Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 19
Date: June 21, 2017
File No.: T2170/4416

Between:

Kathleen Mahood

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Air Transport Security Authority

Respondent

Ruling

Member: Kirsten Mercer

I. Introduction

[1] In connection with the Canadian Human Rights Tribunal's ("CHRT" or "Tribunal") inquiry into an allegation of discrimination in the provision of a service by the Canadian Air Transport Security Authority ("CATSA") brought by Kathleen Mahood ("Ms. Mahood" or the "Complainant"), the Minister of Transport has invoked the procedure prescribed by s. 4.79 of the *Aeronautics Act*, R.S.C., 1985, c. A-2 (the "*Act*") and has requested a hearing to assess certain potential security concerns stemming from the disclosure of Closed Circuit Television footage ("CCTV footage") from the Calgary Airport.

[2] The Minister takes the position that this hearing should be held on an *ex parte* basis.

[3] I have carefully reviewed the legislation, as well as the case law and the submissions put before me, and am of the view that the *Act* provides for an *in camera* hearing where the Minister of Transport has the right to appear and make representations on the confidentiality of security measures that may be disclosed in the context of a proceeding before the CHRT.

[4] I do not find that the *Act* requires that these submissions be made on an *ex parte* basis, nor do I find sufficient grounds to order an *ex parte* hearing on the facts currently before me.

[5] While I do not rule out the possibility that some elements of the Minister's representations may warrant an *ex parte* hearing, the automatic exclusion of the parties would represent a departure from basic principles of natural justice, and cannot be undertaken unless doing so is shown to be necessary on the specific facts of the case, or where expressly directed by Parliament.

[6] There is very little case law outlining the procedure contemplated by s. 4.79 of the *Act* for consideration of the disclosure of security measures. In light of the nature of the rights and interests being affected, I have elected to release a formal ruling outlining my decision.

II. Background

[7] This procedural question arises in the context of an inquiry into a complaint brought by Kathleen Mahood, stemming from her experience at airport security in Calgary on July 9, 2015.

[8] Briefly, Ms. Mahood claims that she was discriminated against on the basis of her disability in the way she was treated by the CATSA screening agents, who found marijuana and a vaporizer in her belongings on July 9, 2015, while she was travelling from Calgary to Toronto (the "Complaint").

[9] The Complaint giving rise to this inquiry was referred to the Tribunal by the Canadian Human Rights Commission ("Commission") on October 13, 2016.

[10] The events related to the Complaint transpired at the domestic traveller screening area of the Calgary Airport, and it is believed that the events were captured by CCTV footage, which is in CATSA's possession.

[11] At a Case Management Conference Call on April 5, 2017, all parties stipulated to the relevance of the CCTV footage, and both CATSA (who has seen the CCTV footage) and Ms. Mahood (who has not seen the CCTV footage) have indicated that they would like to rely on the video at the hearing of the Complaint. Therefore, the relevance of the CCTV footage evidence to the instant inquiry is agreed.

[12] Prior to producing the CCTV footage to the other parties in this proceeding, CATSA raised concerns about the confidential nature of the material captured, and brought a motion for a sealing and non-disclosure order related to the CCTV footage, and for an order that the other parties be allowed to consult the CCTV footage at the Respondent's offices instead of having a copy provided to them.

[13] CATSA's motion record relied upon s. 4.79(1) of the *Act*, which prohibits disclosure of security measures, except where required by law.

[14] Upon further review, it became clear that s. 4.79(2), which entitles the Minister to make representations prior to the issuance of a disclosure order, and 4.79(3), which

provides for a disclosure order, subject to any restrictions or conditions that the Tribunal considers appropriate, are also engaged.

[15] In light of the potential importance of the video to the Complainant's case, the considerable prejudice that would result to Ms. Mahood if CATSA's proposed Order were to be granted, and the legislative requirement to invite representations from the Minister of Transport, I asked the parties to file more detailed submissions, including an affidavit from CATSA, supporting the motion.

