

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 2
Date: January 12, 2023
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, worked for the respondent, Canadian Nuclear Laboratories (CNL). During a workplace incident, Sue Fleming, a co-worker, grabbed her around the neck. Ms. White alleges that because of this incident, and previous interactions with Ms. Fleming, she developed 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 which 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 hearing in this matter is set to begin on January 16, 2023. On January 10, 2023, both CNL and Ms. White asked the Tribunal to order each other to produce documents they say are arguably relevant to the issues in this case.

[3] CNL sent its request by way of email communication. From there followed multiple emails, which included several serious allegations and claims about counsel. In a direction, I ordered the parties to clarify their respective disclosure requests and responses. They complied with this direction.

[4] The Commission did not participate in the email exchanges beyond confirming that it had complied with its disclosure obligations. It did not take a position on the production requests.

Conduct of counsel

[5] The following comments do not engage the Canadian Human Rights Commission or their counsel, past or present.

[6] On January 10, 2023, the parties sent several email communications to the Tribunal. The first email from CNL included a brief request for an order for production. Before the Tribunal could provide direction to the other parties and seek their submissions, counsel for

Ms. White responded. Her email included a troubling narrative about interactions between her office, counsel for CNL, his office, as well as serious allegations involving counsel. Ms. Roth also wrote that should an order for disclosure be issued against Ms. White, the order would be challenged, and that “[u]ndoubtedly, in that case, the Hearing will be adjourned until the decision is reviewed”. It included Ms. White’s own request for production, sent for the first time in this responding email.

[7] After receiving 7 communications from counsel for Ms. White and CNL, I was compelled to issue a direction ordering the parties to immediately stop writing to the Tribunal unless they were making a specific request for my intervention or responding to a Tribunal direction. They were also ordered to communicate in a manner that “befits respect for each other, the process, the Tribunal, and its mandate”. I noted the Tribunal’s obligation to conduct its proceedings fairly and in an expeditious fashion, but also that counsel have their part to play in this. I recalled that “[d]iverting scarce resources to read through, respond and address issues that may not even be necessary for a determination of the issues in dispute in these complaints does not favour an expeditious outcome in this matter.”

[8] Finally, I ordered the Registry to triage the parties’ communications and to stop forwarding messages to me unless they complied with my direction, noting that exchanges that should properly be addressed to counsel only did not fall into this category. I indicated that all materials falling outside these parameters would be returned to the parties and would not be included in the Tribunal’s file.

[9] Unfortunately, this is not the first time I have had to remind counsel to behave with respect and courtesy in these proceedings. This type of behaviour is not helping the Tribunal in its task and is a waste of our collective resources. “Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice ..” (*Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para 64, citing K. A. K. A. Nagorney, “A Noble Profession? A Discussion of Civility Among Lawyers” (1999), 12 *Geo. J. Legal Ethics* 815, at p. 817) [*Groia*].

[10] The parties may make requests for a Tribunal order, namely making a request for an order for production. But it is not acceptable when responses and ensuing correspondence include inflammatory, accusatory language that falls short of the requirements of the civility, courtesy, and respect that I have already directed the parties to maintain. I will address this with counsel when the hearing opens. “Practicing law with civility brings with it a host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.” (*Groia*, at para 63). I expect counsel to choose their battles wisely, to be proportionate in their handling of this file and to refrain from any incivility going forward.

DECISION

[11] CNL’s request is allowed. Ms. White’s request is denied.

REASONS

[12] Parties must be given a full and ample opportunity to present their case (s. 50(1) of the *Canadian Human Rights Act* (the “Act”). This includes the right to the disclosure of all arguably relevant information held by the opposing party so each party knows the evidence they are up against and can prepare for the hearing. See *Egan v. Canada Revenue Agency*, 2019 CHRT 8 at para 4. The Tribunal’s *Rules* require parties to disclose a copy of all documents in their possession that relate to a fact, issue or form of relief that is sought in the case, including those identified by other parties (Rule 19(1)(e)). This is also an ongoing obligation (Rule 24(1)(2)).

[13] The threshold for disclosure is arguable or possible relevance. While this threshold is not particularly high, a party seeking production of a document must still show that there is a rational connection between the document it seeks and the issues raised in the complaint (*T.P. v. Canadian Armed Forces*, 2019 CHRT 19 at para 11; *Turner v. CBSA*, 2018 CHRT 1 at para 30 [*Turner*]). Requests for disclosure should not be speculative or amount to a fishing expedition (*Egan v. Canada Revenue Agency*, 2017 CHRT 33 at paras. 31-32 [*Egan*] and *Turner* at para 30).

[14] The fact that documents are disclosed does not mean that they will be admitted as evidence at the hearing. If a party takes issue with the proposed evidence, it can raise this at the hearing and can also make submissions on the weight that the decision-maker should give that evidence if it is admitted at the hearing.

CNL's request for an order for production

[15] CNL wants the Tribunal to order Ms. White to produce a copy of notes she made on alleged harassment in the workplace. It says that it only discovered the existence of these notes on January 10, 2023 when one of CNL's legal representatives was reviewing the originals of documents already disclosed at the offices of Ms. Roth, counsel for Ms. White. The CNL legal associate noticed a series of stapled pages in the hard copy of Ms. White's notebook that did not appear to have been previously disclosed. Counsel for CNL asked to review them on a without prejudice basis to determine their relevancy.

