Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 8
Date: February 21, 2024
File No.: T2651/2721

Between:

Schelomie Cherette

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Kathryn A. Raymond, K.C.

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I. OVERVIEW OF RULING ABOUT REDACTIONS

[1] It is significant that this is a ruling on a motion brought during case management during the disclosure stage of this proceeding. The Complainant, Ms. Cherette, redacted content in her medical records instead of disclosing them fully. In case management, it was clarified for the parties that irrelevant content may be redacted for privacy reasons in certain circumstances but that content which is arguably relevant to the case cannot be redacted unless the Tribunal grants a confidentiality order. Ms. Cherette has filed this motion requesting permission for her redactions to remain. Ms. Cherette says that the content she wishes to redact engages her privacy interests because it is personal, highly sensitive and is not relevant to this proceeding. She also asserts that some of the content she redacted for irrelevance would negatively impact the well-being of a third party if it became public.

[2] Ms. Cherette also requests a confidentiality order over the redacted portions of her medical records for purposes of both the disclosure stage of this proceeding and the hearing and decision. Ms. Cherette does not want the content she redacted to become public knowledge or to be discussed in this case. She has not shared the redacted content with the other parties.

[3] The Respondent, Air Canada, objects to any content in the medical records being redacted. Air Canada points out that Ms. Cherette has put her health in issue in this complaint. Air Canada submits that disclosure of the complete medical records is required because it is entitled to defend itself fully against her complaint; this requires that it have knowledge of the redacted content. Air Canada asks that the redactions be removed and that the unredacted records in their entirety be made subject to a confidentiality order.

[4] The Canadian Human Rights Commission (the “Commission”) agrees that the content identified by the Complainant in her medical records should be redacted. The Commission accepts Ms. Cherette’s assurance that the redacted content is irrelevant. It submits that it is likely that Ms. Cherette’s medical records will contain content that is not all relevant to this proceeding.

[5] The Commission points out that the parties agreed and that the Tribunal directed that the redactions be reviewed by the Tribunal. The Commission objects to the Respondent's position that a confidentiality order should be granted over the Complainant's unredacted medical records in their entirety. The Commission argues that the Respondent's position that the redacted content needs to be disclosed and that privacy concerns can be addressed by a confidentiality order over all the medical records contradicts directions the Tribunal gave previously in case management and the Respondent's earlier position.

[6] The parties were advised informally of my decision regarding this ruling on February 8, 2024, in case management and were informed that reasons for the decision would follow. These are my reasons.

II. DECISION

[7] I find that some but not all redactions should remain. The Complainant's medical records, as I have redacted them, are to be disclosed to Air Canada and the Commission. The content that I am ordering to be redacted in the medical records is irrelevant. That irrelevant content is of a personal, even intimate nature. Its disclosure would be considered by a reasonable and objective person likely to cause unnecessary and noteworthy embarrassment to a party.

[8] The Tribunal needs to evaluate whether privacy concerns about medical records (beyond personal identifiers) are objectively reasonable. This assessment is not to be made based on the subjective opinion of a party. Content that, viewed objectively and reasonably, is highly embarrassing may be redacted from medical records where the content is irrelevant. Where the redaction does no disservice to the proceeding nor harm the interests of another party, unnecessary and embarrassing content can be excluded. This promotes the dignity of participants before the Tribunal, who should not needlessly suffer public embarrassment over irrelevant matters, and, therefore, guards the respectful manner in which proceedings before the Tribunal are conducted.

[9] The content that Ms. Cherette redacted that will now be disclosed because of this ruling is disclosed subject to limits. These limitations include that disclosure to the other

parties will be made only to their counsel and one instructing representative unless otherwise approved by the Tribunal.

[10] Ms. Cherette's motion for an order that the content she redacted be made subject to a confidentiality order at the disclosure stage of this proceeding and at the hearing is dismissed without prejudice to her ability to advance the same or a similar motion at the hearing, should the medical records be submitted as evidence.

III. ISSUES

[11] The issues resolved as a result of this ruling are:

1) Should the redactions proposed by Ms. Cherette to the entries in her medical records remain?

2) Should Ms. Cherette's medical records in their entirety or the redacted entries in those medical records be made subject to a confidentiality order?

[12] These issues require that I determine four questions, the first of which was decided before the parties filed their motion materials:

1. What is the proper process to employ to determine these issues in a manner that preserves privacy over the disputed content until the ruling is issued?

2. Is the content identified by Ms. Cherette in her medical records, and proposed by her and the Commission to remain redacted, arguably relevant to this proceeding?

3. If content in a document is irrelevant, should it be redacted?

4. Should a confidentiality order be issued over the redacted content on the ground that there is a real risk that disclosure of personal information will cause undue hardship to the persons involved pursuant to section 52(1)(c) of the *Canadian Human Rights Act*, RSC 1985, c H-6., (the "Act") as amended?

IV. THE CONTEXT OF THE COMPLAINT

[13] Ms. Cherette alleges that Air Canada discriminated against her based on the protected characteristics of race, colour and sex. She says that the discrimination occurred when she was travelling with family members on a flight operated by Air Canada. Ms.

