Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 33
Date: October 25, 2017
File No.: T1509/5510

Between:

Pamela Egan

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Revenue Agency

Respondent

Ruling

Member: Edward P. Lustig

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I. Background

[1] Canada Revenue Agency (Respondent) filed a motion pursuant to Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (*Rules*) seeking an order to compel Ms. Pamela Egan (Complainant) to consent to the Respondent's use of confidential information for the purposes of the inquiry before the Canadian Human Rights Tribunal (Tribunal). The confidential information is contained in the Complainant's Workplace Safety and Insurance Board (WSIB) and Workplace Safety and Insurance Appeals Tribunal (WSIAT) files and relates to a 2009 workplace injury, which the Complainant attributes to the Respondent's alleged failure to accommodate.

[2] The Respondent is also seeking an order from the Tribunal that the Complainant produce a list of all health care professionals she has attended for reasons of symptoms or treatment for her visual impairment, chronic pain and psycho traumatic disability (post-traumatic stress disorder and depression) or any other health problems for which she is attributing blame to the Respondent, and that she produce to the parties any arguably relevant medical documents in her possession or that come into her possession during the course of this inquiry.

[3] During a Case Management Conference Call (CMCC) held on September 6, 2017, the Respondent stated that the disclosure of medical documents it seeks related to the Complainant's visual impairment from late 2000. This covers the time period from just before the Complainant returned to work after two years off following a non-workplace injury. That injury eventually led to her complaint in this matter in May of 2003, alleging that the Respondent had discriminated against her by failing to accommodate her visual impairment and chronic pain.

[4] The parties each filed and exchanged submissions for this motion including a Reply submission from the Respondent. During the CMCC held on September 6, 2017, the Tribunal asked the parties to clarify their positions on the issue of confidentiality. Following the Tribunal's questions, counsel for the Complainant requested additional time to review the issue and provide written submissions by way of a Sur-Reply as he had not raised this

issue in his submissions. The Tribunal granted this request and allowed Respondent's counsel to file its own Sur-Reply to respond to the Complainant's further submissions.

II. Facts

[5] In June 1997, the Respondent hired the Complainant through an Employment Equity Initiative as an employee with a visual impairment.

[6] In February 1999, the Complainant sustained injuries to her neck and upper back as a result of a fall off a ladder at home while she was on leave without pay. As a result, she was off work for two years. She returned to work on a gradual basis beginning January 29, 2001.

[7] On May 21, 2003, the Complainant filed a human rights complaint against the Respondent alleging that it discriminated against her by failing to accommodate her visual impairment and chronic pain contrary to sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*Act*).

[8] The Complainant sustained a workplace injury in February 2009 that occurred as a result of her use of specialized equipment and she subsequently applied for worker's compensation benefits under the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A (*WSIA*).

[9] The WSIB granted the Complainant's entitlement under the claim. She was awarded lost time and other medical benefits for approximately 40 months from January 14, 2009 for her right elbow, right shoulder and neck conditions related to the workplace injury. In mid-2012, the WSIB ceased to provide these benefits to the Complainant.

[10] The Complainant also sought entitlement from the WSIB for chronic pain disability and psycho traumatic disability (including post-traumatic stress disorder and depression), alleging that these disabilities developed as a direct result of her employment with the Respondent in its failure to provide accommodation. The WSIB denied entitlement to

these disorders on the basis that they were pre-existing medical conditions and not compensable under the *WSIA*. This decision was appealed to the WSIAT.

[11] In the course of the appeals process relating to the 2009 workplace injury, both the Respondent and Complainant received a full copy of the Complainant's WSIB/WSIAT file. The file includes medical documentation not previously disclosed to the Respondent. The WSIAT also disclosed addenda containing updates to the WSIB/WSIAT file. The WSIB/WSIAT file and addenda are marked "confidential" and to be used "…for Workplace Insurance Purposes Only".

[12] The Respondent alleges that it was only through the appeals process before the WSIAT that it became aware that the Complainant suffered from various health conditions and had attributed the development of her chronic pain, post-traumatic stress disorder and depression to the Respondent.

[13] In the context of the present proceeding, the Complainant has given notice to the Tribunal that she intends to demonstrate that the Respondent's alleged failure to accommodate caused her to suffer chronic pain disability, post-traumatic stress disorder and depression.

