Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Agnaou v Public Prosecution Service of Canada et al, 2019 PSDPT 2

Docket: T-2017-01

Issued at: Montréal, Québec
May 6, 2019

In the Matter of an Application by the Public Sector Integrity Commissioner to the Public Servants Disclosure Protection Tribunal Canada

BETWEEN:

YACINE AGNAOU
Complainant

-and-

THE PUBLIC SECTOR INTEGRITY COMMISSIONER OF CANADA

-and-

PUBLIC PROSECUTION SERVICE OF CANADA
Employer

-and-

ANDRÉ A. MORIN, BRIAN SAUNDERS, GEORGES DOLHAI AND DENIS DESHARNAIS
Individual Respondents

AMENDED INTERLOCUTORY DECISION ON A MOTION TO REDUCE THE COMPLAINANT'S NUMBER OF WITNESSES

I. Introduction

[1] This is further to the April 15, 2019 filing of motions by the respondents, the Public Prosecution Service of Canada (PPSC) and André A. Morin, and by the Public Sector Integrity Commissioner (the Commissioner). They are requesting that the Tribunal to reduces the number of witnesses whom Yacine Agnaou, the complainant, wishes to summon to testify at the hearing of the reprisal complaint he filed on January 5, 2013. The hearing being scheduled to begin on Monday, June 3, 2019. On April 29, 2019, Me Agnaou responded and asked the Tribunal to dismiss the motions, and on May 3, 2019, the respondents and the Commissioner replied.

[2] Considering that the hearing will begin shortly and considering also the deadline imposed on the parties, including Me Agnaou, to request the issuance of the subpoenas (section 35 of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR 2011/170 [the Rules]), the reasons for this order are necessarily concise.

[3] Thus, it should first be noted that Me Agnaou, in his [TRANSLATION] "Complainant's Amended Statement of Particulars" dated February 13, 2018, listed the names of the 55 witnesses, in addition to himself, whom he proposes to call to testify, unless another party produced them. On October 12, 2018, in response to a direction from the Tribunal, Me Agnaou filed a [TRANSLATION] "Complainant's Amended Summary of Expected Testimony" in which he summarized, for each of the witnesses listed, the topics on which each witness will testify as well as the aspects of their testimony that fall under the Tribunal's jurisdiction. The description

contained in these summaries is rather brief, does not identify any specific facts on which each witness will testify and links the testimony of each witness to categories of events.

[4] For the reasons set out below, the Tribunal will grant the respondents' and the Commissioner's motions in part and reduce the number of witnesses that Me Agnaou requested to call at the hearing.

II. Positions of the parties

A. *Position of the Public Sector Integrity Commissioner*

[5] In his motion filed on April 15, 2019, the Commissioner requests that none of his current or former employees who are requested to testify by the complainant be summoned by the Tribunal. According to the Commissioner, the complainant has not provided sufficient information to show that those witnesses are relevant to the case or that their testimony is indispensable to the examination of the case before the Tribunal. More specifically, according to the complainant's position, [TRANSLATION] "someone" at the Office of the Commissioner probably informed [TRANSLATION] "someone" at the PPSC that the complainant had made a disclosure to the Commissioner. According to the Commissioner, summoning these nine witnesses would be tantamount to allowing a fishing expedition, since no evidence exists as to the alleged clandestine sharing of the complainant's disclosure at the Office of the Commissioner.

[6] The Commissioner submits that, according to *Zündel, (Re)*, 2004 FC 798, the party seeking to summon a witness must not only state that the witness has material evidence, but also establish that it is likely that the witness will give material evidence. In addition, the Federal Court in *Laboratoires Servier v Apotex Inc*, 2008 FC 321, held that it would not allow a party to use subpoenas to go on a fishing expedition or examine witnesses in the hope that something might turn up that would assist the party on the issue.

[7] Finally, the Commissioner stresses that the role of the Tribunal is not to review the Commissioner's decisions since it sits in the first instance and that therefore, the witnesses requested by the complainant are not relevant to determining the three elements on which the Tribunal must deliberate, namely whether a protected disclosure has been made, whether measures were taken against the complainant and whether there is a link between the measures taken and the protected disclosure.

B. *Position of André A. Morin*

[8] Me Morin submits that several witnesses appearing on the complainant's witness list are not relevant to the case before the Tribunal and would unnecessarily prolong the hearing. Specifically, he maintains that all of the witnesses called to testify about the circumstances surrounding the decision to not lay charges in File [A] are irrelevant since this issue is not before the Tribunal. To that effect, Me Morin submits a list of 15 witnesses who would be called to testify by Me Agnaou regarding File [A], but who should not be summoned.

[9] Second, Me Morin submits that the witnesses in connection with the harassment complaints filed by the complainant are irrelevant. The facts surrounding the harassment complaints are irrelevant for determining whether the complainant made a protected disclosure and whether a reprisal was taken against him. Me Morin therefore submits that the four witnesses related to the harassment complaints should not be summoned.

