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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ANDY MATOS

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Matos v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Jessica Greenwood and Geoff Dunlop, co-counsel

For the Employer: Karl Chemsi, counsel

Decided on the basis of the documents on file and on written submissions, filed August 3, 18 and 21 and September 22 and 25, 2023.

REASONS FOR DECISION

I. Introduction

[1] After the Federal Public Sector Labour Relations and Employment Board ("the Board") released its decision on the merits of the grievances in this matter in 2023 FPSLREB 77 on August 3, 2023, the grievor requested on that same day that his name be removed from the decision so that it would become anonymized. He provided detailed reasons in support of this request on August 21, 2023.

[2] Upon the Board's invitation, the bargaining agent, the Public Service Alliance of Canada, also provided a detailed submission in support of the grievor's request on September 22, 2023, and counsel for the Department of Justice, on behalf of the Canada Border Services Agency (CBSA or "the employer"), wrote on September 25, 2023, to oppose the request and replied in detail to both the grievor's and the bargaining agent's submissions.

[3] Having carefully considered all the written submissions, I conclude that the grievor has failed to establish a serious risk to an important public interest. I also conclude that the request fails due to reasonable alternatives being available to protect other information on file that is already subject to a sealing order.

[4] For the reasons provided later in this decision, the request to anonymize the Board's decision in 2023 FPSLREB 77 is rejected.

II. Background

[5] The Board's decision on the merits of the grievances notes that the evidence established that the grievor had enjoyed a successful career as a border services officer and that previous to the issues at bar, he sustained a shoulder injury that required him to be away from work for some time. Later, and during the time at issue in 2014, his doctor refused to approve the medical examination required for the grievor to undertake strenuous defence training, which included hand-to-hand combat.

[6] Among other things, this divulged that the grievor suffered from sleep apnea and the related loss of sleep, had very little energy, causing him to occasionally take leave rather than work a full regular shift, and was overweight such that his body mass index was in the range of obesity. And finally, he had a hearing impairment. The

evidence further showed that later, he sought devices to ameliorate his sleep apnea symptoms and sought means to improve his hearing.

[7] His testimony stated that he felt better after taking those actions and after his wife's serious medical condition improved.

[8] I note that the grievor retired after 33 years of service with the CBSA before his grievances came before the Board in 2021.

[9] The medical records and other personal information in the exhibits introduced at the hearing were made subject to a Board sealing order as requested by the bargaining agent, which the employer did not oppose.

III. The grievor's submissions

[10] The grievor was represented but made his own submission and stated that publishing his name with the decision will likely expose him to reports with many sensitive questions. He adds that his grievances would reveal hidden costs to the border services officer arming initiative. And he further notes that French-language services at border crossings were unnecessarily closed.

[11] His reasons become more pointed as he suggests he may expose what he says are impliedly unflattering "hundreds of pages of documentation" and "notes from employers on computer [*sic*]".

[12] The grievor's submissions make no reference at all to him suffering any ill effects from his name being associated with the Board's decision on his grievances.

IV. The bargaining agent's submissions

[13] Subsequent to the grievor's own submission, the bargaining agent filed a submission and stated as follows:

> …
>
> *As outlined by counsel for the employer, the* Dagenis/Mentuck *test determines whether a request for anonymity should be permitted, established by the Supreme Court of Canada in* Dagenis v CBC, *[1994] 3 SCR 835 and* R v Mentuck, *2001 SCC 75 and reformulated in the context of civil proceedings in* Sierra Club of Canada (Minister of Finance), *2002 SCC 41. The necessary considerations are:*

> *1. Whether such an order is necessary to prevent serious risk to an important interest where reasonable alternatives are unavailable; and*
>
> *2. Whether the salutary effects of the order outweigh its deleterious effects with consideration to the right to free expression, the right to a fair and public trial, and the efficacy of the administration of justice.*

The Supreme Court of Canada confirmed in Sherman Estate v Donovan, *2021 SCC 25 that the test must balance the principles of an "open court" approach with the protection of dignity interests related to core identity-giving information.*

…

The Bargaining Agent takes the position that anonymization is necessary to prevent a serious risk to important issues including a serious risk of discriminatory or prejudicial treatment.

