

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

File No.: T1817/4712

Member: Olga Luftig

Date: December 16, 2013

Citation: 2013 CHRT 34

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I. Background

[1] On January 20, 2010, Mr. Geevarughese Johnson Itty, also known as Mr. Johnson Itty, (“Complainant”) filed a complaint (“Complaint”) with the Canadian Human Rights Commission (“Commission”) against the Canada Border Services Agency (“CBSA” or “Respondent”), alleging discrimination based on race, national or ethnic origin and age, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, as amended (“Act”). The Complaint was subsequently amended to include section 10 allegations.

[2] On April 24, 2012, by letter (“Referral Letter”), the Commission asked the Tribunal to institute an inquiry into the Complaint, pursuant to section 44(3)(a) of the *Act*.

[3] The Commission has advised that unless circumstances arise which cause it to change its position, it will not participate in the hearing.

[4] On January 31, 2013, the Complainant filed his Statement of Particulars (“SOP”). On March 8, 2013, the Respondent filed its SOP. The Complainant did not and will not be filing a Reply to the Respondent’s SOP.

[5] On April 11, 2013, the parties by their counsel, and I, absent Commission counsel, had a Case Management Conference Call (“CMCC”), during which Respondent’s counsel advised that he would be making a motion for an order for the confidentiality of parts of the Respondent’s evidence (“Confidentiality Motion”).

[6] The parties submitted written motion materials. There was no oral hearing. The Commission did not participate in the Confidentiality Motion.

II. The Complaint

[7] The Complaint, as amended, alleges that the Respondent's Port of Entry Recruitment Training program ("POERT") discriminated against him on account of his age, national or ethnic origin and race, contrary to sections 7 and 10 of the *Act*.

[8] The Complainant, a naturalized Canadian citizen, applied to the Respondent to become a Border Services Officer ("BSO"). He passed the Respondent's initial screening. He was invited as a trainee into the nine-week POERT program, which contains two evaluation stages, called Determination Points: Determination Point I ("D-I"), and Determination Point II ("D-II"). Trainees must pass the entire POERT program in order to be placed in the pool of those eligible to be hired as BSOs.

[9] The Complainant passed all the behavioural and written tests in D-I, and went on to POERT's second component, at the end of which was D-II. The latter Determination Point consists of another set of written tests and behavioural evaluations, including evaluations of simulations in which ten competencies are assessed. The Complainant did not pass D-II and was not placed in the pool of potential BSOs.

[10] It is not necessary for the purposes of this Motion to further detail the Complaint.

III. Respondent's Motion for Confidentiality and Other Motion Materials

[11] The Complainant has asked for disclosure of POERT assessor manuals, his own and various classmates' POERT test results, and other documents which the Respondent submits require an order designating them as confidential, with conditions governing their release to the Complainant and the Tribunal.

[12] The Respondent's Motion is for an Order that the thirteen documents listed in Schedule "A" of the Affidavit of Fernande Surprenant, Acting Executive Director of the Learning Design Solutions Division of the Respondent, sworn May 17, 2013 ("Surprenant Affidavit") be

designated as confidential and subject to certain conditions of disclosure. I do not specify the specific conditions in this paragraph because they have evolved as a result of the contents of in the Complainant's Response to Motion and the Respondent's Reply.

[13] I also do not set out the parties' arguments in any detail because they have agreed on most aspects of this Motion and the resulting Order.

[14] I refer to the thirteen documents listed in Schedule A of the Surprenant Affidavit as the "Schedule "A" Documents" and will refer to them individually using the same numbers as used in the Surprenant Affidavit.

[15] The Respondent's Reply includes the Affidavit of Emily MacLeod, a legal assistant who works with Respondent counsel, affirmed June 13, 2013 ("MacLeod Affidavit").

IV. Issue

[16] The issue in this Motion is whether or not the Tribunal should grant the Respondent's Confidentiality Motion.

V. Law on Confidentiality in the Act

[17] Section 52 of the *Act* states:

"(1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

- a) there is a real and substantial risk that matters involving public security will be disclosed;

- b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
- c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or
- d) there is a serious possibility that the life, liberty or security of a person will be endangered.

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).”

VI. Other Applicable Legislation

[18] The Respondent also relies on the *Public Service Employment Act*, SC 2003, c. 22, as well as the *Canadian Human Rights Tribunal Rules of Procedure (03-05-04)* (“*Tribunal Rules*”), in particular Rules 3 and 6.

VII. General Analysis

[19] As set out in its Preamble, one of the purposes of the *Public Service Employment Act*, *supra* (“*PSEA*”). is to ensure that appointments to the federal public service are based on merit and are nonpartisan. Further, the *PSEA*’s Preamble provides that the merit principle is a value that is very important to safeguard.

[20] The Respondent uses written and simulation training manuals and testing materials in its POERT program. POERT assessors and instructors (the latter also called “facilitators”) give a written promise to the Respondent not to reveal or discuss with anyone other than designated persons any POERT course content or testing materials including practice scenarios. This

promise applies before, during and after the POERT program. The breaking of this promise of ongoing confidentiality has severe consequences.

[21] The Respondent Agency and its BSOs have an extremely important role in facilitating and safeguarding the movement and security of Canadian citizens, residents, visitors and commercial traffic into and out of Canada's vast borders.

