Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 37
Date: December 4, 2020
File No.: T2252/0718

Between:

Stacy White

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Nuclear Laboratories Ltd.

Respondent

Ruling

Member: Jennifer Khurana

Background

[1] Stacy White, the complainant, started working for the respondent, Canadian Nuclear Laboratories (CNL) in January 2012. On August 1, 2013, Sue Fleming, a co-worker, grabbed her around the neck in the workplace. Ms. White alleges that as a result of this incident, and previous interactions with Ms. Fleming, she developed a number of health problems requiring accommodation, namely, remaining physically separated from Ms. Fleming. Ms. White alleges that CNL failed to accommodate her disability-related needs because it required her to resume face-to-face contact with Ms. Fleming, and that this made her health worse. CNL argues that it did not know, and could not reasonably have known, that the complainant had a disability that may have required accommodation.

[2] The parties to this complaint are in case management, preparing for the hearing of this matter. CNL filed a motion asking the Tribunal to:

1. Order Ms. White to undergo a 4-6 hour retrospective psychiatric evaluation of her medical condition from 2013 to 2015, conducted by a psychiatrist of its choosing, Dr. Hy Bloom. It also wants Dr. Bloom to be able to interview third parties such as the complainant's spouse, her co-workers and friends, subject to their consent; and

2. Split the hearing into phases, starting with a full *prima facie* hearing focused on whether Ms. White had a disability requiring the claimed accommodation and whether CNL knew or ought to have known about her disability and any needs.

[3] Ms. White and the Commission oppose both of the respondent's requests. Together with its response to CNL's motion, Ms. White requested a confidentiality order over the copies of her medical documents filed with CNL's motion.

DECISION

[4] CNL's motion is dismissed. Deciding to order an unwilling complainant to submit to a psychiatric examination requires the exercise of extreme caution in the human rights context. That is a high bar to meet. I am not persuaded that the order is necessary for me to determine the issues in dispute or for CNL to have a fair opportunity to make and defend its case. CNL's request to split the hearing into phases is also dismissed. I do not find that it will be more efficient given how much evidence I will need to hear to determine the issue of a *prima facie* case of discrimination.

[5] Finally, I am granting the complainant's confidentiality request, for now. My reasons for these decisions follow.

Issues

[6] This ruling determines three issues which I have addressed in turn below:

1. Does the Tribunal have jurisdiction to order the complainant to undergo a psychiatric evaluation? If so, should the Tribunal exercise its discretion to do so?
2. Does the Tribunal have the jurisdiction to order that a hearing proceed in a bifurcated manner? If so, should it grant the respondent's request to determine the issue of whether a prima facie case is established as a preliminary issue?
3. Should the Tribunal issue a confidentiality order sealing the record for the medical documents filed with the motion?

REASONS AND ANALYSIS

1. The request for an order compelling Ms. White to participate in a psychiatric exam

Does the Tribunal have jurisdiction to order the complainant to undergo a psychiatric evaluation?

[7] The parties do not dispute that the Tribunal has the ability to make such an order. Rather, they dispute whether the Tribunal should exercise its discretion to do so, as discussed below.

[8] The *Canadian Human Rights Act (*the *"Act")* and the Tribunal's Rules of Procedure (the "Rules") are silent on whether the Tribunal has the power to order a complainant to undergo a medical evaluation. The Tribunal has rarely dealt with requests to order an independent medical examination (IME). It has only once ordered a complainant to attend to an examination in a four-paragraph decision with no facts, reasoning or analysis (*Lee v. Department of National Defence*, 2001 CanLii 38317 [*Lee*]). The Tribunal has nevertheless recognised that it could grant such a request through its ancillary or implicit powers, albeit under very specific circumstances and only with "extreme caution" (see *Lafrenière v. Via Rail Canada Inc*., 2017 CHRT 29, at para 11 [*Lafrenière*]).

If so, should the Tribunal exercise its discretion to do so?