It is an unfortunate reality that the public disclosure of the grievor's identity alongside his private medical information manifests a high probability that the grievor may be subject to otherwise avoidable discriminatory or prejudicial treatment. The matter required disclosure of sensitive medical information about the grievor's disability and health status. Reducing the risk of exposure to discriminatory treatment is an important public interest. As stated by the Board in AB v Canada Revenue Agency, *2019 FPSLREB 53 at para 152: "[a]ll of Canada benefits from the avoidance of prejudiced behaviour that anyone faces, thus satisfying the requirement set out in* Sierra Club of Canada *that the justification for the anonymization request not simply be of a personal benefit to the party making it." Disseminating Mr. Matos' name alongside sensitive and private health information poses a serious risk to his dignity and anonymization would reduce this risk. The reduction of this risk is an important public interest.*

…

The Bargaining Agent submits that the salutary effects of an order permitting the protection of the grievor's anonymity far outweigh any deleterious effects. The open court principle can be met through publication of detailed reasons for the decision with only the grievor's name anonymized, as the Board has routinely achieved. As such, there are no true deleterious effects of the request.

In contrast, the salutary effects of permitting the request include the protection of fundamental values that directly impact the public good, including the right to be free from discrimination and the right to privacy. As Sherman Estate *confirmed, privacy and core identity issues are among the most important interests that required consideration when determining which information should or must be disseminated.*

…

[*Sic* throughout]

[14] The bargaining agent notes the Board's decision in *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53 at para. 152, which I wrote, and that paragraph reads as follows:

> ***152*** *All of Canada benefits from the avoidance of prejudiced behaviour that anyone faces, thus satisfying the requirement set out in* Sierra Club of Canada *that the justification for the anonymization request not simply be of a personal benefit to the party making it.*

V. The employer's submissions

[15] Counsel for the employer replies as follows:

> …
>
> *The grievor has never referred to the protection of sensitive medical information. In fact, we understand that the Board already issued a Sealing Order in section VI of the decision. Therefore, options already exist to protect the grievor's personal information while infringing minimally on the* Open Court Principle*. Should the grievor be of the view that more personal information need [sic] to be protect, he can request further redactions or that the Board seal other documents.*
>
> …

[16] And in response to the grievor's submissions, it states this:

> …
>
> *At this stage of his request, the grievor has not provided any reasons or evidence that there should be an exception to the Open Court Principle as emphasized by the Board in its Policy on Openness and Privacy. As the Supreme Court of Canada determined, in order for the grievor to succeed in his request, he must establish that:*
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

> *We understand that the grievor never raised any issue regarding the redaction of his name before the Panel of the Board during the hearing of the case. As outlined in the Board's policy,* parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of their case files and the Board's related decisions.
>
> *For these reasons, the employer's position is that the grievor has not demonstrated, at this stage, that there is a serious risk to an interest of public importance that is real, substantial, and well grounded to justify redacting his name on the Board's decision. Should the grievor provide further reasons or explanations, the employer requests to be afforded an opportunity to reply and provide its position.*
>
> …

VI. Reasons

[17] The grievor's request to anonymize the Board's decision engages the balancing of Canada's open court approach of administering justice with the protection-of-dignity interests related to core identity-revealing information as the bargaining agent notes (see *Sherman Estate v. Donovan*, 2021 SCC 25).

[18] It is well established that the open court principle, which is linked to our constitution, the rule of law, and responsible democratic government, applies to tribunals such as the Board. As counsel for the employer notes, grievors seeking referrals of their matters to the Board for adjudication do so knowing that the Board's process is open and public.

[19] I noted this important fact in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 at para. 24, which reads as follows:

> *[24] As noted by the respondent in their reply to this motion, all employees who are considering filing a complaint under the* Act *are advised by the Board's* Policy on Openness and Privacy *that, "they are embarking on a process that presumes a public airing of the dispute between them, including public availability of decisions." It further states that, "Board decisions identify parties and their witnesses by name."*

[20] My conclusion on this point in *A.B.* states as follows:

> …

146 *On the important matter of the Board's* Policy on Openness and Privacy*, I quote the following, which is available on its website:*