[10] Third, he argues that the nine witnesses from the Office of the Commissioner should not be summoned to the hearing since they do not have direct knowledge of several events that led to the dispute and are therefore irrelevant. Moreover, according to Me Morin, the witnesses in connection with the access to information requests submitted by the complainant are not relevant to the case before the Tribunal. The respondent then lists nine witnesses who, in his opinion and in taking the accuracy of the subject matter of their testimony for granted, have no connection to the issue before the Tribunal or would simply repeat another witness's testimony.

[11] Finally, Me Morin objects to eight witnesses being summoned relating to the communications with the Public Service Commission in relation to the complainant's priority entitlement. The respondent therefore requests that this number be limited in order to respect the principle of proportionality.

C. *Position of the PPSC*

[12] The PPSC's general position is that witnesses who will not present relevant evidence at the hearing or who do not have personal knowledge of the facts should not be summoned to testify. In its view, the complainant did not establish, through his generic description of the

expected testimony, that there is a relevant connection between the evidence he wishes to obtain from several witnesses and the issues before the Tribunal.

[13] Although the PPSC submits that each party to the Tribunal has full and ample opportunity to present their position, a hearing before the Tribunal is not a fishing expedition.

[14] The PPSC submits that the witnesses relating to the communications connected to File [A] and to the manner in which this file was handled are not relevant to the issues before the Tribunal. Indeed, this question relates to the aspect of wrongdoing, an issue that is not before the Tribunal. In fact, the respondent objects to Chantal Proulx's testimony for this reason since she left the PPSC in 2012 and was therefore not there when the two positions were reclassified. The PPSC also submits that the witnesses relating to the measures that led to the complainant's exclusion from the workplace are not relevant since the latter are not the reprisal measures alleged in the Commissioner's notice of application. The latter specifically addresses the reclassification of the two positions at the LA-2B level as potential reprisal measures.

[15] Similarly, witnesses related to the harassment complaints filed by the complainant or to the access to information requests should not be summoned as these matters are irrelevant to the dispute before the Tribunal.

[16] The PPSC opposes Marc Fortin being summoned since he was the corporate counsel and his legal opinions and advice are protected by solicitor-client privilege. The PPSC also submits that Kathleen Roussel should not be summoned to testify since she was not involved in the

agreement reached on June 26, 2009, and the complainant has not indicated how her testimony relating to the interview with the Commissioner is relevant to the dispute.

[17] The PPSC also objects to eight witnesses being summoned to testify on the communications that took place between the Public Service Commission and the PPSC in relation to the complainant's priority entitlement. He therefore asks that the number of witnesses on this subject be limited to one or two.

[18] Finally, the PPSC submits that the witnesses from the Office of the Commissioner are not relevant to the litigation before the Tribunal. Indeed, the quality of the investigation conducted by the Commissioner and the handling of the complainant's files do not fall under the Tribunal's jurisdiction.

D. *Position of Me Agnaou*

[19] Mr. Agnaou deplores that the respondents are attempting to add another obstacle to the already perilous path of a whistleblower, and alleged victim of reprisal, and to deprive him of the right to present all his evidence. According to him, the Tribunal's power of review over the issue of witnesses is very limited at this stage and he earned the right to call the 55 witnesses as soon as he clarified the issues on which their testimony was expected. He submits that each of the persons named has personal knowledge of the facts, as evidenced by his statement of particulars and relevant evidence.

[20] Me Agnaou asserts that having to demonstrate a higher degree of relevance for the requested witnesses would be tantamount to revealing all his examination strategies and would run counter to the principle of expeditiousness since this would constitute a trial before a trial. Indeed, it is up to the respondents to show that the witnesses requested by the complainant do not have relevant evidence to add to the issues before the Tribunal. He argues that [TRANSLATION] "[t]hus, unless it is clear that a witness has absolutely nothing relevant to say on any of the issues, the Tribunal should allow the witnesses to be summoned to the hearing and asses the questions asked of them one by one in light of the answers they give".

[21] Me Agnaou reiterates that the question of the list of witnesses was settled after he had linked each expected testimony to one of the three issues before the Tribunal. According to him, paragraph 13 of the Commissioner's response to his request for disclosure confirms this point.

[22] Me Agnaou states that the Commissioner is leading the charge with the respondents in order to limit his evidence. In doing so, the Commissioner has abandoned his impartial role as a representative of the public interest and his representations should no longer be permitted. Me Agnaou adds that this is evidenced by the fact that the Commissioner refused to hold an inquiry into this matter and that it was done in a scandalous manner.

[23] Me Agnaou states the following:

> - Mario Dion: the complainant does not know who the [TRANSLATION] "someone" who probably informed [TRANSLATION] "someone" at the PPSC that the complainant had made a disclosure to the Commissioner in June 2009 (informal) and/or in October 2011

(formal) is. However, Mario Dion knew the respondents well enough to recuse himself. The Deputy Commissioner's decision to decline to investigate (September 6, 2012) and the reprisal measures were contemporaneous (September 13, 2012).

- The witnesses called to testify on File A are not being summoned to establish wrongdoing, but to establish that the complainant did indeed make an internal disclosure in 2009.

- The witnesses called to testify about the measures that led to his exclusion from the workplace and the measures taken for his reinstatement will not testify about the wrongdoing committed against the complainant, but to establish that he made an internal disclosure in 2009 and that the reprisal measures are related to this disclosure.

