File No.: T503/2098
Ruling No.: 3

CANADIAN HUMAN RIGHTS TRIBUNAL

R.S.C., 1985, c. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

CANADIAN TELEPHONE EMPLOYEES' ASSOCIATION,
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA,
FEMMES-ACTION

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

BELL CANADA

Respondent

RULING ON MOTION #5

TRIBUNAL:

J. Grant Sinclair, Q.C. Chairperson
Shirish Chotalia Member
Pierre Deschamps Member

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INTRODUCTION

This is a motion dated August 5, 1999, by Bell Canada for a ruling that certain documents ("disputed documents") and any oral evidence in respect of these documents are not admissible in evidence in the hearing of seven complaints referred to this Tribunal by the Canadian Human Rights Commission.[(1)]

The complaints, which allege a contravention of section 11 of the *Canadian Human Rights Act*, were filed by the Canadian Telephone Employees Association, the Communications, Energy and Paperworkers' Union of Canada, and Femmes-Action on behalf of female employees of Bell who are members of these unions.

THE FACTS

Pay Equity Joint Project

In the late 1980's, two bipartite committees were established at Bell, being Bell and C.T.E.A., and Bell and C.E.P. (then the C.W.C.) with the goal of identifying appropriate ways of assessing the relative worth of jobs at Bell. At this time, André Beaudet was responsible for pay equity issues at Bell, Linda Wu for C.E.T.A. and Patricia Blackstaffe

for C.E.P. For a number of reasons this bipartite process was not effective and by 1990 the agreements were at an end.

In early 1991, as a result of efforts to revive the process made by Michèle Boyer, Director of Pay Equity for Bell (who had replaced André Beaudet) Bell, C.E.T.A. & C.E.P. agreed to establish a tripartite process. This agreement was formalized by way of the "Pay Equity Project, Terms of Reference", dated April 26, 1991 ("Joint Study"). The purpose and scope of the Joint Study was "to assess the equity in compensation systems for work performed in female dominated classes within the bargaining units represented by the C.T.E.A. and C.W.C. in accordance with section 11 of the *Canadian Human Rights Act*. The results of the Joint Study were to be turned over to the parties' respective bargaining committees to be used for collective bargaining for the four bargaining units at Bell.

The Terms of Reference established a Joint Committee of twelve members, four each from Bell, C.T.E.A. and C.E.P. The Joint Committee had three co-chairs, one from each of the parties, who were designated as the Sub-committee. The Sub-committee was to make recommendations to the Joint Committee concerning the scope and structure of the Joint Study.

The Terms of Reference, also set up a Job Evaluation Committee, which was made of up to twelve Bell employees who were not members of the Joint Committee. The function of this Committee was to evaluate the 98 benchmark jobs that were selected as representative of the jobs in the bargaining units.

Michèle Boyer was Bell's co-chair from 1991 until 1993 when she was succeeded by

Louise Belle-Isle as Bell's co-chair. Linda Wu and Patricia Blackstaffe were the co-chairs from C.T.E.A. and C.E.P. throughout the Joint Study.

It is important to note that three people gave evidence on this motion relating to the Joint Study process, André Beaudet, Linda Wu and Paul Durber, Director of Pay Equity for the Commission from 1989 to 1998. According to his evidence, M. Beaudet was a member of the Joint Committee, but basically operated in the background during the Joint Study. He did not attend any of the meetings or participate directly in the discussions, teleconference calls or correspondence that are referred to in the evidence and which are of significance in deciding this motion. Of the three witnesses, only Linda Wu was directly involved in all these aspects from the beginning of the Joint Study and beyond. Paul Durber, Director of Pay Equity for the Commission, was also present or participated in these events from the time of the involvement of the Commission. Neither Michèle Boyer nor Louise Belle-Isle were called by Bell to give evidence.

The "Confidentiality Clause" - Article 2.4 of the Terms of Reference

The three parties to the Joint Study had concerns about protecting sensitive information generated or shared during the Study. Specifically, all three parties were concerned about the release of point values and individual job ratings. Bell's sensitivity related to the use

of this information in grievances; C.E.T.A. did not want to share payroll information for fear of C.E.P. raiding its membership. And C.E.P. did not want to release individual point values of jobs because it could cause internal problems within the union.

