

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Elizabeth Cannon, Rhoda Godin and Carol Knowles

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Human Resources and Social Development Canada

Respondent

Ruling

Member: Edward P. Lustig

Date: March 31, 2011

Citation: 2011 CHRT 7

[1] This is a Ruling on the Applicants' motion of February 1, 2011, as amended on February 8, 2011 requesting disclosure of the following documents:

- a. Leave and attendance records Attridge, Chase, Chen, Coultis, Fleury, Godin, Knowles, Noah, Noyle, Rodgers 2005 through to current date;
- b. Overtime records for the above noted complainants for the same period of time;
- c. Overtime hours available to be worked for the same period;
- d. Current dated reporting structure charts for Investigators, Client Service, Officers, Business Expertise Advisors, Pay and Benefits Staff, Finance Staff, Phone Centre Staff;
- e. Un-redacted copy email from Bill Woods 2010/01/03 to Tania Maidment.”

[2] On May 24, 2006, Elizabeth Cannon filed Complaints with the Commission, on behalf of a group of employees of the Respondent, alleging that the Respondent had failed to accommodate the Complainants in respect of their work arrangements, on the basis of family status, sex and disability, prohibited grounds of discrimination under s. 3 of the *Canadian Human Rights Act* (“CHRA”), by cancelling between September, 2005 and January, 2006, a program providing these employees with the opportunity either to work from home (“Teleworking”) or from a government office other than their assigned office (“Hotelling”). The Complainants allege that they have requested accommodation as they are primary caregivers and that their circumstances are such that they commute to work on a daily basis which is alleged is detrimental to their family life.

[3] The Commission referred the Complaints to the Canadian Human Rights Tribunal (the “Tribunal”) for an inquiry on July 31, 2009 pursuant to s. 44 (3) (a) of the *CHRA*.

[4] Pursuant to its correspondence with the parties on January 25, 2011 and a subsequent teleconference with the parties, the Respondent agreed to disclose to the parties the documents

listed in subparagraphs 1 (a), (b) and (c) of this Ruling, to the extent that such documents exist and remain in the Respondent's possession or control, subject to any claim for privilege that the Respondent may have in respect of these documents.

[5] On the basis of the foregoing, the Respondent has stated at paragraph 20 of its February 15, 2011 submissions that the only documents that now need to be ruled on by the Tribunal regarding their disclosure are those listed in subparagraphs 1 (d) and (e) of this Ruling.

[6] For certainty, the Tribunal hereby rules that the Respondent must disclose to the parties the documents requested by the Applicants in this motion, listed in subparagraphs 1 (a), (b) and (c) of this Ruling forthwith.

[7] The parties have all made submissions respecting the request for disclosure in this motion.

[8] The essence of the Applicants' submissions with respect to disclosure by the Respondent of the documents listed in subparagraphs 1 (d) and (e) of this Ruling is as follows:

“With regard to our request for current reporting structure charts; this information is paramount to our case as the Respondent has stated in all of their correspondence to the Complainants, that all telework and hotelling had ceased in 2005. While we can readily see that is not the case. We require the requested documentation as proof that the Respondent provides such workplace accommodation to other groups of employees; yet will not supply this accommodation when requested on the grounds of family status.

With regard to our request for an un-redacted copy of the email between Bill Woods and Tania Maidment of 2010/01/03, we would offer the following:

(a) of late, the Respondent has claimed this email is a privileged solicitor/client communication; however, it should be noted here that the Respondent had ample opportunity to provide that specific information to the Complainants CHRC legal and the Tribunal when the document was originally requested in April, 2010.

(b) the document in question was not prepared by legal counsel and therefore, cannot attract a solicitor-client privilege. Of particular importance is the fact that this document was not created for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation and therefore should be part of the disclosure process.”

[9] The essence of the Respondent’s submissions with respect to the request for disclosure of the documents listed in subparagraphs 1 (d) and (e) is as follows:

“The documents referred to in subparagraph 1 (d), herein, are in respect of other sections of offices within HRSDC and do not include information with respect to teleworking and hotelling. The documents are therefore irrelevant to the issue of whether HRSDC has discriminated against the Complainants on the ground of family status. Even if the documents did broach the use of telework and hotelling in other sections or offices within HRSDC, they would still be irrelevant to the within proceedings and in particular, to whether the Complainants’ individual circumstances give rise to a legitimate claim of discrimination on the prohibited ground of “family status”.

The document referred in subparagraph 1 (e), herein, constitutes a communication to counsel by the HRSDC official charged with responding to the Complainants’ accommodation request. The communication occurred during the period when HRSDC was assessing how to respond to these requests, in the context of ongoing litigation before the Tribunal. HRSDC properly claimed the protection of solicitor-client privilege in respect of this communication.”

The Respondent cited various authorities in support of its submissions respecting solicitor /client privilege and litigation privilege. On March 20, 2011 the Respondent filed corrected materials respecting the correspondence listed in subparagraph 1 (e) of this Ruling which clarifies that it was sent to the Respondent’s counsel in the course of this litigation.

[10] The essence of the Commission’s submissions with respect to the request for disclosure of the documents listed in subparagraphs 1 (d) and (e) of this Ruling is as follows:

“Rule 6 (1) e of the Rules of Procedure of the CHRT is relevant in respect to the issue of disclosure:

(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;

In the Ruling on disclosure in *Connie Bushey v. Arvind Sharma* 2003 CHRT 5, the Tribunal set out the guiding principle regarding disclosure:

(4) The Respondent has taken issue with the fact that a copy of the minutes of settlement with the unions has not been disclosed to him. Although the Respondent is not represented by legal counsel and is acting on his own behalf, **I understand him to be contending that he is entitled to have this document communicated to him, in accordance with Rule 6 (3) of the Tribunal's Interim Rules of Procedure. This rule, when read together with Rule 6 (1) (d), obliges a party to provide to other parties, copies of all documents in its possession which are relevant to any matter in issue in the case and for which no privilege is claimed. The test for relevance for these purposes has been expressed as being whether the document in question is "arguably relevant" to the hearing. (1)**'

In other words, if the materials being sought are arguably relevant to the facts in issue, the liability issue or the issue of damages, the materials should be disclosed.

The Complainants are also challenging the identification of a document identified as solicitor-client privileged."

The Commission did not express an opinion with respect to the document identified as solicitor/client privileged.

[11] While the documents referred to in paragraph 1 (d) do not appear, according to their description, to be anything more than an organization-type chart, the fact that the Applicants have requested disclosure of these documents leads me to believe that they may also include information that is relevant to the case. As such, I agree with the submissions of the Commission and the Applicants, referred to herein, that they are arguably relevant and therefore rule that disclosure of these documents must be provided to the parties by the Respondent forthwith.

[12] With the further information about the document in subparagraph 1 (e) provided by the Respondent on March 15, it is clear to me that this documentation did get sent to counsel for the

Respondent and was intended to be used by the Respondent in this litigation. As such, I accept the submissions of the Respondent with respect to this document and rule that it need not be disclosed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
March 31, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1432/5809

Style of Cause: Cannon et al. v. Human Resources and Social Development Canada

Ruling of the Tribunal Dated: March 31, 2011

Appearances:

Elizabeth Cannon, for the Complainants

Giacomo Vigna, for the Canadian Human Rights Commission

Patrick Bendin, for the Respondent