III. Position of the Parties

A. Tribunal's authority to make an order compelling consent

[14] The Respondent acknowledges that the Complainant had previously agreed to the use of some of the documents forming part of the WSIB/WSIAT file, but she refuses to consent to the use of others for the purpose of the present inquiry. In her Response submissions, the Complainant had agreed to allow the Respondent to use additional documents in the WSIB/WSIAT file that were requested by the Respondent. In its Reply submissions, the Respondent withdrew its request for several of the requested documents. However, the Complainant argues that the remaining documents in her WSIB/WSIAT file ought not to be used (disputed documents). The disputed documents

are identified in the Respondent's submissions as Documents 1, 2, 3, 5, 6, 7, 8, 9, 11, 13, 17, 19, 21, 22, 23, 28 and 29 and are described therein.

[15] The Respondent requests the Tribunal to make an order compelling the Complainant to consent to the use of the disputed documents for the purpose of the present proceedings. The Complainant questions the Tribunal's authority to issue an order compelling a party to consent to the use of confidential documents. The Respondent, in Reply, argues that subsection 48.9(1) and section 50 of the *Act* confer broad powers on the Tribunal including the power to make an order compelling the Complainant to consent to the use of confidential information. In the alternative, the Respondent submits, and the Complainant accedes, that the Tribunal has the power to order the Complainant to disclose and produce the disputed documents pursuant to paragraph 50(3)(*a*) of the *Act* and asks that if the Tribunal does not agree that it has the authority to compel the Complainant to consent to the use of the disputed documents that it order the Complainant to disclose the disputed documents.

B. Disputed Documents

[16] The Respondent argues that the disputed documents ought to be disclosed because they are highly relevant to the present inquiry since the Complainant has put her 2009 workplace injury at issue. Notably, the Complainant alleges that she suffers chronic pain disorder, post-traumatic stress disorder and depression as a direct result of the Respondent's alleged failure to accommodate. Thus, the Respondent argues that there is a nexus between the documents and matters at issue in the current proceedings.

[17] The Respondent also argues that some of the disputed documents are arguably relevant for the Tribunal's assessment not only of liability but also of remedies in order to avoid the potential of double recovery as the Complainant received amounts from the WSIB in connection with the 2009 workplace injury. The Respondent further argues that certain disputed documents are arguably relevant as they are necessary for the Respondent to put forward its case that the Complainant has not been fully cooperative in providing relevant information to the Respondent for the purposes of accommodation.

Finally, the Respondent argues that some of the documents are relevant to demonstrate the challenges that it has faced in relation to the use of health records, including information related to injuries and illnesses previously not disclosed and which the Complainant attributes to the Respondent's failure to accommodate.

[18] The Complainant submits that the rules of disclosure do not justify the blanket disclosure of the entire contents of the WSIB/ WSIAT files. She argues that the Respondent has not justified the request for disclosure of the disputed documents with sufficient particularity. In any event, she contests the disclosure of the disputed documents on the grounds that they are not arguably relevant. She further submits that some of the disputed documents are merely internal WSIB and WSIAT forms with no substantive content, while others constitute correspondence between the parties and the WSIB and WSIAT, which relate solely to administrative or procedural matters and have no substantive content related to the issues of liability or remedy. Further, the Complainant argues that the addenda are not arguably relevant because they do not contain any medical or substantive information related to the appeals. Instead, they contain correspondence related to procedural issues in the WSIAT proceeding.

[19] The Tribunal notes that the Complainant does not contest the use of the disputed documents on any ground related to confidentiality.

C. Medical Documents

[20] The Complainant does not object to the Respondent's request for a list of health care professionals who have treated her for chronic pain, post-traumatic stress disorder, and depression. She also agrees to produce all arguably relevant medical documentation in her possession in relation to those conditions.

[21] However, the Complainant argues that there is no basis for her to provide a list of professionals that have treated her visual impairment, or to produce medical information in relation to her visual impairment (medical documents). She argues that this information is not arguably relevant because the Complainant does not allege that the Respondent's failure to accommodate *caused* her visual impairment. In essence, the Complainant

argues that her visual impairment is not at issue and that the disclosure request represents a “fishing expedition”.

[22] In response, the Respondent argues that the medical documents are highly relevant as her impairment is at the heart of the human rights complaint and inquiry. In effect, the Respondent’s position is that the complaint rests on the allegation that the Respondent refused to accommodate the Complainant’s visual impairment.

