Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Micheline Montreuil

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Forces

Respondent

Ruling

Member: Pierre Deschamps
Date: May 4, 2009
Citation: 2009 CHRT 15

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I. Introduction

[1] On March 17, 2009, the complainant filed an application with the Chairperson of the Canadian Human Rights Tribunal to reopen the inquiry in which she requested that the Tribunal contact the member who heard the evidence to dispose of the application. That said, it was not until April 23, 2009, that I received the application to reopen the inquiry from the Tribunal's registry.

[2] At the outset, the respondent objected to the fact that the application to reopen the inquiry would be disposed of by the Chairperson of the Tribunal. Relying, *inter alia*, on the previous decisions of the Tribunal, the Respondent submitted that it was for the member who heard the evidence to rule on this issue.

[3] The Human Rights Commission did not object to the application being disposed of by the member who heard the case. As for the complainant, she also agreed that the member who heard the case should dispose of the application to reopen the inquiry.

II. Application to Reopen Inquiry

[4] In her letter of March 17, 2009, the complainant requested that the inquiry be reopened for a period not exceeding five days on the ground that the evidence to which she refers in her letter is essential to support her position and that it was not available at the time of the hearing.

[5] The facts on which the complainant relies in her application to reopen the inquiry are as follows:

(1) The fact that the complainant learned that Canada signed documents acknowledging that transgendered persons are victims of discrimination and that they should be protected, as well as the fact that counsel for the respondent argued against Canada's official position on the issue without informing the Tribunal;

(2) The fact that, in the present case, counsel for the respondent argued that the complainant was suffering from mental pathologies, which, according to the

complainant, was not argued by the respondent's lead counsel in another case involving the respondent and the complainant;

(3) The existence of documents not identified by the complainant that were unavailable while judgment was reserved and which would be necessary for the complainant to prove that transgendered persons are victims of discrimination;

(4) The fact that the complainant has possession of documents that were unavailable while judgment was reserved and which, according to her, are necessary to prove not only that transgendered persons are victims of discrimination but also that counsel for the respondent argued against the federal government's official position on defending the rights of transgendered persons;

(5) The fact that the complainant found documents that confirm certain statements made by the complainant and which were requested by the respondent's counsel;

(6) The fact that one of the respondent's experts allegedly withheld important evidence and failed to provide vital information to the Tribunal, which would constitute a lie by omission.

[6] The complainant argues that depriving the Tribunal of that evidence would constitute a miscarriage of justice.

[7] In response to the directions issued by the Tribunal's registry on March 23, 2009, regarding the filing of written submissions and some additional details in relation to the application to reopen the inquiry, the complainant provided, in a letter dated March 27, 2009, additional information concerning the *new evidence* she expected to introduce before the Tribunal in support of her application. In her letter, the complainant relied on the following:

(1) The fact that Canada signed documents acknowledging that transgendered persons are victims of discrimination and that they should be protected, and that counsel for the respondent argued against Canada's official position and withheld that information from the Tribunal;

(2) In this regard, the complainant specifically refers to a statement read on December 18, 2008, by the UN representative from Argentina and quotes the text. The complainant submits that the respondent concealed the existence of that document, which was uncompleted at the time of deliberations;

The complainant states that she intends to introduce into evidence the video recording made during the UN General Assembly as well as the texts of the various statements made;

What is more, in relation to this issue, the complainant submits that counsel for the respondent established evidence against her and demanded that counsel and the Canadian Forces officers concerned be brought to trial;

(3) The fact that counsel for the respondent persistently argued that the complainant suffered from serious mental pathologies that prevented her from serving in the Canadian Forces and that this was never raised by counsel for the Canadian Armed Forces in another case before the Canadian Human Rights Tribunal of a complainant versus the respondent. In that respect, the complainant indicated that she intended to file the decisions rendered by the Tribunal and the Federal Court in that other case;

(4) The fact that hearings on discrimination against transgendered persons in the workplace took place in June 2008 before a House of Representatives subcommittee, in Washington. The complainant provides a list of persons who testified and cited the case of a US serviceman. The complainant states that she intends to file the evidence (CD), as well as the video recording made during the commission's hearings (DVD). Moreover, she states that she intends to file other documents on US human rights legislation involving transgendered persons;

Alongside the evidence, the complainant alludes to the existence of an agreement, which she intends to introduce into evidence, on the pilot project on single joint experts for the District of Laval aimed at putting an end to truncated expert opinions and excessive expert costs. She uses the agreement as a pretext to discredit the three [translation] "psych doctors," as she calls them, whose services were retained by the respondent as expert witnesses and to denounce the fact that they spent weeks sitting behind the Tribunal and were handsomely paid for their services. She wonders how the expert witnesses could be neutral.

