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

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

BETWEEN

IMTIAZ RAJAB

Complainant

and

CHIEF ADMINISTRATOR OF THE COURTS ADMINISTRATION SERVICE

Respondent

and

OTHER PARTIES

Indexed as
Rajab v. Chief Administrator of the Courts Administration Service

In the matter of a complaint of abuse of authority - paragraph 77(1)(b) of the *Public Service Employment Act*

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Melynda Layton, counsel

For the Respondent: Richard Vallee, representative

For the Public Service Commission: No-one

Decided on the basis of written submissions, filed July 12 and September 10 and 12, 2024.

REASONS FOR DECISION

I. Overview

[1] The complainant requested an order for the provision of information (OPI). This decision is about two preliminary issues about that request: whether the information the respondent already provided needs to be organized and provided differently, and whether the respondent needs to provide additional documents concerning the alleged cessation of the complainant's employment.

[2] I have concluded that the respondent has complied with its obligations under the *Public Service Staffing Complaints Regulations*, SOR/2006-6 ("*PSSCR*") in the way in which it has provided and organized its disclosure of documents and information so far in this complaint.

[3] I have also granted the complainant's request for documents that are relevant to the respondent's preliminary motion and the alleged cessation of the complainant's employment.

[4] My reasons follow.

II. Motion concerning format of disclosure provided to date

[5] Subsection 16(1) of the *PSSCR* requires both parties to "exchange all relevant information regarding the complaint", and s. 16(2) requires this exchange to be completed within 25 days from the Board's acknowledgement of the complaint. This complaint was filed on January 2, 2024. As will be discussed later, the respondent filed a motion to dismiss the complaint on January 29, 2024. The Board suspended the deadline to complete the exchange of information until after the motion was decided. The Board dismissed the motion on May 15, 2024, which re-started the time for the exchange of information.

[6] The respondent provided documents and information in two ways. First, it responded to several questions posed by the complainant in an email dated May 23, 2024, and attached five documents to that email. Second, it provided a list of documents in the staffing file that it stated it did not consider relevant, but that it listed out of an abundance of caution. The complainant's representative responded: "please send everything." The complainant's representative also asked the respondent to provide an index to the documents and send them by pdf format.

[7] The respondent provided documents by sending four emails on May 28, 2024. Each email provided a list of the documents that were attached to it. The documents themselves were attached as separate files, with the exception of a Zip file containing "PSC priority clearance emails." The complainant states that there were a total of fifty documents provided to his representative in this process.

[8] The complainant's representative wrote to the Board later that day to complain that she was not able to receive further emails from the respondent because these four emails have "taken over my inbox and paralyzed my ability to work." The complainant requested an order from the Board that the disclosure be done in a single pdf document.

[9] This is the first time that the Board has been asked to decide on the format in which documents are provided under s. 16 of the *PSSCR*. Therefore, the Board asked for written submissions on this issue.

[10] The complainant's submissions expanded on the technical problems caused by the May 28, 2024, emails. The complainant states that the documents comprised over 5600 kilobytes of information and was over 200 pages long. To put that file size in context, the pdf file that comprised the complainant's submissions in this matter was 19 419 kilobytes large despite being only 17 pages long. The complainant said that the respondent's disclosure caused his representative's email system to cease, and it took his representative over three hours to organize it and save it in a single document.

[11] Both parties took relatively extreme positions on the manner in which early exchange of information must take place.

[12] The complainant submitted that the documents must be organized in a single pdf file because that is necessary to allow him to make a meaningful response. The complainant argued that the failure to do so showed bad faith.

[13] The complainant further argued that the *Rules of Professional Conduct* for lawyers in Ontario require a level of courtesy that extends to providing documents in the manner he requested. The individual who provided the documents for the respondent is not a lawyer, but the person who responded to the motion is. The complainant cited no cases or other authority for the proposition that the *Rules of*

Professional Conduct are relevant to disclosure obligations in a tribunal or relevant to determining the rules of procedural fairness in a given case.

