Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Arthur Lee Keith

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

File No.: T1981/6113
Member: Ronald Sydney Williams
Date: March 27, 2015
Citation: 2015 CHRT 4

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I. Preliminary

[1] The Complainant brought a Motion, to seek an order from the Tribunal directing the Respondent to provide further and better particulars and disclosure on specific topics set out in its Motion Record, on the basis that the Respondent's disclosure does not substantiate the Respondent's two defences of undue hardship and a *bona fide* occupational requirement. Prior to the Motion, the parties reached agreement on a number of the Complainant's requests.

[2] The Respondent brought a Motion, requesting that the proposed expert testimony of David Jacobs not be received in evidence by the Tribunal because the subject of his testimony is one within the Tribunal's own knowledge and experience.

[3] The Parties also sought to deal with the Respondent's request of the Tribunal issuing a subpoena for Mr. Andrew Ross of Calian Ltd.

[4] The Respondent also sought the Tribunal's consent to have its witness Dr. Boddam give his evidence at the outset of the hearing on April 13, 2015 for reasons of his unavailability during other days of the scheduled hearing.

II. Complainant's Motion for Further Disclosure & Particulars

[5] The Complainant is a psychiatrist who received his training in the United States of America. In 2007, he received his specialist recognition by the College of Physicians and Surgeons of Ontario (CPSO), which pursuant to reciprocity agreements is recognized in other Provinces of Canada.

[6] In 2008, the Complainant responding to recruitment, by Calian Ltd., on behalf of the Respondent, applied for a position as a psychiatrist with the Canadian Forces (CF). Notwithstanding his recognition by the CPSO as specialist, one of the requirements' of the position with CF was specialist certification in psychiatry from the Royal College of Physicians

and Surgeons of Canada (RCPSC). He was unsuccessful with the examinations of the RCPSC and denied certification and as a result employment by CF.

[7] The Complainant alleges that this hiring policy precludes members of fully qualified specialists of non-Canadian origin from being considered for employment and subjects the Complainant to discriminatory exclusion from employment opportunities and therefore discrimination having an adverse effect.

[8] The Respondent's position is that by adopting the RCPSC standard, the Canadian Forces (CF) ensures that its psychiatrists meet the nationwide, recognized standard for proficiency in psychiatry, and is therefore a *bona fide* occupational requirement (BFOR) and denies that this requirement is discriminatory.

[9] Prior to the hearing of the Motion, the respective parties reached agreement on a number of the Complainant's requests for disclosure and particulars as set out in the Complainant's Motion Record, but other matters were not satisfied.

[10] In reaching any determination, I subscribe that it be fundamental that all parties have a full and ample opportunity to be heard and that all alleged facts, legal issues, relevant documents, and an overview of anticipated testimony be disclosed before the hearing. While the rules of the Tribunal are more flexible than the strict rules of the Courts of Justice, they still aim to ensure parties before the Tribunal benefit from fairness and natural justice.

[11] Subscribing to *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [1999] C.H.R.D. No. 8, it is necessary that the respective parties provide particulars so as to properly define the issues, prevent surprises at the hearing of the matter, to enable the parties to prepare for the hearing and to facilitate the hearing. In complying with Rule 6(1) of the *Canadian Human Rights Tribunal Rules of Procedure,* it is my opinion that the parties should err on providing more, than not enough. It is an obligation of the parties to comply with Rule 6(1) for the aforementioned purposes, as well as to assist the Tribunal in its finding of fact.

[12] The Tribunal is not governed by the Rules of Civil Procedure, and does not have the benefit of examinations of discovery. Section 48.9(2) of the *CHRA* empowers the Chairperson to make rules governing discovery proceedings, but no such rules have been made thus far. All the more reason for the respective parties to know the case which they must meet. This requires the most liberal disclosure of particulars. For the Respondent to argue that the particulars sought are not material, or that reasons for the document or documents being sought are flawed, is for the Tribunal to determine.

[13] I do not believe that a liberal interpretation of the *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [1999] C.H.R.D. No. 8 decision is in conflict with *Tiwari v. Air Canada et al.*, 2011 CHRT 16, especially since the issues in *Tiwari* were significantly different. I do not believe that these two decisions are incompatible with each other, or that they justify an attenuated disclosure obligation for the Respondent in the circumstance of this case.

[14] While I agree with the Respondent, that disclosure of particulars does not entitle the opposing party to "disclosure of all of the evidence and arguments upon which the respondent intends to rely", however, the particulars must enable the parties to know the case that they must meet and as a result, the evidence which they must call or rely upon at the hearing.