D. Complainant’s Privacy Interest

[23] In addition to the arguable relevance argument, the Complainant alleges for the first time in her Sur-Reply that her privacy interest in her medical information, especially information related to her visual impairment, outweighs the Respondent’s interest in disclosure and that production would cause her an undue prejudice.

[24] While the Complainant does not explain how disclosure would negatively affect her right to privacy to the point of causing an undue prejudice, the Complainant submits that the Tribunal ought to consider undue prejudice in deciding whether the medical information requested ought to be disclosed in accordance with a five-fold test set out in an Ontario labour arbitration decision, *West Park Hospital v. Ontario Nurses' Assn.* (1993), 37 L.A.C. (4th) 160 (*West Park Hospital*).

[25] The Complainant also alleges in her Sur-Reply that in deciding the issue, the Tribunal ought to consider the *Personal Health Information Protection Act*, SO 2004, c. 3, schedule A (*PHIPA*). In effect, the Complainant contends that her physicians are bound by the privacy provisions in *PHIPA* and would not be able to disclose the requested medical information in any event as the Respondent’s disclosure request oversteps the provisions in *PHIPA*.

[26] The Respondent submits in its Sur-Reply that the disclosure of the medical documentation is necessary for the Tribunal to ascertain the extent of the Complainant’s visual impairment, her accommodation needs and whether the Complainant communicated her needs to the Respondent for the purposes of accommodation. It

argues that any privacy interests were thus waived by the Complainant when she put her visual impairment at issue.

[27] Additionally, the Respondent submits in its Sur-Reply that neither *PHIPA* nor the five-step test set out in *West Park Hospital* is applicable in this case. In effect, *PHIPA* provides that it does not apply to the power of a tribunal to compel the production of documents. Regarding *West Park Hospital*, the Respondent submits that the Tribunal ought to apply its own three-step test that it has developed for disclosure requests.

IV. Issues

[28] The issues to be determined in this Ruling are as follows:

i. Does the Tribunal have the authority to make an order compelling the Complainant to consent to the Respondent's use of the Complainant's WSIB/WSIAT file in the course of the present proceedings?

ii. Are the disputed documents arguably relevant to the present proceedings?

iii. Are a list of all health care professionals attended by the Complainant for her visual impairment and production of related medical documents in her possession since the year 2000 arguably relevant? If this question is answered in the affirmative, should the Tribunal order their disclosure despite the Complainant's privacy concerns?

V. Applicable Legal Principles

[29] The right to a fair hearing requires that the "...affected person be informed of the case against him or her, and be permitted to respond to that case. (see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 53; *Leslie Palm v. International Longshore and Warehouse Union et al.*, 2012 CHRT 11 at paras. 9-11 (*Palm*)).

[30] Subsection 50(1) of the *Act* provides that the parties before the Tribunal must be given a full and ample opportunity to present their case. This right includes the disclosure of arguably relevant evidence between the parties (see *Grand Chief Stan Louttit in a representative capacity on behalf of the First Nations of Mushkegowuk Council and Grand*

Chief Stan Louttit in his personal capacity v. Attorney General of Canada Ruling, 2013 CHRT 3 at para. 10). Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case they must meet and be adequately prepared for the hearing (see *Guay v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 34 at para. 40 (*Guay*)*; Almalki v. Air Canada*, 2016 CHRT 3 at para. 11 (*Almalki*)).

[31] Where a rational connection exists between a document and the facts, issues, or forms of relief identified by the parties in a matter, the information ought to be disclosed pursuant to paragraphs 6(1)(*d*) and 6(1)(*e*) of the Tribunal's *Rules* (see *Guay* at para. 42; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6 at para. 28 (*Rai*); *Almalki* at para. 11). The burden of proving the rational connection rests with the moving party, but the threshold for the test of "arguable relevance" is low and the jurisprudence has acknowledged that the tendency is towards more rather than less disclosure (see *Warman v. Bahr*, 2006 CHRT 18 at para. 6).

[32] However, there are a few limits to this rule. Notably, pursuant to subsection 50(4) of the *Act*, the Tribunal cannot admit or accept as evidence any information that is privileged. Moreover, a request for disclosure must not be speculative or amount to a "fishing expedition" (see *Guay* at para. 43).

[33] In addition, the disclosure of arguably relevant information does not mean that this information will be admitted in evidence or that significant weight will be afforded to it (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 at para. 4).