[9] No. I am not persuaded that ordering Ms. White to undergo a retrospective psychiatric examination is necessary for CNL to participate fairly in the Tribunal's process. It has received over 1300 pages of medical records dating back to 2006 which its expert can review. In my view, CNL can prepare and present its case without an IME. It can refute the complainant's evidence at a hearing in the way it sees fit.

[10] Further, this is a human rights tribunal. Dignity and respect for an individual's autonomy are at the heart of the *Act* and its purposes. I must consider the values underlying the *Act* before making an order that is inherently invasive and coercive. I must also consider whether the requested order would further those values (*Day v. Canada (Department of National Defence)*, 2002 CanLII 45923 2002 CanLII 45923 (CHRT), at paras 25-28 [*Day*]). In my view, the requested order does not.

[11] I have not exhaustively addressed each and every argument set out in the parties' lengthy submissions. I have instead focused on the main points relevant to my ruling.

Is CNL entitled to examine Ms. White as a matter of fairness?

[12] No. CNL will have a full and ample opportunity to present its case through a number of less intrusive means.

[13] The Commission submits that the requirements of procedural fairness are met by the substantial medical disclosure to date, the respondent's right to summons and question witnesses, to rebut Ms. White's evidence, and its opportunities to lead its own evidence. I agree.

[14] CNL submits that this case turns on the reliability and adequacy of Ms. White's medical information. Its lengthy submissions dissect aspects of Ms. White's medical file and highlight what it submits are problems in Ms. White's accounts of her medical history, including the timing of diagnoses and symptoms. It argues these health issues are not clearly linked to any experiences Ms. White had at work, or to any alleged failure by CNL to accommodate her request to be physically separated at work from Ms. Fleming.

[15] CNL submits that because there are serious reasons to doubt the medical disclosure the complainant has provided, as a matter of fairness its medical experts should have access to the same information source that Ms. White's doctors did: that is, information obtained by way of direct communication with her in a clinical setting. CNL asks me to distinguish Ms. White's case from others in the human rights context where similar requests were rejected.

[16] Ms. White opposes the request. She argues that CNL has not presented an expert report in support of its claims about the necessity of a retrospective psychiatric examination. According to Ms. White, CNL has not proven that its proposed expert is capable of evaluating the state of her disability 5 to 7 years after the relevant time period of this complaint.

[17] As mentioned above, the Tribunal has only granted such an order in one of the four rulings relied on by the parties that deal with the issue of requests to order IMEs (see *Lee, supra*). *Lee* contains no facts or reasoning to help me understand why the Tribunal ordered the complainant to submit to a medical examination by a psychiatrist and occupational therapist retained by the respondent.

[18] In the three other cases, while the Tribunal recognised that there may be times where an order to submit to a medical examination is appropriate, it declined to do so and found there are a number of reasons why a tribunal should move cautiously in this area. Ordering

the complainant in a human rights proceeding to undergo a medical examination is inherently coercive. The dignity and physical and psychological integrity of the individual are at the heart of human rights (see *Rogers v. Deckx Ltd.*, 2002 CanLII 61838 (CHRT), at para 9 [*Rogers*]; *Day, supra,* at para 28 and *Lafrenière, supra,* at paras11 and 16).

[19] In *Lafrenière,* the Tribunal found that it should proceed with "extreme caution" in considering an order compelling an unwilling complainant to submit to a medical examination.

[20] In *Day*, the Tribunal also noted the practical difficulties of compelling an unwilling complainant to undergo a psychological examination, and the impact this might have on a vulnerable complainant. The *Act* is based on the principle of human dignity and respect for others, regardless of their individual circumstances. This includes a respect for the privacy and constitutional values that protect the privacy of the individual (*Day*, *supra* at para 36).

[21] In *Persaud v. Toronto District School Board et al. (No. 2), 2008 HRTO 12* at paras. 22-23, the Human Rights Tribunal of Ontario, adopting the observations made in *Cucek v. British Columbia (Ministry of Children and Family Development)* (No.1) (2003), 2003 BCHRT 44, at paragraphs 23 and 24 [*Cucek*], agreed that even if the Tribunal has implied jurisdiction to make such an order, as is the case with labour arbitrators, such an order should only be made in the clearest of circumstances. As was the case in *Cucek*, CNL will have full access to Ms. White's records from the relevant time period, and the ability to assess those records with its expert.

