Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 43
Date: October 28, 2019
File No.: T2344/0319

Between:

Robert Philps

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Ritchie-Smith Feeds Inc.

Respondent

Ruling

Member: David L. Thomas

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I. Background

[1] This is a ruling on a motion brought by Ritchie-Smith Feeds Inc. (the Respondent) concerning three preliminary matters in the complaint brought by Mr. Michael Philps (the Complainant). The complaint was filed with the Canadian Human Rights Commission (the Commission or CHRC) on December 13, 2016. The complaint and party details were forwarded to the Tribunal on January 14, 2019.

[2] Mr. Philps was employed by the Respondent for 22 years as a truck driver and his duties included various physical demands. He underwent neck surgery in January of 2015 related to a motor vehicle accident injury he sustained in 2011. Following the neck surgery, Mr. Philps was unable to return to his employment because of physical limitations. He alleges adverse differential treatment and termination of his employment under s. 7 of the Canadian Human Rights Act (*CHRA*).

[3] The Respondent has brought this motion to clarify the Tribunal's position on three procedural matters. The Respondent poses the following questions:

i. Should the Complainant be compelled to produce medical records of his treating physicians as part of his disclosure obligations (disclosure issues);

ii. Are certain hearsay documents being admitted for the proof of their contents (admission of hearsay documents); and

iii. In the event the Complainant fails to call his own physicians / treatment providers as witnesses, and the Respondent elects to subpoena their testimony, should the Tribunal rule the Respondent can treat these witnesses as adverse?

[4] This ruling will address each issue and the parties' respective positions separately. The Commission took no position on the first two questions.

II. Issue # 1 Disclosure Issue

[5] The Respondent alleges that the Complainant has not disclosed the full medical files of the medical professionals who he may have seen in relation to his physical disability. The Respondent lists a number of medical professionals and entities from which it would like to receive full medical files relating to Mr. Philps' treatment. The

respondent argues that these records are of direct relevance to the case as Mr. Philps has put his health and medical limitations into issue.

[6] The Respondent believes that the documents requested are arguably relevant as they are rationally connected to the facts, issues and remedies sought in this case. They believe the documents will contain:

a) the nature and scope of the Complainant's medical limitations;

b) the Complainant's prognosis for recovery;

c) the information that was provided to the physicians about the nature and demands of the Complainant's job and workplace which was utilized in developing their medical reports;

d) the Complainant's communication with the Respondents short-term disability (STD) and long-term disability (LTD) insurance carriers about his medical limitations and return-to-work prognosis; and

e) the information about the Complainant's alleged pain and suffering resulting from the Respondent's alleged conduct.

[7] The Complainant argues that the additional evidence requested is not arguably relevant. In the Complainant counsel's view, the materials already exchanged, to be supplemented by the testimony of four witnesses, is already comprehensive. The Complainant further argues that the requested documents do not have a rational connection to the facts, constitutes a fishing expedition and will add substantial delay to the efficiency of the inquiry.

[8] Complainant counsel also argues that Mr. Philps is the best witness, along with his wife, to the "pain and suffering that has resulted because of the respondent's action, in particular the injury to dignity that has flowed from being terminated because of his disability."

[9] In Reply submissions, the Respondent rejects "the Complainant's subjective assessment of what evidence is most persuasive in this case" as irrelevant and asserts that it is the Respondent's role to decide that. In the view of the Respondent, the gravamen of this case turns upon the scope of the Complainant's medical limitations.

[10] The Canadian Human Rights Tribunal has considered whether or not to compel further document disclosure in a numerous cases, for example *Guay v. Canada (Royal Canadian Mounted Police)* 2004 CHRT 34, *Syndicat des communications de Radio-Canada v. Canadian Broadcasting Corporation* 2017 CHRT 5, *Nur v. Canadian National Railway Company* 2018 CHRT 16, and *Mortimer v. Air Canada*, 2018 CHRT 30. At paragraph 42 of *Mortimer v. Air Canada* Tribunal Member Harrington summarized the principles that the Tribunal relies on when asked to decide pre-hearing disclosure questions as follows (citations omitted):

a) All parties have a right to a fair hearing, which requires that the, "…affected person be informed of the case against him or her, and be permitted to respond to the case.";

b) In accordance with subsection 50(1) of the [*Canadian Human Rights*] *Act*, each party has the right to a full hearing and must be provided with "full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations";

c) Each party is entitled to the disclosure of relevant evidence in the possession or care of the opposing party;

