

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2018 CHRT 30
Date: November 9, 2018
File No.: T2242/6417

Between:

Billie Mortimer

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Colleen Harrington

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I. Introduction

[1] On June 27, 2018, the Respondent filed a Notice of Motion for an Order compelling the production of certain documents from the Complainant. The Motion was opposed by the Complainant. As a result, the inquiry into this matter, which was scheduled to take place in August of 2018, was adjourned to permit the parties to file submissions.

[2] In motions for disclosure, the Tribunal must determine whether the documents requested are “arguably relevant” to a fact, issue or form of relief identified by a party. In order to provide context for my decision with respect to this Motion I will start by summarizing the positions of the parties with respect to the complaint.

II. Allegations Contained in the Complaint and the Parties’ Statements of Particulars

[3] According to her complaint filed with the Canadian Human Rights Commission (Commission) in May of 2015, Billie Mortimer (Complainant) began working for Air Canada (Respondent) in 1981 and has been on Long Term Disability (LTD) leave since September of 2007. She filed her human rights complaint in relation to changes made to the Respondent’s Reduced Rate Travel Privilege Policy (the Policy), which she alleges discriminates against her as an employee with a disability, contrary to sections 7 and 10 of the *Canadian Human Rights Act* (the Act).

A. The Policy

[4] The Respondent’s Policy provides employees and eligible family members with access to flights for personal travel on a space-available basis at a substantially reduced cost. In her Statement of Particulars (SOP) filed with the Tribunal, the Complainant says the Policy that became effective on May 15, 2015 discriminated against some employees with disabilities, particularly those on LTD status. According to the Commission’s SOP, the May 2015 Policy provided employee travel privileges as follows:

- a) Employees on a Respondent-approved leave of 365 days or less were eligible for unlimited reduced-rate travel;

- b) At 366 days, employees on a Respondent-approved leave, regardless of the reason, had access to 3 reduced-rate travel passes per year; and
- c) Employees on leave due to injury or illness must also, prior to travelling, obtain medical clearance by having a Fitness For Travel (FFT) form completed by their treating physician and submitted for review and approval by the Respondent's Occupational Health Services before travelling.

[5] The Respondent amended the May 2015 Policy on November 17, 2017, apparently in response to a Labour Arbitration decision. According to the Respondent's SOP, the November 2017 Policy provides travel privileges as follows:

- a) Employees on approved leaves of absences, regardless of the duration or reason for the absence, are eligible for unlimited use of Reduced Rate Travel privileges;
- b) An employee who discloses to the Respondent that he or she possesses a serious medical condition must complete and submit a FFT form; and
- c) Upon review of the FFT form, the Respondent's Medical Aviation Specialist may approve travel or require specific measures or accommodations to ensure safe air travel. The determination of the Medical Aviation Specialist may be valid for periods of up to one year.

B. Commission and Complainant

[6] The Commission states in its SOP that the travel privileges offered by the Respondent through the Policy constitute an employment benefit, which must be offered to all employees in a substantively equal and non-discriminatory manner. The Complainant says she has faced barriers in accessing this benefit because of her LTD status, which has resulted in her being entitled to fewer reduced rate travel passes than other employees not on LTD, as well as being precluded from booking reduced rate travel with other airline companies using the Respondent's booking system. She is also required to provide advance notice of her intention to fly and to obtain medical approval prior to travelling under the Policy, something not required of employees not on LTD.

[7] The Complainant alleges that the Respondent's November 2017 policy continues to impose restrictions on employees on LTD status that are not imposed on the Respondent's customers who may have a disability similar to her own. Specifically, the Complainant says in her SOP that paying customers with a disability identical to hers are

not required to identify their disability to the Respondent or to provide a FFT form prior to travel.

[8] The Complainant says the FFT form required of employees on LTD is costly and onerous and demands the disclosure of private medical information not even relevant to the ostensible purpose of the Policy.

[9] The Complainant, who resides in Campbell River, says the Policy affects her as an employee with a disability, in that she cannot travel on an urgent basis, as she cannot have all of the forms completed and meet the notice requirements of the Policy. This has resulted in her ability to travel being effectively denied. She says these requirements prevented her from visiting her mother before she died, and that she has lost the ability to seek medical care in Vancouver, has lost contact with family and friends, and has had to sell her home in Vancouver.

[10] Although the Policy was amended in November 2017, the Complainant says the allegations relating to the May 2015 Policy are not moot because she suffered hardship as a result of that prior Policy. She says this is relevant to the remedies she is requesting at hearing, which include damages for pain and suffering and, “a financial award in respect of the loss of benefits imposed upon the Complainant by the Respondent resulting from the loss of travel benefits with the Respondent as well as the loss of ability of the Complainant to obtain alternate Reduced Rate Travel benefits from other airlines.”

C. Respondent

[11] The Respondent’s position with respect to the complaint, as set out in its SOP, is that neither the May 2015 Policy nor the November 2017 Policy is discriminatory.

