

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: May 24, 2012

Citation: 2012 CHRT 11

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I. Complaint

[1] On December 17, 2010, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act* (the *Act*), the Canadian Human Rights Commission (the Commission) requested that the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into three separate complaints filed by Ms. Leslie Palm (the Complainant) against the International Longshore and Warehouse Union, Local 500 (the ILWU or the Union), Mr. Cliff Willicome, and Mr. Richard Wilkinson, respectively (all three referred to as the Respondents). The Complainant claims the Union has discriminated against and harassed her on the basis of her sex in violation of sections 9, 10 and 14 of the *Act*. The Complainant also claims that Mr. Willicome and Mr. Wilkinson harassed her on the basis of her sex in contravention of section 14 of the *Act*.

[2] In her complaint, the Complainant claims that the alleged discriminatory conduct affected her well-being. In this regard, she sought the medical attention of her family physician and was prescribed medication to cope with anxiety, depression and stress she experienced as a result of the discriminatory practices. Furthermore, the Complainant claims to have requested further assistance for her emotional state through the ILWU Employee Assistance Program. In this regard, she was referred to a registered psychologist, Dr. Joan Shultz. According to the Complainant, Dr. Shultz is able to provide documentation of the Complainant's account of the events and the effects of these events on her emotional state. The remedy the Complainant is seeking 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 claims privilege over "medical notes" and "financial notes".

II. Motion

[3] On July 18 and August 9, 2011, the Respondents filed Notices of Motion seeking four orders from the Tribunal relating to documentary disclosure:

1. An order from the Tribunal that Ms. Palm produce a list 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, and that she produce to the parties any arguably relevant medical documents in her possession;

2. *Subpoena duces tecum* from the Tribunal ordering each of these health care professionals to produce to counsel for the Respondents the content of all medical files, 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 relate to or are arguably relevant to any symptoms of or treatment for anxiety, depression, stress, insomnia or other health problem identified by the Complainant as a result of the order above.
3. Ms. Palm produce all documents that arguably relate to her claims for wage loss, medication, consultant's expenses, or pain, suffering and mental anguish;
4. Ms. Palm produce all documents that arguably relate to her original complaints to the Commission against the Union, the British Columbia Maritime Employers Association and Western Stevedoring.

[4] A case management conference call was held on December 8, 2011 with regards to the Respondents' motions. The Complainant confirmed that she never replied to the Respondents' motions in writing. With regards to item number 1 of the Respondents' motion, the Complainant identified Dr. Nahid Mehraein, Dr. Joan Shultz and Dr. Kathryn Fung as the health care professionals she has attended in relation to her health issues. The Complainant also confirmed that Dr. Mehraein will produce a medical record for the period of January of 2008 until the summer of 2009; however, the Complainant indicated that she may have problems obtaining her records from the other doctors identified and that a Tribunal order may be of assistance in this regard. Both the Complainant and the Commission expressed concerns regarding the confidentiality of the Complainant's medical records should they be disclosed. Another case management conference call was scheduled for December 13, 2011.

[5] In order to identify and respond to several issues that the Respondents anticipated being raised at the case management conference call scheduled for December 13, the Respondents wrote to the Tribunal on December 12, 2011. In that letter, the Respondents clarified that item

number 4 of their motion seeks all documents in the Complainant's and the Commission's possession with regards to the complaints made against the British Columbia Maritime Employers Association and Western Stevedoring (the Employers). According to the Respondents, they addressed this disclosure request to the Commission as well in recognition that the Complainant is self-represented and as a practical method to lessen the burden on the Complainant of a potentially large disclosure.

[6] Another case management conference call was held on December 13, 2011. During the call, the Respondents agreed to amend item number 4 of their motion to read: Ms. Palm and/or the Commission produce all documents that are arguably related to Ms. Palm's original complainants to the Commission against the Union, the British Columbia Maritime Employers Association and Western Stevedoring. The parties also agreed that if an order for disclosure related to the former files is issued, that counsel for the Employers be provided with the list of documents before disclosure.

[7] On February 10, 2012, the Respondents wrote to the Tribunal seeking the following additional order from the Tribunal:

5. That the Commission must not disclose to the Employers or their counsel any documents contained in the Commission files in these matters. The Commission may disclose to counsel for the Employer a list of documents. If counsel for the Employer has concerns about the disclosure to our office of any of the listed documents, the Commission may provide those documents to counsel for the Employer.

