

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

ALETA GAUCHER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

RULING

MEMBER: Karen A. Jensen 2005 CHRT 42
2005/10/20

[1] On June 16, 1998, Aleta Gaucher filed a complaint with the Canadian Human Rights Commission alleging that the Canadian Armed Forces discriminated against her on the basis of sex, race, national or ethnic origin, marital status, family status and age by failing to promote her and by refusing to continue to employ her.

[2] The Commission referred the complaint to the Canadian Human Rights Tribunal for further inquiry on February 26, 2004.

[3] On January 13, 2005, the Tribunal granted the Commission's motion to amend the complaint to include allegations that, contrary to section 10 of the *Canadian Human Rights Act*, the Canadian Forces engaged in discriminatory policies and practices relating to retention and promotion which have had an adverse impact on women, aboriginal women and single mothers.

[4] The parties have run into difficulties with the disclosure of documents in preparation for the hearing of this matter. Although some disclosure has already taken place, the Commission and Ms. Gaucher are not satisfied with the extent of that disclosure. They have each brought a motion for additional disclosure, arguing that they need more documentation from the Canadian Forces in order to prepare their case.

I. BACKGROUND

[5] Ms. Gaucher enrolled in the Canadian Forces in February 1975 as a Military Police Officer. She was promoted from Private to Corporal in the Military Police in 1979. She became eligible for promotion to Master Corporal in 1981. In January, 1988, Ms. Gaucher transferred to another trade and became eligible for promotion again from 1990 to 1996. In 1996 she retired from the Canadian Forces.

[6] The promotion system in the Canadian Forces is complex. For the purposes of this motion, it is sufficient to note the evidence of the Canadian Forces' witness that, during the relevant periods of time, all members who were eligible for promotion were first evaluated and scored by their unit on the basis of certain documents in their personnel

file. Together with other documents in the file, the score was sent to National Headquarters in Ottawa where a Merit Board file for each candidate would be assembled. The Merit Board file is a package of documents including performance reports, course reports, personnel record, resumes and letters of commendation.

[7] A body known as the Merit Board then assessed the candidates for promotion on the basis of their Merit Board files. At the conclusion of their consideration of eligible candidates in a given year, the Merit Board issued a Board Report which explained, to some extent, the process that was followed in developing the Merit List. The Board also issued a Merit List which ranked the candidates in order of their suitability for promotion.

A. The Motions

[8] In its motion, the Canadian Human Rights Commission is requesting an order for:

- (1) All documentation relevant to the Merit Board Selection process for all of the years that Ms. Gaucher was eligible to be promoted, including but not limited to:

Merit Board Reports;

the Merit Board Personnel Record Resumes (MPRR's) for all candidates that ranked ahead of Ms. Gaucher; and,

the Personnel Records for the relevant time period for all successful candidates in each year.

- (2) All documentation concerning the Canadian Forces' practices and policies in connection with the hiring and retention of Aboriginal members.

[9] In her motion, Ms. Gaucher is requesting an order for:

- (1) the full and complete personnel files for five named individuals who received promotions and who were allegedly no more qualified than Ms. Gaucher;
- (2) the coordinates of the witnesses that Ms. Gaucher's intends to call during the hearing.

II. LAW AND ANALYSIS

[10] The appropriate test regarding the disclosure of documents is whether the document is arguably relevant. In order for the document to be relevant there must be some nexus between the documents and a fact in issue (*Guay v. Royal Canadian Mounted Police* 2004 CHRT 34 at para 42).

[11] The threshold for arguable relevance is low and the tendency is now towards more, not less disclosure (*Communications, Energy & Paperworkers Union, Femmes-Action v. Bell Canada*, Interim Ruling No. 2 dated February 9, 2000, File No. T503/2098; *Neusch v. Ontario (Ministry of Transportation)* [2002] O.H.R.B.I.D. No. 11 at paras 72 and 73). Nonetheless, it is important that the disclosure request not amount to a fishing expedition. (*CEP v. Bell, supra*).

[12] With these principles in mind I will turn to an examination of each of the requests for disclosure.

- (1) All documentation relevant to the Merit Board Selection process for all of the years that Ms. Gaucher was eligible to be promoted**

(i) Merit Board Reports and Merit Lists

[13] The Merit Board Reports and Merit Lists for all of the periods during which Ms. Gaucher was eligible for promotion are clearly relevant to the present inquiry. They provide an indication of where Ms. Gaucher ranked on the list that was used to make promotion decisions as well as the process that was involved in selecting candidates for promotion.

[14] The Canadian Forces state that they will disclose the Merit Board Reports and Merit Lists for the period from 1993 to 1996. However, according to the Canadian Forces'

witness, Lieutenant-Commander Tracey Lonsdale, Board Reports and Merit Lists are not available for the promotion period of 1981 to 1988 and the year 1990. It was not clear from the record as to whether the Reports and List are available from 1991 to 1993.

[15] If the Merit Board Reports and Lists are available for the period 1991 to 1993 and have not been disclosed, I order the Canadian Forces to disclose them.

