Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 3
Date: January 31, 2019
File No.: T2157/3116

Between:

Jane Clegg

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Kirsten Mercer

I. Summary

[1] Air Canada is seeking further production of the Complainant's medical records relevant to this Complaint. While I have determined that the Respondent's request is overly broad, I am convinced that some of the medical records being sought by the Respondent are arguably relevant to the issues raised and the remedies sought in this Complaint and should be disclosed to the parties to this inquiry.

[2] The Tribunal acknowledges the sensitive personal nature of the documents sought on this motion and - more broadly - of the evidence being adduced in this Inquiry.

[3] The Tribunal affirms the collaborative efforts that have been made by all of the parties to ensure that sensitive and/or confidential records are handled with care and compassion in a respectful and proactive way. And I trust that that approach will continue.

[4] In considering this motion, the Tribunal has to balance the need to handle personal medical information with care and compassion, against the requirements of procedural fairness, and the right of all parties to know the case they have to meet. This is not an easy thing to do.

[5] The Respondent's motion for disclosure of the Complainant's medical records is granted in part. Some of the documents requested pass the threshold for arguable relevance and this information should therefore be disclosed. More precisely, I find that there is a rational connection between some of the documents requested and the facts, issues and remedies identified in the Complaint, as defined herein. While other aspects of the motion go beyond what I am prepared to Order, for the most part the request cannot be characterized as a fishing expedition as the documents sought would provide the Respondent with a full and ample opportunity to present its case.

[6] The reasons that follow explain the Tribunal's decision to compel the Complainant to produce further medical records, subject to some limits on how those records can be used.

II. Background

[7] In May 2012, Jane Clegg ("Ms. Clegg" or the "Complainant") filed a complaint with the Canadian Human Rights Commission (the "Commission") against Air Canada (the "Respondent"), her former employer, alleging adverse differential treatment on the basis of sex in the course of her employment as a pilot ("the Complaint").

[8] The Commission conducted an investigation into the Complaint and issued a report recommending that the matter proceed to an inquiry before the Canadian Human Rights Tribunal (the "CHRT" or the "Tribunal"). On June 15, 2016, the Complaint was referred to the Tribunal for inquiry.

[9] In April 2017, the parties advised the Tribunal that the disclosure process was complete and the matter was set down for a hearing to commence in October 2017.

[10] In September 2017, the Complainant provided a report from her treating psychologist, Dr. Jan Heney, who was scheduled to give evidence before the Tribunal.

[11] In October 2017, after dealing with a number of preliminary issues, the Tribunal began hearing evidence in this case. Air Canada sought and (in January 2018) obtained the Complainant's consent to the release of Dr. Heney's complete file from July 2009 to the date of the request, and continuing through the time period covering the hearing of this Complaint.

[12] Dr. Heney subsequently provided a copy of her file, including various records pertaining to the Complainant's medical treatment.

[13] On April 26, 2018, the Complainant called Dr. Heney to testify. Among other things, Dr. Heney testified about the Complainant's mental health during the time period at issue in the Complaint.

[14] Dr. Heney also made reference to a series of issues and events that predated the events described in the Complaint.

[15] More particularly, on cross-examination, Dr. Heney testified that in the course of her treatment of the Complainant, she had reviewed a series of medical records from the

Peterborough Regional Health Centre relating to the Complaint. These records had not been produced to the Respondent in response to its request for Dr. Heney's file.

[16] Dr. Heney testified that the Complainant's sick leave, which commenced in 2012, was the result of a work-related issue.

[17] Dr. Heney also testified that she had diagnosed the Complainant with an adjustment disorder, which had also not previously been raised in these proceedings to the Respondent.

[18] The Tribunal is aware that, on consent, some additional medical records from Dr. Heney's file were provided to the Respondent at the hearing. However, it became clear that further arguably relevant medical records may exist that have not been produced.

[19] The Respondent subsequently advised the Tribunal that it would be seeking further and better production from the Complainant with regard to her medical records.

