

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Leslie Palm

Complainant

- and -

Canadian Human Rights Commission

Commission

- and –

**International Longshore and Warehouse Union,
Local 500, Richard Wilkinson and Cliff Willicome**

Respondents

Ruling

Member: Susheel Gupta

Date: January 2, 2013

Citation: 2013 CHRT 1

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[1] Ms. Leslie Palm (the Complainant) claims the International Longshore and Warehouse Union, Local 500 (the ILWU or the Union) has discriminated and harassed her on the basis of her sex, pursuant to sections 9, 10 and 14 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*). The Complainant also claims that Mr. Cliff Willicome and Mr. Richard Wilkinson have harassed her on the basis of her sex in contravention of section 14 of the *Act* (the Union, Mr. Willicome and Mr. Wilkinson are herein collectively referred to as the Respondents).

[2] The following ruling deals with a request by the Respondents for a subpoena *duces tecum* and for further particulars.

I. Background

[3] The Complainant claims the alleged discriminatory conduct affected her well-being, and the remedy she seeks from the Tribunal includes: \$712.64 for medication; \$56,029.15 in lost wages; \$28,117.98 for consultants; and, \$20,000 for pain and suffering. In her list of relevant documents in support of her complaints, the Complainant claimed privilege over “medical notes” and “financial notes”. By way of motion, the Respondents sought documentary disclosure from the Complainant with regard to her medical and financial claims. In this regard, in a ruling dated May 24, 2012, the Tribunal ordered:

1. Ms. Palm is to produce a list to the Respondents containing the names and addresses of all health care professionals she has attended for reason of symptoms or treatment for anxiety, depression, stress, insomnia or any other health problems for which she is attributing blame to the Respondents. Production to the Respondents shall be completed no later than 6 weeks from the date of this decision.

2. Ms. Palm is to obtain and produce to the Respondents any medical documents, including any clinical study notes, opinions, consultation reports, analysis, test results, laboratory examination results, and any other information whether in hard copy or electronic format, in the health care professionals’ possession or control, that relates to any symptoms of or treatment for anxiety, depression, stress, insomnia, or any other health problem identified by the Complainant for which

she is attributing blame to the Respondents. Production to the Respondents shall be completed no later than 6 weeks from the date of this decision.

3. To protect Ms. Palm's right to confidentiality of her medical records, the documents shall be disclosed to counsel for the Respondents and shall not be disclosed to any other individuals without prior permission from the Tribunal and notification to Ms. Palm. The documents may not be used for any purpose outside of the present inquiry and the documents must be returned to the Complainant at the conclusion of the inquiry.

4. Ms. Palm is to produce to the Respondents any documents in her possession that relate to her claims for wage loss, medication, consultant's expenses, or pain and suffering. Production to the Respondents shall be completed no later than 6 weeks from the date of this decision.

(Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome, 2012 CHRT 11 at para. 19 [Palm])

[4] The Complainant did not comply with the Tribunal's May 24, 2012 order.

[5] The Tribunal convened a Case Management Conference Call on September 24, 2012 to discuss the issue. The Complainant explained that she was unable to comply with the Tribunal's May 24, 2012 order because she was busy with other matters occurring in her life and she and her doctors were unclear as to the requirements of the order. The Tribunal clarified the requirements of orders 1, 2 and 4 above, and the Complainant acknowledged her understanding of what was required of her. The Complainant indicated that she would be able to fully satisfy and comply with the orders and provide the required disclosure directly to the Respondents' counsel by October 9, 2012.

[6] On October 9, 2012, the Complainant produced documents to the Respondents' counsel pursuant to the Tribunal's May 24, 2012 order. In her covering letter accompanying the documents, the Complainant wrote:

Please find enclosed my medical information I was able to obtain along with my update financials.

In regards to the clinical notes you have requested from my psychologist, [...] after consultation and review of my signed confidentiality agreement the clinical notes were not provided to me.

[7] On October 11, 2012, the Respondents made an application for a subpoena *duces tecum* for the Complainant's doctors to appear and produce documents before the Tribunal. According to the Respondents, while the Complainant provided some medical documents, she did not comply with the Tribunal's May 24, 2012 order. The Respondents also request further particulars regarding the Complainant's "consultant" expenses.

II. Subpoena Duces Tecum

[8] According to the Respondents, while the Complainant has identified the names and addresses of three doctors in relation to the allegations in her complaint (Drs. Mehraein, Fung and Schultz), she has only provided documents from one doctor's file (Dr. Mehraein). Therefore, the Respondents are concerned they have not received all relevant documents pursuant to the Tribunal's May 24, 2012 order. The Respondents add, Dr. Mehraein's file includes an August 2, 2012 list of "current concerns", which includes "depression", but the disclosed notes in the file end on March 3, 2011, which I understand the Respondents to be implying that disclosure of Dr. Mehraein's relevant records was not complete. The Respondents also indicate that Dr. Mehraein's notes say that he will provide a return to work note (April 2, 2009), but no such note was disclosed. Since the Complainant has not complied with the Tribunal's May 24, 2012 order, the Respondents request the Tribunal issue a subpoena *duces tecum* for the doctors to appear and produce documents.

[9] According to the Complainant, she has complied with the Tribunal's order and has disclosed the required medical documentation. As explained in her October 9, 2012 cover letter, medical documentation from Dr. Schultz was not provided to her because of a confidentiality agreement. The Complainant has no objection to the issuance of a subpoena in this regard. The Complainant also has no objection to the issuance of a subpoena for the files of Dr. Fung, although she claims to have already provided all relevant documents in this regard to the

Respondents. With regard to the return to work note referred to by the Respondents, the Complainant claims that the medical file provided to the Respondents indicates the note was not provided to her as further information was required.