[14] The closest any decision that I am aware of has come to interlocking the *Rules of Professional Conduct* with procedural fairness is *Bédirian v. Treasury Board (Justice Canada)*, 2001 PSSRB 57. That case was about an order excluding witnesses. The Board member warned a witness, who was in the middle of being examined in chief, not to speak with the employer's counsel about the case. The employer's counsel objected to that warning. The Board member retracted the objection. The Board member relied on the Canadian Bar Association's *Code of Professional Conduct*, which permitted a lawyer to speak to a witness while being examined in chief so long as the lawyer did not discuss any matter that had not yet been covered in the examination up to that point and made an order to that effect. The Federal Court came to a similar conclusion in *Agnaou v. Canada (Attorney General)*, 2014 FC 850, which was a judicial review from the Public Service Staffing Tribunal (the predecessor to this Board) about a similar order excluding witnesses. On judicial review, the Federal Court cited *Bédirian* and the Ontario *Rules of Professional Conduct* in support of the proposition that there was no breach of procedural fairness when the respondent's counsel spoke to the respondent's witnesses (in that case, during the hearing but before the witnesses began testifying).

[15] The issue raised in this motion is very different from that raised in *Bédirian* or *Agnaou*. The complainant's argument amounts to this syllogism: the *Rules of Professional Conduct* require you to be courteous; I want the documents organized in a particular way; it would be courteous for you to do what I want; therefore, you have to do what I want.

[16] As the respondent pointed out, disclosure of information in staffing complaint files is typically provided by non-lawyers within responding departments. The complainant's submission would create different obligations on parties depending on whether they happen to be lawyers or whether they have retained legal counsel. I agree with the respondent that the *Rules of Professional Conduct* are not the appropriate framework for disclosure in this case.

[17] The complainant also cited *Jaroc Holdings Ltd. v. Calgary (City)*, 2018 ABQB 969 in support of his position. That case was an application for judicial review of five

decisions of the Calgary Assessment Review Board ("CARB"). The CARB refused to consider 1392 out of 1593 pages of evidence in a tax assessment hearing because the applicant did not provide a summary or any organization for that evidence, and the Alberta Court of Queen's Bench (as it was called) upheld that decision. The complainant argues that this case stands for the proposition that the respondent in this case is required to provide an organized single PDF file. However, that case is distinguishable in two ways.

[18] First, the CARB is governed in part by the *Matters Relating to Assessment Complaints Regulation*, Alta. Reg. 310/2009, s. 8(2)(a) of which expressly requires each party to provide a "summary of the testimonial evidence" and "any written argument" in advance of a hearing "in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing." Both the CARB and the Alberta Court of Queen's Bench relied upon this provision, which is absent from the *PSSCR*.

[19] Second, and more importantly, the nature of the evidence and issues were different. CARB hears applications for a review of property tax assessments. In cases involving complex commercial undertakings, this involves the assessment of highly technical economic and financial information. The pages struck out in *Jaroc Holdings* were 1392 pages of data about vacancy rates, third party reports, and Assessment Information Packages. By contrast, the information in this case (which the complainant characterizes as a "document dump") are staffing forms, assessments of the successful candidate, and other standard fare in staffing files. This information is neither highly technical nor involving complicated data. There were also just over 200 pages of documents according to the complainant, far less than the 1593 pages at stage in *Jaroc Holdings*.

[20] With that said, I also disagree with the respondent's submission that there is no specific way that information and documentation must be provided. I also disagree with the respondent that the availability of a face-to-face meeting mitigates against any obligation to organize documents in an appropriate way. Section 17 of the *PSSCR* specifically contemplates that a party could be ordered to provide documents to another party. If a meeting were sufficient to meet a party's disclosure obligations, the *PSSCR* would not have such a requirement.

[21] I have found the case law from human rights tribunals helpful in assessing this issue because those tribunals' rules do not specify the format in which documents must be disclosed, and because the nature of the documents in human rights complaints can be similar to the type or format of documents used in staffing complaints.

[22] In *Cormie v. Laurentian University*, 2008 HRTO 44, the Ontario Human Rights Commission provided its disclosure with over 2000 loose-leaf pages in 17 file folders with handwritten labels. The Human Rights Tribunal of Ontario ("HRTO") found that did not comply with the Commission's disclosure obligations, stating:

> [5] *The Commission and complainant are correct that there is no express requirement in the* Rules *governing the format of disclosure. It is, however, implicit in the* Rules *that documents be legible and the nature of the documents identified if this is unclear on their face. To the extent the Commission's disclosure in this case does not meet these requirements, it is in breach of the* Rules.

[23] The HRTO ordered each party to provide its disclosure in chronological order and an index identifying each document by nature and date.

