

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Norm Murray

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration and Refugee Board

Respondent

Ruling

Member: Edward P. Lustig

Date: October 19, 2012

Citation: 2012 CHRT 25

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I. Background & Preliminary Objections

[1] On July 29, 2011, the Canadian Human Rights Commission (the Commission) requested that the Chairperson of the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the complaint of Norm Murray (the Complainant) against the Immigration and Refugee Board (the Respondent) pursuant to subsection 49(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*].

[2] On April 10, 2012, the Commission filed a motion for an order of production by the Respondent of certain documents in its possession and/or control. On April 24, 2012, the Complainant filed its own motion for an order of production of certain documents by the Respondent. In its submissions in response to the motions for disclosure, the Respondent filed the affidavits of Antonella Gullia and Angela Henry. Both the Commission and the Complainant objected to the admissibility of the Respondent's affidavits in their replies to the Respondent's submissions.

[3] On June 4, 2012, the Respondent brought a motion for an order dismissing the complaint. In support of its motion to dismiss, the Respondent also relies on the affidavits of Ms. Gullia and Ms. Henry. In response to the motion to dismiss, the Complainant again objected to the admissibility of the Respondent's affidavits.

[4] On its part, the Respondent objects to the filing of exhibit F of the affidavit of France Saikali. Ms. Saikali's affidavit was filed by the Commission in support of its reply submissions on the motion for disclosure.

II. Positions of the Parties

[5] According to the Commission, the Respondent's affidavits are inadmissible. The Commission submits that Ms. Gullia's affidavit deals mainly with the Commission's process and decision from the filing of the complaint in 2004 up until the time it was referred to the Tribunal.

The Commission claims this discussion is irrelevant to the issue of disclosure and that it appears that the Respondent is taking issue with the Commission's decision. With regard to Ms. Henry's affidavit, the Commission argues that it contains opinion evidence from an unqualified witness and there has not been an opportunity for the Commission to challenge the Respondent as to her *bona fides* to give opinion evidence. The Commission adds that the affidavit of Ms. Henry contains details of Treasury Board policy with regard to employment equity, which has no relevance to the current Tribunal proceedings.

[6] The Complainant adopts the submissions of the Commission on the admissibility of the Respondent's affidavits. With specific regard to the affidavit of Ms. Henry, the Complainant submits that the assertions made regarding the policies and practices of the Treasury Board and other government departments in relation to employment equity are irrelevant to the motions. Furthermore, Ms. Henry has not been qualified as an expert and is not in a position to provide opinion evidence to the Tribunal.

[7] The Respondent replied to the Commission and Complainant's arguments regarding the admissibility of the affidavits as part of its reply to its motion to dismiss. According to the Commission, this amounts to a sur-reply to the Commission and Complainant's reply submissions on the motion for disclosure and, therefore, is an improper reply submission. As a result, the Commission requests that paragraphs 5-7 of the Respondent's reply submissions on its motion to dismiss be stricken. According to the Respondent, it included its arguments relating to the objection to the affidavits in its reply on the motion to dismiss, because the Complainant raised the issue once again in his response to the motion to dismiss.

[8] With regard to the affidavit of Ms. Gullia, the Respondent submits that it does not seek review of the Commission's decisions and this is not the purpose of the evidence. Rather, the Respondent submits that the evidence is relevant to establishing the scope of the complaint before the Tribunal. With regard to the affidavit of Ms. Henry, who is a Director at the Treasury Board Secretariat, the Respondent submits that the Treasury Board is the employer of the Complainant, and it bears the reporting responsibilities for all government departments listed in

Schedule II of the Financial Administration Act. Therefore, the Treasury Board's position on the potential release of employment equity information is relevant to the issues before the Tribunal. The Respondent adds that to the extent that the affidavit contains opinion evidence, it is admissible either on the basis that lay witnesses may provide opinion evidence where they have the requisite experiential capacity to opine on the relevant matter, or because the Affiant's qualifications are such that she is qualified to give an expert opinion on the particular point.

[9] With regard to the affidavit of Ms. Saikali, the Respondent objects to the filing of the unredacted copy of the Commission's Supplementary Investigation Report. The Respondent has filed the same report, but in redacted form. According to the Respondent, the portions of the report which it redacted contain the information which it objects to being disclosed in the motion for disclosure. The Respondent therefore asks that the Tribunal not permit the filing of this portion of the Commission's materials.

III. Ruling

[10] Pursuant to subsection 48.9(1) of the Act, "[p]roceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow". Furthermore, subsection 50(3)(c) of the Act grants the Tribunal broad powers to "...receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law".

[11] The Commission and Complainant objected to the Respondent's affidavit evidence in their respective replies to the motions for disclosure. In support of its motion to dismiss, the Respondent relies on the same affidavit evidence. In response to the motion to dismiss, the Complainant once again objected to the admissibility of the affidavit evidence. The Respondent replied to those arguments in its reply submissions on the motion to dismiss. Given that the objection to the affidavit evidence was again raised in the context of the motion to dismiss, and that the Complainant relied on the same arguments it made in the context of the motion for

disclosure - namely, its reliance on the submissions of the Commission - it was not improper for the Respondent to reply to the Complainant and Commission's arguments in the fashion it did. Therefore, I am not prepared to strike paragraphs 5-7 of the Respondent's reply to the motion to dismiss.

[12] With regard to the affidavits of Ms. Gullia and Ms. Henry, neither the Commission nor the Complainant claims any prejudice or unfairness by the filing of these affidavits. Rather, they claim the information contained in the affidavits is irrelevant and contains opinion evidence from an unqualified witness. Given the informality of Tribunal proceedings and the broad powers to accept information and evidence in subsection 50(3)(c), I am not inclined to strike the affidavits completely. Rather, I will consider the objections of the Commission and Complainant in weighing the value of the information presented in the affidavits.

[13] With regard to exhibit F of the affidavit of Ms. Saikali, the Commission relies on the Supplementary Investigation Report to support its claim that, during the investigation of the complaint the Respondent provided statistical data on representation for 2003-2004, it has waived any claims to confidentiality of the information. It is not necessary for the Tribunal to view the unredacted statistical data in the Supplementary Investigation Report for the Commission to make out this argument. Suffice to say, statistical data on representation for 2003-2004 was examined as part of the Supplementary Investigation Report. At this stage of the proceedings, before having determined the motions for disclosure and the Respondent's claim to confidentiality over the statistical information, it is not appropriate to consider the unredacted version of the Supplementary Investigation Report. Therefore, exhibit F of the affidavit of Ms. Saikali is sealed for the purposes of these motions and until such time as the motions are decided the Tribunal will rely on the redacted version of the Supplementary Investigation Report provided by the Respondent.

Signed by

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
October 19, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1706/6111

Style of Cause: Norm Murray v. Immigration and Refugee Board

Ruling of the Tribunal Dated: October 19, 2012

Place of Hearing: Ottawa, Ontario

Appearances:

David Yazbeck, for the Complainant

Samar Musallam and Ikram Warsame, for the Canadian Human Rights Commission

Christine Mohr and Liz Tinker, for the Respondent