d) Where there is dispute as to whether a document must be disclosed, the principle of "arguable relevance" is applied. In order to be arguably relevant, there must be a rational connection between the documents requested and the facts, issues or forms of relief identified by the parties;

e) The arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case;

f) 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;

g) The request for disclosure must not be speculative or amount to a fishing expedition;

h) The documents requested must be identified with reasonable particularity and the request must not be too broad or general;

i) Where confidentiality or privacy is at issue with respect to medical documents, the Tribunal has held that these interests are overridden by the respondent's right to know the know the scope of the complaint against it as, "[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.";

j) In the search for truth and despite the arguable relevance of evidence, the Tribunal may deny a motion for disclosure where the probative value of the documents sought would not outweigh its prejudicial effect on the proceedings, particularly "where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute". So long as the requirements of natural justice and the *Rules* are respected, in order to ensure the informal and expeditious conduct of the inquiry the Tribunal may exercise its discretion to deny a motion for disclosure.

[11] In this Complaint, Mr. Philps alleges that he was treated in an adverse differential manner and had his employment terminated, on the basis of disability. A request for disclosure of such medical records, in addition to the ones in the possession of the Respondent at the time it made its decisions, is perhaps less relevant if there is no dispute that the disability existed.

[12] On the other hand, where a complainant alleges that the discriminatory conduct itself contributed detrimentally to their health, then they have put their health into question and a respondent should be entitled to a broader examination of medical records, including pre and post alleged discrimination (see *Yaffa v. Air Canada* 2014 CHRT 22).

[13] The difference in the Respondent's motion is that there is no general dispute that Mr. Philps had a medical condition after his neck surgery that impacted his ability to carry on his duties of employment. Furthermore, Mr. Philps is not arguing that the alleged discrimination caused or exacerbated his medical condition. The Respondent does not appear to contest the medical findings in the doctors' letters and reports forwarded to it in the course of Mr. Philps' employment. In fact, in paragraphs 43 and 47 of the Respondent's Statement of Particulars (SOP), the Respondent specifically states that it relied upon such information in coming to its conclusion that it would be an undue hardship to accommodate Mr. Philps. Therefore, the issue before the Tribunal in this motion is to what degree Mr. Philps' other medical records are arguably relevant when he does not claim that the impugned conduct of the Respondent exacerbated his injury or created new harm, other than the remedy he seeks under s.53(2)(e).

[14] It is unclear why the Respondent now wishes to go behind and beyond the medical information that was provided by the Complainant during his employment. The accuracy of the medical opinions provided is not at issue. At no time during the relevant period did the Respondent ever say it questioned the accuracy of the medical opinions or stated physical limitations. It is clear there is some dispute about the suggested workplace accommodation contained in the medical correspondence, but the other medical records requested will have no bearing on that. What is relevant to the assessment of the Respondent's actions is the information made available to it during that period, to which they admit they relied upon.

[15] Regarding the claim for pain and suffering, ordinarily, the Tribunal does not require medical evidence before making an award under s. 53(2)(e) of the *CHRA.* In most of the provincial human rights statutes, the equivalent section to s.53(2)(e) refers to compensation for "injury to dignity" which is not a medical condition for which evidence is required. Therefore, to what extent is a complainant before the CHRT required to bring medical evidence to support a claim for remedial compensation under s.53(2)(e)?

[16] The Tribunal considered this question in another ruling, *Communications, Energy and Paperworkers Union of Canada v. Bell Canada,* 2005 CHRT 9 ("*Bell Canada*") where the respondent argued that making a claim for pain and suffering necessarily put their respective medical conditions in issue and consequently required disclosure of all medical records of the complainants. The Tribunal rejected this argument in *Bell Canada* because the complainants did not argue that the respondent's alleged discrimination resulted in the need for medical attention.

[17] Similarly, Mr. Philps has not pleaded that the Respondent's alleged discrimination resulted in a separate injury that required medical attention. Therefore, the Respondent's request for further medical records is denied in this motion. However, if Mr. Philps' allegations change to include a claim that the alleged discrimination resulted in harm other than the pain and suffering claimed under s.53(2)(e), he will have brought his medical condition into issue in this complaint and the Tribunal may order further disclosure of his medical records.