These concerns were reflected and dealt with by the parties through Article 2.4 of the Terms of Reference which provided:

2.4 The information that is shared and generated during the Pay Equity Project is only for the purposes of this study. All parties agree to safeguard all sensitive or confidential records.

It was also agreed by the Sub-committee that Joint Study information could be communicated or released beyond the Study only with the unanimous consent of the threeco-chairs. This practice was honoured both during the Joint Study process and after its completion.

Mr. Beaudet's view of Article 2.4 was that any information shared, produced, discussed or considered in the Joint Study process was confidential. However, according to Linda Wu, the parties did not consider that all of the information generated or used in the Joint Study was sensitive or confidential. For example, information relating to jobs and job descriptions was generally public information. Nor were minutes of Sub-committee meetings considered to be confidential. Information relating to point values or point ratings and weighting factors was highly sensitive and was to be kept within the Joint Study, subject to release only with the consent of the three co-chairs. On this question, we accept the evidence of Ms. Wu. She was actively involved in the discussions leading to the Terms of Reference and has a personal, direct and contextual knowledge of the whole Joint Study process.

The Complaints, the Commission and the Joint Study

In January 1990, individual Bell employees and C.T.E.A. members, filed individual complaints under section 11 of the *Act*. During 1991 and 1992, C.T.E.A. filed group complaints for those jobs held by the individual complainants who were members of the C.T.E.A. The purpose was to ensure uniform treatment within a job classification. All of the complaints were "job to job" complaints, ie. a complainant job and a comparator job was specified in the complaint.

Although the Joint Study was initiated for collective bargaining purposes, the three parties to the Study soon after, decided that the Commission should be involved. The reason was that if the Commission did a separate investigation, there may be confusion in the work place if the Commission's result were different than those of the Joint Study. In addition, the parties wanted the Commission to validate the Joint Study so that the results would be more readily acceptable to both management and employees at Bell.

Between May 1991 and July 1991, there were a number of meetings between representatives of the parties and the Commission including Michèle Boyer, Linda Wu and Paul Durber.

The Commission's position was that if it was to rely on the Joint Study, it had to be satisfied that the Study met the legislative criteria of section 11 of the *Act*. The Commission wanted to review information such as questionnaires, the progress reports, and job evaluation results. At no time during these discussions was it suggested, that the Commission would be bound by the Terms of Reference.

These meetings led to what the parties describe as the "August 1991 Agreement" between the Joint Study parties and the Commission. The agreement consists of two letters, the first dated August 2, 1991, from Michèle Boyer (and Patrick Hubbert, Director, Industrial Relations, Bell) to Paul Durber, with copies to Linda Wu and Patricia Blackstaffe. The second letter, dated August 6 is Paul Durber's response to the August 2, 1991 letter.

In the August 2, 1991 letter, the three parties proposed that the job evaluation system being developed in the Joint Study be used to assess the value of the complainant and comparator jobs in the complaints filed with the Commission. To this end, the Commission was to be given, on a strictly confidential basis, information about the job evaluation system and the value of the jobs in the complaints. The Commission's investigation into these complaints or any other similar complaints involving C.T.E.A. or C.E.P. jobs were to be held in abeyance during the Joint Study.

The complainant and comparator jobs in the complaints would be audited as part of the Joint Study if they were benchmark jobs. If not so selected, they would be assessed separately using the Joint Study information. When the point values for the jobs in the complaints were determined, they would be provided to the Commission and using this information, the Commission would then determine the validity of the complaints.

Mr. Durber in his August 6, 1991, letter did not agree to putting the Commission's investigation of the complaints into abeyance. Nor did he respond directly to receiving the information on a strictly confidential basis, other than to say that there may possibly be problems on the issue of confidentiality. He was confident, however, that any such problems could be resolved. He accepted the proposal to use the Study as a vehicle for the Commission's investigation.