[22] In *Lafrenière,* the complainant alleged that he was disciplined unfairly and ultimately terminated due at least in part to his disability. The respondent requested an order compelling the complainant to undergo an IME. CNL attempts to distinguish Ms. White's case from *Lafrenière,* arguing that it is not seeking to obtain information about Ms. White's current medical condition, but rather to understand her condition in the past. It suggests that even though Ms. White has the burden of proof to establish a *prima facie* case, its entitlement to challenge the complainant's proof must not be "arbitrarily limited", given s.50(1) of the *Act* which entitles the respondent to a full and ample opportunity to present its

case. It argues it would not be fair or efficient to restrict its expert to listening to Ms. White's testimony and indirectly questioning her through CNL's counsel.

[23] The opportunity to appear at the inquiry, present evidence and make representations is not unlimited. CNL may take the view that not having the opportunity to examine Ms. White prior to the hearing is "less than a full opportunity to present its case", but I must, among other things, balance the privacy concerns involved in making an inherently invasive order with CNL's request and its rights to a fair hearing.

[24] I have also considered what else CNL can do to prepare and present its case. I already ordered the complainant to produce her medical records dating back to 2006 (see *White v. Canadian Nuclear Laboratories*, 2020 CHRT 5 [the "production ruling"]). Ms. White has the burden to make out a *prima facie* case of discrimination, on a balance of probabilities. She intends to call her family physician, as well as two other health professionals she consulted after the workplace incident. CNL can rebut Ms. White's evidence as it sees fit, including by cross-examining Ms. White and her medical professionals on what it sees as problems in the medical record. If CNL's expert reviews these materials and finds that they are lacking, or CNL wishes to challenge whether or not Ms. White had a disability, what the cause of her health issues may have been, and/or what can be attributed to CNL, it will have the opportunity to do so at the hearing.

[25] If Ms. White cannot convince me that she had a disability, and that having to resume contact with her co-worker adversely affected her in a way that was connected to that disability, her claim will fail. If the Tribunal makes a finding of liability, she will also have to prove her damages and make the link between the discrimination, CNL's level of responsibility, and the losses she claims to have suffered.

[26] I am not persuaded that development of an expert opinion requires medical examination of Ms. White. Denying its motion does not preclude CNL's expert from reviewing the entire medical file and forming an opinion, and testifying to that effect. CNL can have its medical expert review Ms. White's medical records and can rely on its expert's advice in cross-examining the complainant on this evidence.

[27] The Tribunal in *Day* and *Lafrenière* did not find any reason to resort to such drastic measures (*Day*, *supra* at para 42, and *Lafrenière, supra* at para 23). I do not find any reason in this case either. While the onus shifts to the respondent to provide a non-discriminatory explanation for its actions if Ms. White establishes a *prima facie* case, it is still her complaint to make and prove on a balance of probabilities. The respondent can challenge the evidence and point out the gaps it sees as it wishes, but in my view, relying on s.50 is not *carte blanche* for CNL.

[28] I am also not persuaded that the value to be gained from a psychiatric examination of the complainant to assess her mental health 5-7 years ago outweighs the invasive nature of this examination.

[29] CNL relies on *Kalyn v. Vancouver Island health Authority (No.2*), 2007 BCHRT 441 [*Kalyn*]) in which the B.C. Human Rights Tribunal ordered the complainant to submit to an IME by a psychiatrist of the respondent's choosing. In my view, the facts of *Kalyn* are distinguishable from CNL's context. As CNL itself acknowledges, one factor in *Kalyn* favoring an IME was that substantial medical disclosure had not been made. The Tribunal only had access to a brief report from the complainant's psychiatrist, a previous reporting letter to the family physician, and 6 pages of clinical notes. This is not comparable to Ms. White's 1300 pages of medical disclosure.

