, since we have the actual documents before us. Although the affidavit sets out the general parameters of the Respondent's claims, it is the contents of the documents that matter. As we have stated in the past, we have not found it all that difficult to determine when a privilege applies. This calls for an exercise of judgement, which can only be taken in the context of the surrounding circumstances.

[8] We wish to stress that the only issue at this point in time, aside from the question of privilege, is whether the Respondent is obliged to disclose the documents. The test on this restricted issue is whether these documents are "arguably relevant" to the hearing. We have accordingly taken no position on the question whether the documents can be entered into evidence in the hearing.

A. THE HAY PLAN

[9] There are two issues that call for further comment. The first relates to the Hay Plan. There appears to be some dispute as to the significance of the Hay Plan in these proceedings. The employer has argued that the union agreed that the Hay Plan was gender neutral, in ratifying the most recent collective agreement. The Complainant demurs. It is evident that the pleadings and particulars filed by the Respondent merely identify a number of problems with the Joint Equal Pay Study and the Willis Plan. The case has evolved considerably, however, in the course of the hearing, and it now seems clear that the Respondent wishes to use the Hay Plan for the purpose of discrediting the Joint Equal Pay Study and the Willis Plan. The argument is apparently that the Hay Plan was superior to the two previous exercises and provides a more accurate assessment of any wage gap.

[10] It follows that the effectiveness of one plan is logically related to the failures of the others. It is for the parties to decide what evidence to call and it is premature to predict where the evidence will take us. It is nevertheless apparent, at this point in the hearing, that the credibility of all three exercises is at least implicitly in issue. It follows that material relating to the Hay Plan and the internal process of introducing the Hay Plan is arguably relevant to the proceedings, at least if it goes to the validity of the Joint Equal Pay Study.

[11] A distinction must be made between the actions taken by the Government in the course of managing its public service and actions taken in a more litigious context. It must be borne in mind that the Government of the Northwest Territories could not function as a large scale–employer without a job classification plan. When the Government realized that it was necessary to introduce a new classification plan to deal with the issue of pay equity, it accordingly went through a relatively extensive process of internal and external consultation, which led to the replacement of the existing classification system. This required a full census of the employees in the public service, under the job evaluation system contained in the Hay Plan. It goes without saying that this was a major undertaking, which led to the creation of many documents.

[12] On the other hand, some of the material relating to the Hay Plan may have been prepared in some dominant sense for the specific purpose of litigation, negotiating a settlement, or collective bargaining and is therefore privileged. We have not found it difficult to distinguish between these kinds of documents in scrutinising the material before us. There are internal documents relating to the Hay Plan that are openly strategic.

They can be characterized as private documents, created on a confidential basis, that address the existing dispute. They were written on the clear assumption that they would not be shared with the opposing parties.

[13] The documents that we are releasing, on the other hand, were prepared by the employer in the normal course of its activities as an employer. They were not created for the purpose of conducting litigation and were only incidentally prepared for collective bargaining purposes. It is true that they were prepared in the context of the larger litigation, but they were not prepared for the purpose of the litigation. The fact that they may have had some utility in preparing for the hearing or entering into collective bargaining is incidental to their purpose and does not change their essential character.

[14] The documents found at tabs 4, 5, 6 and 20 were created in the course of introducing the Hay Plan. As such, they are a natural and inevitable part of the internal process that any large employer would follow in introducing such fundamental changes to its job classification system. The fact that the document was created in the context of litigation and comments on issues that arise in the context of the litigation is not sufficient. There must be a causal connection, which is not present in the documents that we are releasing. There is nothing inherently strategic about these documents, which were not prepared for the purpose of litigation, collective bargaining, or settlement discussions.

[15] We have upheld the Respondent's claim of privilege with respect to the other documents in the three volumes which we have received. As we have recognized in previous rulings, every litigant is entitled to a certain sphere of privacy in which it can evaluate its strategy and consider the various alternatives which face it. This is particularly true of a government or a large corporation, which can only reflect upon such matters through internal communications between its officers. The law recognizes that it is in the public interest to allow the frankest of discussions in such a context. This supports the general purpose of litigation, which is to resolve disputes in as efficient a manner as possible.