[12] The Respondent says all passengers, whether employees or not, must complete a FFT form if they have disclosed that they have a “significant or serious medical condition”, and that the FFT forms gather identical medical information from both employee and consumer passengers. The reason for requiring medical information from certain passengers is that, “[u]nanticipated medical needs and medical emergencies present unique and significant challenges during air transportation.” The Respondent asserts that,

if it is established that the FFT form is *prima facie* discriminatory, it can establish that the provision of safe air travel is a *bona fide* and reasonable justification for requiring a FFT form prior to flying in these circumstances.

[13] The Respondent takes the position that employees approved for LTD leave have disclosed to the Respondent that they have a “serious medical condition” for the purposes of the November 2017 Policy, and so they must complete and submit a FFT form that is subject to review and approval by its Medical Aviation Specialist (Specialist) prior to travelling.

[14] The Respondent says the FFT forms must be assessed by its Specialist, who has specific expertise in aviation medicine, “and a staff of medical professionals”. The Respondent argues that it would experience undue hardship if it had to rely on employees’ subjective evaluations about safe air travel or on the opinion of an employee’s medical practitioner alone. The Respondent says only the Specialist, “with specialized knowledge, can make this determination. General medical practitioners do not have the requisite expertise to advise about the rigours of air travel.”

[15] After reviewing the FFT form, the Specialist determines whether:

- a) the passenger is fit to fly;
- b) the passenger requires accommodation, preparation or other measures to enable safe transportation; or
- c) the passenger is unfit to fly because the medical condition cannot be accommodated.

[16] If the Specialist determines that a passenger’s serious medical condition is permanent and stable, the Specialist may provide the passenger with approval to fly for up to one year without having to complete a FFT form each time.

D. Complainant’s Reply

[17] In her Reply to the Respondent’s SOP, the Complainant questions the Respondent’s contention that the purpose of the Policy’s requirement of a FFT form from employees on LTD is safe air travel. The Complainant points out that, unless a paying

customer were to self-identify as having a serious medical condition (including, presumably, one identical to the Complainant's), the Respondent has no way of becoming aware of, never mind conclusively determining, that any passenger other than an employee on LTD has a "serious medical condition", let alone one that could potentially pose safety concerns to the Respondent's flight operations.

[18] The Complainant suggests that, if she were to simply purchase a ticket from the Respondent, without identifying that she is an employee on LTD, she would almost certainly be permitted to board the plane without any question about her medical condition, as it is not visible, "nor is it relevant to the safety of a flight." The Complainant says the Respondent's criterion for discriminating is not based upon any particular medical condition, but simply on the employee's LTD status. As a result, the Policy imposes burdens on employees receiving LTD benefits on the basis of their disabilities.

III. Motion for Disclosure

[19] The Respondent filed a Notice of Motion for an Order compelling the Complainant to produce certain documents, including:

- i. documents identified in the Complainant's SOP, and specifically documentation "confirming disability";
- ii. the Complainant's Group Insurance Disability Income Plan ("GIDIP") file;
- iii. documents relating to medical appointments allegedly scheduled in the Greater Vancouver Area as described in the Complainant's SOP ("Medical Appointment Documents");
- iv. documents relating to any efforts made by the Complainant to obtain treatment or appointments in or around Campbell River at all times material to the complaint ("Campbell River Appointment Documents");
- v. documents relating to an alleged sale of residential property located in the Greater Vancouver Area, as described in the Complainant's SOP ("Property Sale Documents").

[20] The Respondent relies on Rule 6(1)(d) of the Tribunal's *Rules of Practice and Procedure (Rules)*, requiring all parties to file a SOP, which must include:

A list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

[21] Rule 6(4) requires the parties to provide copies of each document identified in this list to the other parties.

[22] The Complainant does not object to the request for most of these documents, including proof of property sale documents and medical appointments in Vancouver, and documents relating to medical appointments made in Campbell River. However, the Complainant does object to providing her GIDIP file and further medical information and records relating to her disability beyond what she has already disclosed.

IV. Positions of the Parties on the Disclosure Motion

A. Respondent

[23] In its Notice of Motion, the Respondent requests further documentation confirming the Complainant's disability. The Respondent argues that the Complainant must produce documents that disclose the "specific characteristics of her disability" because, in order to prove discrimination on the basis of the prohibited ground of disability, she bears the onus of establishing the existence of "the alleged disability" by providing medical proof of its existence. The Respondent says that the "scant medical information disclosed to date" does not provide sufficient information to determine the existence of a disability.

[24] The Respondent notes that the Complainant has refused to provide medical information beyond two documents already produced, being: i) a FFT form from 2012 completed by Dr. Rabin that says her depression is in remission and that she experiences mild occasional anxiety and depressed moods; and ii) a note dated February 9, 2018 by Dr. Fourie asserting that the Complainant's disability does not affect her ability to travel by air and there is no medical reason to deny her access to travel by any means.