[30] Finally, while CNL argues that an IME is necessary due to the inadequacy and unreliability of Ms. White's medical documentation, it has also acknowledged that it has not yet had a full opportunity to review the medical disclosure or to consult its medical expert about it (see para 13 of its Motion).

[31] I make no finding on the reliability or adequacy of the medical documents at this stage. While I acknowledge CNL's argument that quantity is not the only yardstick by which to measure the medical records that Ms. White has produced, on balance I am not persuaded that there is reasonable cause to conclude that the medical documentation is unclear or ambiguous such that I should exercise my discretion to order Ms. White to submit to a psychiatric examination.

Does an employer's right to request a pre-litigation medical examination extend throughout litigation and after the employment relationship ends?

[32] CNL submits that employers have the right to request an IME during the accommodation process (*Bottigilia v. Ottawa Catholic School Board,* 2017 ONSC 2517) and that the same must be true mid-litigation.

[33] I reject the respondent's arguments. CNL did not provide any authority in support of its position that employers have an ongoing and continuing right to require IMEs, even during litigation and well after the employment relationship has ended. Requesting an IME as an employer during the accommodation process is not akin to ordering an unwilling complainant to undergo a retrospective psychiatric evaluation several years later in the context of a human rights complaint before this Tribunal.

Is there a distinction to be drawn between disclosure of medical records and information in the complainant's mind?

[34] CNL relies on the production ruling in support of its argument that there is no reason to draw a line between information held by the complainant in her medical record and information stored in her head. It suggests that because I agreed with CNL that it is entitled to defend allegations at a hearing and to understand what was going on, medically speaking, with the complainant for a considerable period of time prior to her going off work, this reasoning would now extend to ordering Ms. White to submit to an IME. It submits that it would be unfair to follow the Tribunal's approach in *Day* and *Lafrenière*, whereby CNL could only access this information at the hearing and would have to deal with it "on the fly". CNL suggests that it would be an arbitrary limitation of its entitlement to have a full opportunity to present its case in light of s.50(1) of the *Act*.

[35] I reject the respondent's arguments. The test for whether arguably relevant documents should be produced involves very different considerations than those at play in deciding whether to order an individual to submit to an IME against their will. As the complainant notes, the respondent has not provided any authority for why pre-hearing disclosure principles should extend to "information stored in her head".

[36] At this stage of the process, CNL should not be surprised by what Ms. White's medical evidence or case will involve, particularly given the disclosure ordered to date. The parties will also be directed to identify and share with each other and file with the Tribunal the documents on which they intend to rely at the hearing and to provide detailed witness statements in advance of the hearing. CNL would also receive copies of any expert reports filed by the complainant or the Commission.

2. Bifurcating or splitting the proceedings

Does the Tribunal have the jurisdiction to order that a hearing proceed in a bifurcated manner?

[37] Yes. The Tribunal can determine its own process to be followed in deciding issues raised by a human rights complaint. Tribunal proceedings must be fair, and proceed as informally and as expeditiously as the rules and the requirements of natural justice allow (ss. 50(1), 48.9(1) of the *Act* and Rule 1(1) of the *Rules*).

[38] The parties do not dispute that the Tribunal can decide how the matter will proceed. In other cases, the Tribunal has split or bifurcated its process into phases, first deciding whether or not the complainant has proven that there was discrimination under the *Act* (the liability portion of the complaint) before determining what remedies might flow from the discrimination if it found there was discrimination. The Tribunal can also determine other substantive issues, such as questions of jurisdiction, in a phased approach if it is fair and efficient to do so (see, for example, *Canada (Human Rights Commission v. Canada (Attorney General)*, 2012 FC 445 at paras 124-132).

If so, should it grant the respondent's request to determine the issue of whether a prima facie case is established as a preliminary issue?

[39] No. I do not find that hearing the case in the way proposed by CNL is an efficient or appropriate way of proceeding in the circumstances.