III. Issue #2 Hearsay Documents Admitted as Proof of Content?

[18] The Respondent wishes to have an advance ruling from the Tribunal on whether certain hearsay documents will be admitted for the truth of their contents. In particular, the Respondent is concerned about written materials produced by Dr. Turchen and Karolyn Chiasson, Mr. Philps' physiotherapist. The Respondent states that their reports are premised upon hearsay reports by the Complainant about workplace conditions. The Respondent argues that the reports cannot be admitted for the truth of their contents and still respect the rules of natural justice. The Respondent argues that neither party should be left having to guess whether the Tribunal will allow these documents as proof of the truth of their contents, and therefore the Tribunal should make a ruling now.

[19] The Commission took no position on this question. The Complainant opposed the granting of all the orders sought by the respondent, but made no specific arguments or comments relating to this issue. They did comment that the Complainant would be testifying and it suggests he could speak about what he told his treatment providers.

[20] Hearsay is an out-of-court statement tendered for the truth of its contents (see *R. v. Bradshaw*, (2017) 1 SCR 865 at para. 1.) In the civil and criminal courts, there has been a long-standing presumption against the admissibility of such evidence. However, in the context of human rights complaints, Parliament specifically decided to allow the Tribunal more flexibility to admit different types of evidence, which would include hearsay, under certain circumstances.

[21] The Tribunal is guided on this subject under s.50(3)(c) of the *CHRA*, which reads:

> (3) In relation to a hearing of the inquiry, the member or panel may
> ….
> (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

[22] The Tribunal generally avoids making advance blanket rulings about documents which may or may not form part of the official record of a hearing.

[23] In their submissions, counsel for the Respondent have cited a decision of the British Columbia Human Rights Tribunal, *Redek v. Henderson Development (Canada) and Securigard Services (No.3)*, 2005 BCHRT 302 and this paragraph of the decision:

> **54** In the end, the use to which hearsay evidence may be put depends on ensuring that all parties receive a fair hearing and that the Tribunal has reliable evidence before it on which it can make its findings of fact. As all parties in this case ultimately agreed, the admissibility and use of hearsay evidence must be assessed on a case-by-case basis. In this regard, I have considered in each instance the reliability of the evidence, the necessity for its introduction as hearsay rather than first-hand evidence, the probative value of the evidence, and whether the other parties would be unfairly prejudiced or otherwise disadvantaged through my reliance on it.

[24] The approach in British Columbia is not unlike the approach of this Tribunal concerning hearsay evidence. Periodically, the CHRT is requested to accept hearsay evidence into evidence as proof of the truth of its contents. (See *Jeffers v. Canada (Citizenship and Immigration)*, 2008 C.H.R.D. No. 25 ("*Jeffers*") and *First Nations Child and Family Caring Society v. Attorney General of Canada (Representing Minister of Indian Affairs and Northern Development Canada)* 2014 CHRT 2 ("*Family Caring Society*").

[25] In *Family Caring Society*, the Tribunal rejected the complainant's request for a blanket admission of binders of documents as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document was called as a witness, and whether or not they were put to any other witness. The Tribunal insisted that Tribunal Rule 9(4) be applied, and that documents would be admitted into evidence on a case-by-case basis, once introduced at the hearing and accepted by the Panel.

[26] The question of relying on a hearsay document as proof of the truth of its contents was not directly addresses in *Jeffers* or *Family Caring Society*. However, some guidance is offered by s.48.9(1) of the CHRA which reads:

> 48.9(1) Proceedings before the Tribunal shall be conducted as informally and as expeditiously as the requirements of natural justice and the rules of procedure allow.

[27] It would seem contrary to requirements of natural justice for the Tribunal to make a categorical rejection of documents in advance to them being presented at the hearing. Each party is entitled to know the case they must meet. It follows logically that the Tribunal must be careful and prudent in the admission of documents, in particular if they contain hearsay evidence. However, in this case, the Respondent appears to be referring to two documents specifically, and the questionable portions have been identified. If those portions form a substantial part of the Complainant's case, then the Respondent will have had the opportunity to prepare rebuttal.

[28] In *Butler v. Nenqayni Treatment Centre Society*, (2002) C.H.R.D. No.25 ("*Butler*"), the Tribunal rejected the admission of a doctor's note as evidence of the complainant's medical condition because it was central to the issue at hand. The doctor was not called as a witness, therefore allowing no opportunity for a cross-examination of the author. However, the *Butler* case is distinguishable from the case at issue on two points:

a) In *Butler*, there was no information about the doctor's qualifications or expertise and there was a suggestion in the note that the doctor was not even a medical doctor; and

b) In the case at issue, that Mr. Philps had a medical disability is not the central issue at hand. The Respondent confirms in its SOP that it accepted Mr. Philps had a medical disability. The central issue in the present case is what accommodation was attempted by the Respondent, and to the extent the disability may have played a role in his termination, what defense is available to the Respondent.

