Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 8
Date: March 13, 2018
File No.: T2207/2917

Between:

Cecilia Constantinescu

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background to this motion

[1] On February 20, 2018, the Canadian Human Rights Tribunal (the Tribunal) received a complaint filed by Cecilia Constantinescu (the Complainant) aimed at obtaining a number of clarifications from Correctional Service Canada (the Respondent) regarding a written statement by Pierre Durdu which was disclosed by the Respondent in its exhibits list Appendix A, under the attached exhibit 20.

[2] More specifically, the Complainant's motion is intended to obtain the production of a number of supporting documents related to said statement, in particular:

1. One or more documents attesting to the creation date of the written statement;
2. A document attesting to the place where the written statement was created;
3. The conditions of the creation of the written statement and the identity and professional title of the persons present at the time of its creation; and
4. A copy of the written notes or a certified transcription of the audio recording which led to the creation of the written statement.

[3] With regard to this request, the Respondent filed written submissions on February 26, 2018. The Complainant had the opportunity to submit a reply on March 2, 2018. I had the opportunity to read and consider the submissions of the Complainant and the Respondent, the related documents and case law. Once again and for the sake of brevity, I do not intend to re-examine the details of the parties' submissions.

II. Preliminary remarks

[4] I would first like to point out to the parties that the issue of Mr. Durdu's written statement was already considered by the Tribunal and the parties in the preliminary case management stage and in the disclosure process. The content and explanations of this ruling are not totally unknown by the parties and were previously expressed by the Tribunal. The Complainant decided to knowingly file a motion related to Mr. Durdu's written statement in accordance with Rule 3(1) of the *Rules of Procedure* of the Tribunal (the *Rules*).

[5] The Tribunal finds that this motion before it raises issues which were previously resolved by the Tribunal in a conference call. I remind the parties that filing a motion so

that the Tribunal will reconsider, re-examine or determine issues already judged is an extraordinary remedy. I am of the view that, if it were otherwise, this type of motion could negatively affect the principles related to the definite character of the decisions made by courts of law and tribunals, as well as the integrity of the administration of justice.

[6] Generally, it is not the Tribunal's practice to re-examine an issue that has already been resolved. If this aspect had been clearly referred to before the Tribunal, I would most likely have dismissed it, solely on that basis. However, since the Respondent did not specifically raise and elaborate this issue, I consider that it would not be appropriate to dismiss the motion on that basis.

[7] However, I remind the parties that the multiplication of motions, especially when the issues were previously touched on, could lengthen the quasi-judicial process. Similarly, the multiplication of motions or the filing of redundant or unnecessary motions could, in more extreme cases, be considered abusive or vexatious. The role of the Tribunal is also to safeguard the principles of natural justice and procedural fairness in accordance with subsection 48.9(1) of the *Canadian Human Rights Act* (the *Act* or the *CHRA*). Although the Tribunal's procedures must be less formal and more expedient, they must not be abusive or vexatious.

[8] Consequently, I would ask the parties to exercise caution and due diligence when they ask the Tribunal to re-examine or reconsider issues that have been previously determined.

III. Issue

[9] The issue is as follows: should the Tribunal order the Respondent to produce and disclose documents and information requested by the Complainant?

IV. Law and analysis

[10] The Supreme Court has often reiterated that tribunals are the masters of their own procedures. The Supreme Court set out this principle in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 (*Prassad*):

> […] We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
>
> [Emphasis added]

[11] Consequently, the Tribunal has the discretion to determine how it receives evidence.

[12] This discretion must be exercised by taking into account not only the principles gleaned from Common Law, but also the guidelines under the *CHRA*, RSC (1985), c. H-6 (*Prassad* at paras 568–569). Subsection 48.9(1) of the *Act* indicates that:

> Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

Subsection 50(2) and paragraph 50(3)(*e*) of the *Act* provide that:

> 50(2) In 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.
>
> 50(3) In relation to a hearing of the inquiry, the member or panel may
>
> (*e*) decide any procedural or evidentiary question arising during the hearing.

Finally, Rule 9(4) of the *Rules* provides that:

> **9(4)** Except with the consent of the parties, a document in a book of documents does not become evidence until it is introduced at the hearing and accepted by the Panel.