[25] In its submissions in support of the Motion, the Respondent broadens the scope of the documents requested to include, “all documents in the Complainant’s possession or control relating to any other medical condition(s) or medical issues relevant to the Respondent’s Fitness for Travel form, regardless of whether the medical condition(s) relate to the” Complainant’s disability. The Respondent argues that this broader category of medical documents is relevant to this proceeding, “and to the dispute between the Parties about the requirement to complete” a FFT form.

[26] The Respondent asserts that the medical records requested are relevant to this proceeding because the Complainant has put the specifics of her medical condition into issue by alleging that the Respondent treats her differently from others who may be suffering from a “similar” or “identical” disability. In her Reply to the Respondent’s SOP the Complainant says that, “her medical condition is not obviously visible nor is it relevant to the safety of a flight.” She asserts that the FFT form demands, “far more private and confidential information” of her than is required of non-employee passengers with the same disability, and then is ostensibly required for the purposes of the Policy.

[27] The Respondent argues that it requires documents detailing the specifics of the Complainant’s disability so that it may respond to her allegations, including those regarding hypothetical passengers possessing identical characteristics. The Respondent submits that it is entitled to test conclusions the Complainant makes about her medical condition as it relates to flight safety.

[28] The Respondent requests the Complainant’s GIDIP file in the possession of Manulife Financial Corporation because it contains information the Complainant is required to provide to Manulife every 3 to 6 months that confirms her ongoing eligibility for LTD benefits, which employees are only eligible for if they are “Totally Disabled”. The Respondent argues that this information is relevant to the issue of the inconvenience and hardship she says she suffers by having to complete the FFT form in order to fly under the Policy, as well as to the reliability of the medical information the Complainant has submitted to the Respondent, including the 2012 FFT form. The Respondent also argues that the GIDIP file is necessary to determine whether relying upon employees’ self-

evaluations or the opinions of their medical practitioners alone would result in undue hardship for the Respondent.

[29] With respect to the Vancouver Medical Appointment and Property Sale Documents, the Respondent says the Complainant must disclose these documents because they relate to issues set out in her SOP, specifically that, as a result of the allegedly onerous requirements of the Respondent's Policy, she has been unable to receive medical treatment from specialists in Vancouver and she was forced to sell her home in Vancouver.

[30] The Respondent argues that the Campbell River Appointment Documents are relevant to the issues of whether the Complainant was required to receive medical treatment in Vancouver as opposed to the community where she resides, as well as the "personal damages" she says she suffered as a result of the alleged loss of access to this medical treatment as described in her SOP.

[31] The Respondent further says the Campbell River Appointment and Vancouver Property Sale Documents are relevant to the issue of mitigation of damages that may be raised by the Respondent.

[32] The Respondent notes that, while the Complainant may not be opposed to producing these property sale and medical appointment documents, it nonetheless requests an Order compelling their production.

B. Complainant

[33] The Complainant says that she has been on LTD status for eleven years, in compliance with the Respondent's insurer's requirements, and the fact that she suffers from a disability is not an issue between the parties.

[34] She objects to providing any further information about her health or medical records, including her GIDIP file, beyond what she has already disclosed as part of these proceedings. She argues that, as it is the Respondent's Policy that is in issue in her complaint, and not her specific disability, the medical and GIDIP documents requested by

the Respondent are not relevant to the hearing of the complaint. She says that the discrimination she has experienced is not occurring as a result of the specific nature of her disability of depression, but rather by reason of the Respondent's Policy that demands full disclosure of confidential medical information from all employees who are on disability status, regardless of the nature of their disabilities, and no matter how remote their disabilities may be to the ostensible objective of the Policy. The Complainant asserts that, because she has already provided the Respondent with a note from her doctor stating that her disability does not affect her ability to travel by air, there is no rational basis for her to have to disclose any further medical information.

[35] The Complainant further states that requiring her to provide the requested disclosure, even on an extremely restricted basis, would be tantamount to dismissing the complaint, as it would endorse and confirm the Respondent's discriminatory policy while denying her the right to be free of the unjustified intrusion by her employer into her private medical affairs.

C. Commission

[36] The Commission notes that the Respondent must clearly demonstrate that the documents sought are arguably relevant to the issues before the Tribunal. The Commission says the fact that the Complainant has a disability does not make her entire medical history arguably relevant and, as the Respondent has never disputed her disability in the past, there is no reason why the medical records are now relevant.

[37] The Commission submits that the Respondent's "disclosure request is overly broad and will result in punishing the Complainant for filing a complaint by making available the scope of her medical information." The Commission says that, whether a medical condition or issue would be relevant to the FFT form is ultimately irrelevant to the matter before the Tribunal if it does not relate to allegations in the complaint.

[38] The Commission also submits that the doctor-patient relationship and resulting medical records are protected by a common law privilege, which exists to keep information confidential that is necessary to the proper functioning of certain relationships and to

protect certain recognized privacy interests. The Commission argues that the four criteria from *Wigmore's Evidence in Trials at Common Law* (the *Wigmore* criteria)¹ apply in the circumstances of this disclosure request such that a case by case privilege in respect of patient-doctor relationships or medical records produced by that relationship applies to the documents requested.