[24] The Canadian Human Rights Tribunal ("CHRT") came to a similar conclusion in *Grand Chief Stan Louttit et al. v. Attorney General of Canada*, 2013 CHRT 3. In that case, the respondent provided disclosure on a CD which had large PDF files that were unindexed and unsorted. The complainants sought an order that the disclosure be organized in a workable manner. The CHRT agreed, stating:

> *[14] While the* Rules *do not specify the manner or form by which production is to take place, the purpose of the* Rules *and the principles of fairness in general dictate that the disclosure and production of documents be sufficient to allow each party the full and ample opportunity to be heard. Producing an unorganized CD, with unindexed and unsorted documents, inhibits the Complainants' ability to rely upon or address evidence that the Respondent finds relevant to the present case. Furthermore, the unorganized First Disclosure CD has inhibited the timely and efficient presentation of arguments and evidence in this case. … Perhaps if the documents had been produced in a more efficient manner in the first place, the current motion, or at least aspects of it, may have been unnecessary and these proceedings could have advanced more expeditiously.*

[25] The CHRT ordered the respondent to produce a list of documents that would permit the complainants to know the contents of the CD.

[26] I agree with those cases that the documents provided must be legible and accessible. In the context of electronic disclosure, this requires that the documents be organized and searchable. The degree of organization may change according to how voluminous the documents are. Finally, by "searchable" I mean that the document must be capable of being searched after using an Optical Character Recognition ("OCR") feature that is standard on PDF readers, or clearly identified using an index for shorter documents (including any hand-written notes that are incapable of being read using OCR); see for example *R. v. Cuffie*, 2020 ONSC 4488 at paras. 31 and 59 where the production of over 300,000 pages of documents was inaccessible because it could not be scanned using an OCR program.

[27] In this case, I have concluded that the respondent has met its obligation to provide documents in accordance with the rules of procedural fairness. As I stated earlier, it provided documents by attaching those documents to emails. Each email contained a list of the documents attached to it, with the exception of one email that had a ZIP file (and a ZIP file contains its own list of the documents contained within it once it is opened). The complainant has not argued or suggested that the documents were not searchable. Finally, the documents were not so voluminous as to require special consideration. Given the number and size of the documents, the respondent was not required to merge the documents into a single PDF file or create a single index for all of its documents.

III. Request for additional production through an order for provision of information ("OPI")

[28] As I mentioned earlier, the respondent applied to dismiss the complaint. The respondent alleged that the complainant was not a person employed in the area of selection stated for the appointment on the date the recourse period was posted (i.e. January 3, 2024) because his employment had ceased before that date. The complainant states that he did not voluntarily retire and was never terminated from his employment and, therefore, he remained an employee on that date.

[29] The Board dismissed the respondent's motion on the grounds that it did not have sufficient information at this preliminary stage to determine it, but without prejudice to the respondent's right to raise the matter at the hearing. The respondent has confirmed that it intends to continue this motion at the hearing of this complaint. Therefore, the complainant has requested disclosure of all documents demonstrating

how he ceased to be an employee, including correspondence between the respondent and the Pension Centre.

[30] When making a request for an order for provision of information, the onus is on the requesting party to demonstrate the arguable relevance of the documents that are sought. In *Akhtar* v. *Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 26, the former Tribunal confirmed that the threshold test associated with these requests is arguable relevance:

> *[27] … The threshold test in considering a request for an order for provision of information is arguable relevance. It requires that there be some relevance and the requesting party bears the onus of demonstrating a nexus, or a clear link, between the information sought and the complaint. The Tribunal will not order the provision of the information where a party raises a suspicion that some documents may be relevant, without more, as such a vague request amounts to a "fishing expedition".*

[31] Normally, documents concerning a cessation of employment would not be relevant to a staffing complaint. This complaint was filed under s. 77(1)(b) of the *PSEA*, which means the sole issue in the complaint is whether the respondent abused its authority by choosing a non-advertised appointment process. Documents relating to the cessation of the complainant's employment are not relevant to that issue.