Incidentally, the complainant submits that their presence was an abuse of the use of experts and discredits the administration of justice. She seizes the opportunity to voice significant criticism of the testimony of one of the respondent's experts, thus emphasizing that, in her view, the expert's testimony was fiction tinged with bad faith and that the expert was not credible.

(5) The existence of documents from the UN and the International Lesbian and Gay Association on gender identity and sexual orientation, documents stemming from the statement on discrimination of December 18, 2008, mentioned above;

(6) The existence of documents which confirm certain statements made by the complainant to counsel for the respondent regarding the expert costs she incurred. The complainant submits that the adducing in evidence of these documents is essential to demonstrate that she always told the truth during her testimony before the Tribunal;

(7) The fact that one of the respondent's experts concealed from the Tribunal crucial evidence and failed to provide vital information to the Tribunal, which, in her view, would constitute a lie by omission. In that regard, the complainant states that she intends to produce a report involving one of the respondent's counsel. The complainant says she intends to use that element and other facts to demonstrate the incompetence of the respondent's experts;

(8) The fact that the actuarial report assessing the complainant's damages is no longer up to date. The complainant is demanding that the respondent file an updated version of the actuary's report on the damages caused her.

[8] In a letter dated April 9, 2009, which was a response to the Commission's and respondent's arguments, the complainant makes extensive reference to a draft report by the Haute Autorité de Santé de France (HAS) entitled *Situation actuelle et perspective d'évolution de la prise en charge médicale du transsexualisme en France* and quotes extensively from it. Noteworthy is the fact that the report contains a number of references to documents dating before 2008.

[9] Apart from quoting from that document, the complainant seizes the opportunity to again attack the credibility of one of the respondent's experts and insinuate, based on the information contained in the HAS draft report, that the respondent's expert misled the Tribunal, lied, concealed information and gave biased testimony for which he was well paid. She is demanding that the expert's testimony be dismissed.

[10] In short, the complainant submitted that all the elements she refers to in her various correspondence are of a fundamental nature and that by denying her application would constitute a denial of justice.

[11] On April 6, 2009, the Human Rights Commission made it known by letter addressed to the Tribunal that it would not take a position on the complainant's application to reopen the inquiry, emphasizing however that the complainant had to demonstrate that the documents she intended to submit were newly discovered and constituted evidence that would be a determining factor in the final decision of the Tribunal on her complaint.

[12] The Respondent, for its part, objects to reopening the inquiry on the ground that the two criteria set out in the case law, namely, the reopening of the inquiry will impact the result of the trial and the impossibility of obtaining evidence in a timely manner, will not be met.

[13] In response to the arguments put forward by the complainant in support of her application to reopen the inquiry, the respondent argues the following in a letter dated April 6, 2009:

(1) The statement read by a UN representative from Argentina on December 18, 2008, is not at all relevant;

(2) The decision rendered by another member of the Tribunal in a case of the complainant versus the respondent, decision confirmed by the Federal Court, is not relevant, as the present member has to render a decision based on the particular facts in the present case;

(3) The testimonies given before a US House of Representatives subcommittee and the related documents are not relevant and are practically inadmissible considering that it would be impossible for the respondent to cross-examine those who testified.

The respondent points out that the document entitled *Equality from state to state*, which the complainant refers to, was published in 2005 and was available during deliberations. The same goes for the document entitled *Gender Law Guide to the Federal Courts and 50 States*, apparently published in 2004;

(4) The documents from the UN and the ILGA and the related testimonies are not relevant; incidentally, the mere filing of that evidence would not allow the respondent to cross-examine those who testified;

(5) The documents relating to the expert costs the complainant incurred existed prior to deliberations;

(6) The report concerning one of the respondent's counsel is not admissible in evidence;

(7) The obligation and duty to update the damages suffered by the complainant is specific to the complainant and is not incumbent upon the respondent.

