Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 9
Date: April 25, 2016
File No.: T1956/3613

Between:

Ken Kelsh

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Ruling

Member: Olga Luftig

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I. Brief Background: the Complaint and the hearing to date

[1] The complaint ("Complaint") of Mr. Ken Kelsh ("Complainant") against the Canadian Pacific Railway ("CP" or "Respondent"), as amended, alleges:

- discrimination in employment on account of disability; adverse differential treatment and failure to accommodate, contrary to section 7 of the *Canadian Human Rights Act* (*Act*);
- retaliation, contrary to section 14.1 of the *Act;*
- systemic discrimination in the Respondent's testing, bidding practices and procedures, contrary to section 10 of the *Act.*

[2] The Respondent does not dispute that the Complainant has a disability.

[3] The Canadian Human Rights Commission ("Commission") is not participating in the hearing and has made no submissions on this Motion.

[4] There have been 2 sets of hearing dates: from January 11, 2016 to January 22, 2016 and from February 29, 2016 to March 3, 2016, when the Complainant closed his case.

[5] On January 18, 2016, during the Complainant's examination in chief, the Complainant testified that the Respondent viewed him in a certain unfavourable way. His counsel then asked him if he remembered seeing Dr. Marcus Feak, psychologist, (to which the Complainant confirmed he did see Dr. Feak), and several other questions about the circumstances surrounding the report by Dr. Feak (the definition of Dr. Feak's report is articulated in more detail further on). The Complainant testified that he felt the Respondent's management viewed him the way they did because of Dr. Feak's report. The Complainant agreed with his counsel's suggestion that he would never have gone to Dr. Feak had he known he was entitled to an oral E Card test. The Complainant did not enter Dr. Feak's report into evidence.

[6] During the Respondent's cross-examination of the Complainant on January 18, 2016, the Respondent's counsel raised Dr. Feak's report with the Complainant, and asked him if there was something in Dr. Feak's report which he didn't agree with. The Complainant confirmed that there was and identified the specific finding with which he

disagreed. Respondent's counsel went through one part of the report with the Complainant, and sought to have the report admitted into evidence as an exhibit. Complainant's counsel objected.

[7] Complainant's counsel's objection was on various grounds: the absence of Dr. Feak to testify about the report and be cross-examined on it; the fact that the report provides a lot of information not referred to in examination in chief and that information would not be clear to the Tribunal; admitting the report would put the Tribunal in the position of having to review a complex report; there is evidence in the report prejudicial to the Complainant; the report doesn't go into the root issues of the Complainant's ability to function; it is not relevant to the issues at hand as it does not deal with the practical issues in terms of the Complainant's occupation and certification requirements; and, it was improperly obtained and intrudes into the Complainant's privacy.

[8] In response to the objections, the Respondent's counsel submitted that: the report was relevant to the Complaint's allegation that the Respondent failed to accommodate the Complainant; the Complainant discussed the report in examination in chief; the Respondent would be legally prejudiced if it was not permitted to question the Complainant about the report, which she submitted was part of the Respondent's accommodation process.

[9] After hearing the parties' submissions, and a brief recess to consider the parties' submissions, my ruling was that Dr. Feak's report would be admitted as an exhibit, however, given that Dr. Feak could not be examined or cross-examined, that fact would go to the weight to be given to the document. I also ruled that the report would be subject to a confidentiality order.

[10] The next set of hearing dates is from May 2 to 13, 2016 ("May hearing"). It was anticipated that the Respondent would present and close its case, and the parties would make their closing submissions.

II. Respondent's motion

[11] On March 24, 2016, the Respondent made a motion ("Motion") by way of Notice of Motion ("NOM"), for leave from the Tribunal, pursuant to Rule 9(3)(e), to permit

> a) Dr. Marcus Feak to attend as an expert witness during the May hearing; and
>
> b) that Dr. Feak provide expert and opinion evidence based on his assessments of the Complainant conducted on January 26, February 2 and March 30, 2007, and on his report dated March 28, 2007 (Dr. Feak's report).

[12] I note that Dr. Feak attached to his March 28, 2007 report a form from the Respondent's Occupational Health Services ("OHS"). The form's title is 'Medical report to be completed by the treating physician" ("OHS Medical Form" or "Form"). The Form is dated March 30, 2007 and is signed by Dr. Feak. In answering the Form's question 8, Dr. Feak refers back to the "Attached Report", being his longer report of March 28, 2007. Therefore, where this Ruling refers to Dr. Feak's report, it means both documents.

