

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Heather Lynn Grant

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Ruling

Member: Sophie Marchildon

Date: November 3, 2010

Citation: 2010 CHRT 29

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A. Additional disclosure

[1] The issues raised in this case are related to fundamental human rights. The rules of natural justice require that both parties be able to bring forward their evidence that sustain their positions. However, this does not permit the parties to dispute all collateral assertions made in a hearing. The Tribunal's Rules of Procedure are more relaxed than a court proceeding, however the Tribunal's rules are intended to ensure that parties are not surprised by last minute disclosure. Rules 6 and 9 require the disclosure of all arguably relevant evidence:

6 Statement Of Particulars, Disclosure, Production

Statement of Particulars

6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,

- (a) the material facts that the party seeks to prove in support of its case;
- (b) its position on the legal issues raised by the case;
- (c) the relief that it seeks;
- (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;
- (e) a list of all documents in the party's possession, for which 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;
- (f) a list identifying all witnesses the party intends to call, other than expert witnesses, together with a summary of the anticipated testimony of each witness.

Reply

6(2) The complainant and the Commission shall serve and file a Reply within the time fixed by the Panel,

(a) where they intend to prove facts or raise issues to refute the respondent's Statement of Particulars; and

(b) where these facts or issues were not identified in their Statement of Particulars under 6(1).[14]

Expert witness reports and reports in response

6(3) Within the time fixed by the Panel, each party shall serve on all other parties and file with the Tribunal,

(a) a report in respect of any expert witness the party intends to call, which report shall,

(i) be signed by the expert;

(ii) set out the expert's name, address and qualifications; and

(iii) set out the substance of the expert's proposed testimony; and[21]

(b) a report in respect of any expert witness the party intends to call in response to an expert's report filed under 6(3)(a), which report shall comply with the requirements of 6(3)(a).

Production of documents

6(4) Where a party has identified a document under 6(1)(d), it shall provide a copy of the document to all other parties. It shall not file the document with the Registry.

Ongoing disclosure and production

6(5) A party shall provide such additional disclosure and production as is necessary

(a) where new facts, issues or forms of relief are raised by another party's Statement of Particulars or Reply; or

(b) where the party discovers that its compliance with 6(1)(d), 6(1)(e), 6(1)(f), 6(3) or 6(4) is inaccurate or incomplete.

9 Hearing, Evidence

No previously undisclosed evidence, issue, relief

9(3) Except with leave of the Panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in 1(1), and subject to a party's right to lead evidence in reply,

(a) a party who does not raise an issue under Rule 6 shall not raise that issue at the hearing;

(b) a party who does not, under Rule 6, identify a witness or provide a summary of his or her anticipated testimony shall not call that witness at the hearing;

(c) a party who does not disclose and produce a document under Rule 6 shall not introduce that document into evidence at the hearing;

(d) a party who does not, under Rule 6, identify the relief which it seeks shall not make representations in respect of that relief at the hearing; and

(e) a party who has not complied with 6(3) shall not introduce an expert report into evidence nor call an expert witness at the hearing.

[2] Specifically, rule 9(3) creates a presumption of inadmissibility of undisclosed evidence. With the panel's permission, parties can bring forth new elements, however, it must be expected that last minute disclosure will have certain disadvantages. If last minute disclosure is permitted,

the other party must be permitted to sufficiently prepare itself in order to respect the principles of natural justice. The party that disclosed last minute evidence shall bear some of the disadvantages.

[3] On November 1, 2010, exhibit C-1, tab 18 was put to the Complainant-witness but was not entered into evidence as an objection was raised. The Respondent's counsel indicated to the panel that this document, a job posting and resume, had been disclosed to them only that morning and as such, they had not had an opportunity to review it. The panel ruled that the Respondent's counsel should take this opportunity and examine the document overnight in order to cure the prejudice and prepare accordingly. The next day, the Respondent's counsel presented the Complainant's counsel with a series of documents which had not been previously disclosed and which have not been entered in evidence. The Complainant's counsel was awarded time to review the documents before commenting on his position with regards to them. After his review, the Complainant's counsel requested to view the original of the pre-screening matrix, which was granted. A request was also made to discuss these new documents with the Complainant-witness who is currently still under oath, her examination in chief not yet completed.

[4] After consideration of the parties' submissions and the rule of fairness, the Complainant-witness shall not be given the opportunity to review the documents beforehand. Should the Respondent's counsel wish to enter these documents into evidence, they may do so and put the documents, including the pre-screening matrix to the witness at that time and allow her sufficient time to review the documents on the stand.

B. Addition of Witnesses:

[5] The Respondent's counsel raised the issue of the Complainant-witness testifying that she got along well with her coworkers. Counsel indicated that this evidence took him by surprise as the Complainant's Statement of Particulars did not specify that she would contest the validity of her performance appraisals. The Complainant's counsel responded citing the following paragraphs from the Complainant's Statement of Particulars:

Par. 4: The complainant was a good, competent, loyal and hardworking employee.

Par. 21: In this regard, the complainant says that insofar as the negative comments and criticisms in 2005 and 2006 performance appraisals are accurate, such comments and criticisms are directly attributable to symptoms of the complainant's diabetes.

Par. 31: The respondent gave the complainant poor performance appraisals in 2005 and 2006. The main criticisms in these performance appraisals pertained to attitude/personality issues and work ethic/workload issues. The core ability of the complainant to do her job was not specifically criticised. While the complainant did not accept the validity of all of the criticisms in her report, at the time they were levelled, the complainant acknowledges that insofar as the criticisms are valid they related to how she was feeling in 2005 and 2006.

[6] Although it may not appear at first glance that the Complainant-witness would contest the validity of her performance appraisals, this fact could have been inferred from these paragraphs.

[7] The Respondent's counsel states that they advised the Complainant's counsel of their intentions to potentially call additional witnesses, but the panel notes that this letter was received, as stated by the Complainant's counsel, on the Friday prior to the beginning of the hearing.

[8] The fact that the Complainant-witness testified that she got along well with her coworkers could be questioned depending on what would be submitted by the Respondent's counsel as a will say. The Complainant's counsel also mentioned that if these additional

witnesses were allowed, he would have to re- evaluate his case and possibly present new evidence and call other witnesses, which would be prejudicial to the process.

[9] Both parties may request to add witnesses subject to the submission of precise will-says, including clear statements on issues to be addressed in testimony, relevance to the case and an estimate of the time required for testimony. They should not be redundant and should not distract from the issue at hand. These will-says will be reviewed by the panel and it will then determine if the witnesses may testify. The panel will consider the relevance of the content of the will says and the impact on the entire process before granting the additions. If the witnesses are added to the witness list, the panel expects full disclosure of any supporting documentation for these witnesses prior to the hearing.

[10] The panel has given careful consideration to the nature of the evidence in question, the objections to its admissibility, the relevance of the evidence and the potential unreliability or prejudice suggested by the objections.

Signed by

Sophie Marchildon
Tribunal Member

Winnipeg, Manitoba
November 3, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1452/7809

Style of Cause: Heather Lynn Grant v. Manitoba Telecom Services Inc.

Ruling of the Tribunal Dated: November 3, 2010

Appearances:

R. Ivan Holloway and Season C. Bowers, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Gerald D. Parkinson and Paul A. McDonald, for the Respondent