[10] The purpose of a subpoena *duces tecum* is to summon a witness to appear before the Tribunal and produce documents that they have in their possession. Pursuant to paragraph 50(1)(3)(a) of the *Act*, the Tribunal may, in the same manner and to the same extent as a superior court of record, compel witnesses to produce any documents and things that the Tribunal considers necessary for the full hearing and consideration of the complaint. To be necessary for the full hearing and consideration of the complaint, there must be a nexus between the information or documents sought and the issues in dispute. In *Palm*, I determined that the Complainant had put her health in issue in this case and that relevant medical information should be produced to allow the Respondents to properly respond to the allegations regarding the effects of the alleged discrimination on the Complainant's well being (see *Palm* at paras. 13 and 19).

[11] Given that the Complainant was unable to obtain her medical records from Dr. Schultz, a subpoena would appear to be the only way to compel the disclosure of these relevant documents. Furthermore, as the Complainant does not object to the issuance of a subpoena for the documents of Drs. Mehraein and Fung, I believe proceeding in this manner will ensure that all relevant documents have been disclosed and will allow the parties to move beyond the disclosure stage of these proceedings.

[12] Therefore, the Tribunal will issue subpoena *duces tecum* to each of Drs. Mehraein, Fung and Schultz to appear before the Tribunal and to bring with them and produce to the Respondents the following documents:

Any medical documents regarding Ms. Leslie Palm, including any clinical study notes, opinions, consultation reports, analysis, test results, laboratory examination results, and any other information, whether in hard copy or electronic format, that relate to any symptoms of or treatment for anxiety, depression, stress, or insomnia.

[13] To protect the confidentiality of the medical records, the documents shall be disclosed to the Complainant and counsel for the Respondents only and shall not be disclosed to any other individuals without prior permission from the Tribunal. The documents may not be used for any purpose outside of the present inquiry and the documents must be returned to the respective doctor who disclosed them at the conclusion of the inquiry.

[14] A case management conference call will be convened to determine a mutually agreeable date for the doctors to appear before the Tribunal and to discuss the other details of the subpoena.

[15] Once the subpoenas are issued, the Tribunal encourages the Respondents to attempt to obtain the medical documents informally, without requiring the doctors to appear before the Tribunal. This would save the parties, the Tribunal and the doctors the additional expenditure of time and resources in convening a hearing and would allow these proceedings to move along more expeditiously.

III. Request for Further Particulars

[16] Pursuant to order 4 above, the Respondents claim that the Complainant did not provide any documents regarding her medication expenses. The Respondents add, the Complainant provided an updated financial claim sheet as part of her disclosure, which now includes an increased claim of \$35,598.06 for “consultants” (as opposed to the previous claim of \$28,117.98). Although the Complainant disclosed some invoices from law firms and consultants, she redacted the description of services provided. According to the Respondents, the Complainant has still not particularized why she hired the law firms and other consultants and how those expenses are connected to her current complaint. Therefore, the Respondents request an order for further particulars about the Complainant’s “consultant” expenses claim.

[17] With regard to her medication claims, the Complainant submitted that she is awaiting a printout. For the consultant expenses, she submits that she has provided the relevant invoices and statements. The Complainant adds, all invoices and statements from lawyers and consultants are

direct charges resulting from this human rights complaint, as stated on the invoices. Specifically, the Complainant states: “These expenses were incurred navigating through this complaint and ongoing process...”. According to the Complainant, the updated financial claim includes charges to date, which will continue to rise as the proceedings are ongoing.

[18] In *Palm*, I found documents in the possession of the Complainant with regard to her claims for mediation and consultant expenses were relevant and should be disclosed (*Palm* at paras. 15). An order was made in this regard (*Palm* at para. 19). While the Complainant has yet to produce documents in relation to her medication expense claim, she has indicated that the documentation is forthcoming. Given the Complainant’s undertaking, I will give her until February 1, 2013 to comply with the Tribunal’s previous order. However, I emphasize that the time limits set by the Tribunal are peremptory (Rule 1(5) of the Tribunal *Rules of Procedure* (03-05-04)), and if a document is not disclosed and produced, it may not be introduced into evidence at the hearing (Rule 9(3)(c) of the Tribunal *Rules of Procedure* (03-05-04)), without leave of the Tribunal. To put it another way, should the Complainant fail to provide adequate disclosure, she runs the risk of the Tribunal not accepting such evidence at the hearing.

[19] With regard to the consultant expenses, in response to the current request for further particulars, the Complainant has explained why she hired the law firms and other consultants and how those expenses are connected to her current complaint. However, she has not explained why portions of the invoices and statements she disclosed are redacted. Nor has she claimed any sort of confidentiality or privilege associated with these documents. Therefore, I order the Complainant to produce unredacted copies of invoices and statements related to her claim for consultant expenses; or, in the alternative, provide an explanation for the redactions. The Complainant is to comply with this order by February 1, 2013.

[20] Insofar as this disclosure request may be seeking invoices from lawyers for legal expenses, I would direct the parties to the decision of *Canada* (*Canadian Human Rights*

Commission) v. Canada (Attorney General), 2011 SCC 53 [*Mowat*]¹, wherein the Supreme Court of Canada stated the following:

In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs...

(*Mowat* at para. 64)

Signed by

Susheel Gupta
Acting Chairperson

OTTAWA, Ontario
January 2, 2013

¹ *Mowat* can be found online at: <http://www.canlii.ca/en/ca/scc/doc/2011/2011scc53/2011scc53.html>.

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1625/17110, T1626/17210, T1627/17310

Style of Cause: Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome

Ruling of the Tribunal Dated: January 2, 2013

Appearances:

Leslie Palm, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Joanna Gislason and Lindsay Watson, for the Respondents