[16] Pursuant to s. 4.79(2) of the *Act*, the Tribunal Registry Office served the Minister of Transport with a copy of CATSA's motion record, and the proposed schedule of submissions for the motion.

[17] On May 10, 2017, the Minister wrote to the Tribunal and asserted his position that the procedure for the review established in s. 4.79(2) of the *Act* "…contemplates a standalone *in camera* hearing wherein the Minister of Transport would make submissions to the Tribunal about the effects of ordering production or discovery of the CCTV footage."

[18] The Minister also requested that the Minister's representations be filed under seal, to be viewed only by the Tribunal Member.

[19] The Minister did not take a position with regard to CATSA's motion.

[20] On May 12, 2017, the Tribunal Registry Office wrote to the parties and the Minister, to advise them that I was concerned that conducting an *ex parte* hearing on this matter would represent a marked departure from the principles of natural justice which govern Tribunal proceedings. Consequently, I requested that the parties make further submissions on the review procedure proposed by the Minister and outlined in s. 4.79(2) of the *Act*.

[21] On May 19, 2017, the Minister filed submissions, relying on two cases, in support of the assertion that the *Act* provided for an *in camera* hearing to be conducted *ex parte*.

[22] The Commission did not consent to the Minister's request, but declined to make any further submissions.

[23] CATSA also declined to make submissions.

[24] On June 2, 2017 (albeit after the deadline provided for submissions had passed), the Complainant (who is representing herself in these proceedings) wrote to the Parties and the Tribunal, disputing CATSA and the Minister of Transport's assertion that the CCTV footage is "privileged", and reiterating her request for disclosure.

III. Issue

[25] The main issue before me is to determine what is the appropriate procedure for consideration of the production or discovery of a security measure pursuant to s. 4.79(2) of the *Act*?

[26] As I noted above, there is very little reported case law considering the application of s. 4.79 of the *Act*.

[27] Given the importance of the interests that must be weighed pursuant to the scheme contemplated by the *Act*, I believe that careful consideration of the correct procedure is warranted.

[28] The precise wording of the relevant provisions of the *Act* are central to my reasons, and so I will reproduce s. 4.79 in its entirety here:

> **4.79 (1)** Unless the Minister states under subsection 4.72(3) that this subsection does not apply in respect of a security measure, no person other than the person who made the security measure shall disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.
>
> **(2)** If, in any proceedings before a court or other body having jurisdiction to compel the production or discovery of information, a request is made for the production or discovery of any security measure, the court or other body shall, if the Minister is not a party to the proceedings, cause a notice of the request to be given to the Minister, and, *in camera*, examine the security measure and give the Minister a reasonable opportunity to make representations with respect to it.
>
> **(3)** If the court or other body concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in

> importance the public interest in aviation security, the court or other body shall order the production or discovery of the security measure, subject to any restrictions or conditions that the court or other body considers appropriate, and may require any person to give evidence that relates to the security measure.

A. The Minister of Transport's Submissions

[29] Counsel for the Minister of Transport submits that although the *Act* expressly prescribes an *in camera* hearing, the hearing must also be conducted on an *ex parte* basis in order to prevent the disclosure of security measures protected by that *Act*.

[30] In support of his argument, the Minister relies upon two related decisions in *re CUPE and Air Canada* (File nos. 2015-29; 2015-30; Ruling dated August 10, 2016, Ruling dated December 15, 2016), a proceeding conducted before an Appeals Officer of the Occupational Health and Safety Tribunal Canada (the "OHSTC"). In that case, the Appeal Officer agreed with the Minister and Air Canada's submission that the confidentiality required by s. 4.79(1) of the *Act* would be frustrated if the proceeding contemplated by s. 4.79(2) were to be conducted in the presence of the parties. I note that in that case, it appears that CUPE was provided with redacted copies of the security measures in issue.