Cherette alleges that her family members received poor service and were treated rudely by Air Canada's staff over a seating issue at the boarding gate. She says that her sister-in-law, who is white, became upset with Air Canada staff, primarily the gate attendant. Ms. Cherette, who is black, explains that she spoke up in support of her family to the gate attendant in a calm manner. She alleges that Air Canada's gate attendant unreasonably accused her of hostility and threatened to remove her from the boarding area and to take her boarding pass and passport. Ms. Cherette claims that the gate attendant perceived her as a stereotypical "angry black woman" because she is black and concluded that she was threatening because of the gate attendant's discriminatory beliefs and treated her in an adverse differential manner compared to her sister-in-law. Ms. Cherette and her family members were allowed to board the flight, but Ms. Cherette alleges that she suffered various harms as a result of the discrimination she experienced.

V. THE PROCEDURAL CONTEXT

[14] Issues of disclosure are addressed in advance of the hearing in the interests of fairness by means of case management conducted by the Tribunal. The parties have exchanged Statements of Particulars (SOPs), witness lists and disclosed documents they believe are arguably relevant. The parties are required by the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules") to produce a List of Documents and to disclose all arguably relevant documents to each other.

[15] It is not disputed that Ms. Cherette's medical records are arguably relevant to her complaint of discrimination. She claims that the discrimination caused both emotional and physical injury. These are matters that are relevant to the issue of remedy in this proceeding. If discrimination is found to have occurred, the availability and amount of any award of general damages for pain and suffering will need to be decided by the Tribunal. The medial records are arguably relevant to these issues.

[16] There is another issue of remedy for which the medical records are arguably relevant. Air Canada claims in its defence that the Tribunal should not award general damages for "pain and suffering" for discrimination and related psychological or emotional harms

because of the Montreal Convention. The Montreal Convention is an international agreement among countries, including Canada, that applies to international air travel. Air Canada submits that the Montreal Convention protects airlines from being required to pay awards of damages for pain and suffering to air passengers except in certain circumstances; Air Canada says that the only exception permitted by the Montreal Convention that is relevant to this complaint is when a passenger suffers bodily injury in circumstances prescribed by article 17(1) of the Montreal Convention. Air Canada argues that to be awarded damages for any alleged mental or psychological harm, Ms. Cherette must first establish that she suffered a “bodily injury” and/or that her alleged psychological condition was caused by or associated with a “bodily injury” within the meaning of article 17(1).

[17] Ms. Cherette amended her SOP to include in her claim that the alleged discrimination by Air Canada caused her both physical and mental injury; she also amended her List of Documents to include her medical records. Ms. Cherette says that she suffered a bodily injury as the discrimination she says she experienced contributed to ongoing migraines; she also submits that her psychological/emotional health problems were caused by or associated with a “bodily injury” caused by the alleged discrimination.

[18] In addition to her plan to testify at the hearing, Ms. Cherette relies on the medical records that were created during consultations with her family physician after the alleged discrimination as documentary evidence that she has physical and mental injuries. Ms. Cherette provided copies of her medical records to the other parties with her Amended List of Documents as she is required by the Rules to do. However, as explained, before doing so, she redacted the content that is in issue in this motion for reasons related to privacy concerns.

[19] It is not disputed that Ms. Cherette’s medical records are arguably relevant to this proceeding. Her medical records were required to be disclosed to the other parties at the pre-hearing stage of this inquiry, subject to any redaction permitted by the Tribunal.

VI. THE PARTIES' POSITIONS ON THE MERITS

A. Ms. Cherette

[20] Ms. Cherette submits that the redacted content would cause her undue hardship if disclosed. She describes the undue hardship as severe anxiety and emotional distress. Ms. Cherette also claims that the disclosure of some of the redactions will cause damage to her reputation and dignity. She says that other disclosure may result in stigmatization, discrimination or unwarranted judgment from the public. She states that this undue hardship could negatively affect her emotional, personal, social and professional life.

[21] Ms. Cherette relies on *North American Trust Co. v. Mercer International Inc.* (2000) 1999 CanLII 4550 (BC SC), 71 B.C.L.R. (3d) 72 (B.C.S.C.) ["Mercer"] at para. 13. She submits that this case confirms that a litigant does not need to make disclosure that will not help in resolving the issues but only cause embarrassment or harm.

B. Air Canada

[22] Air Canada made the point that, as the Respondent, it is entitled to disclosure of not only content that is relevant to supporting Ms. Cherette's claim but also content that disproves the claim. Air Canada submits, as an example, that the redacted content in the medical records could establish that the health impacts which Ms. Cherette attributes to the alleged discrimination were caused by some other incident or health issue.

VII. ANALYSIS

Question 1. What process should be employed to determine whether redactions are proper and, in doing so, preserve privacy over the disputed content until the motion is decided?

(i) Preliminary Review of Documents by the Parties

[23] Ms. Cherette brought the issue of the alleged irrelevance of these entries forward in case management and requested directions about how to proceed to have the content she

redacted be made confidential. For purposes of the disclosure stage of the proceeding, parties are correct to identify in advance irrelevant content in the documents to be disclosed or arguably relevant content over which there are confidentiality concerns.