[39] The Commission also notes that communications between patients and their physicians are confidential. The Commission suggests that, if the Tribunal decides to order some documents to be disclosed, there should be limits or conditions placed on who may receive, review or copy the documents. There should also be limits or conditions on the use of the information.

D. Reply of Respondent

[40] The Respondent replies to the Commission's submissions by stating that, "it is not a form of punishment to comply with disclosure obligations in a proceeding before the Tribunal, nor is it a form of punishment to participate in a fair hearing." The Respondent also rejects the Commission's reliance upon the *Wigmore* factors, noting that the GIDIP documents are created for the purpose of being disclosed by the Complainant to the Respondent's benefits administrator. The Respondent denies that it is asking for disclosure of the Complainant's complete medical history.

[41] The Respondent points out that the issue at this preliminary stage is whether documents sought in the Motion are arguably relevant to the matters in dispute, including defences it has legitimately raised, and that many of the statements made in the Complainant's submissions are in dispute and remain to be decided through a full hearing.

¹ At common law, the *Wigmore* criteria are applied to establish the existence of privilege in relation to communications:

- 1) The communications must originate in a confidence that they will not be disclosed;
- 2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
- 3) The relationship must be one which in the opinion of the community ought to be sedulously fostered; and
- 4) The injury that would enure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

V. Applicable Legal Principles

[42] The Tribunal has considered several motions for disclosure, out of which have arisen certain principles the Tribunal has come to rely upon to determine the pre-hearing disclosure obligations of parties. These principles may be summarized as follows:

- All parties have a right to a fair hearing, which requires that the, “...affected person be informed of the case against him or her, and be permitted to respond to the case.”²;
- In accordance with subsection 50(1) of the *Act*, each party has the right to a full hearing and must be provided with “full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations”;
- Each party is entitled to the disclosure of relevant evidence in the possession or care of the opposing party³;
- Where there is dispute as to whether a document must be disclosed, the principle of “arguable relevance” is applied. In order to be arguably relevant, there must be a rational connection between the documents requested and the facts, issues or forms of relief identified by the parties⁴;
- The arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case⁵;
- The burden of proving the rational connection rests with the moving party, but the threshold for the test of arguable relevance is low and the jurisprudence has acknowledged that the tendency is towards more rather than less disclosure⁶;
- The request for disclosure must not be speculative or amount to a fishing expedition⁷;
- The documents requested must be identified with reasonable particularity and the request must not be too broad or general⁸;

² See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para.53; *Leslie Palm v. International Longshore and Warehouse Union et al.*, 2012 CHRT 11 at para.9; *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at para.29.

³ Rule 6(1)(d) & (e) of the Tribunal’s *Rules of Procedure*; *Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 at para.40; *Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11 at para.26.

⁴ *Guay*, *supra* at para.42; *Warman v. Bahr*, 2006 CHRT 18 at para.6; *Egan*, *supra* at para.31; *Turner v. Canada Border Services Agency*, 2018 CHRT 1 at para.30.

⁵ *Warman*, *supra* at para.9.

⁶ *Warman*, *supra* at para.6; *Egan*, *supra* at para.31.

⁷ *Guay*, *supra* at para.43; *Egan*, *supra* at para.32.

⁸ *Guay*, *supra* at para.43; *Turner v. Canada Border Services Agency*, 2018 CHRT 9 at para.25.

- Where confidentiality or privacy is at issue with respect to medical documents, the Tribunal has held that these interests are overridden by the respondent's right to know the scope of the complaint against it as, "[i]n human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a Complainant's arguments. If a complainant bases the case on his/her medical condition, a respondent is entitled to relevant health information that may be pertinent to the claim."⁹;
- In the search for truth and despite the arguable relevance of evidence, the Tribunal may deny a motion for disclosure where the probative value of the documents sought would not outweigh its prejudicial effect on the proceedings, particularly "where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute".¹⁰ So long as the requirements of natural justice and the *Rules* are respected, in order to ensure the informal and expeditious conduct of the inquiry the Tribunal may exercise its discretion to deny a motion for disclosure.¹¹;
- Simply because a document has been ordered to be disclosed at this stage of the proceeding does not mean it will admitted as evidence at hearing or that it will be given significant weight by the Tribunal.¹²

VI. Issue

[43] Are the documents requested by the Respondent arguably relevant to this proceeding, and should the Tribunal order the Complainant to disclose them?

VII. Analysis

[44] The Tribunal in *Turner v. CBSA*¹³ concluded that an analysis of the allegations set out in a party's SOP is of great assistance in identifying the issues and, by extension, the scope of production of arguably relevant documents.

⁹ See *Guay, supra* at para.45; see also *Egan, supra* at para.34.

¹⁰ See *Brickner v. Royal Canadian Mounted Police, 2017 CHRT 28* at para.8; see also *Yaffa v. Air Canada, 2014 CHRT 22* at para.4; *Seeley v. Canadian National Railway, 2013 CHRT 18* at para.7.