[16] During the hearing on the motion, counsel for the Commission and counsel for Ms. Gaucher argued that it might be possible to reconstruct the Merit Lists and Merit Board Reports for the years from 1981 to 1988 and 1990 using existing documentation in personnel files (which is kept for a much longer time) and other information from Canadian Forces personnel. The Canadian Forces indicated that this would be very difficult, if not impossible to do.

[17] I am not going to require the Canadian Forces to reconstruct the Merit Lists and Merit Board Reports that are no longer in their possession. Rule 6(3) of the Tribunal's Interim Rules of Procedure stipulates that a party shall provide copies of the documents "in its possession". The plain meaning of the words "in its possession" suggests that parties are not required to create documents for disclosure. Indeed, this is how the British Columbia Human Rights Tribunal has interpreted similar provisions in its Rules. (See, for example: *Auchoybaur v. Walcan Seafood Ltd.* 2005 BCHRT 35 at para 13)

(ii) The Merit Board Files and The Personnel Files

[18] During the hearing, counsel for the Commission stated that while he was not relinquishing his request for the Merit Board files for all of the candidates that ranked ahead of Ms. Gaucher, he was prepared to accept an order for the disclosure of the Merit Board files for only those candidates who were promoted during the relevant time period.

[19] Counsel for the Commission suggested that this disclosure might be satisfactory and if not, he would renew his request for disclosure of the Merit Board files for all candidates that ranked ahead of Ms. Gaucher during the relevant time period. To be clear, counsel for the Commission also indicated that he was not going to insist on the disclosure of the entire personnel file for the successful candidates.

[20] There are apparently some eighty-three (83) individuals who received a promotion during the period from 1991 to 1996. Counsel for the Canadian Forces argued that only the file of the candidate that was last to be promoted each year could be potentially relevant.

[21] I disagree. In my view, the relevance of the Merit Board files for all of the candidates that were promoted ahead of Ms. Gaucher relates both to the individual and systemic portions of her complaint.

[22] Firstly, in a case dealing with age discrimination in the Canadian Forces' promotion process, this Tribunal has stated that the documents that are used to assess the merit of all persons against whom the complainant was rated are clearly relevant (*Morris v. Canada (Canadian Armed Forces)* [2001] C.H.R.D. No. 41 at 129, aff'd 2005 FCA 154). This is because they constitute the means by which the complainant and the Commission normally attempt to establish a *prima facie* case of discrimination. Although in *Morris*, the Tribunal ultimately found that the documents were not necessary for the Commission and the complainant to make out a *prima facie* case of discrimination; this does not negate the relevance of the documents in the Merit Board files.

[23] Furthermore, the Merit Board files of all of the successful candidates are clearly relevant to the respondent's explanations as to why the complainant was not promoted.

[24] Finally, the relevance of the Merit Board Reports also lies in their potential to reveal practices or policies that contravene section 10 of the *Act*. The respondent argues that the Commission and Ms. Gaucher have not been clear enough about the practices and policies to which they are referring. However, the Canadian Forces themselves have stated in their Statement of Particulars, that they have taken all reasonable steps to eliminate discrimination in their hiring, promotion and retention policies and practices. Therefore, the Canadian Force's own references to policies and practices that may have been discriminatory provide the nexus between the requested documents and the facts in issue.

[25] The Canadian Forces argue that the inconvenience associated with the production of the Merit Board files outweighs the utility of the documents in the tribunal hearing process. Again, I disagree. The importance of providing all parties with full disclosure has been underscored by numerous courts and tribunals (See for example: *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (Ont.C.A.) and *Neusch v. Ontario (Ministry of Transportation)* [2002] O.H.R.B.I.D. No. 11).

[26] Furthermore, in her Affidavit, the Canadian Forces' witness stated that it would take approximately two to three months to produce the personnel records for the approximately 500 individuals who ranked ahead of Ms. Gaucher on the Merit Lists. However, in cross-examination she admitted that it would take less time to produce the Merit Board files for the eighty-three individuals who were promoted between 1991 and 1996. Therefore, a request to produce these records would not, in my view, be unduly burdensome.

[27] There is the remaining problem of the disclosure of files for the periods during which neither Merit Lists nor Merit Board Reports are available from 1981 to 1988 and 1990. I reiterate the point that I made above: the Canadian Forces should continue to use their best efforts to locate and disclose documentation relating to members that were promoted in Ms. Gaucher's occupational groups during the relevant time periods.

- (2) All documentation concerning the Canadian Forces' practices and policies in connection with hiring and retention of Aboriginal members.

[28] In their submissions in response to the motion, the Canadian Forces stated that they would amend their Statement of Particulars to disclose and produce additional material regarding the hiring and retention of Aboriginal members. No other issues were raised on this point. I would, therefore, simply remind the Canadian Forces of their ongoing obligation to disclose any documentation related to this issue and, more particularly, documentation that relates to the point they have raised in paragraph 1 (n) of their Statement of Particulars.