[15] The Respondent cites *Bailie et al. v Air Canada Pilots Association*, 2011 CHRT 17, in support of its position that it has provided sufficient particulars to meet the requirements of Rule 6 of the Tribunal's *Rules of Procedure* and satisfy the purposes of Rule 6, namely, "…to allow each of the parties to effectively run their respective cases…." I agree with the argument stated at paragraph 12 of *Bailie* that a claim for further particulars should not be in effect a challenge to the credibility of the facts themselves. But with respect, I do not believe the Respondent has satisfied Rule 6, which in my opinion must be interpreted in a generous and broad sense in compliance with Rule 1(1) and (2) of the Tribunal's *Rules of Procedure*.

[16] The Complainant is seeking, under heading C and E of his submissions, "…job descriptions or other information/documents on the occupational requirements of both a civilian and a non-civilian Canadian Forces psychiatrist, including working directly or indirectly for the CF in August 2008, including any Calian psychiatrists, PS psychiatrists and Blue Cross psychiatrists." I believe that the Complainant is entitled to better and further particulars on these two issues concerning the use of civilian and non-civilian specialists providing services to the CF, and I so ORDER.

[17] The Complainant further seeks particulars of CF's history of refusals of applications on the basis of CPS recognition without meeting RCPSC prerequisite by date and specialty as well as any accommodation or exceptions made for civilian CF specialists without RCPSC certification, before and after Dr. Keith was denied the positions for which he had applied. Any information which relates to (i) the Respondent's decision not to accept CPS credentials for CF specialist positions, or (ii) the Respondent's above-noted accommodation/exemption of civilian CF specialists, is relevant. Accordingly, insofar as they relate to the period running from the Complainant's first application for the position until the date of his *CHRA* complaint, disclosure of any documents in the Respondent's possession containing this information is appropriate; and I so ORDER.

[18] The Complainant seeks documents related to the RCPSC's and the CPSO's specialist certification procedure at the time of Dr. Keith's application. I believe that, to the extent such documents are in the Respondent's possession, such production is necessary for the reason claimed by the Respondent that the RCPSC policy was a *bona fide* occupational requirement and a fundamental issue in the Complainant's claim of adverse effect discrimination; and I so ORDER.

[19] The Complainant's Motion also seeks more detailed witness statements, other than statements that consisted of a short paragraph of topics to be covered by each witness and on further request, five short bullet points summarizing categories of testimony. The Respondent's position is that it has provided a general description of the main points that each witness will

testify about, sufficient to enable the Complainant to prepare his case and they need not be comprehensively detailed. It is sufficient to enable the Complainant to prepare its cross-examination and argument in chief.

[20] Rule 6(1)(f) of the Tribunal's *Rules of Procedure* requires the witness statement to be "a summary of the anticipated testimony of each witness." I do not believe that bullet points satisfy this rule. I believe that the quality of a witness statement is properly stated in *C.D. v. Wal-Mart Canada Corp.*, 2010 HRTO 426, at paragraph 7: "[w]itness statements should …be detailed and set out the particular evidence that the witness will give, rather than just general topics." I do not believe that this requires a full and complete verbatim statement of the proposed testimony, but the summary prescribed by Rule 6(1)(*f*) should be sufficient for the opposing party to anticipate the evidence to be presented, and to allow proper preparation of its cross-examination and general case (See *Bailie*, at para. 15). It is ORDERED that the Respondent provide more detailed witness statements not later than 10 days prior to the commencement of the hearing.

III. Respondent's Motion for an Order that David Jacobs' Expert Opinion and Testimony be Excluded from the Hearing

[21] This motion is brought by the Respondent to exclude David Jacobs as an expert witness as part of the Complainant's case. The Respondent alleges that expert evidence should only be admitted if the matter in issue requires specialized expertise to assist the Tribunal to understand the factual matter to reach a proper conclusion.

[22] The Complainant's position is that Mr. Jacob's report (the Report) is necessary to assist the Tribunal in evaluating the Respondent's claim that Royal College certification is a *bona fide* occupational requirement (BFOR) for the position sought by the Complainant; and further, that the report is of a technical subject matter not within the expertise or knowledge of the Tribunal.

[23] The Complainant's Motion materials state that the Report provides detailed information about the regulation of doctors by the CPSO, its role, its powers and its duty to the public. It

addresses the issue of CPSO recognition of specialists and how this relates to certification from the RCPSC.

[24] The Respondent claims, at page 2 of its Motion Record, that the opinion evidence "consists primarily of a recitation of the statutory and regulatory framework for medical regulation" and that the report is "akin to calling expert evidence on domestic legal issues" which is "not outside the experience and knowledge of this CHRT."

[25] The *Canadian Human Rights Act*, R.S.C., 1985, c.H-6, section (50)(3)(*c*) provides the Tribunal a more generous latitude in the admission of evidence as would otherwise be in a court of law. Nevertheless, both parties have referred to the leading case of *R. v. Mohan* [1994] 2 SCR 9, which at paragraph 17 states that the admission of expert opinion evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. The *Mohan* decision makes reference to the earlier decision of *R. v. Abbey*, [1982] 2 SCR 24, as being illustrative of the necessity requirement.