[16] Ms. White opposes the request. She initially said the requested notes were personal in nature. She later added that these notes are related to the harassment she alleges she experienced from her former co-worker but are not arguably relevant to the issues in dispute. According to Ms. White the notes do not refer to anything she discussed with her managers and supervisors. The notes will not allow the Tribunal to decide whether CNL's duty to inquire about possible accommodation was triggered, whether it inquired, whether it provided accommodation because of disability, and/or whether it failed in these duties. Ms. White says that "only the harassment reported" is relevant to the issues in dispute in this case, and not any incident she did not report or convey to her employer. Finally, Ms. White submits that CNL's request is a fishing expedition, is meant to discredit Ms. White, is speculative, and that CNL wanted the notes before it learned that they were about harassment.

[17] In my view, the notes are arguably relevant and should be disclosed. Ms. White is not asking the Tribunal to make findings about harassment under s. 14 of the *Act* and the harassment Ms. White refers to is not based on a prohibited ground of discrimination. However, Ms. White's complaint alleges that CNL failed to accommodate a disability which she says was either caused - or exacerbated by - harassing treatment in the workplace,

which required CNL to accommodate her by ensuring she avoid all face-to-face contact with the co-worker who assaulted and harassed her. While CNL initially accommodated her health issues, it takes the position that it did not knowingly fail to accommodate Ms. White because it was not aware that she was still experiencing significant health issues related to the incident involving her co-worker.

[18] As a result of the nature of the allegations and CNL's response, in my view, the notes on harassment are arguably relevant to the issues in this case. Ms. White has alleged that the harassing behaviour is the cause of her disability or has aggravated her health condition, and CNL takes the position that it did not, and could not reasonably have known, about her ongoing health issues or a disability. Given how the protected characteristic in this case – disability – is so closely related to these incidents and allegations of workplace harassment, the notes are arguably relevant and must be produced. I do not find the request to be a fishing expedition and CNL has explained the factual basis for its belief that the records exist and are relevant to the issues in dispute.

[19] Further, as the parties well know, this is not evidence before the Tribunal, and has not been admitted.

Ms. White's request

[20] Ms. White is asking the Tribunal to order CNL to produce "all notebooks from 2012 to 2015 of: Caroline Allen, Marty Kapitan, Andrea Denby, Laura Dykstra, Sandra Faught, Karry LeBlanc, Barry Lamirande, Steven Anderson, Daniel Sullivan, and Robert Thistle."

[21] She says that CNL disclosed limited notes from Caroline Allen that relate to Ms. White's reporting of harassment, the assault, and the accommodation she required. Ms. White also says that in preparing for the hearing, she interviewed witnesses who were employed by CNL during the relevant times. She learned that "all incidents and instances of observations regarding harassment, Ms. White's health and concerns were reported to Ms. Allen, Mr. Kapitan, Ms. Dykstra, and Ms. Denby, amongst others" and "they were all noted in the respective individuals' notebooks". Ms. White submits that supervisors and managers also followed this practice of keeping notebooks. According to Ms. White these

notes have not been provided, and CNL never advised of this practice and the existence of these notebooks.

[22] CNL opposes the request. It says that Ms. White's request is a fishing expedition, that she has not identified who she interviewed and when. It submits that the claim that all incidents were reported in all the notebooks is absurd on its face given how unlikely it is that the witnesses saw each one of the ten individuals whose notebooks are sought write down details of all of Ms. White's alleged harassment incidents. Finally, it argues that it already conducted a thorough sweep of its records earlier in the proceedings and produced all it could. Ms. White has not supported her request with anything concrete to suggest that the alleged notebooks either exist or contain relevant information that has not been produced.

[23] Ms. White maintains these notes are relevant to interactions among and by Ms. White's supervisors and managers regarding the alleged harassment, her disability and concerns she and others say they voiced to their supervisors and management. She submits that this information will assist the Tribunal in determining the extent of the information conveyed by Ms. White and others in this regard, presumably to help establish the duty to inquire, and to accommodate Ms. White because of her disability. She maintains this is not speculative and not a fishing expedition.

[24] Ms. White's request is denied. As the parties know, disclosure obligations are ongoing. If any of the parties were to discover materials that are arguably relevant to the issues in this file, they are required to disclose them. But I am not prepared to order production of 3 years of notebooks for ten individuals based on a statement a witness may have made during preparation for the hearing at this late stage, particularly as it is not clear that the notebooks exist, or that what they contain is even going to assist the Tribunal in its task. The request is speculative, and I do not find a sufficient basis to order production or another search through all of CNL's records based on what Ms. White has provided as the foundation for her request.

ORDER

[25] CNL's request is allowed. Ms. White must provide a legible, electronic copy of the requested notes in their entirety no later than noon ET on Friday, January 13, 2023 to the other parties. She must also send a confirmation to the Tribunal that she has complied with this order.

[26] If a party intends to introduce this document into evidence, it should send a copy to the Tribunal's Registry for inclusion in the Joint Book of Documents no later than Monday January 16, 2023 and I will address this at the hearing, as needed.

[27] Ms. White's request is dismissed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
January 12, 2023

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: January 12, 2023

Requests dealt with in writing without appearance of parties

Written representations by:

M. Christine Roth, for the Complainant

Kevin MacNeill, for the Respondent