More light is shed by Ms. Wu as to the substance and operation of the August 1991 Agreement. Her evidence, which we accept, is that the co-chairs wanted the Commission involved but were concerned about the Commission releasing information relating to point values for incumbent jobs. The point values and details of the job evaluation produced by the Joint Study would be given to the Commission and used by the Commission for the purpose of its investigation and assessment of the complaints. The Commission would not disclose or release any of this information during the investigation. But if the complaints were not resolved and were referred to a Human Rights Tribunal, then the information could be released and made public.

The evidence of Paul Durber confirms that the co-chairs were concerned that the Commission not release information on point ratings or point values of jobs. Mr. Durber assured the co-chairs that the Commission would not disclose this information during its investigation. But he made a point in their discussions, of telling the co-chairs that he could not give this guarantee beyond the investigation stage.

The Commission did participate in the Joint Study process. Commission staff was involved in pilot testing; the Commission provided feedback on subfactors questionnaires; Commission's staff attended sessions where the questionnaires were considered as well as attending focus groups, training sessions and some Joint Study committee meetings and Job Evaluation committee meetings. The development of the job evaluation plan was also monitored by the Commission.

The Joint Study and the Assessment of the Job/Job Complaints

The Joint Study was completed in November, 1992, and the results were reported in the "Final Report of the Pay Equity Joint Committee", dated November 23, 1992. On December 14, 1992, representatives of the three parties including Linda Wu, Trish Blackstaffe and Michèle Boyer and representatives of the Commission including Paul Durber met at the Commission's office. At this meeting, the Commission was given the Final Report of the Joint Study and four binders containing information from the Joint Study relating to the complainant and comparator jobs. This information included, compiled questionnaire results, job profile and training requirements, and evaluation rating information for each job. However, to complete its audit, the Commission required more information, namely the final weighting scheme from the Joint Study. Mr. Durber requested this information from Louise Belle-Isle in January 1993.

Ms. Belle-Isle provided this information in February 1993. In her covering letter, she reiterated the co-chairs' concern to avoid public disclosure of the factor points and noted that the information was provided on a confidential basis.

Thus, as of February 1993, the Commission had received the Final Report of the Pay Equity Study which was not useful to determine the validity of the job/job complaints[(2)]. It also had the job evaluation rating and final weighting factors for the complaint and comparator jobs, both benchmark jobs and non-benchmark jobs.

Conclusion - Confidentiality of Joint Study Documents - Pre-Mediation

Bell disputes the admissibility of 49 documents of the 74 documents identified by the Commission as being the Joint Study documents. Bell argues that these documents are confidential as between the three parties to the Joint Study and the Commission knowing this, is bound by this confidentiality.

We do not agree that all information generated or shared in the Joint Study is confidential. It is clear from the evidence of Linda Wu that the three parties had specific concerns about the *release* of information relating to job evaluation and job incumbency

for the job/job complaints. Article 2.4 does not give the information generated by the Joint Study an imprint of confidentiality. It requires that the parties "safeguard all sensitive or confidential records". The safeguards were provided through the practice of the co-chairs requiring unanimous consent to the release of any sensitive information.

Obviously, the three co-chairs did not consider that Article 2.4 of the Terms of Reference afforded the protection required when giving sensitive information to the Commission. Thus, they sought an agreement with the Commission. If the Commission is bound to maintain confidentiality of the information given to it to assess the complaints, such obligation must flow from the August 1991 Agreement.

We find that, under the August 1991 Agreement, the Commission was not to release or make public any information relating to point ratings or point values derived from the Joint Study. But this obligation was limited not only in scope, but also in time. The Commission made it clear from the beginning that it would not release this information during its investigation of the complaints, but if the complaints went to a tribunal, this information would be made public. Indeed, in its submissions, Bell concedes that this information was not to be given to individual employees nor was there any question that it would not be receivable in evidence before a tribunal.

Confidentiality and the Mediation

Events Leading to the Mediation Agreement

The Final Report of the Pay Equity Project confirmed that there was disparity wage between female dominated and male dominated jobs in the Bell workforce. The Final Report was given to the parties' bargaining committees and was widely publicized to the employees who were advised that the wage discrepancies would be addressed through consultation and collective bargaining. With respect to the job/job complaints, the Joint Study audit showed no wage gap. The Commission, however, in carrying its verification audit using the Joint Study information concluded that the jobs were of equal value and there was a wage gap at least for some of the complaints.