[24] In this case, the parties were directed by the Tribunal in case management to determine whether they could agree that the redacted content should remain confidential and, therefore, redacted based on the context available from review of the redacted records, and sharing basic explanations, without sharing the actual content, as a first step. As noted, Ms. Cherette indicated that she would be further traumatized if the other parties read the redacted content. She objected to Respondent counsel or Commission counsel reviewing the unredacted records. In *Peters v United Parcel Service Canada Inc. and Gordon*, 2020 CHRT 19 at paras 83-84, the Tribunal acknowledged that there is a pre-existing right to privacy over one's medical records. The Tribunal determined that it was not appropriate for disputed redactions to be reviewed by the respondent's counsel where the complainant objects to this process. Rather, in those circumstances, the role of reviewing redacted content more appropriately falls to the Tribunal.

[25] The parties agreed as a first step to review the redacted records and determine whether they could reach a consensus about whether the redactions required the Tribunal's assessment. Air Canada's counsel did not review the content in the redacted portions in the medical records.

(ii) The Tribunal's Review of Unredacted and Redacted Documents

[26] The parties could not reach an agreement based on a review of the redacted documents and discussion. As this complaint is at the disclosure stage of the inquiry, I determined the methodology to be followed to resolve the motion during case management based on consultation with and the agreement of the parties. The process was simplified in case management and the issues to be addressed in the motion were reduced in the interests of focusing the issues to be decided and efficiency. The matters that were resolved in case management were resolved on agreement.

[27] To preserve privacy until the motion could be decided, the parties jointly agreed to submit both the unredacted medical records and the proposed redacted versions to the Tribunal to be reviewed for this ruling. All parties agreed that the Tribunal should review the redacted content and decide whether that content is arguably relevant and must be disclosed or whether it is irrelevant, personal and sensitive and should be redacted.

(iii) The Complainant's Request for a Confidentiality Order Over the Redacted Records Disclosed to the Other Parties is Unnecessary

[28] As explained, Ms. Cherette has asked that the redacted content in her medical records be made subject to a confidentiality order, which I indicated would be needed to preserve the redactions if the redacted content is arguably relevant. Ms. Cherette wanted a confidentiality order to apply to the redacted content during the disclosure stage of this proceeding.

[29] There are cases where the Tribunal has made confidentiality orders regarding how medical records can be used between the time they are disclosed and when they are admitted as evidence at the hearing, such as in *Clegg v Air Canada* 2019 CHRT 3. However, as was explained to the parties during case management, a confidentiality order is rarely necessary to address the confidentiality of documents disclosed to other parties at the disclosure stage of the proceeding.

[30] At the disclosure stage of the proceeding, the documents themselves are not filed with the Tribunal Registry; there is no need for a confidentiality order to prevent public access to the documents at the disclosure stage because the documents do not become part of the official record (in the possession of) the Tribunal. In general, documents that are disclosed to other parties do not become part of the official record of the proceeding before the Tribunal unless they are filed with the Tribunal in support of a motion as part of a "motion record" or if they are admitted into evidence at the hearing and form part of the official evidentiary record of the hearing into the complaint.

[31] Any documents disclosed to another party during a legal proceeding are subject to an implied undertaking of confidentiality. This means that the documents cannot be

disclosed or used outside this proceeding unless their disclosure is required by subpoena or court order, which does not typically arise. The implied undertaking of confidentiality is essentially an implied rule, and an important rule, that applies to parties engaged in litigation who are required to disclose confidential documents and/or documents which are against their interest to produce, as is the case here. Ms. Cherette is not required to file a motion to ensure that the other parties will not use the medical documents she discloses in her Amended List of Documents outside the purposes of this proceeding. The implied undertaking of confidentiality applies without the need for a motion or an order by the Tribunal.

[32] Ms. Cherette expressed skepticism that Air Canada's counsel would preserve the confidentiality of her medical information. Air Canada's counsel is legally and ethically obligated to comply and to make best efforts to ensure that the Respondent complies with the rule and respects confidentiality unconditionally. No evidence was provided to support Ms. Cherette's concern. Evidence is required to establish that a respondent or respondent counsel is not likely to comply with the implied rule of confidentiality, not speculation. Respondent counsel is an experienced litigator. It is assumed in law that he will comply with his professional obligations unless proven otherwise. There is no need for an order requiring confidentiality from the other parties at the disclosure stage.

(iv) Preserving Confidentiality Over the Filed Motion Materials Pending the Ruling

[33] As indicated, it was agreed that Ms. Cherette's unredacted medical records would be filed with the Tribunal as part of her motion for review by the Tribunal. Documents that are filed with the Tribunal in support of a motion as part of a "motion record" become part of the official record of the proceeding before the Tribunal. However, the Tribunal has the authority pursuant to section 52(2) of the Act to make an interim confidentiality order until a ruling on the motion can be issued if it considers an interim order an appropriate measure to take.

[34] Since it was not known at the time Ms. Cherette filed these documents whether the redacted portion of her documents would remain redacted, I issued an interim confidentiality

order over the medical records in the motion record so that they are sealed and may only be reviewed by myself for purposes of this ruling.

[35] The copy of the unredacted records that Ms. Cherette sent to the Tribunal Registry will remain sealed as part of the motion record. Ms. Cherette will make any further re-disclosure of her medical records that may be required as a result of the outcome of her motion.

