

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2017 CHRT 29
Date: August 18, 2017
File No.: T2162/3616

[ENGLISH TRANSLATION]

Between:

Serge Lafrenière

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Via Rail Canada Inc.

Respondent

Ruling

Member: Anie Perrault

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I. Complaint and motion

[1] This is a preliminary motion by the Respondent asking the Tribunal to order the Complainant to submit to a medical examination by an expert retained by the Respondent.

[2] In this ruling, I will not repeat all the facts alleged in the complaint; In essence, the Complainant alleges that he was treated differently and that he had unfairly accumulated penalty points in his disciplinary file, all of which led to his dismissal on October 5, 2012. The ground of discrimination alleged in his file and accepted by the Tribunal is disability.

[3] The Tribunal has already issued rulings in this file, specifically, on March 30, 2017, on a motion to strike filed by the Respondent; and on May 11, 2017, on a motion to amend filed by the Complainant. The Tribunal also issued clear directions to the parties on June 16, 2017, regarding the motions for disclosure filed by the Complainant and by the Respondent.

[4] The Tribunal is now considering the Respondent's motion for a medical assessment and has received the written submissions of the Complainant and the Commission in response to this motion. The Respondent did not file a reply.

II. Issues

[5] The Tribunal has identified the following issues arising from the filing of the Respondent's motion for a medical assessment and the written submissions of the parties:

- a) the jurisdiction and powers of the Tribunal and the issue of procedural fairness raised by the Respondent; and
- b) the Complainant's rights.

III. Analysis

A. Does the Tribunal have the power and the jurisdiction to order the Complainant to submit to an independent medical examination?

[6] First, it is important to note that the Respondent's motion is poorly supported. Despite the clear responses submitted by the Complainant and the Commission, who object to this motion, the Respondent did not file a reply with the Tribunal that would allow me to better understand why the Respondent requires such a medical assessment. In fact, the Respondent has not given any legal reason or raised any legal arguments in its motion other than procedural fairness, an issue on which I will rule further on. Its motion is drafted in very general terms.

[7] In its response, the Commission objects to the Respondent's motion, raising the issue of the Tribunal's powers. In short, the Commission argues that there is no procedural rule that would allow the Tribunal to make such an order.

[8] In my view, there is no provisions in the *Canadian Human Rights Act (CHRA)* or the Tribunal's *Rules of Procedure* expressly providing for such an order. Given that administrative tribunals are masters of their own procedures, it is less often a matter of determining what Parliament has permitted, but rather of how to interpret the powers that have been granted to them. Moreover, administrative tribunals are often called upon to interpret what Parliament has left unsaid, in light of the legislative regime in force. Therefore, the question is whether the Tribunal has an ancillary or implicit power to do so.

[9] Without elaborating on its argument, the Respondent refers in its notice of motion to the principle of procedural fairness and its right to a full and fair hearing to justify its motion for a medical assessment.

[10] On this point, I refer to *Day v. Canada (Department of National Defence)*, 2002 CanLII 45923 (CHRT) ("*Day*") at paras. 22-24:

[22] . . . So where does the Tribunal obtain the interim authority to deal with such matters? I think the answer can be found in the ancillary or incidental jurisdiction of the Tribunal, without which an informal body cannot carry out its proper functions.

[23] All a term like ancillary jurisdiction means in this context is that a body with a more informal mandate has the authority to do what is necessary to ensure a fair hearing, in accordance with the provisions of the *Act*. Unlike the courts, which take their powers from their own inherent authority, this authority inheres in the process contemplated by the *Act* rather than the character of the Tribunal. The basic statutory role of the Tribunal is set out in the provisions of section 50(1), which requires the Tribunal to give the parties a full and ample opportunity to present their cases. This sets out the natural scope of the Tribunal's authority. It is the fairness of the process before the Tribunal that must be consulted, in determining whether the Tribunal has the authority to issue an order that extends, strictly speaking, beyond the process. This is a pragmatic standard that cannot be reduced to rigid rules.