¹¹ *Brickner, supra* at para.7; see also s.48.9(1) of the *Act*.

¹² *Guay, supra* at para 53; *Brickner, supra* at para.9; see also *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services, 2007 CHRT 28* at para.4.

¹³ 2018 CHRT 1 at para.43.

[45] According to the Commission's SOP (which was adopted by the Complainant and accords with the Respondent's statement of Issues in its SOP), what is specifically at issue in this matter is:

- a) whether the Complainant's disability was a factor in the alleged denial of travel privileges contrary to sections 7 and 10 of the Act;
- b) whether the Respondent's Policy is discriminatory in regards to employees with disabilities under section 10 of the Act;
- c) whether the Respondent can provide a justification that is non-discriminatory and not a pretext; and,
- d) if there was or is a discriminatory practice within the meaning of the Act, what remedies should flow?

[46] In order to prove such allegations, the Complainant will have to establish on a balance of probabilities that:

- a) She has a disability;
- b) She was adversely differentiated against in respect of her employment; and
- c) Her disability was a factor, though not necessarily the sole factor, in the adverse treatment.¹⁴

[47] Also, with respect to section 10 of the *Act*, the Complainant will have to prove that her employer has established or pursued a policy or practice that deprives or tends to deprive her of employment opportunities on a prohibited ground of discrimination.

[48] If there is a finding of discrimination, the Complainant will ask the Tribunal to order remedies, including an award of damages for pain and suffering and compensation for losses allegedly incurred by the Complainant by not being able to travel under the Respondent's travel privileges Policy, or at a reduced rate with other airlines.

[49] The Respondent disputes that the Complainant was denied travel privileges under the Policy on the basis of her disability. The Respondent has indicated that, if it is established that the FFT form is *prima facie* discriminatory, it can establish that the

¹⁴ See *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII) at para.69, citing *Moore v. British Columbia (Education)*, 2012 SCC 61 at para.33 and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para.35.

provision of safe air travel is a *bona fide* and reasonable justification for requiring a FFT form prior to flying in these circumstances.¹⁵

A. Documents confirming disability

[50] The Respondent notes that, in her SOP, the Complainant committed to disclosing documents confirming her disability as part of these proceedings. The Respondent is not satisfied with the limited documentation provided by the Complainant in this regard. As noted earlier, the Respondent then broadened the scope of the medical documents requested to include all medical documents in the Complainant's possession or control relating to: a) the specific characteristics of her disability, and b) any other medical condition or issue described in the Respondent's FFT form, regardless of whether it relates to her disability.

[51] The Respondent argues that, in order to establish a *prima facie* case of discrimination, the Complainant must prove on a balance of probabilities that she has a disability, as this goes to the core of her complaint. Both the Complainant and Commission note that the existence of the Complainant's disability has never been questioned before. Indeed, it is her status as an employee receiving LTD benefits that has resulted in her experiencing the alleged discriminatory treatment by the Respondent as a result of its Policy.

[52] In its Notice of Motion the Respondent states that, "[e]mployees are eligible for GIDIP benefits if they are Totally Disabled, defined in the plan as a medical condition preventing the employee 'from performing any and every gainful occupation for which the employee is reasonably fitted by education, training or experience.'" By acknowledging that she receives GIDIP benefits, the Respondent appears to acknowledge that she has a disability for the purposes of this complaint.

¹⁵ In order to prove that a standard or requirement is *bona fide*, a Respondent must generally prove that: i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed; ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and iii) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that it cannot accommodate persons with the characteristics of the complainant without incurring undue hardship, considering health, safety and cost (*B.C. (Sup't of Motor Vehicles) v. B.C.C.H.R.* [1999] 3 S.C.R. 868 (*Grismer*) at para.20 and sections 15 (1)(a) and 15(2) of the *Act*).

[53] Of course it is the Tribunal that decides whether the Complainant has a disability for the purposes of the *Act*. The Federal Court of Appeal has defined disability in a legal sense to be a physical or mental impairment that results in a functional limitation, or is associated with a perception of impairment.¹⁶ The evidence required to prove that a Complainant has a disability varies from case to case. However, the case law suggests that a Complainant is not required to establish proof of a disability by way of a medical diagnosis.¹⁷

[54] I am of the view that the Respondent's more compelling argument is that documents relating to the Complainant's disability are arguably relevant to this proceeding because she has put the specifics of her disability in issue herself. She asserts that the FFT form demands, "far more private and confidential information" of her than is required of non-employee passengers with an identical or similar disability, and more than is ostensibly needed for the purposes of the Policy. She says in her Reply to the Respondent's SOP that her "medical condition is not obviously visible nor is it relevant to the safety of a flight." In the Respondent's written submissions in support of its Motion, it has included a letter from the Complainant's counsel stating that the reason the Complainant refuses to disclose the requested medical documentation goes to, "the core issue before the Tribunal, namely, 'Is the Respondent's policy requirement for disclosure of this personal information discriminatory?' It is the Complainant's position that verification by her physician that she is not suffering from any disability that would affect her ability to travel is entirely sufficient for the purposes of the Respondent's operations."