Grounds for Respondent's Motion

[13] The grounds for the Respondent's Motion are as follows:

- The Respondent disclosed Dr. Feak's report to the Complainant in February, 2014 as part of its documentary disclosure accompanying its Statement of Particulars (SOP);
- During the Complainant's cross-examination on January 18, 2016, Dr. Feak's report was introduced into evidence as Respondent's exhibit R-1, tab 4;
- The Complainant did not call any expert witnesses or any witnesses other than himself who spoke to his literacy and abilities as they related to taking a written examination;
- Dr. Feak's assessment of the Complainant is about the Complainant's abilities and limitations regarding literacy and overall functioning in the workplace, and therefore his evidence is material and relevant to the main issues "arising from the hearing";
- Calling Dr. Feak to give evidence would not cause serious prejudice to the Complainant because:

(i) Dr. Feak's report was disclosed in February, 2014, before the hearing;
(ii) It has already been admitted into evidence during the hearing;
(iii) Complainant counsel can cross-examine Dr. Feak;
(iv) Complainant can call rebuttal evidence through other witnesses.

- Subsection 48.9(1) of the *Act* provides that proceedings be conducted in a way that balances speed with the principles of natural justice; and
- Subsection 50(1) of the *Act* provides that the Member or Panel must give all parties a full and ample opportunity to present evidence and make representations.

Complainant's Position

[14] The Complainant opposes the Motion on the grounds set out below:

- The Respondent has not complied with Rule 6(3) and filed a copy of Dr. Feak's report with the Tribunal;
- Rule 9(3)(e) prohibits a party who has not complied with Rule 6(3) from introducing an expert report into evidence and calling the expert as a witness;
- Dr. Feak's report was obtained under false pretences and should never have been done, because the Respondent's own RQS Manual, at exhibit C-4, tab 11 of Complainant's Document Book 1 sets out the Complainant's entitlement to oral D and E Card tests, and the Respondent and Complainant's then supervisor should have permitted the Complainant to take the oral tests in 2005;
- The assessment itself was therefore prejudicial to the Complainant;
- The assessments and report are also prejudicial because they are nine years old; were done during a period of extreme stress related to the Complainant's marital situation; and are not probative of the Complainant's present situation;
- The Complainant had no counsel during 2007 when Dr. Feak made his assessments and wrote his report;
- Dr. Feak's assessments and report are also irrelevant for the same reasons; the Respondent was "somewhat reasonably" accommodating the Complainant at the time, which continued for "the next almost 4 years until the end of 2010"; and
- The Complainant closed his case on March 3, 2016. He only knew that the Respondent planned to call Dr. Feak as an expert witness on March 24, 2016, and is thereby also prejudiced.

[15] In its Reply to Complainant's Response to Motion ("Complainant's Response" or "Response"), the Respondent further submitted that:

- The Complainant's Response does not reveal any prejudice to the Complainant;
- Alternatively, the Complainant's Response did not address the remedies available to the Complainant if there is any prejudice in calling Dr. Feak – the remedies of cross-examination and calling rebuttal witnesses;
- The Respondent served and filed Dr. Feak's report in accordance with Rule 6(3) of the Rules of the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) (all together: Tribunal Rules; individually: Rule);
- The statements in paragraphs 3 and 5 of the Complainant's Response regarding lack of counsel, the Complainant's mental state and timing of the assessment can go to the weight the Tribunal gives to Dr. Feak's Report and testimony;
- The Complainant's statements in paragraph 3 and 4 of its Response, regarding the Respondent's 1991 RQS manual permitting oral testing are assertions only, because the Respondent has not yet presented evidence regarding the RQS or the Respondent's efforts to accommodate the Complainant;
- Further, and notwithstanding the Complainant's statements regarding the RQS manual, which the Respondent denies, that information alone is not sufficient reason to deny the Respondent's motion to call Dr. Feak as an expert and adduce his testimony, in light of the contents of subsections 48.9(1) and 50(1) of the *Act.*

III. Issue

[16] The issue in this Motion is whether the Tribunal should grant leave to permit the Respondent to call Dr. Marcus Feak as an expert witness to provide expert opinion evidence, including the document called "Dr. Feak's report" in this Ruling.