[20] On July 6, 2018, the Respondent filed a motion (the "Medical Disclosure Motion") seeking disclosure of:

- The Complainant's complete medical records from January 1, 2008 to the present, and continuing, whether electronic or otherwise, including without limitation all clinical notes and records;
- A list of all of the physicians, health care professionals and hospitals that the complainant has seen or attended at since January 1, 2008 (a "List of Health Care Providers"); and
- A summary from the Ontario Health Insurance Plan ("OHIP") of her personal claims history, confirming all of the physicians, health care professionals and hospitals that the Complainant has seen or attended at since January 1, 2008 (an "OHIP Summary").

(the "Requested Medical Documents")

[21] The Complainant and the Commission responded to the Medical Disclosure Motion on August 9, 2018.

[22] The Respondent filed a Reply on August 17, 2018.

[23] For reasons unrelated to the Complaint or the Medical Disclosure Motion, the scheduled hearing dates were adjourned to the Spring of 2019.

A. The Complaint

[24] Ms. Clegg alleges that she experienced adverse differential treatment on the basis of sex in regards to a series of specific incidents occurring between July 2009 and April 2013, and in regards to Air Canada's response to these incidents.

[25] The Complaint raises a broader, systemic issue regarding Air Canada's response to gender harassment complaints made by female pilots at Air Canada. Specifically, in her Summary of Complaint, Ms. Clegg alleges widespread experiences of gender harassment among female pilots at Air Canada and a "systemic ambivalence that Air Canada displays towards harassment".

[26] In her Complaint and Statement of Particulars, the Complainant claims that the policies and practices of the Respondent have caused both financial and health consequences for her, and she notes the "…detrimental impact the Respondent's policies and procedures have caused to the complainant's health and wellbeing".

[27] Furthermore, the Complainant is seeking, among other things, compensation for pain and suffering that she claims was caused by the Respondent's discriminatory conduct.

[28] She also claims that her depleted state of health and wellbeing has limited her ability to find suitable alternate employment.

B. The Medical Records Sought by Air Canada

[29] As was detailed above, the Respondent is seeking an order to compel further and better production of the Complainant's medical records, including all clinical notes and records for the period from Jan 1, 2008 to the present.

[30] For the purposes of considering the parties' submissions, I have identified the following time periods as being covered by the Medical Disclosure Motion:

1. Prior to July 2009: medical records pertaining to the period before the events alleged in the Complaint. (the "Pre-Complaint Medical Records").
2. From July 2009 to the start of the Complainant's sick leave in 2012: medical records pertaining to the period running from the initial event alleged in the Complaint to the date on which the Complainant began her leave. (the "Pre-Departure Medical Records").
3. The start of the Complainant's sick leave in 2012 to the present (and continuing through the conclusion of the Hearing into this Complaint): medical records pertaining to the period running from the time the Complainant began her leave and continuing (the "Post-Departure Medical Records").

As noted above, the Respondent is also seeking a List of Health Care Providers and the OHIP Summary.

III. Issues

Medical Records

i. Are the Requested Medical Records protected from disclosure in this case due to privilege?
ii. Are any or all of the Pre-Complaint Medical Records arguably relevant to the issues raised in the Complaint?
iii. Are any or all of the Pre-Departure Medical Records arguably relevant to the issues raised in the Complaint?

iv. Are any or all of the Post-Departure Medical Records arguably relevant to the issues raised in the Complaint?
v. Should the Complainant be required to produce a List of Health Care Providers?
vi. Should the Complainant be required to produce an OHIP Summary?

Confidentiality

vii. If any Medical Records are ordered to be disclosed, what confidentiality measures (if any) ought to be put in place at this time to protect the Complainant's personal information?

Medical Records

A. Law

[31] As I have already outlined in an earlier ruling in this case (see *Clegg v. Air Canada*, 2017 CHRT 27), the Tribunal's authority to order pre-hearing production of a document flows from subsection 50(1) of the *Canadian Human Right Act,* R.S.C., 1985, c. H-6 *(*the *"Act"),* which states, in part:

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

Rule 6 of the Tribunal's *Rules of Procedure*, which provides for the exercise of this authority as follows:

> "(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
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> […]
>
> (d) 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;

> […]
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> (5) A party shall provide such additional disclosure and production as is necessary
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> […]
>
> (b) where the party discovers that its compliance with 6(1)(d)…is inaccurate or incomplete."