(v) When a Motion Under Section 52(1) of the Act Is Required

[36] As was reviewed with the parties in case management, when a party wishes to assert confidentiality in a manner or to an extent beyond that provided by the implied undertaking of confidentiality that attaches to disclosed documents at the pre-hearing stage or wishes to make confidential any relevant document or matter at the hearing stage of the proceeding, an application is required by section 52(1) of the Act. Section 52(1) states that "[a]n inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry…." (emphasis added)

[37] Rule 26(1) applies to applications or what the Tribunal terms a "motion". Rule 26 requires that a motion be initiated by a notice in writing that sets out the order the motioning party requests and the grounds relied upon. However, Rule 26 (1) also confers procedural discretion upon the Tribunal to decide in individual cases how an application/motion may be brought. For example, where appropriate in the interests of efficiency, an informal application/motion may be made by way of an oral request during case management, or by letter, but an application/motion is required by section 52(1) of the Act.

[38] In this case, Ms. Cherette included a request for a confidentiality order pursuant to section 52(1) for purposes of the entire proceeding (including the hearing) in her motion. An application/motion was required. The parties asked that submissions for the motion be provided in writing. However, Ms. Cherette, who is self-represented, was relieved of the obligation to file a formal "Notice of Motion" with the wording of her proposed draft order, or to provide a draft order, as can be required of a party. Ms. Cherette was asked to provide a

written statement expressly stating what relief she was requesting. The requirement in Rule 26 that a party requesting an order from the Tribunal clearly articulate what order they are asking the Tribunal to issue is necessary in light of the application requirement in section 52(1) and is appropriate.

[39] Ms. Cherette did not, in fact, provide a clear, stand-alone statement of what she was requesting in her motion submissions. However, I was able to discern what I was being asked to order from a holistic review of Ms. Cherette's motion materials and correspondence. Ms. Cherette is asking that her redactions remain and that a confidentiality order be made over the redacted content for purposes of this proceeding. The focus of her motion and requested order is purely on the redacted content for the purposes of this proceeding. Her other comments about possible outcomes are responses to positions taken by other parties.

(vi) Resolving the Parties' Conflicting Positions About the Relief to Be Granted

[40] The relief to be considered in this motion is: 1) whether content in the medical records can be redacted for irrelevance, and, if so, should it be redacted for privacy concerns; and, 2) should a confidentiality order be issued over any redacted content on the ground that there is a real risk that disclosure of personal information will cause undue hardship to Ms. Cherette or the third party that outweighs the open-court principle pursuant to section 52(1)(c) of the Act.

[41] However, the parties approached this motion differently when they filed written submissions and sought conflicting confidentiality orders. Essentially the parties were talking at cross-purposes in their submissions for the motion. This occurred notwithstanding that the parties had agreed upon the methodology to be followed to resolve the motion during case management.

[42] As indicated, the parties had asked and were permitted to file submissions to support their positions and assist my review of the medical records themselves. I assumed that the submissions would fall within the parameters of the possible relief to be granted as

discussed in case management. Nonetheless, Air Canada took a different approach in its submissions and proposed an alternative order for the first time in its response to Ms. Cherette's motion materials. Air Canada advised the Tribunal that it consented to a confidentiality order over the entirety of the unredacted medical records on the basis that it would receive full disclosure, including the redacted content. Air Canada argued that this approach would strike the right balance between Ms. Cherette's privacy concerns and procedural fairness to its interests.

[43] This garnered objection by the Commission on the basis that Air Canada had not followed the Tribunal's directions. The Commission submitted that the order Air Canada proposed would serve no purpose. The Commission emphasized that Ms. Cherette does not seek a confidentiality order with respect to arguably relevant medical information. The Commission submitted that Air Canada's proposed order for unfettered access to Ms. Cherette's private medical information (albeit subject to a confidentiality order) contradicted the Tribunal's approach of reviewing the medical records in their entirety and rendering a ruling on whether Ms. Cherette's proposed redactions are appropriate.

[44] I agree with the Commission's objection to the position now taken by Air Canada in its submissions and with the Commission's reasoning for its objection. To protect Ms. Cherette's privacy on an interim basis, the Tribunal decided that Air Canada would not review the redacted content; Ms. Cherette had difficulty determining how to explain her privacy concerns about the redacted content without giving it away: *Hadani v Hadani*, 2012 BCSC 1142 at para 34. The Tribunal's directions for the motion included that the Tribunal would decide whether the redacted content should be private and remain redacted, which would only be permitted if it is irrelevant, and that the redacted content would be disclosed if it is arguably relevant. This procedural approach is consistent with the responsibility of the Tribunal to determine what is arguably relevant and what is not. It had been agreed in case management that arguable relevance was the primary issue that needed to be decided and that this motion would be decided in this manner. Further, Ms. Cherette's request for a confidentiality order was only over redacted content. The parties agreed in case management that a redacted copy of her medical records could be made public.