IV. Statute law and Tribunal Rules

[17] Section 48.9(1) of the *Act* states:

> Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

Subsection 50(1) of the *Act* states in part:

> …the member or panel shall inquire into the complaint and shall give all parties…a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Subsection 50(3)(c) of the *Act* states:

> In relation to a hearing of the inquiry, the member or panel may
>
> (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law.

Subsections 50(4) and (5) disallow, respectively, the admittance or acceptance as evidence "…anything that would be inadmissible in a court by reason of any privilege under the law of evidence" and the calling or compelling of a conciliator appointed to settle a complaint as a witness at the hearing.

[18] Rule 1(1) of the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) ("Tribunal Rule(s)" or "Rule(s)") states:

> These Rules are enacted to ensure that
>
> (a) all parties to an inquiry have the full and ample opportunity to be heard;
> (b) arguments and evidence be disclosed and presented in a timely and efficient manner; and
> (c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.

Rule 1(2) states:

> These Rules shall be liberally applied by each Panel to the case before it so as to advance the purposes set out in 1(1).

Rule 6(3) states:

> Within the time fixed by the Panel, each party shall serve on all other parties and file with the Tribunal,
>
> (a) a report in respect of any expert witness the party intends to call, which report shall,

(i) be signed by the expert;
(ii) set out the expert's name, address and qualifications; and
(iii) set out the substance of the expert's proposed testimony; and

(b) a report in respect of any expert witness the party intends to call in response to an expert's report filed under 6(3)(a), which report shall comply with the requirements of 6(3)(a).

Rule 9(3)(e) states:

> Except with leave of the Panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in 1(1), and subject to a party's right to lead evidence in reply,…
>
> (e) a party who has not complied with 6(3) shall not introduce an expert report into evidence nor call an expert witness at the hearing.

Analysis

[19] In order to determine whether to grant the leave the Respondent seeks, I find that a consideration of the following issues is necessary at this stage of the proceeding:

1) To what extent has the Respondent complied with Rule 6(3)?;
2) Where there has been non-compliance, to what extent has it caused prejudice to the Complainant?; and
3) Is any such prejudice curable?

1) To what extent has the Respondent complied with Rule 6(3)?

[20] Rule 6(3) is of particular importance to this Motion because it sets out a specific procedure for the calling of expert witnesses. The Rule differs from the general Rules governing the calling of non-expert witnesses. Rule 6(3) requires that the party:

- state that the party is tendering the individual as an expert;
- serve on the other parties and file with the Tribunal "a report in respect of the expert witness the party intends to call";
- include in the report, the expert's qualifications, and the substance of the expert's proposed testimony; and

- comply with the same rule where a party wishes to file a *responding* expert's report in respect of any expert witness which the *opposite party* intends to call [italics mine].

[21] The Complainant closed his case on March 3, 2016.

[22] The usual procedure in accordance with Rule 6(3) entails that a party who wishes to tender an expert witness will notify the Tribunal and the other parties. The Tribunal will then fix a time for the initiating party to serve and file an expert report in sufficient time to allow the other party or parties, if they choose, to retain their own responding expert witness and serve and file their own responding expert report, again "[w]ithin the time fixed by the Panel", as stated in Rule 6(3). Ideally, this all occurs well before the hearing starts.

[23] There is no dispute that the Respondent disclosed Dr. Feak's report in February 2014, as part of the disclosure of documents accompanying its Statement of Particulars ("SOP"), though the Respondent did not file the Report with the Tribunal, as required by Rule 6(3). Also, Dr. Feak's report was admitted into evidence during the cross-examination of the Complainant, in the circumstances described above.

[24] While the Complainant objected to the admission of Dr. Feak's report as an exhibit, it is noteworthy that his objections were not based on alleged non-compliance with Rule 6(3). This is most likely because, at that time, the report was neither tendered into evidence nor admitted as being an *expert* report [italics mine].

[25] Therefore, while Dr. Feak's report was disclosed and admitted into evidence, it was not served, filed or tendered into evidence as an *expert* report in accordance with Rule 6(3). Also, the Respondent did not notify the parties or the Tribunal that it wished to treat Dr. Feak's report as such, or that it wished to call Dr. Feak to give expert opinion evidence until its March 24, 2016 Notice of Motion – brought less than 6 weeks before the resumption of the May hearing, and 3 weeks after the Complainant closed his case.