[14] Finally, the respondent argues that the applicant did not demonstrate that such evidence, if presented at trial, would probably change the result.

III. Analysis

[15] All parties seem to agree that the applicable test, in the case at bar, to dispose of the present application to reopen the inquiry is the two-part test endorsed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983: (1) the evidence would probably have an important influence on the result of the case, (2) the evidence could not have been obtained with reasonable diligence before the trial.

[16] Moreover, the case law involving the reopening of an inquiry dictates that the tribunal must exercise its discretion to reopen the inquiry sparingly and with the greatest care so that fraud and abuse of the tribunal's processes do not result.

[17] A careful reading of the various arguments put forth by the complainant in support of her application to reopen the inquiry and of the various facts alleged by her clearly demonstrates that the complainant's application essentially aims at attacking again the credibility of the respondent's expert witnesses, particularly one of them, and vilifying counsel for respondent.

[18] Throughout her argument in support of her application to reopen the inquiry, the complainant does not hesitate to undermine the respondent's experts and impeach their credibility by relying on the documents to which she refers. Furthermore, she had the audacity to attack the integrity of the respondent's counsel and members of the Canadian Forces.

[19] As for the documentation the complainant would like to adduce in evidence, as mentioned earlier, it does not aim to bring to light crucial evidence in the complainant's case, but rather to support her attack against the respondent's expert witnesses and to attempt to discredit them on the basis of the documentation she intends to produce.

[20] In a given case, the witnesses' credibility is an issue that is left to be determined by the Tribunal, who ultimately decides what weight to afford a person's testimony. In the case at bar, the complainant was able, during her cross-examination of the respondent's expert witnesses, to attack or impeach their credibility. In the present case, the inquiry will not be reopened to allow the complainant to attack again the credibility of the respondent's experts by producing new documentation.

[21] It is important to note that, in the present case, the Tribunal had the benefit of hearing not only an expert psychiatrist called as a witness by the respondent but also an expert psychiatrist called by the Commission. It is for the Tribunal to decide what weight to afford each of the experts' testimony.

[22] Moreover, the complainant cannot find a pretext to reopen the inquiry in the fact that new documents emerged after judgment in the case was reserved. This will always be the case in all matters. What is more, it appears that the complainant only plans to file the documents she makes reference to and to comment as she wishes, without the Tribunal having the benefit of presenting contradictory evidence.

[23] During the proceedings the parties had the chance to produce all the documentation they deemed relevant relating to transsexualism and transgenderism and the experts called as witnesses were able to express their points of view on the subject. As far as these issues are concerned, it will be for the Tribunal to evaluate the expert evidence submitted by the parties, as well as the testimonies and documentation produced during the proceedings, to make the necessary findings.

[24] As for the decisions rendered by the Tribunal and the Federal Court to which the complainant refers, they are of judicial knowledge and there is no need to reopen the inquiry so that the Tribunal can review them and determine their relevance to the present case.

IV. Conclusion

[25] Finally, where the issue of damages is concerned, it is for the Tribunal to make the appropriate changes, if any, on the basis of the actuarial report submitted in evidence. It is unnecessary, at this stage of the deliberations, to obtain further comments from the actuary on the report.

[26] I therefore find that, in light of the reasons given in support of her application to reopen the inquiry, the complainant did not meet the criteria for reopening an inquiry and that her application is first and foremost aimed at attacking again the credibility of the respondent's experts and the integrity of its counsel.

[27] For these reasons, the complainant's application to reopen the inquiry is dismissed.

Signed by

Pierre Deschamps
Tribunal Member

Ottawa, Ontario
May 4, 2009

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1047/2805

Style of Cause: Micheline Montreuil v. Canadian Forces

Ruling of the Tribunal Dated: May 4, 2009

Appearances:

Micheline Montreuil, for herself

Ikram Warsame, for the Canadian Human Rights Commission

Guy A. Blouin, for the Respondent