CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

DEBBY MCAULEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CAMECO CORPORATION

Respondent

DECISION ON REMEDY

MEMBER: Dr. Paul Groarke

2005 CHRT 11
2005/02/23

[1] There was a hearing in the present case on December 4, 2003, in Saskatoon. The Respondent admitted liability and the case proceeded on the basis of an agreement on the facts. The only outstanding issue is the amount of compensation to which the Complainant is entitled for lost wages.

[2] The Tribunal has encountered a variety of obstacles in trying to bring the case to its proper conclusion. By my count, and I am sure there are others, the Complainant is responsible for at least five delays in the process. Some of this

may be attributable to her psychological state. The equities in the case nevertheless lie on the side of the Respondent and the Commission.

[3] The Complainant takes the position that she suffers from post-traumatic stress disorder and is unable to work. She attributes this to the discrimination, which occurred between 1984 and 1996. The Respondent and the Commission have submitted that there is no evidence that the effects of the discrimination have prevented her from finding employment. They say that an award of 22,000 dollars for two years of lost wages would be sufficient.

[4] Counsel for the Complainant, Mr. Korchin, has now provided the Tribunal with a medical report and an affidavit from Ms. McAuley. The parties have asked me to deal with the relevance and admissibility of this material on the basis of written submissions. Although I have received submissions from all counsel, Mr. Korchin now seems to have changed his mind on the matter. All I can say is that it is too late for this. I have already cancelled the remaining hearing days, at the request of the parties.

[5] Although the affidavit from Ms. McAuley establishes her firm belief that the discrimination has had a lasting psychological effect, it does not contribute all that much to the positions taken by the parties. I cannot see any reason why the bare affidavit would not be admissible, subject to any rights of cross-examination. It has been suggested that Ms. McAuley should be spared the rigours of *viva voce* evidence.

[6] The exhibits attached to the affidavit are more problematic. They include material from the files of Dr. Burgess, a psychiatrist, which contains the strongest statement in the Complainant's favour. In one document, Dr. Burgess states that "the workplace environment was definitely a cause, the sole cause of triggering the post traumatic stress disorder." This conclusion is naturally based on information that he received from Ms. McAuley.

[7] The exact words that Dr. Burgess uses may be significant. I say this because he refers to the "triggering" of the disorder rather than the disorder itself. This is in keeping with the position of the Respondent, which has suggested that other factors contributed to the origins of the disorder. The situation is further complicated by the fact that the material from Dr. Burgess is taken from correspondence regarding a complaint that Ms. McAuley filed with the College of Physicians and Surgeons.

[8] The medical report consists of a brief letter from Dr. Li, a psychiatrist, who apparently saw the Complainant four years after she left Dr. Burgess. It contains only the most general evaluation of the situation and is of little assistance without

the material supplied by Dr. Burgess. The medical information, taken as a whole, might be sufficient to establish that the precipitating cause of any post-traumatic stress disorder lies in the discrimination. It does not comment on the longevity of such a cause.

[9] Mr. Garden, for the Respondent, argues that the medical evidence is inadmissible. His submission is based primarily on the fact that the Respondent has not had an opportunity to investigate the Complainant's psychological condition and obtain its own advice on the matter. It would simply be unfair to let the Complainant lead this evidence without giving the Respondent an opportunity to reply.

[10] This kind of argument is based on the principles of natural justice. There are other terms, like fundamental justice or even due process, that may be helpful. At the end of the day, however, the question is simply whether the process is fair. This calls for an exercise of judgement, which takes into account the various factors that arise in the case. I agree with counsel that any questions of fairness must be decided in the specific context of each case.

[11] I do not think it would be fair to let the Complainant introduce this kind of psychiatric evidence without giving the Respondent an ample opportunity to respond. The Respondent submits that this would require some kind of independent psychological examination. Ms. McAuley has wavered on this question. At one point, she was unwilling to submit to such an examination. At another point, her lawyer was unable to obtain instructions. At yet another point, she appeared to say yes, but with conditions that would at least symbolically leave her in control of the process. I cannot accept these conditions.