¹⁶ *Desormeaux v. Ottawa (City)*, 2005 FCA 311 at para.15.

¹⁷ See *Nova Scotia Liquor Corporation*, 2016 NSCA 28 at paras.63-76.

[55] The Respondent is correct in stating that the merits of the complaint and the parties' respective positions are not at issue at this preliminary stage and such a definitive statement by the Complainant remains to be proven at hearing. This motion is about whether the documents sought by the Respondent meet the low threshold of arguable relevance to matters that have been raised in this proceeding. This includes the Respondent's position with respect to both the Complainant's case and its own defence. The Tribunal in *Egan, supra* stated at paragraph 34:

Where medical documents are concerned, this Tribunal has held that where confidentiality or privacy is at issue, these interests are overridden by the respondent's right to "know the grounds and scope of the complaint against it" (*Guay* at para.45). As stated in *Guay*, "[i]n human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a Complainant's arguments. If a complainant bases the case on his/her medical condition, a respondent is entitled to relevant health information that may be pertinent to the claim" (see *Guay* at para.45; see also *Palm* at para.11).

[56] The Respondent argues that it requires the Complainant's medical records in order to defend itself against the claim of discrimination. It says it requires documents detailing the specifics of the Complainant's disability so that it may respond to her allegations, including those regarding hypothetical passengers possessing identical characteristics. The Respondent submits that, in order to argue undue hardship as part of its defence to the complaint, it must be able to respond to the Complainant's allegations about the nature of her alleged disability and whether it is relevant to the purposes of the Policy, including flight safety.

[57] The Complainant says in her submissions to the Motion that, if the Tribunal orders disclosure of any medical documents, it will in essence be dismissing her complaint, as this would endorse and confirm the Respondent's discriminatory policy while denying her the right to be free of the unjustified intrusion by her employer into her private medical affairs. I cannot agree with this statement. The complaint will only be dismissed if the Complainant fails to prove that she was adversely differentiated against in respect of her employment and that her disability was a factor in that adverse treatment, or if the Respondent proves that it has a *bona fide* reason for its Policy requirements. Ordering the

Complainant to disclose further documents in the case management process does not amount to a dismissal of the complaint.

[58] I agree that the Complainant has put the specifics of her disability in issue in her complaint. As such, procedural fairness and Tribunal *Rule* 6(1)(d) entitle the Respondent to respond to these allegations with adequate knowledge about the Complainant's disability.

[59] The Respondent has requested that I order disclosure of "all medical documents in the Complainant's possession or control relating to: a) the specific characteristics of her disability." The Respondent agrees that the Complainant's GIDIP file will contain such documents. The request for "all medical documents" relating to her disability appears to be overly broad when the Respondent agrees the documents in the GIDIP file will contain the information it is seeking. As such, I decline to order the Complainant to disclose *all* medical documents in her possession or control relating to the specific characteristics of her disability.

[60] In this case, the Complainant's disability has resulted in her being in receipt of LTD benefits through the Respondent's insurance administrator. In order to remain eligible for these benefits, the Complainant must continue to prove she has a disability for the purposes of the insurance plan by providing some medical documentation on a regular basis. It is fair to assume, therefore, that documentation confirming the Complainant's disability and providing sufficient information about the specifics of the disability would be contained in her GIDIP file. As such, I agree to order the Complainant to disclose certain documents from her GIDIP file, as described in the next section of this decision ("*b*) *GIDIP file*").

[61] With respect to the second part of the Respondent's broadened request for, "all medical documents in the Complainant's possession or control relating to: ...b) any other medical condition or issue described in the Respondent's FFT form, regardless of whether it relates to her disability", I decline to order disclosure of this category of documents.

[62] The Respondent suggests that this additional request satisfies the “reasonable particularity” threshold described in *Guay* more effectively than the documents listed in the Complainant’s SOP. I respectfully disagree with this assertion.

[63] The Respondent says that any medical documents in the Complainant’s possession or control that are directly relevant to the FFT form are relevant to this proceeding and to the dispute between the Parties about the requirement to complete one. While the Complainant does object to the extent of the confidential medical information required by the FFT form, her complaint is grounded in the Respondent’s requirement that, in order to utilize the employee travel privileges available under the Policy, she must first complete a FFT form, simply because she has a disability for which she is in receipt of LTD benefits.

[64] Although the disabling condition for which she receives LTD benefits is arguably relevant to the complaint, it is not clear from the Respondent’s submissions how documents relating to any other medical condition or issue described in the FFT form are arguably relevant to this complaint, including the Respondent’s defence. I am not satisfied that the Respondent has established the arguable relevance of this additional broad category of medical records requested. As such, I decline to order their disclosure.