[32] It is well-established by case law, and not in dispute on this motion, that the standard for the disclosure of documents pursuant to Rule 6(1)(d) and (5) is that the documents must be arguably relevant to a fact, issue or form of relief sought, or identified by any of the parties. To be arguably relevant, there must be a nexus or rational connection between the document sought to be disclosed and a fact, issue or form of relief sought or identified by the parties (*Seeley v. Canadian National Railway*, 2013 CHRT 18 *("Seeley"*), at para. 6).

[33] The disclosure obligations that flow from these Rules, provide for the disclosure of arguably relevant records to the other parties. Arguably relevant records are not just those that might tend to prove the factual allegation being advanced in the Complaint, but also those that might tend to disprove it.

[34] Requests for disclosure "…must not be speculative or amount to a 'fishing expedition' (*Guay v. Royal Canadian Mounted Police,* 2004 CHRT 34 ("Guay"), at para. 43), but the bar for production of arguably relevant documents is a low one, and the trend is towards broader disclosure at the production stage (*Warman v. Bahr*, 2006 CHRT 18 at para. 6; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, at para 11 ("*Gaucher*")).

[35] In *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 ("TEAM"), the Tribunal held at para. 4:

> …The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get

> information or documents that are or could be arguably relevant to the proceedings. This does not mean that these documents or this information will be admitted in evidence or that significant weight will be afforded to them.

[36] However, the disclosure of arguably relevant documents does not mean that these documents will be admitted in evidence at the hearing of the matter (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para 5; see also *TEAM* at para. 4).

B. The Positions of the Parties

(i) The Respondent's Position

[37] The Respondent submits that a clear and direct nexus exists between the Requested Medical Records and the Complaint. In fact, the Respondent argues that it is the Complainant herself who has put her health and wellbeing, and therefore her medical history, in issue.

[38] The Respondent further notes that Dr. Heney's evidence raises new information and issues about the Complainant's health during the period that may be relevant to the Complaint, which it is entitled to test in its defense.

[39] Air Canada submits that the Requested Medical Records from 2008 onward are arguably relevant to:

a. whether workplace issues directly caused the Complainant to terminate her employment, as alleged;
b. whether the Complainant's health and wellbeing were detrimentally impacted by the workplace at Air Canada, as alleged; and
c. the damages the Complainant alleges she has suffered, including lost wages from her resignation effective April 3, 2013 to present, and the Complainant's ability to either work and/or to mitigate her damages by seeking alternate employment during those periods of time.

[40] The Respondent argues that Medical Records from the period prior to the first alleged incident are arguably relevant to the Complaint and should be produced.

[41] While Air Canada acknowledges that its request may be overly broad (*i.e*,. the Requested Medical Records may include records that are not arguably relevant to the Complaint), it submits that it ought to be permitted to consider all records to determine which are, in its view, relevant, in order to have a full and ample opportunity to respond to the Complaint.

[42] With respect to the need for any confidentiality measures, the Respondent submits that it continues to be open to collaboration with all parties to ensure the protection of sensitive information, however it is not seeking any such orders at this time.

[43] In its Reply submissions, the Respondent argues that, notwithstanding any privilege that might arise in regard to a patient's medical records in general, where a party to a Complaint has explicitly put her health in issue, that privilege is implicitly waived. In this regard, the Respondent relies on the Tribunal's ruling in *Guay, supra*, which states at para. 45:

> … The Respondent has established that there is a connection between the requested documents and the issues in dispute, particularly regarding the remedies sought. In human rights proceedings, when a complainant seeks compensation for physical injuries and for pain and suffering, he/she implicitly agrees to allow a respondent to have access to medical records or, in general, personal health information. The right to confidentiality of medical records no longer exists. In the present case, the Complainant is seeking financial compensation for physical injuries and pain and suffering. The right to confidentiality is therefore overridden by the Respondent's right to know the grounds and scope of the complaint against it. In 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.