[31] The Minister also cites a judgment rendered in the criminal case of *R. v Herman*, 2017 BCSC 241, in which the Court indicates that the s. 4.79(2) hearing was conducted in absence of the accused. The Minister submits that if such an exclusion can be permitted in a criminal proceeding (where the Constitution guarantees the right to make a full answer and defense), then it ought to be sufficient for the purposes of an inquiry under the *Canadian Human Rights Act* (the "*CHRA*").

[32] The *re CUPE and Air Canada* reasons also refer to two cases before the Canada Industrial Relations Board (the "CIRB") that were relied upon by CUPE in their submissions to the Appeals Officer (see: *Securiguard Services Ltd*., 2005 CIRB 342, paras. 17-18; *A.S.P Inc,* 2006 CIRB 368, paras. 3-5). While neither of those cases were referred to in the Minister's submissions to this Tribunal, it appears from the Appeal

Officer's reasons in *re CUPE and Air Canada* that in those cases, the disclosure hearings were not conducted on an *ex parte* basis.

IV. Analysis

[33] While a decision of the British Columbia Supreme Court that s. 4.79(2) requires a hearing to be held on an *ex parte* basis would represent a highly persuasive authority for this Tribunal, a close examination of the judgment rendered in *R. v. Herman* reveals that no such finding or determination was made in that case. The fact that a hearing was conducted on an *ex parte* basis does not represent a finding that it must be so.

[34] With regard to the OHSTC's determination that s. 4.79(2) prescribes an *ex parte* hearing, I would observe that I am not bound by the finding of the Appeal Officer. For the reasons that follow, I must respectfully disagree with the Appeal Officer's conclusion, as a matter of statutory interpretation.

[35] While I agree that s. 4.79(1) prohibits the disclosure of a security measure, that prohibition is a general one, and is qualified by the limitation "…unless the disclosure is required by law…".

[36] There is no dispute between the parties that the CCTV footage is arguably relevant to the Complaint and therefore, the production of this CCTV footage would be required by the *CHRA* and the Tribunal's *Rules of Procedure* in the context of this proceeding.

[37] As such, the CCTV footage is not captured by the prohibition against disclosure in s. 4.79(1), but rather by the exception.

[38] Therefore, the Minister's concern that the purpose of s. 4.79(1) would be frustrated by disclosure to the parties at a hearing in the context of subsection (2) that is not conducted on an *ex parte* basis, is addressed, because the prohibition in subsection (1) is not engaged on these facts.

[39] This then brings us to a careful reading of s. 4.79(2), which is engaged where a request is made for production or discovery of a security measure in the context of a

proceeding before a court or other body with the ability to order production or discovery of information.

[40] The issues that must be considered and determined are:

i. Does the public interest in the proper administration of justice outweigh in importance the public interest in aviation security with regard to the production or discovery of the security measure; and

ii. in the event that production or discovery of a security measure is warranted on the facts of the specific case, what restrictions or conditions ought to attach to its disclosure.

[41] Where (as in this case) the Minister is not already a party to the proceeding, the Minister must be given Notice of the request for production, and must be given a reasonable opportunity to make representations with respect to the security measure.

[42] The statute explicitly provides that the court or other body must examine the security measure and hear the Minister's representations *in camera*.

[43] The issue before me arises because the Minister has asserted that the hearing must also be conducted on an *ex parte* basis, that is to say without the parties to the Complaint being present or knowing what is being said.

[44] As I advised the parties and the Minister in the Tribunal's letter of May 12, 2017, an *ex parte* hearing is an extraordinary derogation from the requirements of natural justice that must guide the proceedings before this Tribunal, as confirmed by s. 48.9(1) of the *CHRA*.

[45] It is my view that these requirements of procedural fairness are even more acute when one party is representing herself, as is the case with Ms. Mahood.