[8] While a further case management conference call was scheduled to address the Respondents' February 10, 2012 letter, on March 15, 2012, the Tribunal sent a letter to the parties informing them that the Tribunal had considered all correspondence received and would rule on the motions without holding a further call. None of the parties objected to the Tribunal proceeding in this manner.

III. Principles of Disclosure

[9] The right to a fair hearing requires that "...the affected person be informed of the case against him or her, and be permitted to respond to that case (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at para. 53). In this regard, parties should be given an opportunity to address evidence prejudicial to their case and bring evidence to prove their position (see *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, at para. 40). In order to provide the parties with this opportunity, they require the full and ample disclosure of relevant information in the possession or care of the other party.

[10] To make a determination as to whether documents should be disclosed, the Tribunal has identified the following three step process: (1) determine whether the information is "likely to be relevant", that is, the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute; (2) without examining the documents, determine whether there is a compelling reason to maintain the privacy of the documents; and, (3) if the Tribunal is unable to resolve the matter without examining the material, then it should inspect the documents and decide whether the documents should be produced (see *Day v. Canada (Dept. of National Defence)*, (December 6, 2002), T627/1501 and T628/1601 Ruling No. 3, at para. 7 (CHRT); and, *Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34, at para. 44 [*Guay*]).

[11] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to his or her medical records (see *Beaudry v. Canada (Attorney General)*, (July 24, 2002), T694/8201, Ruling No. 1, at para. 7 (CHRT) [*Beaudry*]; *McAvinn v.*

Strait Crossing Bridge Ltd., (January 3, 2001), T558/1600, Ruling No. 3, at para. 3 (CHRT) [*McAvinn*]). However, the right to privacy and confidentiality with respect to medical records may cease when that person puts his or her health in issue (see *McAvinn* at para. 4 (CHRT); *Guay* at para. 45; and, *Communications, Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*, 2005 CHRT 9, at paras. 9-11). In cases where the Tribunal has ordered the disclosure of medical records, it has used the following procedures to protect the privacy and confidentiality of the information:

- Vet the documents to determine which ones are in fact related to the medical condition in issue (see *Guay*; *McAvinn*; and, *Beaudry*); and/or,
- Put conditions on who may see and copy the documents (see *Shiv Chopra v. Health Canada*, 2007 CHRT 10; *Micheline Montreuil v. Canadian Forces*, 2005 CHRT 45; and, *Beaudry*).

IV. Analysis

A. Disclosure of Medical Documents

[12] According to the Respondents, the Complainant has put her health in issue as part of her case and, therefore, in the interests of fairness to the Respondents, Ms. Palm must disclose her medical information so the Respondents know the case they must meet and can prepare for the hearing. The Respondents add that through the material facts pled in her particulars and her remedies sought, the Complainant has waived any confidentiality or privilege over her arguably relevant medical information.

[13] Based on the Complainant's allegations outlined above, I agree that she has 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. That being said, during case management, the Complainant provided a list of the healthcare professionals she has attended for reasons of any

health problems for which she is attributing blame to the Respondents. She has also indicated that Dr. Mehraein will produce a medical record for the period of January 2008 until the summer of 2009. Although the Complainant has indicated that she may have some problems obtaining the records of the two other doctors she has identified, she has undertaken to attempt to obtain them, but has stated that an order from the Tribunal may help in this regard. Given the above, I believe it is sufficient that the Complainant simply be directed to obtain and disclose any relevant medical documents relating to her claim. As the Respondents will then have access to any relevant medical information, I find that a subpoena duces tecum, compelling the doctors to produce documents to the Respondents, is not necessary at this stage. In order to protect the confidentiality of the Complainant's medical records, I place conditions on the access to these documents as found in the direction below.

B. Disclosure of documents relating to claims for wage loss, medication, consultant's expenses, and pain and suffering

[14] In her Statement of Particulars and request for remedy, the Complainant has provided a document that lists her wages; vacation pay; indemnity benefits received in 2008 and 2009; and, lists an amount of expenses for medication and consultants. According to the Respondents, the Complainant has failed to provide particulars for these claims and has not disclosed any documents that support the amounts she claims. The Respondents add that the Complainant has an obligation to disclose these documents and that there is no privilege attached to them.