(ii) The Complainant's Position

[44] The Complainant submits that personal health care records are protected from disclosure due to their sensitive and intimate nature, and that this protection is based in part on s. 7 of the *Canadian Charter of Rights and Freedoms*.

[45] The Complainant argues that medical records are considered privileged and that they should not be released without a patient's consent. She further submits that disclosure should only be ordered where there is clear and demonstrable evidence that the medical records would have probative value and that their production would not cause harm to the person from whom disclosure is sought.

[46] The Complainant submits that the Respondent has not demonstrated the relevance of the Requested Medical Records, and as such they should not be ordered produced.

[47] Furthermore, the Complainant argues that, as a condition of her pilot's licence, she is subject to regular medical assessments to determine her fitness to fly. The Complainant submits that the fact that she was deemed fit to fly in 2009, 2010, 2011 and 2013 alleviated any obligation to otherwise produce medical records in these proceedings.

(iii) The Commission's Position

[48] The Commission submits that the request for disclosure of the Requested Medical Records is overly broad, and that ordering their disclosure could result in punishing the Complainant for filing a complaint by making available the entire scope of her medical information.

[49] The Commission submits that the Respondent has failed to demonstrate that any medical record pertaining to the period before the events outlined in the Complaint is arguably relevant to this Inquiry. Moreover, it submits that the Tribunal should not order the disclosure of any record prior to the Complainant's resignation in 2012.

[50] The Commission highlights the importance, in general, of the privacy between a patient and her doctor. It notes that a common law privilege exists to protect medical records from undue disclosure.

[51] Finally, the Commission relies upon the language of the *Aeronautics Act,* R.S.C, 1985, c. A-2, that establishes, in part, the regulatory regime governing the holders of a pilot's licence, and that creates or articulates the existence of a privilege protecting medical information that is compellable within that regime.

IV. Analysis

A. The Medical Records

Disclosure Obligations and Doctor-Patient Confidentiality

[52] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to her medical records (see *Beaudry v. Canada (Attorney General)*, 2002 CanLII 61851 (CHRT), at para. 7 ("*Beaudry"*); *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 38296 (CHRT), at para. 3 ("*McAvinn*"). However, that right to privacy and confidentiality may cease when that person puts her health in issue (*McAvinn* at para. 4; *Guay* at para. 45; *Communications, Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*, 2005 CHRT 9, at paras. 11-13; see also *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 SCR 647 ("*Frenette"*); and, *M. (A.) v. Ryan*, [1997] 1 SCR 157, para. 38).

[53] In *Ryan,* the Supreme Court made it clear that the law of privilege should reflect relevant *Charter* values (in that case those affirmed by ss. 8 and 15). While in the present matter the Complainant relies on s. 7 of the *Charter*, she has not indicated how this constitutional provision should alter the analysis set out by the majority in *Ryan*. What's more, while the interpretation of the law of privilege must be consistent with *Charter* values, these values cannot eclipse the principles of fundamental fairness that require parties to disclose arguably relevant information about their Complaint, whether it supports the position taken in the litigation or not.

[54] In general, however, the Tribunal recognizes that a party's medical information may be protected from disclosure by privilege.

[55] In this case, the Complainant has put her mental health and wellbeing in issue, by alleging that the Respondent's approach to her complaint caused her "health and wellbeing" to suffer.

[56] The evidence of Dr. Heney before the Tribunal suggests that there may be a connection between the harassment at issue in the Complaint and the Complainant's leave from work that began in 2012.

[57] Finally, if the Complaint is substantiated, the remedies sought include, for example, compensation for pain and suffering, as well as for lost wages (which raises the extent to which the Complainant ought to have mitigated these losses through alternate employment). These remedies may require the Tribunal to determine the impact of those events alleged in the Complaint that were proven to have occurred on the Complainant's health and wellbeing, as well as how, and to what extent, those impacts may have limited her ability to find or perform another job.

[58] Determination of these issues will require the Tribunal to understand any pain and suffering that the Complainant has alleged, as well as any limitations on her ability to find alternate employment in the relevant time periods.

[59] What's more, the Respondent must be permitted to test the assertions being put forth by the Complainant, in light of all of the evidence which can fairly be said to bear on the issue, and not just those aspects of her medical file on which the Complainant seeks to rely.

