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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

GEORGE SGANOS

Grievor

and

TREASURY BOARD

Employer

Indexed as
Sganos v. Treasury Board

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Melynda Layton, counsel

For the Employer: Stephanie White, counsel

Decided on the basis of written submissions, filed September 13 and 20 and October 4, 2023.

REASONS FOR DECISION

I. Introduction

[1] This is an interim award after George Sganos ("the grievor") made a motion on September 8, 2023, for a production order for documents that he submits are arguably relevant to the adjudication of six related individual grievances, including a termination grievance. Each grievance was referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] The grievor is a professional accountant. He was terminated on April 9, 2021, from his position as an analyst at the Costing Centre of Expertise within the Treasury Board ("the employer"). He alleges that the employer's disciplinary actions against him and the termination of his employment were unjust and constituted a reprisal. The employer alleges that the grievor was progressively disciplined and that he was terminated with cause for successive acts of insubordination.

II. Decision

[3] Applying the "arguable relevance test" that this Board has consistently used, I find that the documents that the grievor requests are arguably relevant to the grievances before the Board. There is a nexus between them and the position that he has advanced. The grievor seeks internal communications about the disclosure and argues that the disclosure resulted in him receiving discipline and his eventual termination. In short, he alleges that management targeted him repeatedly after he disclosed to the Senior Officer of Internal Disclosure (SOID) that management was involved in alleged wrongdoing.

[4] Since the disclosure test is much broader at this stage than during a hearing, I order the production of the requested internal communications.

[5] There are certainly important public policy considerations in maintaining the confidentiality of a process under another act — the *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46; *PSDPA*) — that was established to facilitate the disclosure of wrongdoing in the public service.

[6] However, this must be balanced within a labour relations system and a specific adjudication process under the *Act* in which each party has a right to procedural

fairness. This includes having the right to information that is arguably relevant so that a grievor can fully and fairly present a case.

[7] Disclosure helps 1) ensure procedural fairness and expediency in the grievance adjudication process for both parties, 2) guard against surprises, and 3) may open the door to an earlier resolution. Therefore, given what is at stake for both parties in discipline and termination grievances, especially for grievors, a broad approach to disclosure is required.

III. Procedural history

[8] The hearing of the grievor's six grievances was scheduled to take place in person in Ottawa, Ontario, from September 18 to 23, 2023. However, the grievor's counsel requested a postponement on September 14, 2023, because her office could not fully prepare since it was unable to receive or download large volumes of documents that the employer's office attempted to send via its secure document portal and email in compliance with the Board's production order of September 8. After it heard the parties' oral submissions during a second case-management meeting on September 15, 2023, the Board granted the request for a postponement.

IV. First pre-hearing conference

[9] The first pre-hearing conference took place on September 8, 2023, regarding the grievor's request for a production order for information the grievor had requested from the employer. The grievor referred to a document entitled "Additional Documents from Treasury Board" (sent from Treasury Board Secretariat (TBS) August 31, updated September 8) which was sent to the employer on August 31 and updated and submitted to the Board on September 8.

[10] After hearing oral submissions from the parties regarding the grievor's production motion and the employer's objection, the Board made an initial production order that was communicated to the parties orally on September 8 and confirmed in writing on September 11, 2023. The Board ordered that the employer disclose the following items to the grievor by September 13:

> *1. Copies of all organizational charts for the Costing Centre of Expertise for the period of December 2019 inclusive of 2022;*

> *2. A redacted copy of Don Wong's job offer for the 323926 Position in the Costing Centre of Expertise that does not include confidential information of third parties;*
>
> *3. Copies of all communications that are not subject to privilege, including but not limited to email messages with respect to Dr. Sganos' discipline and the termination of his employment;*
>
> *4. Copies of the disciplinary fact finding for each disciplinary action that is not subject to privilege;*
>
> *5. Copies of all internal communications with respect to Dr. Sganos' Complaint to Benoit Tremblay sent by email on May 14, 2020 that is not subject to privilege;*

[11] The outstanding item requested by the grievor that is the subject of this interim decision is the grievor's request for "Copies of all internal communications with respect to Dr. Sganos' SOID Complaint received from the Complainant on May 6, 2020, and its investigation of same." For this item, the Board requested further submissions and provided a schedule for written submissions from the parties. The grievor's counsel requested an extension to provide her reply submissions, which was also granted.