[34] Where medical documents are concerned, this Tribunal has held that where confidentiality or privacy is at issue, these interests are overridden by the respondent's right to "know the grounds and scope of the complaint against it" (*Guay* at para. 45). As stated in *Guay*, "[i]n human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a Complainant's arguments. If a complainant bases the case on his/her medical condition, a respondent is entitled to relevant health

information that may be pertinent to the claim" (see *Guay* at para. 45; see also *Palm* at para. 11).

VI. Analysis and Rulings

A. Issue i) Does the Tribunal have the authority to make an order compelling the Complainant to consent to the Respondent's use of the Complainant's WSIB/WSIAT file in the course of the present proceedings?

[35] In my opinion, the Tribunal does not possess the authority to make an order compelling the Complainant to consent to the use of the Complainant's WSIB/WSIAT file in the course of the present proceedings.

[36] The Tribunal is a creature of statute. As such, its powers are derived from and prescribed by the provisions of the *Act*. Nowhere in the *Act*, in my opinion, is there any authority given to the Tribunal to issue an order compelling a person to consent to anything, including to the use of confidential documents.

[37] The sections of the *Act* cited by the Respondent as authority for the Tribunal to make such an order do not, in my opinion, provide such authority. Subsection 48.9(1) of the *Act* provides for the conduct of the hearing to be informal and expeditious. Subsection 50(1) of the *Act* provides for the inquiry to be conducted fairly.

[38] The Tribunal understands that the parties rely on subsection 50(3) for disclosure and production in this case instead of subsection 50(1) as both parties are already in possession of the disputed documents. Subsection 50(3) of the *Act* provides members with certain specified additional powers in relation to a hearing of the inquiry. These powers do not include the power to compel a party to provide consent to use documents. However, the Tribunal does have the power under paragraph 50(3)(*a*) of the *Act* to order the Complainant to disclose and produce the disputed documents at the hearing, provided that they are arguably relevant to the present proceedings.

B. Issue ii) Are the disputed documents arguably relevant to the present proceedings?

[39] In my opinion, the disputed documents which are in the WSIB/WSIAT files concerning the 2009 workplace injury are arguably relevant to the present proceedings and are hereby ordered to be produced pursuant to paragraph 50(3)(*a*) of the *Act*.

[40] As noted above, the jurisprudence for determining disclosure requests generally relies on the following criteria:

- Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case.
- To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession and care of the opposing party prior to the hearing of the matter.
- Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case they are up against and, therefore, adequately prepare for the hearing.
- For that reason, if there is a rational connection or nexus between a document and the facts, issues or forms of relief identified by the parties in the matter, the document should be disclosed pursuant to sections 6(1)(*d*) and 6(1)(*e*) of the *Rules*.
- The party seeking the disclosure must demonstrate that the nexus exists and the documents are probative and be arguably relevant to an issue in the hearing, which is not a particularly high standard.
- The request for disclosure must not be speculative or amount to a "fishing expedition". The documents should be identified with reasonable particularity.
- The disclosure of arguably relevant documents does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process.

[41] The Complainant has put the 2009 workplace injury at issue in this inquiry in alleging that it is a direct result of the Respondent's failure to accommodate and that the workplace injury is relevant to both liability and remedy in this inquiry. The Complainant has been attempting, through the WSIB/WSIAT process, to have it recognized that she

developed chronic pain, depression, anxiety and post –traumatic stress disorder as a result of the Respondent's failure to accommodate. But for the WSIB/WSIAT process which resulted in the Respondent receiving the files from these agencies, it would not have become aware of certain elements of the Complainant's situation that may be relevant to this inquiry. In particular, whether medical issues unknown to the Respondent contributed to the delay in providing accommodation.

[42] It is the Tribunal's view that the Respondent adequately particularized the disputed documents at paragraphs 12, 13 and 14 of its Reply submissions for the purposes of establishing the necessary nexus to satisfy the onus of proving that they are arguably relevant to the issues in this proceeding with respect to both liability and remedies. As such, procedural fairness requires use of the disputed documents to provide the Respondent with a fair opportunity to make its case.

C. Issue iii) Are a list of all health care professionals attended by the Complainant for her visual impairment and production of related medical documents in her possession since the year 2000 arguably relevant? If this question is answered in the affirmative, should the Tribunal order their disclosure despite the Complainant's privacy concerns?