[13] It should be kept in mind that the Tribunal is not a court of law per se and, consequently, it is not necessarily subject to the same rules. As explained at para 35 in *Temple v. Horizon International Distributors*, 2017 CHRT 30 (*Temple)*:

> The rules and admissibility of evidence before the Tribunal are less formal than those before a court of law. The Tribunal may therefore receive and accept any information by any means that it sees fit under section 50(3)(c) of the *Act*.

[14] This is mainly the reason why the Tribunal could, for example, accept evidence that is hearsay or decide that the authentication of documents is not necessary (*Temple* at para 34). The *Act* and the *Rules* do not order the filing of certified or authenticated exhibits. Similarly, the parties are not obliged to detail the conditions for crating documents. In other words, the Tribunal may receive any evidence as it sees fit, whether or not that evidence would be admissible in a court of law (paragraph 50(3)(*c*) *CHRA*).

[15] It is important to understand that the disclosure of documents process is different from the admissibility of evidence process at the Tribunal hearing (see *Malenfant v. Vidéotron S.E.N.C.*, 2017 CHRT 11 at para. 29). As explained in *Telecommunications Employee Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28, at para 4:

> […] The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get information or documents that are or could be arguably relevant to the proceedings. <u>This does not mean that these documents or this information will be admitted in evidence or that significant weight will be afforded to them.</u>
>
> [Emphasis added]

[16] At the disclosure of documents process, **<u>the parties exchange only the documents in their possession</u>** which are potentially relevant to the issues raised by the complaint.

[17] Further to disclosing potentially relevant documents, the parties select the documents that they want to introduce into evidence at the hearing and organize the said documents in an evidence book. **A document does not become evidence until it is introduced at the hearing and accepted by the Panel** (Rule 9(4)).

[18] Contrary to the Complainant's submissions, nothing in the *Act* or the *Rules* prevents a party from disclosing to the other parties a document that may raise certain reliability issues.

[19] According to Rule 9(4) and the Tribunal's current practices, the parties can test the reliability and authenticity of the evidence at hearings by examining or cross-examining various witnesses. When the parties introduce evidence, such as written statements, all the issues related to reliability and authenticity will be assessed case by case by the presiding member.

[20] The Tribunal can base its final ruling on all of the evidence clarified **at the hearing** (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2014 CHRT 2 at paras. 58, 63, 69).

[21] As recently reiterated by the Supreme Court of Canada in *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30, "It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts" (at para. 20). It is the Tribunal's exclusive role to admit evidence at the hearing and, further to the instruction of the complaint (and not during the document disclosure process), assign the relevant weight and credibility to the evidence submitted to it.

[22] With regard to Pierre Durdu's statement, which is neither dated nor signed, it appears from the list of witnesses of the parties that Mr. Durdu will be called as a witness at the hearing. By doing this, the parties will have, if they so wish, the opportunity to examine and cross-examine Mr. Durdu in a full and meaningful way and to clarify the content of his written statement, as well as the circumstances surrounding its creation (see *Chuba v. Canada (Canadian Human Rights Tribunal)* (FCA), [1984] FCJ No. 1013). The parties will also have the opportunity to ask him other questions about, for example, the potential statements that he has made or allegedly made.

[23] The Tribunal believes that it will also be called on to read Mr. Durdu's statement and assess its reliability, weight and credibility. However, this statement must first be introduced into evidence at the hearing, and we are not at that stage yet. I would like to reiterate that, at the disclosure process, the parties only exchange documents. If Mr. Durdu testifies at the hearing, the Tribunal will be able to not only assess the credibility and reliability of such a statement, but also assess his testimony. In other words, if the parties want to raise any doubts about the reliability and authenticity of any evidence or wish to attack Mr. Durdu's credibility, they will be able to do so at the hearing, and it will be up to the Tribunal to resolve these issues and assign the necessary weight to the evidence submitted to it. However, raising objections at the disclosure process is premature.