[45] It would constitute a clear error of law by the Tribunal to adopt Air Canada's suggestion and the agreement of the parties that Ms. Cherette's privacy interests in medical records that are arguably relevant in this proceeding can be addressed by a confidentiality order on consent. It was explained to the parties in case management that the consent of the parties is not sufficient to grant a confidentiality order. A confidentiality order is required if the relevant content is arguably relevant to the proceeding. An order respecting arguably relevant content can only be granted pursuant to section 52 of the Act. Where the issue is the disclosure of personal information, an applicant for such an order must establish on the evidence that there would be undue hardship to those involved that is not outweighed by the societal interest in proceedings being open to the public. Air Canada's position respecting section 52(1)(c) is contrary to the law.

[46] Air Canada's procedural position contradicts the Tribunal's directions (based on the consent of the parties) that it will review the redacted medical information and render a decision on its arguable relevance. Its position could also include an unnecessary request for an order from the Tribunal. Ms. Cherette agrees that the material that she concedes is arguably relevant medical information can be made public. If the Tribunal agrees with her position about what content should be redacted, there will be no need for a confidentiality order over all her medical records.

[47] Air Canada's proposal that its counsel have unfettered access to private medical information in exchange for a confidentiality order negates the right of Ms. Cherette to have her objection to disclosure heard and decided by the Tribunal. In my view, approaching the issues in the manner agreed to in case management is legally required and strikes the right balance between Ms. Cherette's privacy concerns and procedural fairness to Air Canada.

Question 2. Is the content redacted by Ms. Cherette in her medical records arguably relevant to this proceeding?

[48] The content under redaction can be separated into two topics: Content A and Content B. Content A is not arguably relevant to this proceeding; it is located in the medical records on page 19 of 35. Content B is arguably relevant; it is found on pages 10 and 18 of 35.

(i) Content A Is not Arguably Relevant

[49] The content that Ms. Cherette asks to be redacted that I have described as Content A is irrelevant to the issues to be decided in this complaint. The content will not help the Tribunal determine the truth of what occurred in this inquiry because it is irrelevant. It is not content that is required to be disclosed for reasons of fairness because the redacted content is not arguably relevant to the issues in dispute in this case.

[50] The content concerns a temporary condition that arose years after the alleged discrimination and had resolved by the time Ms. Cherette saw her physician. It lasted about a month. Her symptoms are well described and do not overlap with the symptoms Ms. Cherette alleges were caused by the discrimination. It is implausible that what is described in this redacted content can be relevant to what Ms. Cherette alleges was caused by discrimination and it is not relevant to disproving her allegations. In any event, the alleged discrimination, if it occurred, happened quite some time earlier, negating any causation issue. The content is irrelevant to remedy because Ms. Cherette is obviously not seeking compensation for the content under redaction. Her doctor sent her for a test to confirm there was nothing of consequence in the background, and there is no further mention of the topic in her records. It is reasonable to infer that Content A is not in any way material to this complaint.

(ii) Content B is Arguably Relevant

[51] Ms. Cherette has put her health in issue in this proceeding. When a complainant bases their case on their medical condition, a respondent is entitled to health information that may be relevant to their claim. This was well stated in *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para 45:

> In the present case, the Complainant is seeking financial compensation for physical injuries and pain and suffering. The right to confidentiality is therefore overridden by the Respondent's right to know the grounds and scope of the complaint against it. In 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.

[52] Content B is arguably relevant and must be disclosed. Most importantly, parts of Content B appear in the medical records in close proximity to references to migraines and stress; these are specific symptoms and health issues that Ms. Cherette attributes, at least in part, to the discrimination she alleges she experienced. While Content B may, in fact, be a separate matter from those topics, this documentary evidence would need to be clarified in that respect. On the face of the records alone, I cannot rule out the arguable relevance of the proposed redacted content. The redacted content and the content about migraines and stress appear in the notes that were taken on the same visit with the physician. Some patients who have the relevant health issue can have symptoms like those for which Ms. Cherette claims compensation from Air Canada. The best evidence concerning whether these matters are related or not would require an exercise of medical expertise by the physician who saw Ms. Cherette on those dates. I was provided no evidence from the physician who made these entries for the purposes of this motion to establish that Content B had no relationship to the symptoms that appear in close proximity on the page. By reason of placement on the page and the shared temporal connection, the redacted content appears likely to be arguably relevant to or may overlap with specific symptoms and health issues that Ms. Cherette attributes to the discrimination she alleges she experienced. This can only be clarified by further evidence.

(iii) The Portions of Content B About the Third Party

[53] Ms. Cherette pointed out that the entries she redacted obliquely refer to a third party. She submitted that the content could be harmful to the third party if disclosed. The third party is not named, but it is possible to identify the third party, in theory, by relationship. It is not possible to redact only the information relevant to the identity of the third party. Doing so would render Content B nonsensical.

[54] Subject to one potential concern, I do not agree that Content B would be harmful to the third party. Most of Content B is not controversial and would not result in harm as it reflects typical health issues associated with the condition in issue. There is nothing

objectively embarrassing about the condition in issue or other matters related to that condition or to further developments referenced in Content B. If there is, Ms. Cherette did not explain why.

[55] However, there are two comments respecting Content B that the physician who made the notes appears to attribute to Ms. Cherette that I recognize have the potential, if known to the public, to be misconstrued and possibly perceived in a negative fashion and thereby cause embarrassment. It is also reasonable for Ms. Cherette to be concerned about how these comments may be interpreted by the third party.