[24] None of this should be taken too far. There are many limits on the ancillary authority of the Tribunal, which does not give the Tribunal the more general powers enjoyed by the courts. It is clear, however, that Parliament cannot have intended that the Tribunal be without the essential authority that it needs to fulfil its responsibilities and uphold the *Act*. This is in keeping with the quasi-constitutional nature of the *Act*, which calls for a large and liberal interpretation. The question before me, as I see it, is whether these powers extend as far as the requested order. In order to answer that question, I think it is necessary to examine the nature of the interests that would be imperilled by such an order.

[11] I agree with the statements of my colleague Member Groarke in that decision. I find that the Tribunal, through its ancillary or implicit powers, could make such orders where appropriate, in very specific circumstances. However, as in *Day*, I am troubled by the fact that the Tribunal could have such powers to invade someone's privacy, and I believe that the Tribunal must proceed with extreme caution in these cases.

[12] I will say no more on the issue of jurisdiction, as in any event, I am not prepared to give the Respondent carte blanche and grant its motion. Here is why.

B. The Complainant's rights

[13] Since personal dignity is the very foundation of human rights protection, the Tribunal should “exercise some prudence before compelling an unwilling complainant to submit to an examination by those in the service of the respondent” (*Rogers v. Deckx Ltd.*, 2002 CanLII 61838 (CHRT), at para. 9).

[14] The *CHRA* is based on the dignity and value of the person. Human rights tribunals should therefore respect the autonomy of the individual and protect the dignity of the person, as these are fundamental values. This implies maintaining a certain measure of privacy. A tribunal faced with a motion from one of the parties should therefore consider whether the requested order, such as an order for a medical assessment, would have an impact on these values, and whether this impact is warranted.

[15] Each case is therefore unique and must be assessed on its own merits.

[16] The act of compelling an individual to undergo a medical examination is inherently coercive. I must therefore be very careful before granting such a request, which affects an essential aspect of the person. The physical and psychological integrity of the individual lie at the very heart of human rights and could implicate section 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees security of the person (*Day, supra*, para. 28; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, paras. 55-57).

[17] The basis for a human rights complaint is discrimination; medical issues are subordinate to the main issue considered in the complaint. In the present case, the main issue refers to alleged facts in the file that date to 2012 at the latest.

[18] More specifically, in the case now before the Tribunal, the Complainant submits that he was treated differently and that he had unfairly accumulated penalty points in his disciplinary file, all of which led to his dismissal on October 5, 2012. The ground of discrimination alleged is disability.

[19] The Complainant understands that his psychological history will be considered at the hearing in relation to the alleged facts and the time the events unfolded. What troubles him is that, through this motion for a medical assessment, the Respondent is attempting to

obtain information about his current medical condition, which has nothing to do with the complaint . I share his concerns.

[20] It is now 2017, more than five years after the alleged facts. The Tribunal does not believe that a medical assessment at this stage of the process would enlighten the Tribunal on the allegations in dispute, which date back to 2012 or before. The medical assessment requested by the Respondent is therefore irrelevant.

[21] The fact that the Complainant won't submit himself to an independent medical assessment as the Respondent wishes will in no way prevent the Respondent from presenting its rebuttal evidence at the hearing. Accordingly, the Respondent, through its counsel, will have an opportunity to, among other things; freely cross-examine the Complainant or his expert witnesses regarding the Complainant's disability at the time of the alleged facts.

[22] Finally, the most important factor is that I agree with the Commission's submissions in its response to the Respondent's motion, to the effect that the burden of proof lies on the Complainant to show a *prima facie* case of discrimination. To do so, the Complainant must meet three criteria, namely, he will have to show that, at the relevant time, he had a characteristic protected from discrimination by the *CHRA*, that he experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact. (*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, para. 24; *Quebec (C.D.P.D.J.) v. Bombardier Inc.*, 2015 SCC 39, paras. 63-65).

IV. Conclusion

[23] For all these reasons, the Tribunal dismisses the Respondent's motion for a medical assessment.

Signed by

Anie Perrault
Tribunal Member

Ottawa, Ontario
August 18, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2162/3616

Style of Cause: Serge Lafrenière v. Via Rail Canada Inc.

Ruling of the Tribunal Dated: August 18, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Serge Lafrenière, for himself

Daniel Poulin, counsel for the Canadian Human Rights Commission

Cristina Toteda, counsel for the Respondent