[12] After it received the parties' submissions, the Board requested further particulars from the grievor as to what he meant by "SOID complaint" and whether he had made a separate complaint under the *PSDPA*. The Board provided an opportunity for the employer to respond, if needed.

[13] The grievor's representative confirmed on October 4, 2023, that the SOID complaint referred to the "… disclosure of wrongdoing made by Dr. Sganos … to the Senior Officer of Internal Disclosure …" on May 6, 2020. The grievor stated that he made a disclosure under the *PSDPA* but that he did not make a reprisal complaint with the Public Service Integrity Commissioner. The employer did not make additional submissions.

V. No jurisdiction over disclosures or reprisal complaints under the *PSDPA*

[14] The Board has no jurisdiction over disclosures or reprisal complaints made under the *PSDPA*. The disclosure and complaint processes outlined under ss. 12 and 19.1 of the *PSDPA* are distinct from individual grievances referred to the Board under section 209(1)(b) of the *Act*. Further, a complainant who pursues a reprisal complaint

under the *PSDPA* — which the grievor confirmed he did not do — is barred from presenting an individual grievance on this issue (see s. 208(2) of the *Act*).

[15] Therefore, this decision does not address any of the grievor's allegations as to how the SOID handled the disclosure. It is strictly limited to the grievor's motion for a production order for copies of all internal communications with respect to his disclosure to the SOID on May 6, 2020.

[16] The parties use the terms "complaint" and "disclosure" interchangeably in their submissions, although they have very different meanings under the *PSDPA*. For the purpose of this decision, I will refer to the event of May 6, 2020, as a disclosure of alleged wrongdoing or as a disclosure to the SOID.

VI. Summary of the arguments

A. For the grievor

[17] The grievor claims that he is a whistleblower whom the employer punished after he made a disclosure of wrongdoing to the SOID about his managers' alleged breach of the *Values and Ethics Code for the Public Sector*.

[18] The grievor argues that it is important for him to know how the disclosure was treated internally so that he may confirm that there was institutional bias that resulted in him being disciplined and eventually terminated. Ultimately, the SOID decided not to investigate further, following the disclosure.

[19] The grievor notes that the disclosure to the SOID and to another manager form the background to the disciplinary actions and his grievances alleging that the employer acted in bad faith, exhibited an institutional bias, and carried out a reprisal against him, resulting in his termination.

[20] The failure to fully disclose all the requested internal communications will result in a breach of procedural fairness.

[21] The grievor further argues that the requirement for confidentiality in disclosure proceedings under the *PSDPA* must be balanced with principles of procedural fairness and natural justice in a grievance adjudication process.

[22] In this case, disclosure is required, as the Board's decision on the merits will affect the grievor's employment and career. When rights are affected in such a significant way, full disclosure is required (see *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)*, [1993] O.J. No. 3380 (QL)).

[23] Further, the Board will be unable to fulfil its role of determining whether the termination was reasonable if the grievor is unable to obtain the arguably relevant documents.

B. For the employer

[24] The employer submits that the parties are required to disclose arguably relevant documents according to the Board's direction on the pre-hearing exchange of document lists.

[25] However, a disclosure request cannot be a fishing expedition (see *Ontario Public Service Employees Union (Madan) v. Ontario (Environment)*, 2012 CanLII 76562 (ON GSB) ("*O.P.S.E.U.*") at para. 11). Labour arbitrators must use their discretion to make production orders that are balanced, practical, and reasonable. There are limits on broad requests that may cause unnecessary delays. The principle of proportionality relative to the probative value of documents sought must be considered (see *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078 (CanLII)).

[26] In this case, the employer submits that there is no reasonable basis for the grievor's allegation that management colluded in the form of a reprisal. Essentially, the grievor's motion is a fishing expedition.