[29] It could be said, as a generalization, that the Tribunal, like all triers of fact, is predisposed to prefer the best available evidence. In this case, that would clearly be direct testimony, which could be tested under cross-examination, versus written documentation containing hearsay. If there is no other evidence available, the Tribunal might have to consider documentary hearsay evidence. However, if it is controversial, or cuts to the core of the issue at hand, then the Tribunal will have to consider the amount of weight to give such evidence, and it may not be very much.

[30] In the case at hand, the Respondent is specifically objecting to the admission of letters from the complainant's treating health professionals, where it is proposed they will be introduced into evidence without any direct testimony by those professionals. In these documents, it is alleged that the professionals have made recommendations about Mr. Philps' possible return to work, which may include some assumptions about the workplace conditions.

[31] It would seem obvious that the Respondent should be able to provide a witness with firsthand knowledge of the workplace to refute such recommendations and assumptions if the Respondent feels they are incorrect. If the health professionals do not appear as witnesses to defend their written statements, then the Tribunal would likely be inclined to give more weight to that oral testimony.

[32] However, there should be a distinction drawn about what "truths" might be drawn from some documents if the health officials do not appear as witnesses. It could be accepted as a truth that the complainant was examined on a certain date. It could also be accepted as a truth that the health professional came to certain conclusions about the complainant's health status at such time. In paragraph 47 of its SOP, the Respondent confirmed it was fully apprised of the Complainant's physical limitations. However, if that matter is in contention, then it would certainly be open for the Respondent to challenge such observations by way of their own expert or other evidence.

[33] However, the main objection of the Respondent appears to be more focussed on the health professionals' assessment of the workplace environment and Mr. Philps' suitability to return to it. It would be a reasonable assumption to conclude that the Tribunal will prefer direct evidence on this matter and in light of such evidence, will give the appropriate amount of weight to any statements made by the health professionals in their letters.

[34] In conclusion, the Tribunal will not issue any blanket statement about the admissibility or weight to be attributed to any document in advance of the hearing itself. It is proper for the Tribunal to treat each document separately, on a case-by-case basis,

and to allow parties to make representations about each document as they are proffered.

IV. Issue #3 – In the event the Complainant fails to call his own physicians / treatment providers as witnesses, and the Respondent elects to subpoena their testimony, should the Tribunal rule the Respondent can treat these witnesses as adverse ?

[35] In the event that the Tribunal permits the admission of medical reports at the hearing as part of the Complainant's case, and if the Complainant does not call the authors of those reports as witnesses, the Respondent wants clarification that the Tribunal will permit it to call such treatment providers as adverse witnesses.

[36] The Respondent argues that if they must call the Complainant's treatment providers as witnesses, their evidence should not be treated as part of the Respondent's case for the purpose of the satisfaction of any evidentiary burdens. If there is no ruling that the evidence of an adverse witness is not part of the Respondent's case, the Respondent argues they may be in breach of the maxim "one cannot approbate and reprobate at the same time." They further argue that the Respondent ought not to be compelled to present potentially conflicting evidence because the Tribunal allows documentary hearsay on a "critical fact issue."

[37] The Complainant does not directly address the adverse witness argument, but does argue that the Respondent has not adequately explained the nexus of the expected testimony to the allegations that it discriminated against Mr. Philps under the *CHRA* because of disability.

[38] The Commission also does not directly address the adverse witness argument. The Commission addresses a different question of whether or not the Tribunal ought to make an adverse inference if Mr. Philps decides not to call his treatment providers as witnesses. (This was an issue raised by the Respondent in its SOP. However, the adverse inference argument was not made in the motion to which this ruling responds.)

[39] The Commission does argue, however, that it might not be necessary, efficient, or cost-effective to call Mr. Philps' treatment providers as witnesses to the hearing. As

noted above, in paragraph 43 of the Respondent's SOP, the Respondent specifically states that it relied upon the information from Mr. Philps' treatment providers in coming to its conclusion that it would be an undue hardship to accommodate Mr. Philps.

[40] To the extent that the Respondent disputes any conclusions of the treatment providers regarding workplace conditions, those concerns were addressed in the section above.