[26] I believe that the Tribunal should follow the interpretation of Dickson J., in *R. v. Abbey* that the [opinion expert] evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. For the expert evidence to be admissible it must be such that "ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge" (see *Beven on Negligence* (4th ed. 1928), cited in *Mohan* and *Rosin v. Canadian Armed Forces* 1989 CanLII 149 (CHRT), aff'd [1991] 1 F.C. 391 (C.A.)). "Mere helpfulness" is too low a standard to warrant accepting the dangers inherent in the admission of expert evidence" (see *R. v. D.D.* 2000 SCC 43, at para. 47, referring to *Mohan* and *Morin v. Canada (Attorney General),* 2003 CHRT 46, at para. 8.)

[27] The Complainant has suggested that the Tribunal's area of experience and knowledge is limited by being specific to interpreting whether discrimination has occurred and providing the appropriate remedy. He cites *Gaucher v. Canadian Armed Forces*, 2006 CHRT 40, as authority

for this assertion. As a result, in the complainant's view, Dr. Jacobs' report is outside the experience and technical knowledge of the Tribunal.

[28] Section 50(2) of the *Canadian Human Rights Act*, provides that "[i]n the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter." I believe the Tribunal's determination as to the appropriateness of receiving expert opinion evidence on the law was best stated in *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [2001] C.H.R.D. No. 26., at paragraphs 16 and 17. The Tribunal is charged with deciding issues of fact and law and should not delegate this responsibility to expert witnesses: "[t]he law is the province of counsel and the Tribunal,...it should be raised in argument rather than as expert or opinion evidence."

[29] I agree with the Respondent's characterization of the Report as consisting primarily of a recitation of the statutory and regulatory frameworks. I believe that the test established in *Mohan* has not been met. Dr. Jacob's Report is not outside the knowledge and experience of the Tribunal, and the issues of law discussed therein should not be delegated to an expert witness, as was stated in *Northwest Territories* above.

[30] For the above reasons, I Order Dr. Jacob's Report not be admitted as evidence.

IV. Issuance of a Subpoena *Duces Tecum* for Andrew Ross of Calian Ltd.

[31] Prior to the Motions being heard, the Respondent requested the Tribunal to issue a summons pursuant to section 50(3) of the *Canadian Human Right Act* to Andrew Ross of Calian Ltd. to produce documents that are relevant to this proceeding, specifically information relating to the compensation for the position at issue which, the Respondent states, is in the sole possession of Calian Ltd.

[32] The Complainant was in favour of the issuance of the subpoena to Andrew Ross, but desired broader terms.

[33] On consent of the Respondent and the Complainant, the Tribunal is to issue a subpoena requiring the attendance of Mr. Andrew Ross of Calian Ltd., who is to be directed to produce all relevant documents in Calian Ltd.'s possession, including but not limited to the salary structure for the positions in Petawawa and Cold Lake for which Dr. Keith applied, from the date of his first application for the position until the date of this decision, including terms of all benefits provided; and all documents concerning the actual tasks performed by Calian psychiatrists at Cold Lake and Petawawa over that period of time, to counsel for the Respondent, within 1 week's time from the date of Mr. Ross' personal service with the summons, or face compelled attendance at a hearing to be scheduled by the Tribunal and further to attend and give evidence at the hearing at such time and place as counsel for the Respondent may advise.

[34] As requested by the parties, Tribunal agrees, on being advised by the Respondent that Mr. Ross has not made full production of all relevant documents being the subject matter of the above subpoena, within the time set out, at a date and time determined by the Tribunal, to schedule a hearing by teleconference for the sole purpose of requiring the attendance of Mr. Ross at the offices of the Respondent, at which time he will be ordered to produce all relevant documents to counsel for the Respondent.

[35] On consent of the Parties, it is ordered that the Respondent will make production forthwith to counsel for the Complainant of all documents produced to the Respondent by Mr. Ross, upon receipt of same, and will further make production of all unproduced relevant documents from the CPSO and RCPSC, in its possession at the earliest possible date.

V. Respondent's Witness, Dr. Boddam Testimony on April 13 or Week Following

[36] On consent of the Parties, it is agreed that Dr. Boddam will not give testimony prior to the completion of the Complainant's case.

[37] Dr. Boddam shall present his testimony, at a date following the scheduled week of the hearing, at such time as shall be determined by the Tribunal after consultation with counsel for the Respondent and the Complainant.

Signed by

Ronald Sydney Williams
Tribunal Member

Ottawa, Ontario
March 27, 2015