Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation : 2018 CHRT 19
Date : July 4, 2018
File No. : T2162/3616

[ENGLISH TRANSLATION]

Between :

Serge Lafrenière

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Via Rail Canada Inc.

Respondent

Ruling

Member : Anie Perrault

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I. Introduction

[1] The Canadian Human Rights Commission and the Complainant both filed a motion seeking the dismissal of the report by Dr. Martin Tremblay. Both are asking the Tribunal to order that the expert report, disclosed by the Respondent, be inadmissible and Dr. Martin Tremblay not be heard by this Tribunal on the report.

[2] The Tribunal received written arguments from all parties — the Commission's was submitted on June 8, 2018, the Complainant's on June 11, 2018, and the Respondent's on June 19, 2018. The Tribunal also received the replies from the Commission and the Complainant on June 21.

II. The facts

[3] On November 30, 2012, Serge Lafrenière (the "Complainant") filed a complaint under the *Canadian Human Rights Act* ("*CHRA*") against Via Rail Canada Inc. (the "Respondent").

[4] On August 22, 2016, after investigation, the Canadian Human Rights Commission (the "Commission") referred the complaint filed by the Complainant to the Canadian Human Rights Tribunal (the "Tribunal") pursuant to section 7 of the *CHRA*.

[5] Essentially, the Complainant alleges that he was treated differently and that he had unfairly accumulated penalty points in his disciplinary file, all of which led to his dismissal on October 5, 2012. The ground of discrimination alleged in this case and accepted by the Tribunal is disability.

[6] Between the time Mr. Lafrenière's complaint was referred to the Tribunal and the start of the hearing on May 28, 2018, I rendered decisions on four preliminary motions (motion to strike, motion to amend, motion for medical assessment, and motion for confidentiality order) and I provided instructions on two motions for disclosure.

[7] I also had several conference calls with the parties to prepare the case for the hearing and for case management.

[8] Although the parties had declared they were satisfied with the disclosure and were ready to proceed twice — the first hearing having been postponed — it was only on May 28, 2018, in the morning on the first day of the hearing that the Tribunal was advised by the Respondent that it wished to file an expert report.

[9] This, we must recall, was further to significant changes to the Complainant's list of witnesses, namely a reduction in the number of witnesses from more than 30 to around 5, excluding his family physician who was still on the list. These changes had been communicated to the parties and the Tribunal only a few days prior to the start of the hearing.

[10] After hearing the parties on this request by the Respondent, I decided to allow (oral decision) the Respondent to serve its expert report within 48 hours, which was done to all parties and the Tribunal on May 30, 2018. I then suspended the hearing until May 31 to give the Complainant time to read it before presenting his evidence.

[11] On June 8, 2018, after the Complainant had already begun presenting his case, the Commission served on the parties and the Tribunal a motion to dismiss the Respondent's expert report. On June 11, 2018, the Complainant filed a similar motion.

[12] At the June 11 hearing, I submitted a deadline to the parties and asked the Respondent to submit its written representations on these two motions by June 19 and the replies of the other parties by June 21, which would allow me to render a decision on the motion before the Respondent opened its case, which was today, June 26, 2018.

III. Issues

[13] What are the eligibility criteria for an expert report?

[14] When should the Tribunal analyze the components of the expert's duty: during the assessment of the eligibility of the report or during the assessment of the probative value of the report (during the assessment of the evidence)?

[15] Is it preferable to proceed by *voir dire* before determining the eligibility of the expert's testimony and his report?

[16] Is the expert report admissible or inadmissible?

[17] As an alternative question, should the Tribunal come to the conclusion that the expert report can be admitted to evidence, can it require that Dr. Tremblay's entire file, including all his working notes, be disclosed to the parties before he testifies?

IV. Analysis

A. What are the eligibility criteria for an expert report?

[18] The Commission submits that the Supreme Court decision *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 ("*White Burgess*") applies in this case and that the criteria established by the Court in that decision, relying on the criteria from *R. v. Mohan*, 1994 CanLII 80 (SCC) ("*Mohan*"), another Supreme Court decision, represents the criteria that this Tribunal should use to determine whether the Respondent's expert report is admissible.

[19] The Respondent also relies on *White Burgess*, but instead argues that the criteria established in this decision are not met here and therefore the expert report should not be dismissed by the Tribunal at the eligibility stage.