[43] First, it must be noted that pursuant to section 6 of the *Rules*, a party's obligation to disclose is limited to documents that are "in the party's possession" (see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para. 17). Thus, in the absence of evidence that a list of health care professionals that attended to the Complainant's visual impairment already exists, the Respondent's request is denied.

[44] Second, the Tribunal finds that the extent to which the Complainant's visual impairment required accommodation is directly in issue and essential for the effective resolution of this matter. The Tribunal notes the Complainant's assertion that her medical records extend for decades. This may be true, but the Respondent made precisions that it would require her medical documents from late 2000. The Tribunal finds that this request for disclosure is arguably relevant for the Respondent's defence that the Complainant refused to provide it with sufficient information about her limitations, which prevented it from providing the Complainant with accommodation in a timely manner. It therefore

cannot be said that the request amounts to a “fishing expedition” or is not sufficiently particularized.

[45] Finally, the Tribunal is of the view that the Complainant’s right to privacy over the medical documents is not a bar to disclosure in this case.

[46] Regarding the five-step disclosure test set out in *West Park Hospital* that the Complainant wishes the Tribunal to apply in this case, the Tribunal prefers to apply the case law it has developed with respect to disclosure. But for the “undue prejudice” criterion, the other criteria in the *West Park Hospital* test are already well established in the Tribunal’s case law and have already been considered in the present ruling. Moreover, considering the arbitrator’s comments at paragraph 20 *in fine* in *West Park Hospital*, it appears that the arbitrator considers that the “undue prejudice” criterion ought to be considered within the wider context of the Wigmore test. The Tribunal is reticent to recognize *West Park Hospital* as a governing authority on the law of privilege given the Supreme Court’s decision in *A.M. v. Ryan*, [1997] 1 S.C.R. 157 (*Ryan*) (see notably paragraphs 24-38). In effect, the Wigmore test, as adopted in *Ryan*, is also consistently applied by the Tribunal (see for example *Communications, Energy and Paperworkers Union of Canada v. Bell Canada*, 2003 CHRT 19 at para. 11; *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 38296 (CHRT)). While the Wigmore test is dealt with in the following paragraph, the Tribunal has nonetheless considered “undue prejudice” as a standalone factor and finds that the Complainant’s bald assertion is simply not enough to establish a prejudice to her right to privacy in this case.

[47] It is well established at law that the party opposing disclosure has the burden of demonstrating that the documents should be privileged (*R. v. National Post*, 2010 SCC 16 at para. 60, [2010] 1 S.C.R. 477; see also *R. v. Gruenke,* [1991] 3 SCR 263 at 293). After a careful review of the Complainant’s submissions, the Tribunal finds that the Complainant’s submissions are silent on this issue. As such, the Complainant failed to meet her burden of proof. In any event, the Tribunal finds that by putting accommodation of her visual impairment at the center of the complaint, the Complainant has waived any right to privacy she may have had in the medical documents as they pertain to the diagnosis, prognosis and accommodation of her disability that would be necessary on a

return to work (*Guay* at para. 45; *Rai* at para. 30; *Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2013 CHRT 19 at paras. 44-45).

[48] Furthermore, the Tribunal rejects the Complainant's submissions that such a disclosure order oversteps the provisions in *PHIPA*. Even if the Tribunal were to assume, without deciding, that *PHIPA* applies to federal bodies such as itself, subsection 9(2) of *PHIPA* provides that it does not interfere with the power of a tribunal to compel the production of documents. Thus, it is apparent that the Tribunal's disclosure order does not go beyond *PHIPA's* provisions.

[49] Given the above, the Tribunal orders the disclosure of the medical documents as of December 31st, 2000. Again, the Tribunal reminds the parties that the disclosure order is subject to any objections going to admissibility raised at the hearing. In effect, pursuant to paragraph 50(3)(*c*) of the *Act*, the medical documents are not placed on the hearing record unless admitted into evidence.

[50] Despite the Tribunal's ruling, the Tribunal is mindful of the Complainant's concerns as to the scope and use of the medical documents as stated in her Sur-Reply. If the Complainant's privacy concerns remain following this ruling, she may discuss this with the Tribunal so that the Tribunal can decide appropriate terms and conditions, if any, in order to protect the Complainant's privacy.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 25, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1509/5510 Egan v. Canada Revenue Agency

Style of Cause: T1509/5510 Egan v. Canada Revenue Agency

Ruling of the Tribunal Dated: October 25, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

David Yazbeck, for the Complainant

Gillian Patterson and Laura Tausky, for the Respondent