[41] In criminal and civil cases, an adverse witness usually refers to a witness who would be expected to give unfavourable evidence for the calling party or who proves to be uncooperative on the stand. In such cases, the various federal and provincial evidence and procedure statutes provide means by which the witness may be called and treated as an adverse witness so that they may be cross-examined. In such a case, it is important for such a witness to be formally identified as adverse so that counsel may be permitted to ask leading questions, typical of a cross-examination.

[42] The Tribunal is not bound by such formalities of the civil and criminal courts. The concern of Respondent counsel was addressed in a Case Management Conference Call (the CMCC) on May 1, 2019. Respondent counsel was not satisfied with the Tribunal's verbal assurance that flexibility would be allowed in the manner of questioning if such witnesses were called.

[43] The Respondent refers to a ruling in *Chopra v. Canada (Department of National Health and Welfare)*, (1999) CHRD No. 5 ("*Chopra 2*"). Specifically, Respondent counsel cites part of paragraph 10 of *Chopra 2*, which reads:

> 10. However, irrespective of how much information the complainant or the Commission may be able to gather going into a hearing, some facts may nevertheless only be accessible and/or proven through the cross-examination of the respondent's witnesses. To submit that a complainant or the Commission could opt to call those individuals who are adverse in interest to testify in chief is not an appropriate resolution to this problem for it would in effect compel those parties to introduce what is essentially the respondent's evidence while at the same time denying them the opportunity to cross-examine on this evidence.

[44] I am not bound to follow a previous ruling of the Tribunal, and in these circumstances, I do not find it would be appropriate given the different context of the case before me. In *Chopra 2*, the issue before the Tribunal was whether the respondent ought to be forced to elect between filing a motion of non-suit at the conclusion of the complainant's evidence or calling further evidence of its own. In *Chopra 2*, the Tribunal decided that there might be evidence adduced in cross-examination of the respondent's witnesses that might be essential to the complainant's prima facie case.

[45] However, in *Chopra 2*, the Tribunal did not explain why it would be inflexible about the manner in which it would allow the complainant to question witnesses in the employ of the respondent. As the master of its own procedure, it was within the power of the Tribunal to permit such flexibility in the manner of questioning the respondent's employees. However, this was not the main question before the Tribunal in *Chopra 2*.

[46] In the present case, the Respondent is concerned that any evidence of an adverse witness not be treated as part of the Respondent's case for the purpose of satisfaction of any burdens of proof. I have already confirmed to Respondent counsel that the Tribunal will permit leading questioning of such witnesses. The Respondent appears to be concerned that if an adverse witness gives evidence that they dispute, they may be forced to call another witness that contradicts that evidence. Respondent counsel is concerned that they will be presenting the Tribunal with conflicting evidence that both form part of their case, or put differently, that they would be required to both make and defend the case.

[47] As indicated in the CMCC, the Tribunal is not bound by formalities of the civil and criminal courts. Under the circumstances, I see no reason why the Tribunal would not accept Respondent counsel's argument that it did not accept all or part of the testimony of certain witnesses called, particularly if they are witnesses connected to the Complainant, such as his treatment providers. Section 50(3)(c) of the *CHRA* permits this type of flexibility.

[48] If Respondent counsel feels more comfortable identifying such witnesses as “adverse witnesses” to their client, then they are free to do that. There is not a need for the Tribunal to make a formal declaration of such in advance to the hearing.

V. Conclusion

[49] The Respondent’s request for further medical records is denied in this motion. However, if Mr. Philps alleges that discrimination resulted in harm other than the pain and suffering claimed under s.53(2)(e), he may be ordered to disclose his medical records.

[50] The Tribunal will not issue any blanket statement about the admissibility or weight to be attributed to any document in advance of the hearing itself. It is proper for the Tribunal to treat each document separately, on a case-by-case basis, and to allow parties to make representations about each document as they are proffered.

[51] There is no need for the Tribunal to make a formal declaration about adverse witnesses in advance to the hearing. The Respondent may identify witnesses they call as “adverse witnesses” and the Respondent counsel will be permitted latitude in their questioning to allow for cross-examination of such witnesses.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
October 28, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2344/0319

Style of Cause: Robert Philps v. Ritchie-Smith Feeds Inc.

Ruling of the Tribunal Dated: October 28, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Fiona H. McFarlane, for the Complainant

Julie Hudson, for the Canadian Human Rights Commission

Donald J. Jordan and Jessica Fairbairn, for the Respondent