[56] While I agree that Ms. Cherette's concern is understandable, the comments in question may not necessarily be as emotionally harmful as Ms. Cherette fears. A reasonable, informed person should realize that the comments can reflect normal reactions of persons experiencing the health condition in question. Additional evidence, especially from Ms. Cherette or her physician, could clarify whether this was a normal reaction at the hearing if the comments are admitted as evidence. The comments may not need to be admitted into evidence.

[57] To attempt to find a possible solution in advance of the hearing to address the sensitivity of these two comments, the Tribunal will have an informal and off the record discussion with the parties.

[58] While these two notes constitute sensitive, personal, health information that may cause discomfort or fear of embarrassment to Ms. Cherette or cause some unknown possible degree of emotional upset to the third party, this content is arguably relevant, nonetheless. It must be disclosed as this proceeding is at the disclosure stage. All arguably relevant content in documents must be disclosed now.

[59] However, because the parties are at the disclosure stage of this proceeding, the two comments that have potential to cause emotional upset to Ms. Cherette and/or the third party in Content B will not become public information by reason of the implied undertaking of confidentiality unless it is admitted as evidence at the hearing. If Content B is admitted as evidence at the hearing, a motion can be made at that time, if necessary, for a confidentiality order.

[60] There is no evidence at this juncture from Ms. Cherette to indicate how the sensitive comments would cause undue hardship to the third party, only my own supposition. Ms. Cherette is reminded that a motion for a confidentiality order requires that she prove that disclosure will result in undue hardship.

Question 3. Is there a reasonable and objective basis to redact Content A for irrelevancy?

[61] Not all irrelevant content in medical records is required to be redacted or should be. Most documents that are disclosed in legal proceedings include some content that is either not relevant at all to the issues in dispute in the proceeding or of only indirect relevance. That litigants do not avoid producing entire documents because some portions are not relevant was recognized in *Mercer* at para. 13, where Justice Lowry acknowledged this practice:

> [13] Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

[62] If parties, courts and tribunals adopted the practice of ensuring that every document disclosed in a legal proceeding was redacted of irrelevant content, our legal system would grind to an abrupt halt. It is neither realistic nor sustainable for the courts or for this Tribunal to adopt such a practice. Instead, parties and their lawyers operate on an implicit understanding that irrelevant content that does not create a problem for a party to the proceeding will be ignored. Something more than irrelevance alone must arise in relation to irrelevant content for the parties to be permitted to make redactions. There must be some interest at stake that should be protected.

[63] Courts and tribunals have recognized privacy as a legitimate interest in the context of business interests such as trade secrets and matters involving public security, as examples.

[64] It has been explained that, when privacy interests are engaged over clearly irrelevant content, a confidentiality order is not needed pursuant to section 52 of the Act to redact the irrelevant content. Personal identifying information, such as phone numbers, addresses, social insurance numbers, banking information, may appear in documents that are going to be disclosed at the pre-hearing stage of the proceeding. These documents may potentially become exhibits later at the hearing. If personal identifying information is not relevant to the issues in dispute, which is usually the case, the information should not be left exposed in the documents for privacy reasons. That type of personal content is often redacted by the parties on agreement, without the need for a confidentiality order. However, all redactions to documents disclosed in a proceeding are subject to the supervision and final approval of the Tribunal. Redactions must be made on notice to the Tribunal and with the Tribunal's agreement that the described content is irrelevant to the human rights complaint: *Davidson v Global Affairs Canada* 2023 CHRT 52 ("Davidson"), at paras 32-34.

[65] In this case, there is a reasonable and objective basis to redact Content A for irrelevancy. The irrelevant content is of a personal, rather intimate nature. Its disclosure would be considered by a reasonable and objective person, informed of all the circumstances, likely to unnecessarily cause significant embarrassment to Ms. Cherette. This is to be assessed objectively, not subjectively based on the personal views of a party. The assessment that Content A should not be disclosed is based on review of Content A, not Ms. Cherette's subjective beliefs. As the Tribunal has determined that the content in the medical records is irrelevant and would be viewed, objectively and reasonably, as embarrassing, it may be redacted without need for a confidentiality order and proof of undue hardship. This approach promotes the respectful manner in which proceedings before the Tribunal are conducted by protecting the dignity of participants where appropriate. Parties should not needlessly suffer embarrassment over irrelevant matters.

Question 4. Should a confidentiality order be issued over Content A and/or B on the grounds that there is a real risk that disclosure of personal information will cause undue hardship to Ms. Cherette or the third party?

(i) The Exceptions to the Public Hearing Rule

[66] As is appreciated, the inquiry into Ms. Cherette's human rights complaint is required to be heard in public by section 52(1)) of the Act. In general, when a party relies on documents at a public hearing, the documents cannot remain confidential. As has also been explained, Ms. Cherette has asked that the content she redacted be made subject to a confidentiality order on the ground that there is a real risk that disclosure of personal information will cause undue hardship to the persons involved pursuant to section 52(1)(c). Section 52(1)(c) of the Act reads as follows:

> 52 (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
>
> …
>
> > (c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public….

[67] As the motion is brought by Ms. Cherette, she bears the onus to establish that the redacted portion of her medical records meet the criteria required by section 52(1)(c) of the Act for a confidentiality order.