[16] We have not found it difficult to separate the documents that would attract a litigation privilege from the kind of documents that we are releasing. The documents found at tabs 23 and 25, for example, have a pronounced strategic character and were prepared for the purpose of internal consultation and advice. They accordingly meet the criteria set out in the case law and satisfy the Wigmore test.

B. COLLECTIVE BARGAINING PRIVILEGE

[17] There is also an issue with respect to the collective bargaining privilege, as counsel has described it. All of the parties before us took the position at the outset of the disclosure process that it was important to protect the relationship between the Government of the Northwest Territories and its public service. This is a matter of acknowledging that there is a general public interest in protecting the efficacy of the

collective bargaining process. The recognition of something "akin to a litigation privilege" offers a measure of protection for the relations between the parties, which may be damaged by undue disclosure. The interest that the public has in such a relationship seems all the more compelling in the context of collective bargaining between a government and its public service.

[18] We essentially agreed with the position put forward by all counsel in argument and adopted the position of the parties. It is too late for the parties to change their position without establishing that there are exceptional circumstances that would permit them to do so. In fairness, the Complainant appears to have contented itself with the argument that any collective bargaining privilege should be construed in a relatively narrow fashion. It advanced two basic arguments in this context: one is that the collective bargaining privilege only extends to the negotiations and does not extend to the "administration" of the collective agreement.

[19] The other argument is that any collective bargaining privilege is temporally restricted. In paragraph 19 of its written argument, the Complainant submits: "The collective bargaining privilege should only cover the current collective bargaining round, and, like litigation privilege, it should end with the dispute." The Complainant has cited three decisions, which ostensibly stand for the proposition, at paragraph 21, "that a collective bargaining or labour relations privilege only attaches to disputes". The problem with such an argument is that there is an ongoing controversy between the union and the employer in the immediate case with respect to the issue of pay equity.

[20] The history of the present case establishes that the pay equity dispute extends far beyond the parameters of a single round of collective bargaining, whatever the results of such a round. The union itself has taken the position that the Hay Plan was imposed unilaterally and has at least implicitly suggested that it still possesses the right to challenge the plan. In our view, the limitations urged upon us by the Complainant raise legitimate concerns with respect to the possibility of broadening the existing categories of privilege beyond their proper parameters. It is important to maintain the transparency of the hearing process, which assists all of the parties in establishing the truth.

[21] Having said this, we do not feel it would be appropriate to enter into an extensive discussion of the exact scope of the collective bargaining privilege in the present proceedings. There seems no reason to do so. The Complainant agrees that the issue is whether the documents meet the general Wigmore criteria, and the concerns expressed in the case law, at this moment in time. It is accordingly sufficient to say that this is the issue that we have addressed, in examining the documents. It may help to add, in this context, that we have assessed the possible effect of disclosure on the relations between the parties as they presently exist.

[22] It has become apparent, in the course of the hearing, that the issues before the Tribunal are still considerably sensitive. It follows that internal documents, of a strategic nature, which may affect the relations between the parties, are entitled to some measure of protection, on both sides. In saying this, we are reaffirming the position that we took in

our original ruling, where we essentially agreed that the sensitivities of the collective bargaining process deserve some measure of protection under the Wigmore criteria.

III. RULING

[23] The Tribunal is of the view that the other documents which have been challenged are privileged.

[24] The Respondent is accordingly ordered to provide the Complainant and Commission with copies of the above documents by Wednesday, November 14th, along with copies of the documents from which the claim of privilege has been withdrawn. This will give counsel an opportunity to review the documents before the case conference scheduled for November 21st.

[25] The Tribunal will ask the Registrar to keep all of the documents in safekeeping until such time as the disclosure process has been concluded.

Paul Groarke, Chairperson

Athanasios Hadjis, Member

Jacinthe Théberge, Member

OTTAWA, Ontario

November 13, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T470/1097

STYLE OF CAUSE: Public Service Alliance of Canada v. Minister of Personnel for the Government of the Northwest Territories, as Employer

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(October 17, 2001)

DECISION OF THE TRIBUNAL DATED: November 13, 2001

APPEARANCES:

Judith Allen For the Public Service Alliance of Canada

Ian Fine For the Canadian Human Rights Commission

Joy Noonan

George Karayannides For the Government of the Northwest Territories

1. See the transcript of the proceedings, vol. 101 pp. 12194 - 12200.