[27] The only supporting facts that the grievor relies on are that discipline occurred after he made his disclosure and that the SOID was an employee of the TBS. There is no nexus between those facts and the discipline that would warrant disclosing confidential information.

[28] The grievor seeks to broaden the scope of the proceeding and to involve matters that are irrelevant or to relitigate matters that the SOID has already determined. The SOID concluded that the disclosure of wrongdoing was not founded and that it involved an interpersonal conflict and actions taken due to the grievor's performance.

[29] The employer submits that the Board should exercise its discretion and preserve the confidentiality of a process premised on voluntary disclosure and the protection pursuant to s. 11 of the *PSDPA* of the identities of persons making disclosures, witnesses, and persons alleged to be involved in wrongdoing.

[30] The probative value of the documents sought is outweighed by the public interest in protecting an internal disclosure process under the *PSDPA*.

[31] If the Board does order the disclosure, it should be limited in scope.

VII. Reasons

[32] Section 20(f) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that:

20 *The Board has, in relation to any matter before it, the power to*	***20*** *Dans le cadre de toute affaire dont elle est saisie, la Commission peut :*
…	[…]
(f) *compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant.*	***f)*** *obliger, en tout état de cause, toute personne à produire les documents ou pièces qui peuvent être liés à toute question dont elle est saisie.*

[33] This Board, like so many other administrative tribunals, has also developed its own direction on the pre-hearing exchange of document lists and I have reproduced an excerpt below:

…

> ***Purpose of this Direction***
>
> *Unless otherwise directed by a panel of the Federal Public Sector Labour Relations and Employment Board ("the Board" or FPSLREB), the pre-hearing disclosure of lists of documents necessary to enable a party to participate in an adjudication process* ***is required.***
>
> *The purpose of the pre-hearing exchange of Document Lists is to require the parties to share with the other parties* ***all arguably relevant documents on the matter before them****. That exchange early in the proceedings* ***means that the parties will not be taken by surprise, which will reduce potential adjournment requests and will expedite Board proceedings.***

…

[Emphasis added]

[34] At the pre-hearing stage of the proceeding, the test for disclosure that this Board has consistently applied is arguable relevance. Some of the factors that a decision maker must consider are succinctly cited in *West Park Hospital v. Ontario Nurses' Association* (1993), 37 L.A.C. (4th) 160, which sets them out as follows:

> 1) an arguable case;
> 2) the requested information must be particularized;
> 3) the decision maker should be satisfied that it is not a fishing expedition;
> 4) there is a nexus between the information requested and the positions in dispute at the hearing; and
> 5) the decision maker should be satisfied that the disclosure will not cause undue prejudice.

[35] Any decision about an order for the provision of information is factually specific since so much of the analysis depends on the nature of the information being requested, its link to the issues raised in the dispute, and the impact that the disclosure may have on another party or third parties. Further, I agree with the employer that the issue of the request's proportionality relative to the probative value of the information sought remains an important factor to consider.

[36] Sweeping requests for information of little relevance to a dispute serve as a significant obstacle to the administration of a fair, efficient, and credible process. Conversely, proportional requests for arguably relevant information contribute to optimizing the process's fairness and efficiency.

[37] In *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 26, which is cited in *Berglund v. Deputy Minister of National Defence*, 2007 PSST 34 at para. 18, the former Public Service Staffing Tribunal ("the Tribunal") confirmed that the test, at this stage, is broader than in a hearing:

> *[18] …*
>
> [28] (…) It is important to recognize that the threshold test to establish relevance at this stage of the complaint process is broader than that at the hearing. It may be found that the information produced will lead to the realization that other information not yet produced is relevant and should be provided. As well, information produced may lead to the realization that it is not useful to the party requesting it.

[38] In this case, in light of the grievor's explicit allegations, I find that the information being sought is arguably relevant. There is a clear nexus between the information that he seeks and his allegations that after the disclosure, a reprisal, bad faith, and institutional bias occurred, which led to the disciplinary actions taken against him and to his termination.

[39] Without the benefit of a hearing, I find it difficult at this preliminary stage to determine whether or not the grievor seeks the internal communications to corroborate existing information. Still, his request is far from a fishing expedition. Internal communication between the SOID, the grievor's managers, and others, including the employer's Labour Relations branch, could shed light on management's perceptions of the grievor and help explain their subsequent labour relations response.