[26] The Respondent has also not included Dr. Feak's qualifications in his report, as required by Rule 6(3)(a)(ii).

[27] Taking into account all of the above with respect to Rule 6(3) and what the Respondent did and did not do, I conclude that the Respondent did not comply with the Rule.

2) Where there has been non-compliance with Rule 6(3), to what extent has it caused prejudice to the Complainant?

[28] I find that the Complainant's submission that Dr. Feak's report is in and of itself prejudicial to the Complainant and should never have been done in the first place is a submission going to the merits of the report. It would be premature at this stage for the Tribunal to make a finding on this submission.

[29] I conclude that because the Respondent did not comply with Rule 6(3), and only notified the Complainant on March 24, 2016 that it intended to seek leave to treat Dr. Feak's report as an expert report and permit Dr. Feak to testify as an expert witness, the Complainant has not had a reasonable opportunity to obtain his own responding expert report and witness, as Rule 6(3)(b) entitles him to do.

[30] He has also been deprived of the opportunity to arrange for other rebuttal witnesses. It is possible that he and his counsel may in fact decide not to do so, but the Respondent has effectively deprived the Complainant of the opportunity to do so before the Complainant closed his case.

[31] Therefore, I conclude that to the extent that the Complainant has been deprived of the opportunity to respond pre-emptively to Dr. Feak's expert opinion evidence by way of the Complainant's own expert or other witnesses, the Complainant has been prejudiced.

[32] That said, there are a number of considerations that tend to diminish the prejudice incurred by the Complainant.

[33] In paragraph 22 of the Complainant's SOP dated December 17, 2013, the Complainant states that Dennis Curtis had the Complainant attend for a psychological assessment in 2007 and that this resulted in Dr. Feak's assessing the Complainant and rendering his report.

[34] Paragraph 22 of the Complainant's SOP also quotes two portions of Dr. Feak's report in support of one of the remedies the Complainant seeks – namely, that he be permitted to take the D Card test orally.

[35] The Complainant disclosed Dr. Feak's report in his own documentary disclosure attached to his SOP (at para. 22). As set out above, the Complainant also testified about the report in direct examination. Thus, Dr. Feak's report is a part of the narrative of the Complainant's case.

[36] The Respondent's SOP also describes or refers to Dr. Feak's report - in paragraphs 61, 64, 79, 94, 95 and 96. I find that Dr. Feak's report is also a part of the narrative of the Respondent's case, and the Complainant has known this from the time he was served with the Respondent's SOP.

[37] On the basis of the foregoing, one can conclude that the Complainant's reading and writing abilities, and how they impact his capability of doing the work he desires, are issues in this Complaint.

[38] Dr. Feak's report discusses those same issues, and has been known to the Complainant for some time.

[39] In assessing the prejudice to the Complainant, I also take into account the Complainant's submissions in his Response to Motion that the report is 9 years old, that it was done when the Complainant did not have counsel and when he was under a great deal of personal stress. Those factors may go to the weight that is ultimately attributed to Dr. Feak's report.

[40] Moreover, one cannot lose sight of the fact that the report has already been introduced into evidence during the cross-examination of the Complainant. At the time I admitted it, I found that it was relevant to the Complaint for the purposes for which it was originally tendered.

[41] On the whole, I am convinced that the Complainant incurs significant prejudice from the Respondent's non-compliance with Rule 6(3), and from the timing of the Respondent's Motion, but it is not on the scale of the prejudice suffered where a party is truly subjected

to “trial by ambush.” One cannot contend in the current case that the prospective expert evidence comes as complete surprise, i.e., that there was absolutely no notice given (constructive or otherwise) that this expert opinion evidence even existed, and that none of it had thus far been adduced into the record in any form.

[42] I note that the Respondent does not dispute the Complainant’s right to call rebuttal witnesses.

[43] I now turn to the question of to what extent the prejudice is curable.

3) Is any such prejudice repairable?

[44] I have concluded that the Complainant has been prejudiced. Balanced against the Respondent’s right to be given a full and ample opportunity to present its case is the Complainant’s right, if Dr. Feak’s expert opinion evidence is admitted, to also be given a full and ample opportunity to present evidence in response to Dr. Feak’s evidence, and make representations about it.