[24] Similarly, the Tribunal is aware of the Complainant's concerns about the credibility of the witnesses. Consequently, I remind the parties that anyone who obstructs a Tribunal member in carrying out the instruction of the complaint commits an offence under paragraph 60(1)(b) of the *Act*. Moreover, section 59 of the *Act* prohibits anyone from threatening, intimidating or discriminating against an individual who testifies at the hearing. This section protects the integrity of the process before our Tribunal since it is an incentive for the witnesses to testify without fear of sanctions, especially from their employer if testifying against them. However, anyone who commits an offence under paragraph 60(1)(b) or section 59 of the *Act* could potentially be prosecuted under subsection 60(4) of the *Act* by or with the consent of the Attorney General of Canada.

[25] For all these reasons, I agree with the Respondent's submissions to the effect that the conclusions sought by the Complainant in her motion are not in the context of documentary disclosure, but instead are related to the hearing and the administration of evidence. Consequently, requests 1, 2 and 3 of the Complainant set out in the second paragraph of this ruling are dismissed.

[26] With regard to the Complainant's fourth and final request (namely, a copy of the written notes or a certified transcript of the audio recording that led to the creation of the written statement), I would like to point out that if other documents or statements related to Mr. Durdu's undated and unsigned statement exist, the Respondent is obliged to disclose them.

[27] However, the Respondent's counsel has already indicated her agreement to double-check with her client regarding other potential statements. These checks must be serious, comprehensive and not limited to guidelines and access request conditions that may be governed by other federal or provincial laws. The Respondent must disclose **all** the relevant evidence in its possession (Rule 6(1)). Given the Respondent's agreement, the Tribunal is satisfied that it is not necessary to issue an order in this regard at this stage.

[28] In fact, I understand that, over the years, Ms. Constantinescu has taken many steps to retrieve documents from the Respondent and other government institutions, particularly through access requests. I also understand that she has put a lot of time and energy into retrieving these documents. I am aware of the fact that complainants, in order to have access to documents, often have to take these different steps, which are sometimes laborious, complex and exhausting. I am also aware that requests to government institutions for access to information are governed by specific laws and regulations and that access to documents is subject to specific conditions and guidelines. Unfortunately, these conditions and guidelines do not fall under the jurisdiction of the Tribunal so I cannot intervene in this matter.

[29] It must be remembered that, in the Tribunal process, disclosure does not involve any of the access to information conditions or guidelines that the Complainant might have encountered in her various requests. Since the threshold of potential relevance at the Tribunal is low and therefore broader and inclusive, it is highly likely that Ms. Constantinescu has received new documents that had not been previously disclosed in the access to information request process.

[30] Having said this, I would like to point out that, if other documents or statements exist related to Mr. Durdu's undated and unsigned statement and are in the Respondent's possession, then it is obliged to disclose them. I reiterate that the threshold of potential relevance is very low and the trend is more disclosure rather than less (*Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para. 11 (*Gaucher*)).

[31] If, for example, an audio recording of Mr. Durdu's statement existed and was in the Respondent's possession, without hesitation, this material would be considered as

potentially relevant to the litigation and should be disclosed by the Respondent unless a privilege is claimed. I would like to point out that this obligation does not extend to the creation of documents for disclosure purposes (*Gaucher* at para. 17) and, in so doing, the Respondent would not have to submit a certified transcript of such a recording.

[32] Finally, I previously wrote in *Polhill v. Keeseekoowenin First Nation,* 2017 CHRT 34, in paragraphs 51 to 54, that human rights complaints are sensitive in nature and concern the dignity of individuals and their self-esteem. I have already asked the parties to show respect in their procedures. I think that respect goes both ways. I have no doubt about the range of deep and intense emotions that the parties, and especially Ms. Constantinescu, may be experiencing in this difficult process. However, I believe it is in everyone's interest, including the interests of justice and of the public, that the parties exercise restraint in their submissions. I would therefore ask the parties to show respect and courtesy and to avoid, at all costs, making certain comments concerning the integrity of individuals, including their professional integrity.

V. Ruling

[33] For these reasons, I dismiss the Complainant's motion.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
March 13, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2207/2917

Style of Cause: Cecilia Constantinescu v. Correctional Service Canada

Ruling of the Tribunal Dated: March 13, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

Cecilia Constantinescu, for herself

Patricia Gravel et Paul Deschênes, for the Respondent