[40] In its submissions, the employer confirms that in February 2021, the SOID concluded that the matter was a labour relations issue of "interpersonal conflict" and performance management. Therefore, not only is internal communication regarding the grievor's disclosure to SOID and its investigation of the same relevant (i.e., who was contacted) but also, it could be key to the grievor's allegations of institutional bias, bad faith, and reprisal.

[41] Further, the information requested is sufficiently particularized to internal communications related to the May 6, 2020, disclosure and the SOID's subsequent investigation of the allegations.

[42] On the issue of undue prejudice, the employer's argument is that the integrity of a confidential process intended to protect whistleblowers will be prejudiced. No arguments have been advanced that any individual will be prejudiced by the disclosure at this early stage.

[43] In support of its position regarding the need to protect the confidentiality of the disclosure process, the employer referred to s. 11 of the *PSDPA* which underlines the obligation of chief executives to protect the identity of persons involved in the disclosure process:

… […]

Duty of chief executives	***Obligations de l'administrateur général***
***11(1)** Each chief executive must*	***11(1)** L'administrateur général veille à ce que :*
***(a)** subject to paragraph (c) **and any other Act of Parliament and to the principles of procedural fairness and natural justice**, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;*	***a)** sous réserve de l'alinéa c) et de toute autre loi fédérale applicable, de l'équité procédurale et de la justice naturelle, l'identité des personnes en cause dans le cadre d'une divulgation soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;*
***(b)** establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and*	***b)** des mécanismes visant à assurer la protection de l'information recueillie relativement à une divulgation soient mis en place;*
***(c)** if wrongdoing is found as a result of a disclosure made under section 12, promptly provide public access to information that*	***c)** dans les cas où il est conclu par suite d'une divulgation faite au titre de l'article 12 qu'un acte répréhensible a été commis, soit mise promptement à la disposition du public de l'information faisant état :*
***(i)** describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and*	***(i)** de l'acte répréhensible, y compris l'identité de son auteur si la divulgation de celle-ci est nécessaire pour en faire état adéquatement,*
***(ii)** sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.*	***(ii)** des recommandations contenues, le cas échéant, dans tout rapport qui lui a été remis et des mesures correctives prises par lui-même ou des motifs invoqués pour ne pas en prendre.*
Exception	***Exception***
***(2)** Nothing in paragraph (1)(c) requires a chief executive to provide public access to information the disclosure of which is subject to any*	***(2)** L'alinéa (1)c) n'oblige pas l'administrateur général de mettre à la disposition du public de l'information dont la communication*

restriction created by or under any Act of Parliament.	*est restreinte sous le régime d'une loi fédérale.*
…	[…]

[Emphasis added]

[44] The employer also submitted the internal TBS policy on internal disclosures and I have excerpted a relevant part of it below:

> …
>
> ***6. Protecting the Identity of the Individuals Concerned and the Confidentiality of Information***
>
> *The identity of the individuals involved (the one making the disclosure, witnesses involved and individuals targeted by the disclosure)* ***must be protected, subject to any other applicable Act, and the principles of procedural fairness and natural justice.*** *This protection of identity is an element of the protections against reprisal that are provided by the PSDPA.*
>
> …
>
> [Emphasis added]

[45] However, it may be necessary to share information among a limited number of people during an investigation, in accordance with the requirements of natural justice and procedural equity, to enable individuals facing an allegation of wrongdoing or reprisal to know the nature of the allegations and to respond to them. Every situation will be assessed on its own merits.

[46] The employer does not refer to any provision of the *PSDPA* or policy that bars this Board from ordering the disclosure of the internal communication the grievor has requested. In fact, the language of both the *PSDPA* at s. 11 and the excerpted policy contemplate the possibility that the identity of persons involved in any disclosure process may not always be protected.

[47] Further, I am not persuaded that the integrity of a disclosure process under the *PSDPA* will be prejudiced by one order to disclose specific information to a specific grievor and his counsel. While there is a public interest in protecting a confidential disclosure process for public servants, it must be weighed against the grievor's right in an adjudication process to procedural fairness.