- The witnesses called to testify on their handling of the complainant's harassment complaints will not testify to justify their management of those complaints, but to establish that he made an internal disclosure in 2009 and that the reprisal measures are related to this disclosure.

- Marc Fortin will testify about his communications with third parties, including the PSC, and not on his legal advice to the PPSC.

- Chantal Proulx was involved in the management of the complainant's internal disclosure, in his harassment complaints, in his expulsion, in his reinstatement and in the making of the memorandum of understanding.

- Kathleen Roussel answered questions from the Commissioner's investigators and her testimony is relevant.

- Hugo Giguère and Josée Lesage are the human resources officers who administered the staffing process in connection with the reprisal measures.

III. Discussion

[24] The Tribunal is the master of its own procedure and can limit the number of witnesses in a hearing in order to respect the principle of proportionality and to ensure that the hearing is conducted fairly and expeditiously, and that the evidence presented is relevant and non-repetitive

(section 21.2 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46; section 2 of the Rules; *Forrest v Canada (Attorney General)*, [2002] FCJ No 713). In exercising its discretion, the Tribunal must respect the principles of procedural fairness and allow the complainant to present his case. However, the complainant cannot engage in a fishing expedition and must establish that the witnesses for whom he intends to request a subpoena will provide relevant and non-repetitive evidence.

[25] Me Agnaou argues that the onus is on the respondents to show that the witnesses whose exclusion they are seeking are not relevant to the issues before the Tribunal. However, the case law teaches rather that it is up to the party requesting the issuance of a subpoena to establish that the testimony might provide material evidence. Indeed, in *Zündel, Re*, 2004 FC 798, the Federal Court reiterated the reasoning of the Ontario Court of Appeal in *R. v Harris*, [1994] OJ No 1875 and held that it was not sufficient for the party calling the witness to simply state that the witness might have material evidence; rather, the party had to establish that it was likely that the witness would give material evidence (see also *R v Stupp*, (1982) 70 CCC at paras 107 to 121). These decisions also state that the fact that a party must establish the relevance of testimony reinforces the principle that a subpoena should not be a fishing expedition (*Lee v The Queen*, 2011 TCC 337).

[26] The burden of demonstrating that a witness is needed at the hearing is not onerous: the party requesting the summons must demonstrate that it is likely that the witness will give material evidence. In this case, Me Agnaou conceded that he did not really know who the

[TRANSLATION] “someone” at the Office of the Commissioner who probably informed [TRANSLATION] “someone” at the PPSC that he had made a disclosure was.

[27] Me Agnaou argues that having to establish the relevance of the witnesses he calls to testify amounts to asking him to reveal his examination strategies. This has nothing to do with revealing examination strategies. There are rules in place to prevent, among other things, that parties are taken by surprise (*Schecter v Canadian National Railway Company*, 2005 CHRT 35). Paragraph 41(a) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure* states to this effect that a party is not permitted to do any of the following at the hearing: raise a position, or seek to prove a material fact or to introduce a document that was not previously disclosed.

[28] In the case of a lawyer being summoned to testify, the Federal Court has held, after reviewing the case law to that effect, that subpoenas requiring a lawyer to testify in respect of matters where they acted as legal advisors to a client should be issued only in the most obvious cases where their testimony will not profoundly affect the relationship between a lawyer and client (*Laboratoires Servier v Apotex Inc.*, 2008 FC 321 at para 26). Me Agnaou has not established that the communications between the PPSC and the PSC in which Me Fortin was allegedly involved would not affect solicitor-client privilege and the Tribunal will not issue a subpoena to him.

[29] Thus, considering the principles that should guide the Tribunal, I am satisfied that the witnesses related to File [A] are not relevant in this case since the Tribunal does not have to

consider the examination of a wrongdoing. Thus, the Tribunal will remove from the list of witnesses proposed by Me Agnaou the witnesses related to File [A], that is, the 14 witnesses whose names correspond to numbers 13, 14, 15, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 in the [TRANSLATION] "Complainant's Amended Summary of Expected Evidence" dated October 12, 2018, and will not issue subpoenas to them.

[30] Similarly, the facts related to the harassment complaints filed by the complainant, the access to information requests, and the manner in which the Commissioner conducts investigations and handles complaints, are not relevant in the context of the present dispute, while other announced testimonies constitute a fishing expedition. Thus, the Tribunal will remove from the list of witnesses proposed by Me Agnaou the 15 witnesses whose names correspond to numbers 9, 10, 11, 16, 17, 20, 41, 49, 50, 51, 52, 53, 54, 55 and 56 in the [TRANSLATION] "Complainant's Amended Summary of Expected Evidence" dated October 12, 2018, and will not issue subpoenas to them.

[31] I have considered the arguments raised by the moving parties in connection with their requests to further reduce the number of witnesses, but have not been satisfied that the above criteria were met in their case.

DATED at Montréal this 6th day of May 2019.

SIGNED on behalf of the Tribunal by the Chairperson.

(signed) The Honourable Martine St-Louis