[12] The best that can be said is that the Complainant is extremely reluctant to submit herself to any kind of independent medical or psychological examination. I do not take issue with her feelings on this account. Psychological records provide the most personal accounts of our individual lives. In a society that values privacy and personal autonomy, public policy militates against any order that would compel an individual to share such records with a stranger. There is no doubt in my mind that any psychologist or psychiatrist retained by the Respondent would be a stranger within the meaning of these words.

[13] There are significant differences between a psychological and a medical examination. I am quite sure that a psychologist or psychiatrist would be uncomfortable with the idea that a patient can be compelled, as a matter of force, to submit to the kind of probing encounter that is necessary to establish the origins of a psychological disorder. For a fuller discussion of these issues, I would refer the parties to my ruling in *Day v. Department of National Defense,* No. 4 (2002/12/18).

[14] There is some recognition of these issues in *Bion v. Sehok*, QB 1998 SASK. D. 770.45.20.00-01 (QL), which was cited by counsel for the Complainant. I do not accept, however, that it would be reasonable to allow the Complainant or some independent body to nominate the examining psychiatrist or psychologist. I realize that the Complainant does not trust the legal or medical process. This is regrettable but does not alter the situation. It would not be fair to the Respondent to deprive it of the right to choose its own expert, unless compelling grounds have been advanced for doing so. In any event, the issues that arise in the present case go far beyond the identity of the Respondent's proposed expert.

[15] There is no need to discuss the jurisdiction of the Tribunal to order a psychological examination. All three counsel seem to agree that it would not be in Ms. McAuley's psychological interests to submit to such an examination. I think their views deserve a certain measure of respect. There is an element of professional and even moral judgement that comes into play in dealing with these kinds of issues, which takes lawyers beyond the narrow self-interests of the parties. In the circumstances, I do not think it is in the interest of the Complainant, or the larger public interest, to require her to submit to the potential indignity of an independent psychological examination.

[16] On the medical issue, this is where the matter rests. I have the psychiatric information tendered by the Complainant. The problem is that this information is all on one side. As I have stated, it would be a plain contravention of the most basic principles of justice to let the Complainant introduce such evidence, without giving the Respondent an equal opportunity to do so. I am accordingly of the view that the medical documents are inadmissible.

[17] The second argument is advanced by Ms. Reaume, for the Commission. She simply submits that the medical information provided by the Complainant is not material to the issue that comes before me. It does not assist me in determining the amount of compensation to which the Complainant is entitled for lost wages. The Respondent and the Commission have already acknowledged that the discrimination was a proximate cause of the Complainant's condition.

[18] I agree with the Commission. Even if the documents were entered into evidence, they are too general to be of much assistance. They do not address the financial question before me. I think the psychological information is too sparse and too imprecise to assist me in determining the extent to which the Respondent should be held responsible for her ongoing problems.

[19] At the end of the day, I am left with the original agreement on the facts. This is sufficient to establish that the Respondent is liable for 22,000 dollars in lost wages, with interest. There is no evidence before the Tribunal that would justify a larger sum. I cannot see any reason to ask for further submissions. I will

nevertheless reserve jurisdiction in the case for 30 days, to allow the parties to raise any other issues that might require the assistance of the Tribunal. Once the thirty days have elapsed, I will instruct the Registrar to issue a Notice of Discontinuance and close the file.

[20] I would like to make one final comment. The human rights process is remedial. I accordingly think it is important to recognize the positive steps taken by employers in rectifying such matters. The Respondent in the present case deserves considerable credit for accepting its responsibilities and adopting a constructive approach to the resolution of the complaint. I appreciate the work of all counsel on the file.

"*Signed by*"
Dr. Paul Groarke

OTTAWA, Ontario

February 23, 2005

PARTIES OF RECORD

TRIBUNAL FILE:	T723/2802
STYLE OF CAUSE:	Debby McAuley v. Cameco Corporation,
DATE AND PLACE OF HEARING:	December 4, 2003 Saskatoon, Saskatchewan
DECISION OF THE TRIBUNAL DATED:	February 23, 2005
APPEARANCES:	
Laurie Korchin	On behalf of the Complainant
Leslie Reaume	On behalf of the Canadian Human Rights Commission
A. Robson Garden	On behalf of the Respondent