[20] First, without disagreeing with the parties, I would say that although the criteria from these two Supreme Court decisions are important to this case and must be reviewed - I will do so later - it must be done taking into consideration the rules of evidence that are much more flexible in the *CHRA*, and not despite this regime. I am referring, of course, to paragraph 50 (3)(c) of the *CHRA*.

[21] The criteria in question are the following, and here I cite the Supreme Court in *White Burgess,* at paragraph 23 (emphasis added):

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-

> 801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. (...)

[22] The Court also describes in great detail what constitutes the expert's duty to the Tribunal as follows:

> [26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[23] The Court continues further, describing the elements that constitute the "expert's duty," as it added at paragraph 32:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

B. At what time should the Tribunal analyze the components of the expert's duty: during the assessment of the admissibility of the report or during the assessment of the probative value of the report (during the assessment of the evidence)?

[24] The Supreme Court stated the following in *White Burgess* on this very important question:

> [34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[25] The Complainant and the Commission both filed motions to dismiss the expert report, and initially it is my duty, according to our rules of procedure (Rule 3) to address this in the manner I feel is appropriate. To do so, I feel that I need to evaluate the criteria set out by the Supreme Court in *Mohan* and *White Burgess*, at the eligibility stage.

C. Is it preferable to proceed by *voir dire* before determining the eligibility of the expert witness and his report?

[26] Although it is possible in some cases to defer a ruling on the admissibility of an expert report — some of my colleagues have done it and decided to proceed by *voir dire* — it is also possible to decide the admissibility without hearing the witness. Thus, if it is possible for me to assess the concerns about this admissibility and determine admissibility by examining the report, I can make the determination without hearing the witness. I cite *Christoforou* 2016 CHRT 14, at para. 63 :

> [63] In some cases, the Tribunal has deferred a ruling on the admissibility of expert opinion evidence to the time the evidence is called (e.g. *FNCFCS*). If, however, the concerns regarding admissibility of expert opinion evidence can be assessed and determined by a review of the report, the ruling can be made before the expert witness is called to testify or before hearing the evidence of the expert witness: *Brooks v. Fisheries and Oceans*, 2004 CHRT 20 (CanLII) ("*Brooks*"); *Gaucher v. Canadian Armed Forces*, 2006 CHRT 40 (CanLII) ("*Gaucher*"); and, *Public Service Alliance of Canada v. Minister of Personnel for the Government of the Northwest Territories*, 2001 CanLII 25850 (CHRT) ("*PSAC*").

[27] I consider that I have sufficient information to properly assess the arguments presented by the parties on the eligibility of the report.

D. Is the expert report admissible or inadmissible?

[28] Did the Commission and the Complainant show in their respective motions that Dr. Tremblay's expert report does not meet the eligibility criteria in *White Burgess* such that it is not admissible under paragraph 50(3)(c) of the *CHRA*? In particular, considering the *CHRA*, did the applicants clearly show that the expert committed a fundamental breach of his duty to be impartial and independent and that the relevance and necessity criteria for his evidence were not met?

[29] The Commission and the Complainant both argue in their motions that the expert did not meet his duties, that he is not independent and impartial, that the report does not meet the necessity and relevance obligations and therefore, that the expert's report and testimony should not be admitted.

[30] The Respondent argues the opposite.

[31] First, we shall examine the expert's obligation criteria as defined in *White Burgess*, namely impartiality and independence of the expert.

(i) Impartiality and independence

[32] In light of *White Burgess*, the impartiality criterion is not particularly demanding, in that it is rare for a court to refuse testimony based on this criterion (see paragraph 49).

[33] Was the expert related to the Respondent's family? No. Does the expert have a direct financial interest in the result of the case, the decision that will be rendered? No. As the Court stated, a mere employment relationship or contractual relationship between the expert and the Respondent is not sufficient for a finding of partiality.

[34] At first glance, the report seems impartial and independent.

[35] However, it is the nature and extent of the interest or connection the expert has with one of the parties that matters. Here, I cite Judge Cromwell from paragraph 49 of *White Burgess*.

[36] In this case, this connection seems to have begun in October 2017, around eight months prior to the start of the hearing of this case before the Tribunal. At that time,

Dr. Tremblay was not, according to the correspondence provided by the Respondent, acting as an expert in this case, but as a member of the Respondent's defence team. It was only on the first day of the hearing that he received the mandate to prepare an expert report, specifically on May 28, 2018 (mandate letter enclosed with the motions).