[32] However, this threshold test for provision of information applies to preliminary motions as well as the substance of a complaint. In *Shafaie v. Deputy Head (Department of Health)*, 2022 FPSLREB 15, at para. 27, the Board confirmed that it required the production of information to permit the complainant to respond to a motion to dismiss their complaint, stating:

> *[27] The complainant also seemed to argue that by issuing an order for the production of information (OPI) earlier in the complaint process, the Board implied that there could be evidence indicating that the "… establishment of recourse is tainted and therefore questionable." It would be inconsistent for the Board to decline jurisdiction after earlier ordering "disclosure". A request for an OPI is a mechanism for a party to obtain information prior to a hearing that is arguably relevant to their complaint. It allows the requesting party to have the necessary information to make their case. In the complainant's situation, the Board determined that the information she sought was arguably relevant for her to reply to the respondent's motion to dismiss. The decision was in no way determinative of the Board's jurisdiction over the matter.*

[33] The respondent states that the complainant was outside the area of selection because he was no longer an employee. The complainant denies that he was no longer an employee. The Board was unable to decide that issue based on the documents the respondent has already provided.

[34] Documents about the complainant's cessation of employment (if there was one) are arguably relevant to the respondent's motion to dismiss, and the complainant is entitled to be provided with those documents.

[35] The respondent says that the reasons or mechanism behind the cessation of the complainant's employment is irrelevant because he was outside the area of selection no matter how his employment came to an end. I reject that submission for two reasons. First, the complainant denies that his employment came to an end, so the documents which the respondent says show that his employment ceased are relevant to that argument. Second, the threshold test at this stage is arguable relevance. The Board may, or may not, end up agreeing with the respondent that the mechanism by which the complainant ceased to be employed is irrelevant, but that is not the issue before the Board in this request. In *Shafaie*, the respondent ended up being right that the documents (which in that case were about whether the area of selection was designed in bad faith) were irrelevant; however, the respondent in that case still needed to provide them.

[36] I have reached a similar conclusion here. It is too early to say for certain whether the documents are relevant, but they are arguably relevant, and that is enough.

[37] The complainant's request for documents had four elements. My decision on each of them is as follows:

> *Copies of emails, notes, communications, and correspondences Ms. Carreau, Mr. Lepine, and Ms. Anderson (Director of Human Resources) with respect to Mr. Rajab's employment and cessation of same from Courts Administrative Services.*

[38] Documents about the complainant's cessation of employment are arguably relevant to the issue of whether the complainant's employment ceased and must be provided.

[39] By contrast, the complainant has not demonstrated how documents about his employment more generally are arguably relevant. The request is overbroad.

> *Copies of the email message distributed by Ms. Carreau, Mr Lepine, and/or Ms. Anderson announcing that Mr. Rajab was ill and on medical leave.*

[40] This document is not relevant to the issue of whether the complainant's employment ceased. For context, the complainant states that he was absent on medical leave, returned to work for several months, and then the respondent took the position that he had agreed to retire. The announcement of his medical leave is not relevant to the question of whether his employment ceased.

> *All correspondences with respect to Mr. Rajab's pension.*

[41] The complainant submits that the respondent acted in bad faith and in breach of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, by contacting the Pension Centre to direct that he be placed on pension. Those issues are not relevant to the motion to dismiss: either the complainant was in the area of recourse or he was not.

[42] However, the respondent's correspondence with the Pension Centre in 2023 may shed light on whether his employment ceased and, if so, on what date. I will therefore order the provision of this 2023 correspondence.

> *All other arguably relevant documents.*

[43] This Board has previously stated in *Akhtar* that it will not order the provision of information where a party only raises a suspicion that the documents may be relevant. This request is not specific enough for the Board to issue an order for it.

(The Order appears on the next page)

IV. Order

[44] The request is granted in part.

[45] The Board orders the respondent to provide the following to the complainant by **January 17, 2025**:

a) Copies of emails, notes, communications, and correspondence to or from Ms. Carreau, Mr. Lepine, and Ms. Anderson with respect to Mr. Rajab's cessation of employment.

b) All correspondence in the possession of the respondent with respect to Mr. Rajab's pension dated between January 1 and December 31, 2023.

[46] The Board held the complaint in abeyance until it rendered this decision. Now that a decision has been rendered, the timelines can be reactivated. The exchange of information between the complainant and the respondent is to be completed by **January 17, 2025.** The complainant shall submit his allegations by **January 31, 2025.**

[47] All parties should consult the *PSSCR* and *Procedural Guide* to calculate the amended deadlines resulting from the reinstatement of timelines.

December 23, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board