B. GIDIP file

[65] The Respondent argues that it requires disclosure of the Complainant’s entire GIDIP file. In its Notice of Motion, the Respondent describes the GIDIP documents as: “documents and correspondence, including documents which contain medical information, submitted by the Complainant to the administrator and/or underwriter of a disability insurance plan through which the Complainant receives wage loss benefits by virtue of her employment with the Respondent.” The Respondent notes that the administrator is Canadian Benefits Consulting Ltd. and the underwriter is Manulife Financial Corporation (referred to by the Respondent as the “GIDIP Organizations”). Although it does not know the precise nature of all documents contained in the file, the Respondent is aware that the GIDIP file contains information the Complainant is required to provide to Manulife every 3

to 6 months in order to continue to qualify for LTD benefits, as is indicated in the Complainant's human rights complaint of May 15, 2015. All parties acknowledge that the Complainant has been on LTD status since 2007.

[66] The Respondent argues the GIDIP file is relevant to the following issues:

- i) the specific nature of the Complainant's disability;
- ii) the inconvenience and hardship that she has suffered by having to complete the FFT form as she alleges in her SOP;
- iii) whether medical information previously submitted to the Respondent by the Complainant directly, including a completed 2012 FFT form, is reliable;
- iv) whether relying on employees' self-evaluations or the opinions of their medical practitioners alone would result in undue hardship for the Respondent as it alleges in its SOP; and
- v) whether requiring the Complainant to complete a FFT form while receiving GIDIP benefits constitutes *prima facie* discrimination.

[67] I have already discussed the issue of the specific nature of the Complainant's disability and why I believe certain documents from the Complainant's GIDIP file are arguably relevant in relation to that issue.

[68] With respect to the Respondent's argument that the GIDIP file is relevant to the issue of the alleged adverse differential treatment and resulting inconvenience and hardship the Complainant has experienced as a result of the Policy, I note that the Complainant characterizes the requirement of having to complete a FFT form prior to being able to book travel under the Policy as onerous, intrusive and costly, as she must make an appointment to see her doctor to complete the FFT form.

[69] The Respondent disputes that a FFT form must be completed in respect of every travel request, as approvals to travel, and the duration of approvals, are based on individualized assessments of passengers' medical conditions by the Specialist. The Respondent suggests that, in any event, having to complete a FFT form in order to travel

does not constitute *prima facie* discrimination, nor does it cause the Complainant inconvenience or hardship, since she is required to obtain and submit similar medical information from a physician on a regular basis in order to continue to receive LTD benefits. The Respondent says the GIDIP file will show the nature and frequency of the forms that must be submitted in order to continue to remain on LTD status.

[70] I can see the arguable relevance of certain documents from the GIDIP file to the issue of whether requiring the Complainant to complete a FFT form while receiving GIDIP benefits constitutes *prima facie* discrimination, and to the damages remedy requested by the Complainant. However, I am not convinced that disclosure of the Complainant's entire GIDIP file is necessary.

[71] The Respondent is also requesting the GIDIP file because of two documents the Complainant has disclosed during this proceeding that touch on her medical condition. A FFT form from February 2012 says the Complainant suffers from a "previous history of depression now in remission" and "occasional anxiety and depressed moods, though these are mild". The second document is a brief letter dated February 9, 2018 from Dr. H Fourie asserting that, "Billie's disability does not affect her ability to travel by car, bus, train or air. There is no medical reason whatsoever to deny her access to travel by any means".¹⁸

[72] The Respondent says the GIDIP documents are arguably relevant to whether the third-party medical information and opinions submitted by the Complainant in this proceeding "are reliable and/or consistent with medical information submitted to the GIDIP Organizations for the purpose of obtaining wage loss benefits." It stresses the importance of relying on its Specialist to assess medical information in relation to its safety requirements. The Respondent says it will argue that it would experience undue hardship if it had to rely on either employees' subjective evaluations regarding safe air travel, or the opinion of an employee's family physician alone, as only its Specialist has the required

¹⁸ Although the Tribunal does not receive copies of the parties' documents during the Case Management process, it does receive the lists of documents exchanged between the parties as required by Rule 6(1)(d). I note in the Respondent's List of Documents, there is reference to Fitness for Travel forms dated September 7, 2012, September 30, 2013, and September 1, 2017.

knowledge to make this determination. The Respondent says that general medical practitioners do not have the expertise to advise about the rigours of air travel. I can see the arguable relevance of certain medical documents from the GIDIP file to the issues of reliability of evidence and the Respondent's undue hardship defence.

[73] With respect to the Commission's argument that the Complainant's medical records are subject to a common law privilege, I note that *Rule 6(1)(d)* of the Tribunal's *Rules* requires parties to disclose all documents in their possession relating to a fact, issue or form of relief sought in the case, "for which no privilege is claimed ". While the Complainant makes a brief reference in her submissions to the information required by the FFT form as being "privileged", she does not specifically argue that the medical information requested by the Respondent is privileged and so should not be ordered to be disclosed.

[74] In any event, as I have decided only to order disclosure of some of the documents from the Complainant's GIDIP file, and not her medical records directly from her physicians, I am not of the view that a common law privilege applies. As the Respondent points out, it is difficult to argue the GIDIP documents should remain privileged, given that they were created, presumably by the Complainant's physicians, for the purpose of being disclosed to the Respondent's insurer, in order for her to prove her eligibility for LTD benefits. As such, the first of the *Wigmore* criteria (as set out in Footnote 1) is not met.