[45] Rule 9(3) provides the Tribunal with wide latitude in crafting a remedy to negate any prejudice to the other party if the Member or Panel grants leave to a party who has not complied with Rule 6(3). The Member or Panel can grant leave “on such terms and conditions as accord with the purposes set out in 1(1).”

[46] I conclude that, if he wishes to have one, an adjournment for a meaningful and reasonable amount of time would put the Complainant in the same position he would have been in had the Respondent provided the proper notice regarding Dr. Feak. This would give him the opportunity to arrange for his own expert report and witness, if he wished to do so, or to call other witnesses and evidence in rebuttal to Dr. Feak’s report and testimony.

[47] It is not necessary that the entirety of the May 2–13, 2016 hearing dates be adjourned in order to fully deal with this issue. That would not be in the interests of either of the parties who both wish this hearing to proceed on those dates.

[48] The Respondent has provided a proposed schedule for the May hearing, which includes the dates on which it would call its own witnesses. For the 8th day of the May hearing, after all its own witnesses have been called but before final submissions, the Respondent has proposed "Possible Rebuttal Evidence." I assume that this day is proposed as the time for the Complainant to call his expert witness in response, or witnesses in rebuttal, to Dr. Feak's report and testimony.

[49] I find it is reasonable to assume that the Complainant and his counsel will be occupied with the ongoing hearing for the 7 days prior to the 8th day. Therefore, the timetable the Respondent proposes does not allow for a reasonable amount of time for the Complainant to be able to muster an expert or other witness in rebuttal, if the Complainant and his counsel decide to do so.

[50] If Dr. Feak is qualified as an expert witness, and the Complainant wishes to present expert or other evidence and witnesses in response to Dr. Feak's report and testimony, the Complainant would be entitled to an adjournment, after the Respondent has presented all its witnesses, the terms of which I will decide after hearing the submissions from the parties. In other words, all of the Respondent's witnesses will testify in chief and be cross-examined, with re-direct examination as necessary. By then, the Complainant would have had sufficient time to decide if he requires the adjournment, and both parties could make submissions on the adjournment's terms.

[51] It will be apparent from a reading of the above reasons that they do not fully dispose of the Respondent's motion or the parties' arguments. This is because it is extremely difficult to fully address all objections to proposed expert testimony prior to the actual proffering of the expert witness (see in this regard *FNCFCS v. AGC,* 2012 CHRT 28). Rule 3 indicates that a Tribunal Member seized with a motion may direct the making of argument and the presentation of evidence, including the time, manner and form thereof, and dispose of the motion as he or she sees fit.

[52] In the present ruling, I have addressed the issue of prejudice flowing from non-compliance with Rule 6(3), and have decided that it is not a bar to the relief sought by the Respondent. However, that is not the end of the matter. The remaining issues relating to

the admissibility of Dr. Feak's expert opinion testimony, including those related to his report, will be addressed at the May hearing. In my order below, I have issued a direction as to the Respondent's filing obligation, and as to the procedure I intend to follow when the hearing resumes. Only once all issues have been examined will I be able to make a final determination of whether to grant leave under Rule 9(3) permitting Dr. Feak to testify as an expert witness.

V. Order

[53] The Respondent shall, no later than April 29, 2016, provide to the parties, in writing, and file with the Tribunal, a statement of Dr. Feak's qualifications, in compliance with Rule 6(3)(a)(ii) of the Tribunal's Rules of Procedure (03-05-04).

[54] During the hearing scheduled to begin on May 2, 2016, the Respondent may proffer Dr. Marcus Feak for qualification as an expert witness and the Complainant may cross-examine Dr. Feak and make submissions on: (i) whether Dr. Feak should be qualified as an expert witness; and (ii) the general admissibility of his proposed testimony.

[55] The Tribunal shall then decide whether to qualify Dr. Feak as an expert witness.

[56] If the Tribunal decides to qualify Dr. Feak as an expert witness, the following procedure will apply: after all of the Respondent's witnesses have testified, and before any closing submissions, the Complainant shall have the opportunity to adduce reply evidence in relation to Dr. Feak's report and testimony. The Complainant may request an adjournment for this purpose, the terms of which the Tribunal shall rule upon, after hearing from all parties. Regardless of whether an adjournment is sought, any reply evidence the Complainant may choose to present will be subject to the requirements of Rule 6.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
April 25, 2016