During 1993, Bell and the Unions made serious attempts to resolve the wage disparity. At the same time, the Commission was under considerable pressure from the individual complainants to complete its investigation and move the matter along.

By the end of 1993 and in early 1994, it was apparent that a stalemate had developed. Negotiations between Bell and the Unions had not resulted in closing of the wage gap and Bell had indicated that it was not willing to commit to a redress plan as requested by the Commission.

In January 1994, both Femmes-Action and C.E.P. filed systemic or non-specific complaints under section 11 of the *Act*. In March 1994, C.E.T.A. filed a systemic complaint and amended a group job/job complaint to a systemic complaint. C.E.T.A. filed another systemic complaint in June 1994.[(3)] The systemic complaints allege a

contravention of section 11 of the *Act* based on the results of the Joint Study, but do not specify complainant and comparator jobs. At this point, it became clear to Bell that it was no longer responding to job/job complaints, but complaints based on the Joint Study, which had identified a wage gap. For Bell, there was a "sea change", both in terms of the complaints it now had to meet and in its relationship with the Commission. Because the systemic complaints referenced the Joint Study which showed a wage gap, Bell was vulnerable. In addition, there was an issue between the parties as to the methodology to be used to assess this wage gap. As a result, Bell pulled back and was not willing to provide any more Joint Study information to the Commission.

The Mediation Agreement

In an attempt to resolve the outstanding complaints, the Commission proposed that the complaints be mediated by an independent mediator. A meeting was held on March 16, 1994, to discuss the terms of the proposed mediation. Paul Durber, the three co-chairs and other representatives of the parties attended this meeting. It was chaired by the proposed mediator. The terms for the mediation process were discussed at this meeting and documented by Mr. Durber. The "Mediation Agreement" reached by the parties is set out in a letter from Paul Durber to the co-chairs dated March 22, 1994; a letter dated March 31, 1994, from Paul Durber to Louise Belle-Isle; and in paragraph 14 of the contract between the Commission and the mediator, dated March 15, 1994.

According to Mr. Durber's March 22, 1994 letter, the process was to be without prejudice and the data provided from the Joint Study was to be examined on a confidential basis. The Commission acknowledged the need to safeguard the data from the Joint Study, and in this regard, the Commission agreed that details of the point ratings of the 98 benchmark jobs would not be released other than to the Commission, the mediator and the three parties except with the consent of the co-chairs. The Commission also agreed that it would take the position that any data received by the Commission is exempt from the *Access to Information Act*. Mr. Durber concluded that these safeguards would operate during the mediation and for the purposes of the investigation report.

The only other evidence on the Mediation Agreement is that given by Linda Wu. According to Ms. Wu, the confidentiality obligations of the Commission were no different under the Mediation Agreement than under the August 1991 Agreement except that these obligations now extended to the systemic complaints. The sensitive information provided for the purpose of the mediation could not be disclosed in the investigation report. If, however, the complaints went to a tribunal, the information would be made public.

In his March 31, 1994 letter, Mr. Durber assured Louise Belle-Isle that the mediator was bound by the understandings to keep the data confidential as per his March 22 letter. The contract between the Commission and the mediator confirmed this.

By letter dated April 5, 1994, Louise Belle-Isle sent to the Commission the consultant's Technical Report prepared for the Joint Study; two presentations by Nan Weiner, one to

C.T.E.A. and the other to C.E.P.; and job information including job incumbents by number and gender, point values and ranking for the 1998 benchmark jobs. This latter data was on diskette. The April 5, 1994 letter was marked "Confidential Without Prejudice" and in the letter Ms. Belle-Isle requested confidential treatment of the information and its non-disclosure under the *Access to Information Act*. She also stipulated that the documents and diskettes were to be returned to Bell on completion of the mediation. In fact, the Commission did return this information to Bell at that time. The mediation was not successful and the mediation process came to an end.

The Draft and Final Investigation Reports

The Commission prepared two investigation reports that are relevant; a draft investigation report dated May 15, 1995, and the final investigation report dated November 15, 1995. In paragraph 105 of the draft investigation report, the investigator states that the Bell agreed to release the detailed results of the Joint Study on condition that the information be used solely for the mediation and the Commission agreed to this in writing. The investigator concludes in this paragraph, that although the Commission was given all the job evaluation results for the jobs in the Study, this information could not be used in the investigation report. This position is repeated in paragraphs 173 and 174 of the final investigation report.