[40] As in all cases of discrimination, there are two steps to a successful claim of discrimination related to employment. First, Ms. White will have to establish a *prima facie* case of discrimination on the basis of disability. There are three parts to that test:.1) did she

have a disability at the relevant time; 2) did she experience an adverse impact because CNL made her resume face-to-face contact with the co-worker who assaulted her; and 3) was her disability a factor in the adverse impact (See *Moore v. British Columbia (Education),* 2012 SCC 61, [2012] 3 SCR 360 at para 33; *Campbell v. Canadian Imperial Bank of Commerce*, 2019 CHRT 13 (CanLII), at paras 108-109 [*Campbell*]).

[41] In deciding whether a complainant has met its burden to establish a *prima facie* case, the respondent can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination (i.e. a statutory defence such as a *bona fide* occupational requirement (BFOR), or do both. The Tribunal can consider all the evidence before it in deciding whether the complainant made out a *prima facie* case of discrimination, including the respondent's evidence refuting the existence of a *prima facie* case (*Campbell*, *Ibid* at para 113).

[42] If Ms. White is successful, the onus shifts to CNL to justify its actions or provide a non-discriminatory reason to justify or explain its actions or practice (ss. 15(1) and 15(2) of the *Act*). In some cases, respondents try to justify their actions by showing that the requirement, as for Ms. White and Ms. Fleming to resume contact was a legitimate, or *bona fide,* occupational requirement and that it could not accommodate the employee's request short of undue hardship.

[43] As the Commission submits, the respondent's Statement of Particulars (SOP) does not appear to rely on that defence in this complaint. Rather, it appears that the question of whether there is a *prima facie* case of discrimination on the ground of disability is likely to be a primary focus of the evidence and argument in this case. CNL's SOP does not appear to make a BFOR defence of undue hardship but seeks to establish that CNL was not or could not have been aware of Ms. White's disability at the relevant time, such that its duty to inquire was not triggered.

[44] CNL proposes a full hearing at the *prima facie* stage involving live testimony, expert reports and submissions. It argues that it would save time and money to avoid preparing for a full merits hearing until the Tribunal determines whether Ms. White has made out a *prima facie* case. It submits that this is a more efficient way of proceeding because the question of

whether the complainant had a disability that required accommodation in the form of avoiding face-to-face interactions with Ms. Fleming could be dispositive of the case.

[45] I agree with Ms. White and the Commission that the question of the *prima facie* case cannot be determined in a vacuum and cannot be considered separate and apart from the other issues in the case. Determining whether Ms. White has established a *prima facie* case is not a discrete preliminary issue or a question of pure law.

[46] CNL acknowledges that certain witnesses may need to be recalled in the event that the first phase does not result in the dismissal of the complaint, but submits that "this will not spell inefficiency" as the Tribunal would be picking up from where it left off. It argues that the Tribunal has recalled witnesses in other cases and that in light of the COVID-19 pandemic, the typical costs associated with recalling witnesses for an in-person appearance are no longer at play. In CNL's view, this approach will result in a more focused, efficient remote hearing, which will allow the process to be broken off into manageable chunks.

[47] The Commission submits that the Tribunal would arguably have to hear a substantial amount of evidence at the *prima facie* stage from most, if not all, witnesses to be called by both parties. It argues that the *prima facie* assessment will involve many contested facts that will require the Tribunal to make credibility assessments to determine whether Ms. White had a disability at the material times and whether CNL knew or ought to have known that Ms. White had a disability requiring accommodation.

[48] I agree. I am not persuaded by CNL's arguments on efficiency. The possibility of overlapping evidence, a need to recall witnesses, and an intermingling of issues in this case does not support proceeding in the way CNL suggests. CNL appears to want to challenge whether Ms. White had a disability or characteristic falling within the ambit of the *Act's* protection. It will also challenge whether this disability resulted in medically-established accommodation needs in the way Ms. White claims. This first "phase", namely determining whether Ms. White has made out a *prima facie* case of discrimination, will necessarily engage a number of witnesses and significant amounts of evidence. In my view, CNL minimises the concern about intermingling of issues and evidence and the possible implications on the hearing.