(i) Can a confidentiality order be issued based on consent?

[68] The parties were advised in case management that the parties' consent to a confidentiality order does not determine whether an order for confidentiality will be granted under section 52(1) of the Act. This was well explained in *White v Canadian Nuclear Laboratories*, 2020 CHRT 5 ("White"), where Chair Khurana was presented with the consent

of all parties to an anonymization request. At para 50, Chair Khurana explained the overriding authority of the Act:

> [50] I acknowledge that the parties consent to the anonymization request. But this consent cannot be determinative. In other words, the parties' consent is not sufficient for me to disregard the wording of s.52(1)(c) of the Act or the principles set out in the jurisprudence that require decision-makers to engage in a balancing exercise. It is not because a party asks for a confidentiality order and no one objects, that I can dispense with the binding analytical framework to be applied in deciding whether to make a confidentiality order. I am required to consider the openness of legal proceedings and determine whether the party seeking the order has established that there is a serious risk, well-grounded in the evidence, which poses a threat to an important interest in the context of the litigation because reasonably alternative measures will not prevent the risk (See *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R.522 at paras 48 and 53, and *Dagenais v. Canadian Broadcasting Corp*., 1994 CanLII 39 (SCC), 1994 3 S.C.R. 835, [1994] S.C.J. No.104 and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R.442).

[69] Other Tribunal decisions since *White* confirm that the parties' consent is not sufficient to grant a confidentiality order (see *Peters v United Parcel Service Canada Ltd. and Gordon* 2022 CHRT 25; *Davidson*, ibid.) This is by now a well-settled point of law.

(ii) Procedural Direction and Comment on the Motion Materials

[70] The Tribunal has reviewed the facts and evidence offered both for and against Ms. Cherette's motion for a confidentiality order over the original proposed redactions and in the context of the content that will now be unredacted by order of the Tribunal. The Tribunal concludes that Ms. Cherette's motion for a confidentiality order cannot be granted based on the existing motion record. However, she may renew her request for a confidentiality order at the hearing.

[71] As noted, Ms. Cherette intended to rely upon section 52(1)(c) of the Act which authorizes the Tribunal to grant a confidentiality order where "…there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public…." Reliance on this ground, therefore, required that Ms. Cherette provide evidence that disclosure of her records would cause undue hardship

to the persons involved. It appears from review of the materials Ms. Cherette filed for her motion that she did not fully understand what was meant by the Tribunal's direction in case management that the parties should file any evidence to support their position in relation to the motion.

[72] Ms. Cherette was relieved of the obligation to prepare a formal affidavit to serve as evidence to support her motion. The Tribunal is authorized by section 50(3)(c) of the Act to receive any information or evidence, whether on oath or by affidavit or otherwise, that the member sees fit, even if the information would not be admissible in court. Ms. Cherette was advised by the Tribunal that she could provide an unsworn statement if she wished. She was also provided with an explanation of the kind of information expected in a written statement to be offered to the Tribunal.

[73] In her written statement, Ms. Cherette identifies that, if disclosed, "…the portions of my medical records that are redacted would unnecessarily cause me great prejudice." That prejudice is alleged to be stigmatization, discrimination or unwarranted judgment from the public that could affect her emotional, personal, social and professional life. She says this includes damage to her reputation and dignity. Having reviewed the redacted portions that I have now determined should be unredacted, I do not agree that this content could reasonably be seen to impact Ms. Cherette's reputation. The suggestion it would is speculative and anticipatory. Most people visit their physicians to discuss health issues that they may find embarrassing or difficult depending on their subjective sense of privacy. Objectively, most of the issues discussed in these records are common health problems or are not problems but events. The primary health issue in Content B would be apparent to the public. At para 77 of *Sherman Estate v. Donovan*, 2021 SCC 25, the court stated the situation this way: "The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences."

[74] Ms. Cherette says that the thought of the potential disclosure of the redacted content is a source of significant mental and emotional distress that "…could have a profound impact on my mental health, potentially leading to increased anxiety, depression and emotional trauma." There is no medical evidence to support this.

[75] Undue hardship is more than ordinary hardship. There must be evidence of harm, or the potential for harm must be predicted with reasonable certainty. Ms. Cherette's motion materials do not establish that disclosure would result in undue hardship. I see no content in the medical records provided that permit me to conclude that what Ms. Cherette fears will happen to her health is likely and presents a serious risk. As indicated, there is also no evidence of a serious risk of harm to the third party which is required to establish undue hardship in regard to the third party.

[76] Ms. Cherette does not address the legal test in section 52 of the Act. She does not explain why her embarrassment would outweigh the societal interest in her proceeding being open to the public. This is a significant and required part of the legal test for section 52, and, to be successful on a motion for confidentiality, this point must be properly addressed.

[77] Ms. Cherette relies on an article that is generally about privacy in the United States: Kostura, J. (2018) "Ethics of Redacting Medical Records (Plaintiff's Perspective)". The article confirms the importance of privacy interests which is not disputed in this motion. She also relies upon a few cases from the civil courts in Canada that address disclosure of medical information that is not arguably relevant as opposed to the confidentiality of medical information that is arguably relevant.