In paragraph 13 of the draft investigation report, the investigator states that the mediation process received the same protection as a formal conciliation and, therefore, the information shared or obtained during the mediation process cannot be disclosed during the investigation. Again, this is repeated in paragraph 12 of the final investigation report.

Conclusion on Mediation Confidentiality

Bell has argued that the circumstances concurrent to the mediation had changed so substantially that it could not have agreed to the same terms of disclosure as it did for the August 1991 Agreement. Systemic complaints of an entirely different nature had been filed in 1994. Bell was opposed to giving the Commission any more Joint Study data. When it did, it did so on a without prejudice, confidential basis with the stipulation that it be returned and the data was returned by the Commission, as opposed to past practice.

While we are sympathetic to Bell's argument that circumstances had changed significantly from Bell's perspective, in the absence of evidence from Louise Belle-Isle, we accept the evidence of Linda Wu that the terms of the Mediation Agreement was consonant with the terms of the August 1991 Agreement. That is, the data would not be disclosed but would be made public if the matter went to a tribunal.

This evidence is also consistent with the terms set out in the March 22, 1994 letter of Paul Durber that the safeguards would prevail during the mediation and for disclosure purposes in the investigation report.

Conclusion on Section 47(3) of the *Act*

Bell argued by reference to paragraphs 12 and 13 in the investigation reports, that the mediation should be treated the same as conciliation under section 47(3) of the *Act*.

Section 47 of the *Act* provides for the appointment by the Commission of a conciliator for the purpose of settling a complaint. Under this section, a conciliator may not have acted as an investigator for the complaint, and any information received by a conciliator is confidential and may not be disclosed without the consent of the information provider.

No conciliator was formally appointed under section 47 for purpose of these complaints. In our opinion, the statements of the investigator in paragraphs 12 and 13 of the two investigation reports can not transform the mediation into a conciliation under section 47 so as to afford Bell the protection of section 47(3) of the *Act*.

In fact, the conclusions reached by the investigator in these paragraphs that there can be no disclosure of Joint Study data in the investigation report is part of a consistent theme throughout the involvement of the Commission in the Joint Study. That theme is that the confidentiality obligation of the Commission was limited to in scope and time did not go beyond the investigation stage.

In their submissions, counsel for the parties referred us to a number of authorities, which we have reviewed and considered in reaching our decision. Many of these cases are distinguishable on their facts from this motion. More importantly, in view of our findings of fact that the obligation of the Commission under the August 1991 Agreement and the Mediation Agreement was self-limiting, we need not expound further on these authorities.

Final Conclusion

For all of the reasons set out above, we have concluded that all of the disputed documents may be received in evidence in the hearing of the complaints referred to this Tribunal.

DATED at Ottawa, Ontario, this 10th day of April, 2000.

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J. GRANT SINCLAIR,
Chairperson

Shirish Chotalia,
Member

Pierre Deschamps,
Member

1. There is some ambiguity as to which of the disputed documents Bell claims privilege arising out of the Mediation Agreement. In his submission, counsel for Bell stated that the crucial or core documents are those identified in Bell's April 5, 1994, letter. Mr. Beaudet, in his evidence, identified five of the disputed documents as having mediation privilege. Counsel for Bell, in response to the Tribunal's request for clarification, identified eight documents on the disputed documents list, including the five listed by Mr. Beaudet. Our review of Mr. Beaudet's evidence indicates that document numbers 32, 56, 64, 65, 66, 67 and 71 on the disputed documents list were provided by Bell to the Commission for mediation purposes.

2. The Final Report did identify a wage gap of $1.99/hr. - $5.45/hr. This was based on a line to line comparison, rather than a job/job comparison.

3. The Commission has referred seven complaints to the Tribunal. Five of the complaints are systemic complaints and two are C.T.E.A. group, job/job complaints. These latter two complaints, which were filed in 1991 and 1992 were amended to systemic complaints but the amended complaints were not referred to the Tribunal.