> **Open justice**
>
> The Federal Public Sector Labour Relations and Employment Board ("the Board") is an independent quasi-judicial tribunal that operates very much like a court when it conducts proceedings under several labour-related statutes, including the *Federal Public Sector Labour Relations Act*, the *Parliamentary Employment and Staff Relations Act*, the *Public Service Employment Act* and Part II of the *Canada Labour Code*. The mandate of the Board is such that its decisions can impact the whole public service and Canadians in general. This document outlines the Board's policy on the openness of its processes and describes how it handles issues relating to privacy.
>
> The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.
>
> The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

147 *Having carefully considered the evidence, arguments, and cases submitted by both parties, I am persuaded by the grievor's testimony that he has been subjected to racist treatment (not related to matters raised in this hearing) but in his day to day life in Canada. I accept the submissions of his representative that this decision, if it is published with his full name, could significantly increase the risk of this racist treatment being exacerbated. Given the evidence that he and his wife have already suffered racist treatment, I find this risk is not purely speculative.*

148 *In arriving at the decision to anonymize the decision, I considered the risk presented by his representative that the grievor fears that he could be unemployable if this decision identifies him (as he suggests may happen) as a terrorist sympathizer. However, I cannot accept this submission given the very clearly established facts that literally, he was the author of his own misfortune by*

> *writing disturbing tweets that were posted on the Internet, open for anyone with a computer or smartphone to read. Therefore, I reject his claims that the risk of economic harm to him justifies anonymizing his case.*
>
> ***149*** *While the Board is very concerned to at all times be open and accountable in its decisions, to enhance confidence in the administration of justice in Canada, on the balance of interests as set out in the* Dagenais/Mentuck *test, I find that in this case, anonymizing is necessary, to prevent a serious risk to the proper administration of justice. And I find that the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression and on the efficacy of the administration of justice.*
>
> ***150*** *The grievor attended an open public hearing, and all the relevant details of the hearing and the detailed rationale supporting my findings and conclusion will be published for public edification, to assure the Board's accountability.*
>
> ***151*** *Given what I expect will be exceedingly rare instances of a member of the public service making prolific social media postings that are sympathetic to groups considered terrorists by the Government of Canada, I consider this anonymized decision an extraordinary gesture to protect social values of superordinate importance, as stated by Dickson J. in* Nova Scotia (Attorney General) v. MacIntyre, *[1982] 1 S.C.R. 175, those being the avoidance of a high probability that otherwise, the grievor would be subjected to racist treatment.*
>
> …

[21] The test for ordering a discretionary limit on court openness was reformulated by the Supreme Court of Canada in *Sherman Estate* (at paragraph 38). The party requesting a confidentiality order must demonstrate the following: court openness poses a serious risk to an important public interest; the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and, as a matter of proportionality, the benefits of the order outweigh its negative effects.

[22] The bargaining agent submits the following:

> …
>
> *… that anonymization is necessary to prevent a serious risk to important issues including a serious risk of discriminatory or prejudicial treatment.*
>
> *It is an unfortunate reality that the public disclosure of the grievor's identity alongside his private medical information manifests a high probability that the grievor may be subject to*

> *otherwise avoidable discriminatory or prejudicial treatment… Disseminating Mr. Matos' name alongside sensitive and private health information poses a serious risk to his dignity and anonymization would reduce this risk.…*
>
> *…*

[23] The employer replies by stating as follows:

> *…*
>
> *The employer would like to draw the Board's attention to the actual reason's the grievor himself provided to justify and explain the need for anonymization. In his email (attached) the main reason's are as follows:*
>
> *- "My grievances would reveal that there are many costs to the border arming initiative that the public was not aware"*
>
> *- "If cornered by reporters, I would have to reveal these facts to make sense of my grievance"*
>
> *- "I do not wish to inform the reporters that the UPS manager offered overtime to customs for their services rendered"*
>
> *- "my name and address are on public record and would be easy to track me down. I do not think it is in the publics to reveal these facts"*
>
> *The grievor has never referred to the protection of sensitive medical information. In fact, we understand that the Board already issued a Sealing Order in section VI of the decision. Therefore, options already exist to protect the grievor's personal information while infringing minimally on the* Open Court Principle. *Should the grievor be of the view that more personal information need to be protect, he can request further redactions or that the Board seal other documents.*
>
> *…*
>
> [*Sic* throughout]

[24] The bargaining agent submits that the disclosure of the information reported in the decision would pose a serious threat to two important public interests: namely, protecting the grievor from discriminatory or prejudicial treatment, as well as to the grievor's dignity. In *A.B.*, I concluded that protecting individuals from discriminatory or racially prejudicial treatment can be an important public interest for the purposes of limiting the open court principle.