[15] As the Complainant has requested compensation for wage loss, medication and consultant's expenses, and pain and suffering, I agree that any relevant documents in the possession of the Complainant with regards to these claims should be disclosed. This will allow

the Respondents the opportunity to address the Complainant's remedial claims and may assist the Tribunal in fashioning an appropriate and fair remedy should the complaint be substantiated. While the Complainant claims privilege over "financial notes", she did not provide

reasons during the case management conference calls regarding why documents related to her requests for compensation should not be disclosed. Therefore, I direct that any relevant documents related to the Complainant's claims for wage loss, medication and consultant's expenses, and pain and suffering, be disclosed to the Respondents pursuant to the direction below.

C. Disclosure of documents relating to Ms. Palm's original complaints to the Commission

[16] According to the Respondents, Ms. Palm originally filed three complaints with the Commission: one against the British Columbia Maritime Employers Association; one against Western Stevedoring; and one against the ILWU. After these complaints were rejected by the Commission, Ms. Palm filed another five complaints: the three current complaints against the Respondents and the complaints against the Employers, which have been settled. According to the Respondents' submissions, the Complainant must produce all documents relating to her original and subsequent complaints to the Commission against the Union, and the Employers. Although the complaints against the British Columbia Maritime Employers Association and Western Stevedoring are now settled, the Respondent argues that the original and subsequent complaints are arguably relevant because the Complainant's claims against the Employers were essentially the same as her claims against the Respondents. The Respondents add that, in support of her original complaint against the Union, the Complainant expressly relied on the details of her complaint against Western Stevedoring.

[17] In *Leslie Palm v. International Longshore and Warehouse Union, Local 500 and Willicome and Wilkinson*, 2011 CHRT 12 [Palm], an earlier disclosure ruling in this same matter, the Tribunal found that the Complainant's five complaints against her employer, the employer's association, the union, Mr. Wilkinson and Mr. Willicome, while not identical, were strikingly similar. The Tribunal ordered that the terms of Settlement of the Complainant's settled complaint against her employer and the employer's association be disclosed. However, this

disclosure was not based solely on the fact that the complaints were similar. The Tribunal found that “[t]he Settlement terms relating to releases of liability may directly affect the outcome of Ms. Palm’s complaints against Mr. Wilkinson and Mr. Willicome” (Palm at para. 17). The Tribunal also found that “the Settlement terms relating to both lost wages and non-pecuniary damages are relevant and necessary to guard against the possibility of double recovery with regard to the former, and to allow for some proportionality among these interconnected claims with regard to the latter” (Palm at para. 17). Finally, the Tribunal found that “[a]ny terms of Settlement relating to Ms. Palm’s complaint of systemic discrimination are both relevant and necessary to achieve a just result in these circumstances” (Palm at para. 18). As these passages from Palm indicate, the disclosure of the terms of Settlement was relevant “...to make a just decision on the claims...” (Palm at para. 17).

[18] In the Respondents’ current request for disclosure, aside from stating the Complainant’s claims against the Employers are essentially the same as the current complaints, the Respondents have not indicated how any information contained in the Complainant’s original and subsequent complaints to the Commission are relevant to any of the current issues in dispute. In her statement of particulars before the Tribunal, the Complainant has laid out the basis for her complaint and has provided a list of any relevant documents in her possession relating to her allegations. Apart from its request for disclosure of medical documents and other documents related to the Complainant’s claims for relief, the Respondents have not indicated that they do not know the case to be met or that they have insufficient information to be able to respond to the Complainant’s allegations. In addition, the Commission has provided a list of all relevant documents in its possession with regards to the referred complaints against the Respondents. In this sense, I find the Respondents’ request for disclosure here to be speculative. I am not convinced that documents related to Ms. Palm’s original complaints against the Union or the original and subsequent complaints against the Employer, to the Commission, are likely to be relevant to the current inquiry. As a result, it is not necessary to address item 5 of the Respondents’ disclosure request.

V. Direction/Order

[19] Pursuant to the reasons above, I issue the following order and direct as follows:

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.

Signed by

Susheel Gupta
Tribunal Vice-Chairperson

OTTAWA, Ontario
May 24, 2012

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: May 24, 2012

Appearances:

Leslie Palm, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Joanna Gislason and Lyndsay Watson, for the Respondents