[48] I find that in this case, given no evidence of any prejudice to the public interest, the grievor's right to arguably relevant information to fully and fairly present his case must prevail.

[49] The employer cites a number of cases to support its position that the documents requested do not meet the threshold for disclosure and that this amounts to a fishing expedition. I did not find these cases particularly helpful in supporting the employer's objection.

[50] All of the cases that the employer cites acknowledge that the arguable relevance test is broader than the stricter test applicable at a hearing (see *Berglund*, at para. 18; *Akhtar*, at para. 18; *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46 at paras. 27 to 29; *O.P.S.E.U.*, at para. 27; and *West Park Hospital*, at paras. 18 and 19).

[51] Moreover, the employer has not presented a single Board case with similar facts in which the Board refused to order the production of the information requested at the pre-hearing stage.

[52] In *Berglund*, a complainant requested an order for the provision of information to fully present their position that an internal staffing process had been unfair. The Tribunal commented generally that a vague request may amount to a fishing expedition. However, it also acknowledged that a lower threshold applied in the context of requests for orders for the production of information at the pre-hearing stage.

[53] The Tribunal analyzed the arguable relevance of each item the complainant requested to support their arguments, including their request for a copy of the appointee's personal record, résumé, and information from the selection committee and Human Resources about the appointee's qualifications. It rendered an order requiring the employer to produce all the information requested but noted that only a redacted version of the appointee's résumé should be provided since medical, personal, or family information was not relevant to the dispute and since releasing it could have been unduly prejudicial to the appointee.

[54] In this case, the employer made no arguments that any of the information requested contains information of the same nature as in *Berglund*.

[55] In *Zhang*, a Board predecessor ordered the disclosure of information from the employer's Labour Relations branch related to a search for alternate employment that in an earlier decision, the Board had ordered the employer to undertake. The Board rejected the employer's arguments that a labour relations privilege applied to the information and found that the information was linked to the allegations of the grievor in that case that the employer acted in bad faith and did not want to find her alternate employment.

[56] In *O.P.S.E.U.* — a non-Board case that most resembles this one — the grievance settlement board ordered a draft report produced after the supervisor of the grievor in that case made a workplace discrimination and harassment complaint against the person who had fired the grievor. Although the complaint was made under an expectation of confidentiality, the arbitrator noted that its disclosure could not be viewed as causing undue prejudice given that it was "… made pursuant to collective agreement and statutory provisions."

[57] Similarly, in this case, the disclosure request is grounded in longstanding principles of procedural fairness that are embedded in grievance adjudication processes under the *Act*. Within this context, the employer's argument that the Board should exercise its discretion and preserve the confidentiality of a separate process over which it has no jurisdiction or control cannot prevail.

[58] The Board has an obligation to ensure a fair adjudication process for all parties. Upholding procedural fairness is particularly important in a termination case, like this one, in which the consequences of not having the opportunity to obtain all the arguably relevant information to a case could have serious consequences for both parties, especially the grievor.

[59] The employer has noted that if the Board orders the disclosure, it should be limited to information from the managers involved in the disciplinary actions taken against the grievor and to the period from May 6, 2020, to April 2021. I disagree that such strict parameters are necessary at this early stage of the proceedings. According to the employer's own submissions, the SOID determined that the grievor had not chosen the right forum for what it essentially identified as a labour relations matter so it closed the file in February 2021. This means that any internal communications produced is likely already limited to the short period in which the file was open.

[60] Nonetheless, the order is made without prejudice to the employer's right to request a confidentiality order if, during a hearing, the grievor seeks to introduce into evidence any of the documents ordered to be produced.

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

(The Order appears on the next page)

VIII. Order

[62] I order the employer to produce the requested information to the grievor within 15 days of the receipt of this decision in a format that the grievor's counsel is able to receive.

[63] I order that disclosure be made only to the grievor and his counsel or representative, in the context of pre-hearing disclosure, and that documents received by the grievor and his counsel not be made public or used for any other purpose.

January 24, 2024.

Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board