[37] It would seem, upon reading the expert report submitted by the Respondent, that the expert did not have access to all the documents disclosed in this case. If he did have access to all the documents, his report makes no mention of the Complainant's version. There is no balance in the report written by the expert.

[38] Moreover, several crucial events in this case are described by the expert in the manner presented by the Respondent, with no reference to the Complainant's version, either by choice or because the expert did not have access to this version.

[39] Thus, after reading the report, can I say that it was not influenced by the party for whom he is testifying? Given the near total lack of reference to the Complainant's version of the facts, can I truly conclude that the expert's opinion would not have changed if he had been retained by the Complainant? (*White Burgess*, paragraph 32)

[40] After reading the report, I cannot clearly determine whether it provides me with fair, objective and impartial assistance. In fact, I have serious doubts about this.

[41] Among the doubts, there is the fact the expert in question remained in the room after his report was submitted and listened to the Complainant's evidence, while having the occasional discussion with the Respondent's counsel, as if he were still part of the Respondent's team. After his report was submitted, was his presence necessary for the Tribunal, that was to hear him on his report, or instead, was it useful for the Respondent? I refer to Judge Cromwell at paragraph 49 of *White Burgess*.

[42] At paragraph 38 of his reply to the motions, the Respondent himself confirms that the expert remained in the courtroom for the entire presentation of the Complainant's evidence. Thus, he does not provide any reason to believe the expert withdrew from his prior mandate, which was to act as a member of the defence team.

[43] Moreover, I would have been more likely to find that the expert was impartial if counsel for the Respondent were not simultaneously claiming solicitor-client privilege and litigation privilege in his reply to the Commission's motion, refusing to provide the parties access to the entire file with which Dr. Tremblay wrote his report.

[44] I would first like to state that I am fully aware of the right of each party to claim the non-disclosure privilege recognized in the law of evidence, as prescribed under subsection 50(4) of the *CHRA*. That said, there are inevitable problems that arise here in terms of the request to produce the expert's file, since it is clear that the parties disagree on the relevance of the two privileges (litigation and solicitor-client privilege). These difficulties arise very late in the instruction process — I will restate that we would not be here if the expert report had been submitted during the disclosure process as prescribed by our rules of procedure — they are significant and could clearly derail the hearing that is in progress.

[45] I would have to decide these issues in the middle of the hearing, which would possibly require the review of the documents by the Tribunal (further to *Walden* to which the Respondent referred in his submissions) or even by the Federal Court if a party objects to the jurisdiction of the Tribunal to conduct this review, thereby suspending the ongoing instructions.

[46] Regardless of the road that will be taken, it would be a painstaking exercise to be considered in my cost-benefit analysis mentioned in *White Burgess* and *Mohan*.

[47] For the time being, I will say that I tend to agree with the Commission when it states that an expert witness cannot be both an impartial and independent witness for the Tribunal and also claim to be an agent for the Respondent.

[48] Despite the above, I will not rule on the final admissibility of the report before I have reviewed the two other criteria defined in *Mohan* and restated in *White Burgess*: relevance and the cost-benefit analysis to which I just referred, as well as necessity.

(ii) Relevance, cost-benefit analysis and necessity

[49] In light of what is before me, the report at first glance seems relevant in that it is closely related to the actual issue that concerns us, namely the Complainant's disability. The report provides some definitions from a reference manual that could be relevant, and it addresses the issue of diagnoses and side effects of medication. These questions, in themselves and in their general meaning, are indeed relevant.

[50] If the report ended there, I would have been able to find it had a certain relevance. However, the report does not end there. It goes much further and tries to show that the Complainant did not have any disability at the time the facts occurred, even though the expert never assessed the Complainant at the time or even close to the time the facts occurred.

[51] This report comes almost six years after the alleged facts and was submitted by the Respondent at the very last minute, at the exact moment the hearing of this case was starting. I believe it is important here to review the circumstances of the disclosure of this report.

[52] Thus, despite the fact the Respondent's expert was involved in this case from at least October 2017 — according to the emails I read — nearly eight months before the start of the hearing, it was only on the very day the hearing started that the Respondent chose to inform the Tribunal that it wished to submit an expert report. Contrary to the rules of procedure of the Tribunal, the Respondent did not signify its intention to submit an expert report before the actual day the hearing began. And when it did, it wanted the expert in question to be present for the presentation of all of the Complainant's evidence before submitting his report. This would have permitted what I myself had denied when I refused the medical expertise request a few months earlier. This would also have been a denial of justice for the Complainant, who had the right to read this report before presenting his evidence. This is why I suspended the hearing to allow the Respondent to submit its expert report within a deadline of 48 hours, before the Complainant began presenting his evidence.