[49] I agree that it may be necessary to break up virtual hearings into more manageable blocks and to proceed in a different way than we might do in person. It does not follow that the risks and costs associated with recalling witnesses are not important factors to consider. It is not “free” to a witness, to the parties or to the Tribunal to recall a witness and to potentially have to comb over parts of the evidence already covered with the same witnesses, whose testimony may be different at a later stage. Although travel costs are not a factor in a videoconference hearing, recalling witnesses still requires an outlay of time, resources, preparation and possible witness fees.

[50] We will proceed with one hearing. The parties should prepare accordingly. This does not mean that the parties cannot cooperate with each other and with the Tribunal’s case management efforts to consider what is truly essential to make their respective cases. Working collaboratively going forward will go a long way to helping us move this matter to its conclusion without further entrenching positions before the hearing has even started.

[51] While this is an adversarial process, as I have already recalled at para [37] above, Tribunal proceedings are to be informal and efficient, while remaining fair. It is a question of proportionality. Resources are scarce, both private and public ones. Ms. White and CNL’s responsiveness to this (now repeated) appeal from me to collaborate in a respectful and collegial way will also be an important part of this hearing progressing efficiently. Their communications, in whatever form, should also reflect that respect for each other, the public interest, the Tribunal, and this process.

3. Should the Tribunal issue a confidentiality order sealing the record for the medical documents filed with the motion?

[52] Yes. Ms. White asks that her medical records remain sealed and not accessible by the public. She argues that CNL filed a large number of documents in support of this motion, which now form part of the Tribunal’s record and that reveal confidential details of her past medical history and information regarding her family members who are not parties to this complaint. In the absence of a confidentiality order, this information will be available to members of the public upon request.

[53] CNL did not make any submissions in response to the complainant's request in its reply.

[54] Human rights hearings are intended to be public proceedings (Section 52(1) of the *Act*). The Tribunal and its processes are accountable to the public. Confidentiality orders are not to be granted without balancing the societal interest in the proceeding occurring in public with the specific privacy interests of the party requesting a confidentiality order.

[55] The Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if it is satisfied that there is a real and substantial risk that the disclosure will cause undue hardship to the persons involved. It must also be satisfied that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public (Section 52(1)(c) of the *Act*).

[56] Ms. White argues that the public need not have unfettered access to her medical records, including information regarding her family members, in order to ensure the openness and transparency of the Tribunal's process and procedure in this inquiry.

[57] I agree. While the complainant has clearly put her health in issue as the basis for her complaint and it will necessarily be addressed at the hearing, the hearing has not yet started. CNL filed a motion, in support of which it provided over 100 pages of medical records from Ms. White's expansive medical documentation. None of these documents have been admitted as evidence at the hearing, and were only filed in support of the motion. At this stage of the proceedings, I do not find that keeping those documents sealed will impact the societal interest in the inquiry being conducted in public. I agree with the complainant, that her specific privacy concerns are engaged, and that public access to her medical records at this stage is not necessary given the limited scope of the issues to be determined in this motion.

[58] The motion materials are for the moment, sealed. If the same documents are introduced at the hearing, she may renew her request for a confidentiality order. The other parties will be asked to make submissions on any such requests.

Order

[59] The respondent's motion is dismissed in its entirety.

[60] The complainant's request to seal this motion and related motion materials, including all medical documents, is granted for the time being.

[61] The Tribunal will also issue a separate direction regarding the issues in dispute in this file.

[62] The parties are directed to participate in a case management conference call. The parties should be prepared to provide projected dates for the filing of any expert reports and for the hearing of this matter. The Tribunal will send details of the conference call and an agenda when the date has been confirmed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
December 4, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2252/0718

Style of Cause: Stacy White v. Canadian Nuclear Laboratories Ltd.

Ruling of the Tribunal Dated: December 4, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

M. Christine Roth, for the Complainant

Sasha Hart, for the Canadian Human Rights Commission

Kevin MacNeill, for the Respondent