[60] I find that in certain respects, the Complainant's claim of privilege cannot succeed as her interest in privacy is outweighed by the Respondent's interest in production*, i.e.* the interest of properly disposing of the litigation. In other words, to the extent the Complainant is seeking to place her health and wellbeing at issue in this inquiry, she cannot claim privilege to shield herself against the disclosure of those medical records that

would permit the Respondent to test her claims and allow the Tribunal to determine the truth thereof.

Medical Clearance to Fly

[61] The Complainant has argued that because she was cleared to fly following medical examinations in 2009, 2010, 2011 and 2013 that she has no obligation to provide further medical disclosure in the context of her complaint.

[62] The Tribunal has no knowledge of the nature of the medical clearance obtained by the Complainant, the extent to which such medical clearance addresses the issues before the Tribunal on this Complaint, or whether the results of the medical assessment are available to Air Canada (beyond the fact that the pilot has received her medical clearance).

[63] I do not find that the Complainant's medical clearance to fly, as she asserts, discharges the Complainant's disclosure obligations with regard to her medical file.

Privilege under the *Aeroautics Act*

[64] The Commission asserts that section 6.5(5) of the *Aeronautics Act* establishes a statutory privilege protecting patient-doctor communications where disclosure of medical information is required under section 6.5(1) *Aeronautics Act* (i.e., where a physician or optometrist reasonably believes that the patient may present a risk to flight safety).

[65] As articulated above, the protection of medical information from disclosure is well established in the Tribunal's jurisprudence, except where the medical information is put in issue in a Complaint.

[66] While the existence of a privilege is supported by the provisions cited by the Commission, the protection afforded by section 6.5(5) pertains specifically to disclosure pursuant to section 6.5(1), and has no bearing to the Tribunal's analysis on this motion.

What Records Must Be Disclosed?

[67] As I have noted above, I have identified three relevant time periods for the purpose of considering the disclosure issues on this motion:

(i) the Pre-Complaint Medical Records

[68] Despite the Respondent's submission that it ought to be provided with the Pre-Complaint Medical Records, the Respondent has not established a sufficient connection between the Pre-Complaint Medical Records and the facts, issues and remedies raised in this case to justify an order that the Pre-Complaint Medical Records be disclosed at this time.

[69] Therefore the Respondent's motion for disclosure of the Pre-Complaint Medical Records is denied.

(ii) the Pre-Departure Medical Records

[70] Based on the submissions of the parties, and the evidence adduced thus far, I find that the medical documents pertaining to:

- the Complainant's state of mind; and/or
- the Complainant's physical health to the extent that it contributed to her sick leave,

from July 2009 to the commencement of the Complainant's sick leave, are arguably relevant to the Complaint.

[71] I am satisfied that the Respondent's request in this regard is not in the nature of a fishing expedition, as it is based upon documents already disclosed to it by the Complainant, and on evidence adduced before the Tribunal. The events alleged in the Complaint are also alleged to have had an effect on the Complainant's physical or mental health, so the presence or absence of any connection between these two elements will need to be examined in the context of the Complainant's prior state of health in order to provide the Respondent with a full and ample opportunity to present its case.

[72] The Tribunal is not ordering the disclosure of all medical records covering this time period, but rather only those that pertain to the Complainant's allegations and/or to her sick leave.

(iii) the Post-Leave Medical Records.

[73] In the Complaint and the Complainant's Statement of Particulars, the Complainant raises issues and remedies that pertain to her health and wellbeing. Specifically, the inquiry into this Complaint may require the Tribunal to determine: (a) whether, or the extent to which workplace issues caused the Complainant to terminate her employment; (b) whether, or the extent to which the Complainant's health and wellbeing were harmed by her experience at Air Canada and how that harm might be compensated; and (c) whether, or the extent to which the Complainant ought to have been able to mitigate her losses by seeking alternate employment during this period.

[74] It is the Complainant who has put her health and wellbeing at issue in these proceedings, and it would not be consistent with the Tribunal's obligation to ensure that all parties have a full and ample opportunity to present their case to permit the Complainant alone to determine which aspects of her medical history are introduced into evidence, and which aspects are not.