[53] The expert therefore never met the Complainant to assess him. The Respondent never made the assessment request at the time, but only several years later, through a preliminary motion filed in 2017. As I had mentioned, I myself had rejected this motion

based on the fact that such a medical expertise, more than six years after the fact, would not enlighten the Tribunal on the facts in question that date back to 2012 or earlier. It was at that time that such an expertise by the Respondent should have been requested.

[54] There are two important questions that emerge in this case, namely was there a disability at the time of the events that led to the Complainant's demerit points and dismissal, and if so, should or could the employer have known there was a disability?

[55] The expert report does not help the Tribunal with any of these questions. In fact, it cannot help the Tribunal with the first question, as it did not contain the Complainant's expertise at the time or close to the time of the facts. In his report, the expert merely challenges the medical notes of another physician without even having met the Complainant.

[56] As to whether the employer should or could have known there was a disability, it is a question of fact for which the expert cannot replace the Tribunal.

[57] Today, the Respondent is attempting to enter into evidence an expert report that would not help the Tribunal on the questions of fact that are before it and that took place more than six years earlier.

[58] It seems to me that the expert report is to be submitted solely to contradict the medical notes of the Complainant's physician. It therefore aims to counter factual testimony– nearly six years after the facts in question occurred.

[59] Thus, the report attempts to override my duties as an adjudicator of fact.

[60] Therefore I conclude that the report is not relevant or necessary. Moreover, the cost-benefit analysis (I refer to paragraphs 44, 45 and 46 of this decision, above) reveals that the probative value is overborne by its prejudicial effect.

(iii) Right to be heard and to make full answer and defence

[61] The Respondent argued that if the Tribunal were to determine that the expert report was inadmissible, his right to be heard and to make full answer and defence would be irreparably affected. The Tribunal does not share this opinion.

[62] The Respondent can very well ask the Tribunal for permission to assign the Complainant's family physician if it feels it is important to question him on his medical notes. Since we already had the dates reserved in July for this hearing, one more witness would cause very little, if any, delay in the conduct of the instruction. I would add to this, to answer the Respondent's argument, that it is not clear that he would be prohibited from asking the witness suggestive questions. On this, I refer the parties to the CHRT decision, *Fahmy v. G.T.A.A*. 2008 CHRT 12, at para. 73 and the Federal Court decision *RNC Media v. Côté* 2015 FC 439, at paras. 16-18.

V. Conclusion

[63] After reading the expert report served on the parties and the Tribunal by the Respondent, and after reading the emails and documents exchanged between counsel for the Respondent and the expert in question, I conclude that the expert report submitted by the Respondent does not meet the criteria defined by the Supreme Court in *Mohan* and *White Burgess* such that it is not admissible within the meaning of paragraph 50(3)(c) of the *CHRA*. More specifically, the Tribunal considers the report submitted by the Respondent is not relevant, necessary, impartial or independent. Moreover, the Tribunal concludes, based on a cost-benefit analysis, that the probative value of this evidence is overborne by its prejudicial effect.

[64] The expert's report is not based on all the documents submitted and disclosed in this case, but only on some of them, those submitted by the Respondent. The text of the document is clearly unbalanced. It is not independent and does not seem to be free from the Respondent's influence. Moreover, without dwelling on it, it seems to me that it is not objective or unbiased, in the sense that it seems to clearly favour one party over the other. To conclude, this report does not aim to assist the Tribunal; instead, it serves the Respondent.

[65] For these reasons, the Tribunal allows the two motions, that of the Commission and that of the Complainant, to dismiss the expert report.

[66] Considering my decision, it is not necessary for me to address the Commission's secondary motion.

Signed by

Anie Perrault
Tribunal Member

Montréal, Quebec
July 4, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File : T2162/3616

Style of Cause : Serge Lafrenière v. Via Rail Canada Inc.

Ruling of the Tribunal Dated : July 4, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

Serge Lafrenière, for himself

Daniel Poulin, counsel for the Canadian Human Rights Commission

Jacques Rousse, counsel for the Respondent