[25] I take notice of the Board's recent decision in *Tarek-Kaminker v. Treasury Board (Office of the Director of Public Prosecutions)*, 2023 FPSLREB 61, which considers the same issue, anonymization, where a party alleged that the disclosure of the

information reported in the decision posed a threat to a party's dignity. The Board gave close attention to the *Sherman Estate* decision of the Supreme Court of Canada, cited by the bargaining agent in this matter. In *Tarek-Kaminker*, the Board noted as follows:

> …
>
> *[43] To demonstrate that an individual's dignity is at play in the context of court openness,* ***the party seeking the confidentiality order must satisfy the requirement that*** *the information consists of "… intimate or personal details about an individual …", what the Supreme Court of Canada has described in its jurisprudence on section 8 of the* Charter *as the biographical core (see* Sherman Estate*, at para. 75). As such, the requirement focuses on the sensitivity of the information, which is stated in* Sherman Estate *at paragraph 76 as follows:*
>
> > [76] … Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.
>
> *[44]* ***The threshold set by the Court is high****. At paragraph 63 of* Sherman Estate*, the Court states that "… an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases." At paragraph 74, it states that this is only when "… the sensitivity of the information strikes at the subject's more intimate self." In addition, at paragraphs 63 and 75,* ***the Court explicitly states that embarrassment and shame are insufficient to meet the first branch of the test****. This threshold of sensitivity distinguishes between information that is "deserving of public protection" and information that is not. This is a distinction that the Supreme Court of Canada has qualified as critical to the assessment (see* Sherman Estate*, at para. 78).*
>
> …
>
> [Emphasis added]

[26] The issue is therefore whether the grievor has demonstrated that the refusal to grant an anonymization order would pose a serious risk to the important public interests mentioned above.

[27] As the employer notes, neither the grievor, in his submissions, nor the bargaining agent cites any specific personal information that they submit would constitute "biographical core" information and justify a confidentiality order, as recently noted in *Tarek-Kaminker* and that the Supreme Court of Canada has set out.

[28] I infer that the grievor's medical condition in 2014 may be what is at issue, but I decline to accept that the disclosure of his body weight at that time or his sleep apnea and hearing impairment, both of which he claimed had been treated, rise to the level of anything more than embarrassment, which the Supreme Court of Canada stated is insufficient to make a discretionary order limiting court openness (see *Sherman Estate*, at para. 32).

[29] The bargaining agent also correctly notes my decision in *A.B.*, which ordered anonymization for a racialized person of Muslim faith who testified to suffering racial discrimination and whose highly detailed and social media posts apparently supporting the terrorist group "ISIS" would render him "unemployable" at a relatively young age with many years left for him to work, to support himself and his family.

[30] Crucial in that conclusion was that grievor's testimony of experiencing racial discrimination. Thus, it made his concerns over possibly not being able to find employment after the Board's decision in his case identified him as posting on social media supporting ISIS terrorism real as opposed to a theoretical risk.

[31] Furthermore, the Supreme Court of Canada, in *Sherman Estate*, stated that a serious risk to an important public interest must be made out on the record and must not amount to "impermissible speculation" (see *Sherman Estate*, at para. 97).

[32] As counsel for the employer points out, the fact is that no such evidence of real or apprehended prejudice is before the Board. And as counsel notes further, the grievor, in his *ex tempore* submission, states no personal concern or perceived risk. Rather, he states several matters involving historic acts related to his former employer and his former employment, which he states that he may speak publicly about and that would cast the employer in a bad light.

[33] Accordingly, I conclude that the grievor has failed to demonstrate a serious risk to an important public interest. Even if I were to have found otherwise, I would have concluded that reasonable alternatives were available and had been ordered, namely the sealing order that had been ordered in the decision on the merits.

[34] Consistent with the Board's decision in *Tarek-Kaminker*, and for the same reasons noted in *A.B.* related to the importance of the Board's open court policy, the grievor's request to anonymize the Board's decision in 2023 FPSLREB 77 is denied.

[35] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[36] The request to anonymize the Board decision in 2023 FPSLREB 77 is denied.

January 12, 2024.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board