[78] For purposes of the hearing, there is no need to issue a confidentiality order over the redactions that are allowed to remain in this ruling, described as Content A, as the content is embarrassing and irrelevant and should remain redacted if the record in question is submitted into evidence. However, in considering whether to issue a confidentiality order over what has been decided will be unredacted, described as Content B, Ms. Cherette did not persuade me by evidence or law in her motion materials "…that there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to [herself or the third party] such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public…."

(iii) The Potential for a Future Motion for Confidentiality

[79] Ms. Cherette's motion for confidentiality of her unredacted medical records is dismissed "without prejudice" to her opportunity to make the same or a similar motion at the hearing. In this regard, I am exercising my discretion under the authority of section 50(3)(e) of the Act which authorizes the Tribunal to decide any procedural or evidentiary question arising during the hearing, and Rules 3(2), 5, 6(1) and 7, all of which confirm the Tribunal's procedural discretion at the hearing to ensure that the hearing proceeds appropriately and fairly. It is appropriate in this case to preserve the opportunity for Ms. Cherette to seek a confidentiality order on her own behalf and/or that of the third party at the hearing if her medical records are offered as evidence, based on the best evidence available and legal submissions that address the relevant issues.

[80] The merits of granting a confidentiality order based on undue hardship can sometimes be best determined at the hearing. Some Tribunal cases have explicitly declined to issue confidentiality orders at a preliminary stage because it is not yet obvious what the significant issues in dispute will be. In *T.P. v. Canadian Armed Forces*, 2019 CHRT 10 ("T.P."), at para 25, Member Harrington declined to order before the hearing that documents filed as evidence at the hearing into the complaint were required to be kept confidential.

[81] Similarly, in *White*, at para 46, Chair Khurana found a request by the complainant for anonymization of the Tribunal's ruling on her motion and redaction of health history to be premature. While the complainant put their health in issue in the proceeding, and the issue would be addressed at the hearing, the hearing had not begun. Chair Khurana pointed out that the documents had not been admitted into evidence but offered that "the complainant may wish to renew her request for confidentiality at the appropriate time."

[82] Disclosure of medical or other records does not necessarily mean they will become evidence at the hearing. It is not a proportional use of time and resources to spend significant time addressing a confidentiality order over documents, especially a large number of documents, that may not be admitted into evidence.

[83] However, in this case, it would have been a reasonable procedural option to address the confidentiality of Content B before the hearing. This case differs from *T.P.* and *White* in

this regard. Ms. Cherette appears to have amended her SOP for the very reason that she intends to rely on her medical records at the hearing as part of her litigation strategy; the issues in the SOPs that include the Montreal Convention make it almost certain the records will be introduced as evidence at the hearing, if not by Ms. Cherette or the Commission, then by Air Canada. This is not a case where it is not yet obvious what the significant issues in dispute will be or how the evidence will be used. The option of deciding this issue early could have provided certainty to the parties and saved time at the hearing. However, Ms. Cherette did not support her personal beliefs that disclosure of Content B would cause serious harm to her or the third party with medical or other corroborating evidence, nor did she apparently appreciate the need to provide complete legal arguments.

[84] Assuming that a party will wish to submit the medical records into evidence at the hearing, the Tribunal will determine whether the records are admissible and, if asked, will decide whether any unredacted content ought to be made subject to a confidentiality order.

VIII. ORDER

[85] The Tribunal orders that:

1) The entries in the medical records of the Complainant written by her family physician that have been redacted by the Tribunal as a result of this motion are to remain redacted in this proceeding as they are not relevant to this proceeding and contain sensitive and personal information about the Complainant that gives rise to valid privacy interests that should be recognized and protected in this proceeding.

2) The content that was redacted by the Complainant that will now be disclosed because of this ruling is disclosed subject to limits. These limitations include, but are not limited to, that disclosure to the other parties is to be made only to counsel and one instructing representative unless otherwise approved by the Tribunal.

3) The parties may only use the documents produced in this proceeding for the purposes of the proceeding and must not disclose them to any outside person or entity.

4) The Tribunal’s copies of the Complainant’s unredacted medical records submitted as part of her motion record concerning these issues shall remain sealed and kept confidential.

5) The Tribunal does not agree at this time to grant an order that any medical records or parts thereof filed as evidence during the inquiry into the complaint shall be confidential, aside from ensuring that the irrelevant, personal and sensitive information about the Complainant in her medical records, described as Content A, is redacted.

6) Any party wishing to request that documentary evidence at the hearing be sealed must make an application pursuant to section 52 of the Act during the hearing; the application should be made at the time the document is submitted for admission as evidence at the hearing; the Tribunal will provide any required procedural directions or interim confidentiality orders over the application.

7) The Complainant's motion for a confidentiality order over her medical records is dismissed "without prejudice" to the Complainant's opportunity to bring the same or a further motion at the hearing for a confidentiality order over any medical records sought to be admitted into evidence.

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
February 21, 2024

Canadian Human Rights Tribunal

Parties of Record

File No.: T2651/2721

Style of Cause: Schelomie Cherette v. Air Canada

Ruling of the Tribunal Dated: February 21, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Schelomie Cherette, Self-represented

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Clay Hunter, for the Respondent