[22] It is in the interests of Canada and those who live here that BSOs be properly trained, vetted and qualified for this significant work. The POERT program tries to accomplish this. Another rubric under which POERT functions is the requirement under the *PSEA* that public service appointments be based on merit and be nonpartisan, and further, that these values be safeguarded. In order to do so, the integrity of the POERT documents listed in the Schedule "A" documents must be safeguarded; otherwise, there is a real risk that POERT's testing materials and training and assessment scenarios could be disclosed, whether intentionally or inadvertently, and candidates without merit could pass them. This would compromise not only the merit principle and cause the Respondent undue hardship, but would also compromise the public's safety.

[23] I am satisfied, in accordance with section 52 of the *Act*, that if the Schedule "A" Documents were made public during the inquiry or as a result of the inquiry being conducted in public, there is a real and substantial risk that matters involving public security would be disclosed, and that the disclosure of personal or other matters will cause undue hardship to the persons involved, particularly the Respondent, such that the need to prevent disclosure other than under the conditions set out in the Order below outweighs the societal interest that these documents be fully disclosed to the public.

VIII. Complainant's Position regarding Items 1 to 8 and 11 of the Schedule "A" Documents

[24] In paragraphs 2 and 3 of the MacLeod Affidavit, the deponent avers, on information from Respondent's counsel, that the Complainant "does not object" to all the conditions of the

Respondent's proposed Confidentiality Order in its Notice of Motion applying to items 1 to 8 and item 11 of the Schedule "A" Documents. Exhibit "A" of the MacLeod Affidavit consists of copies of two emails from the Complainant's representative to the Respondent's counsel setting out Complainant's position.

IX. Respondent's Position regarding Item 9 of the Schedule "A" Documents

[25] In paragraph 12 of its Reply, the Respondent states it does not require a confidentiality order for item 9 of the Schedule "A" Documents as the Complainant has obtained it pursuant to an Access to Information application.

X. Items 10 and 12 of the Schedule "A" Documents

[26] Items 10 and 12 are POERT scores for some of the Complainant's classmates. The Complainant states he needs to present them to those individuals, in order to fully present his case. Subject to certain conditions to ensure confidentiality, the Respondent agrees.

[27] I find that the Respondent's conditions are reasonable limitations on disclosure, and balance the need to protect the confidentiality of these aspects of the POERT program while protecting the Complainant's right to fully present his case. The Order below reflects this accordingly.

XI. Item 13 of the Schedule "A" Documents

[28] The Complainant submits that he needs to provide this document to an expert witness, whose opinion is necessary in presenting his case. I have reviewed the Respondent's proposed conditions for the release of item 13 to the Complainant's expert. I conclude that these conditions are also reasonable limits on disclosure, and balance the need for confidentiality of the document with the Complainant's right to natural justice, including the right to fully present his case. The Order below deals with item 13 accordingly.

XII. Order

[29] This Order does not apply to item 9 of the Schedule “A” Documents.

[30] All the Schedule “A” Documents, except item 9, are designated as confidential, in accordance with section 52 of the *Act*, and are also subject to the following terms:

- (a) they or any of them shall not be disclosed, directly or indirectly, during the course of this proceeding, without the Respondent’s prior written consent, to anyone other than:
 - (i) the Complainant and his representative; and
 - (ii) the Tribunal.
- (b) When filed with the Tribunal, they or any of them shall not form part of the public record and shall be filed in a sealed envelope. The Tribunal shall not make the Schedule “A” Documents, or any parts thereof, available to the public.
- (c) The Complainant or his representative shall not use the Schedule “A” Documents for any purpose other than pursuing the Complaint before the Tribunal.
- (d) The Complainant and his representative shall not make any copies of the Schedule “A” Documents, including, without limitation, electronic copies.
- (e) The Complainant’s representative is required to keep the Schedule “A” Documents under lock and key when not in use in this proceeding.
- (f) Within ten (10) days after the appeal rights relating to the Complaint have expired, the Complainant’s representative, and the Complainant, if applicable, shall return the Schedule “A” Documents to the Respondent’s counsel.

[31] The parties shall comply with the following conditions with respect to items 10 and 12 of the Schedule “A” Documents:

- (a) the Complainant shall only disclose each of item 10 and 12 to the witness to whom the item pertains and to no other witness;
- (b) before the Complainant discloses item 10 and 12 or either of them to the witness to whom the item pertains, the Complainant shall obtain and provide to the Respondent the witness’ written consent for the Respondent to disclose to the Complainant and his representative which documents pertain to the witness;
- (c) upon receipt of the witness’ written consent, the Respondent will disclose to the Complainant which documents pertain to which witness;
- (d) the Complainant shall only permit the applicable witness to view the documents in question either at the office of the Complainant’s representative or during the hearing before the Tribunal;
- (e) the Complainant and his representative, or either of them, shall not provide the witness with his or her own copy of the documents.

[32] The parties shall comply with the following conditions with respect to item 13 of the Schedule “A” Documents:

- (a) Before the Respondent provides item 13 or a copy thereof to the Complainant and before the Complainant provides the copy of item 13 to his expert witness, the Complainant shall provide the Respondent with the name and qualifications of the Complainant’s expert witness;
- (b) subparagraphs a) through f) of paragraph 2 of this Order shall apply *mutatis mutandis* to the Complainant’s expert witness; and
- (c) before the Complainant gives item 13 to his expert witness, the Complainant or his representative shall furnish the expert witness with a copy of this Confidentiality Order and shall obtain from that expert witness a written dated

acknowledgment that the expert witness has read the Confidentiality Order, understands it, and agrees to be bound by it.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
December 16, 2013