III. ORDER

A. Order with Respect to the Commission's Motion

- (1) To the extent that they have not already done so, and to the extent that they are still available, the Canadian Forces are ordered to disclose the Merit Lists and Merit Board Reports relevant to Ms. Gaucher's ranking for promotion for 1991 to 1996.
- (2) The Canadian Forces are ordered to use their best efforts to locate and disclose documentation relating to the Merit Board selection process for all remaining years that Ms. Gaucher was eligible for promotion.
- (3) The Canadian Forces are ordered to disclose the Merit Board files for all of the candidates on the Merit Lists who were promoted during the period 1991 to 1996.

- (4) The Canadian Forces are ordered to use their best efforts to locate and disclose all documentation relating to members that were promoted in Ms. Gaucher's occupational groups during the period 1981 to 1988 and in 1990.
- (5) The Canadian Forces are ordered to use their best efforts to locate and disclose documentation related to the hiring and retention of Aboriginal members and more particularly, documentation which relates to the point they have raised in paragraph 1 (n) of their Statement of Particulars.

B. The Complainant's Motion

[29] Ms. Gaucher has requested disclosure of the full and complete personnel files for five named individuals whom she alleges were promoted in spite of being no better qualified than her. The Canadian Forces have disclosed the Merit Board files for four of the five individuals named in Ms. Gaucher's Statement of Particulars.

[30] The Canadian Forces argue that, in making promotion decisions, the Merit Boards do not review the entire personnel file, only the documents contained in the Merit Board file. Therefore, they argue, only the Merit Board files are relevant to the promotion issue.

[31] However, the cross-examination of the Canadian Forces' witness revealed that the Performance Evaluation Reports, which are included in the personnel file but not the Merit Board file, are completed by the candidate's immediate supervisor and then scored. The score is sent on to the Merit Board. Therefore, in my view, this document is arguably relevant and must be disclosed for each of the named individuals. There is also some indication that other parts of the members' personnel files are considered in the preparation of the documents for the Merit Board files. For these reasons, I order that the entire personnel file for the named individuals be disclosed.

[32] In spite of its best efforts, the Canadian Forces have been unable to locate the file for the fifth person. Counsel for Ms. Gaucher has stated that he will explore alternate spellings and names with Ms. Gaucher. This seems to be the best that can be done in the situation. The Canadian Forces are to continue to work with counsel for Ms. Gaucher to determine if the personnel file for this individual can be located.

[33] Ms. Gaucher has also requested the names and contact information for the witnesses that she intends to call. Counsel for the Canadian Forces undertook to provide Ms. Gaucher's counsel with an indication of which individuals on Ms. Gaucher's witness list are no longer members of the Canadian Forces. With this information, Ms. Gaucher's counsel will be in a better position to seek out the information he needs to make contact with those witnesses who are no longer members of the Canadian Forces.

[34] In the event that Ms. Gaucher's counsel is unsuccessful in obtaining the information that he needs, he may provide letters to the potential witnesses in stamped and sealed envelopes to the Canadian Forces who will then mail the envelopes to the last-known addresses of those individuals who are no longer in the Canadian Forces. Of course, it is entirely up to the individuals whether they wish to respond to the communication or not.

C. Order with Respect to the Complainant's Motion

- (1) The Canadian Forces are ordered to disclose the personnel files for the named members whom Ms. Gaucher alleges were promoted although they were no better qualified than her.
- (2) The Canadian Forces are ordered to continue to use their best efforts, in cooperation with counsel for Ms. Gaucher, to locate the personnel file for the fifth named individual.

- (3) In the event that counsel for Ms. Gaucher is unsuccessful in making contact with those potential witnesses who are no longer members of the Canadian Forces, the Canadian Forces will forward stamped and sealed envelopes containing correspondence from Ms. Gaucher to the last-known addresses of the those individuals.

D. Order with Respect to Confidentiality

[35] In order to address the concerns regarding the confidentiality of the documents, I order the disclosure on the following conditions:

- The names and contact information of the individuals whose files are disclosed shall be whited out;
- The Commission and Ms. Gaucher shall not use the disclosed information for any purpose outside the hearing;

- Neither Ms. Gaucher nor the Commission shall disclose the documents or their contents to anyone other than their legal counsel;
- Additional copies shall not be made of the disclosed documents and they shall be returned to the Canadian Forces one week after the close of the hearing in this case.

_____ "*Signed by*" _____
Karen A. Jensen

OTTAWA, Ontario
October

20,

2005

PARTIES OF RECORD

TRIBUNAL FILE: T903/2304
STYLE OF CAUSE: Aleta Gaucher v. Canadian Armed Forces
DATE AND PLACE OF HEARING: September 26, 2005
(PRELIMINARY MOTION) (via video conference between Ottawa and Edmonton)

RULING OF THE TRIBUNAL DATED: October 20, 2005

APPEARANCES:

Dennis Callihoo For the Complainant
Giacomo Vigna For the Canadian Human Rights Commission
Doreen Mueller For the Respondent