[75] The fourth *Wigmore* criteria is also not met in my view, as I am not persuaded that any "injury that would enure to the [patient-doctor] relationship by the disclosure of the communication" is "greater than the benefit thereby gained for the correct disposal of litigation." The Tribunal has already held that, where confidentiality or privacy is at issue with respect to medical documents, these interests are overridden by the respondent's right to know the scope of the complaint against it as, "[i]n human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a complainant's arguments. If a complainant bases the case on his/her medical condition, a respondent is entitled to relevant health information that may be pertinent to the claim".¹⁹

¹⁹ *Guay, supra* at para.45; see also *Egan, supra* at para.34.

[76] The Respondent has identified the arguable relevance of some of the medical documents requested to its response to the complaint. As such, I agree that the Complainant's right to privacy with respect to the GIDIP documents ordered is overridden by the Respondent's right to present a complete defence, "for the correct disposal of [this] litigation."

[77] The Commission also argues that, if I do agree to order the disclosure of any of the Complainant's medical documents, I should impose limits or conditions on who may receive, review or copy the documents, and there should be limits or conditions on the use of the information. I will address this in my Order below.

[78] As I have already stated, while I agree that some of the documents contained in the GIDIP file are arguably relevant to some of the issues identified by the Respondent, I am not convinced that the Complainant must disclose her entire GIDIP file containing eleven years' worth of documents.

[79] Although the Complainant filed her human rights complaint with the Commission on May 15, 2015, apparently in response to the introduction of the Respondent's revised Policy, her complaint indicates the alleged discrimination complained about started in December of 2012 and is "current and worsening". She refers in her complaint and in her SOP to events that obviously happened prior to May of 2015, including not being able to travel to her mother's birthday and the issues she has had with travelling to Vancouver from Campbell River since she moved there in 2011. I note that she has also already disclosed a FFT form dated February 22, 2012. I can see the arguable relevance of viewing the medical documents that the Complainant has been required to submit every 3 to 6 months in order to continue to maintain her LTD benefits for the period of time relevant to the complaint. As such, I will order the Complainant to provide from her GIDIP file the documents she is required to submit every 3-6 months to the insurer in order to continue to qualify for LTD benefits, from February 2012 to November 2018.

C. Vancouver medical appointment documents

[80] As the Complainant has argued in her SOP that she has suffered personal damages as a result of the loss of access to her, “medical professionals skilled in the treatment of her specific disorder by reason of her inability to economically travel to their offices in the greater Vancouver area”, documents relating to the scheduling of medical appointments in the Greater Vancouver area, if they exist, are arguably relevant to the issue of remedy. As such, I order them produced.

D. Campbell River medical appointment documents

[81] The Respondent has requested documents relating to the Complainant’s efforts, if any, to obtain medical treatment or appointments in or around Campbell River at times material to the Complaint. I agree that such documents, if they exist, are arguably relevant to the issue of whether the Complainant was required to travel to Vancouver to obtain medical treatment and whether she suffered “personal damages” as a result of the alleged loss of access to this treatment as described in her SOP. These documents may also be relevant to the issue of mitigation of damages that the Respondent may raise. As such, I order them produced.

E. Vancouver property sale documents

[82] As the Complainant has argued that she has suffered personal damages from the “significant emotional distress resulting from being forced to sell her Vancouver real property once Reduced Rate Travel benefits were denied”, such documents are arguably relevant to the issue of remedy and to the issue of mitigation of alleged damages, if raised by the Respondent. As such, I order them produced.

[83] For the foregoing reasons, the motion is allowed in part.

VIII. Order

[84] That the Complainant immediately produce the following documents requested by the Respondent, namely:

- i) Those medical documents from her GIDIP file that she is required to file with the insurer every three to six months (or such other period as mandated by the GIDIP organizations) in order to maintain her eligibility for LTD benefits, from February 2012 to November 2018. These documents may only be relied upon for the purposes of this human rights hearing, and not for any other purpose or legal proceeding. Further, disclosure of these documents does not mean that they will be admissible as evidence at hearing, and any issues in this regard shall be dealt with during the hearing. If the Complainant wishes to object to any information contained in these documents becoming part of the public record, she should also raise this at the hearing.
- ii) All documents relating to her efforts to obtain medical care in Campbell River, as well as documents relating to medical appointments in Vancouver and the sale of her Vancouver property, at all times relevant to the complaint. If no further documents are available, the Complainant shall notify the Respondent in writing that, pursuant to a diligent search, no further documents that fall into these categories were located.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
November 9, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2242/6417

Style of Cause: Billie Mortimer v. Air Canada

Ruling of the Tribunal Dated: November 9, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

Raymond Hall, for the Complainant

Daniel Poulin, for the Canadian Human Rights Commission

Andrew Woodhouse, for the Respondent