[46] The right to be heard is a well-established principle of natural justice. In light of, among other things, the nature of the decisions made by the Tribunal, the quasi-judicial nature of Tribunal proceedings, the importance of the rights and issues at stake, and the lack of an appeal from Tribunal decisions, the Tribunal goes to great lengths to ensure that these principles are given meaningful effect in our proceedings.

[47] In order to justify a departure from the basic principle that all parties should have the opportunity to be heard on an issue that affects their rights, privileges or interests, there would have to be a very clear reason to do so, including, but not limited to Parliament having expressly provided for such a departure. What is more, in the absence of a specific legislative mandate, a court or tribunal ought to take care to ensure that such a departure impairs natural justice principles as minimally as possible.

[48] In the case of the *Act*, there are three separate provisions where Parliament saw fit to provide for an *ex parte* proceeding:

> s. 4.5(2): the application for an order of seizure in the case of non-payment of interest or charges owed to the Minister;
>
> s. 8.7(5): an application for a warrant to enter a dwelling-house; and
>
> s. 14(4): an application for a search warrant relating to an investigation of a military-civilian occurrence.

[49] In each case, the provision for an *ex parte* proceeding is expressly made by Parliament.

[50] As a matter of statutory interpretation, the fact that Parliament expressly provided for an *ex parte* hearing in the three instances cited above, and not in the case of s. 4.79(2), indicates that it did not intend for the production or discovery hearing to be an *ex parte* proceeding.

[51] While counsel to the Minister has argued that s. 4.79(2) prescribes an *ex parte* hearing, I see no evidence that Parliament intended to do so. Instead, a contextual reading of the provision in accordance with the ordinary sense of the language indicates that Parliament intended for the hearing to be conducted *in camera*, to protect against public disclosure of the security measure, but not in absence of the parties, unless there was another reason to do so based on the facts of the case.

[52] The *Act* requires this Tribunal to afford the Minister a reasonable opportunity to make representations with respect to the security measure—in this case the CCTV footage—prior to making a decision on whether or not to order production or discovery. In

the absence of urgency, necessity or any specific legislative intent evincing an *ex parte* hearing, I find that it would be unreasonable to require the Tribunal to exclude the parties from the s. 4.79(2) hearing.

[53] On the circumstances of the case before me, the process established in s. 4.79 of the *Act* is as follows:

1. Where production or discovery of a security measure (as prescribed in the *Act*) is sought, Notice of the request shall be given to the Minister.
2. On reasonable Notice to the parties and to the Minister, an *in camera* hearing will be conducted at which:
    a. the Minister is afforded a reasonable opportunity to make representations with regard to the security measure;
    b. the security measure is reviewed by the Tribunal;
    c. the parties have an opportunity to make submissions with regard to the security measure and public interest issues at stake;
    d. the Tribunal must determine whether, in respect of the requested production or discovery of the security measure, the public interest in the proper administration of justice outweighs in importance the public interest in aviation security;
    e. if the Tribunal orders production or discovery of the security measure, the Tribunal must determine;
        1. what restrictions or conditions should be placed on its production or discovery; and
        2. whether any person should be required to give evidence relating to the security measure.
3. Notwithstanding the foregoing, where and as appropriate, the Tribunal may hear evidence or submissions regarding the security measure on an *ex parte* basis.

V. DISPOSITION

[54] I therefore Order that:

i. A hearing pursuant to s. 4.79(2) of the *Aeronautics Act*, shall be conducted in Ottawa, at a date and location to be fixed by the Registrar in consultation with the parties, and counsel to the Minister (the "Confidentiality Hearing");

ii. Prior to the date of the Confidentiality Hearing, the Minister will make arrangements with the Registry Office for the Member to review the security measure;

iii. The Confidentiality Hearing shall be conducted *in camera*, with any materials to be filed under seal;

iv. The Minister shall advise the Registrar of any further security arrangements it seeks for the Confidentiality Hearing; and

v. In the event that the Minister seeks to have any part of its representations made on an *ex parte* basis, such request shall be made at the outset of the Confidentiality Hearing.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
June 21, 2017