[75] While it is undoubtedly a difficult aspect of the adversarial process, the Respondent must be allowed to test the Complainant's assertions with the benefit of all the arguably relevant documentary evidence. In the case of the Complainant's assertions about her health and wellbeing, the Respondent must have the ability to assess the Complainant's claims in light of all of the relevant documents in her medical file, in order to test the Complainant's assertions on these points.

[76] It is a central tenet of the adversarial process that only through the testing of claims and assertions can the Tribunal be best situated to make its determination on the issues raised by the Complainant.

[77] I am satisfied that medical records pertaining to the Complainant's health and wellbeing during the period running from the commencement of her sick leave to the present are arguably relevant to this Inquiry, and as such ought to be disclosed.

[78] I am aware of the Complainant's deep concern about disclosing medical records that are not arguably relevant to the Complaint. However, without the benefit of more

precise submissions from the Complainant with regard to any Post-Leave Medical Records that would not be arguably relevant to the Complaint, it is difficult for the Tribunal to further narrow the scope of its Order.

[79] In an effort to protect the Complainant's privacy to the greatest extent possible, and to mitigate against the disclosure of any non-relevant records, the Tribunal is prepared to receive, under Seal, a copy of any Post-Leave Medical Records that the Complainant wishes to have exempted from this Order, or in the event that the records are voluminous, a summary of any Post-Leave Medical Records, including dates, the name of the treating physician or practitioner, presenting complaint (the reason for seeking treatment), diagnoses, and treatment plan (if any).

[80] Subject to the objection of any party, the Tribunal will confidentially review those Post-Leave Medical Records or the relevant summaries under Seal, and will provide an exemption to this Order for any Post-leave Medical Records that I determine are not arguably relevant to the Complaint.

(iv) The Health Care Summaries

[81] The Respondent is also seeking a List of Health Care Providers seen or attended by the Complainant, and an OHIP Summary in respect of the same information.

[82] With regard to the List of Health Care Providers, I find that this document does not currently exist and that the Complainant is under no general obligation to create new records for the purpose of complying with her disclosure obligations (see *Gaucher,* para. 17). As such, I deny the Respondent's request for the List of Health Care Providers.

[83] With regard to the OHIP Summary, while I am of the view that such a document could contain information that is not relevant to this proceeding, I find that a document of this nature, is likely the most efficient way to capture the totality of the Complainant's mental and physical health care from July 2009 to the present, and can be redacted, if necessary, to remove any information that is not arguably relevant to the factual issues in this Inquiry.

Is the Obligation to produce arguably relevant documents limited to those in the Complainant's possession?

[84] The Complainant argues that she is not obligated to produce records that are not in her possession, and therefore was not obligated to produce her medical file.

[85] However, Rule 1(2) of the Tribunal's *Rules* states that they are to be "…liberally applied by each Panel to the case before it so as to advance the purposes set out in 1(1)". Among other things, the purpose of the *Rules* is to ensure that: "arguments and evidence be disclosed and presented in a timely and efficient manner" (Rule 1(1)(b)); and that "all proceedings before the Tribunal be conducted as informally and expeditiously as possible" (Rule 1(1)(c)). In this way, Rule 1(1)(c) captures and reflects subsection 48.9(1) of the *Act*.

[86] In the circumstances of this case, interpreting the word "possession" as it appears in rule 6(1)(d) to include those documents over which the Complainant has access and control, having the Complainant obtain and disclose arguably relevant medical documents that only she is entitled to obtain, will ensure that the purpose of the Tribunal's *Rules* is advanced. This interpretation appropriately extends the disclosure obligation to documents which may not currently be in the physical possession of a party, but which documents the party is legally entitled to obtain from their custodian.

[87] In addition, the Complainant has access to, and in the course of the hearing, has sought to rely upon, some aspects of her medical file. It would be unfair to allow the Complainant to select and disclose only those aspects of her medical file that support her case, without providing the Respondent the opportunity to test the evidentiary context and suggest that the Tribunal make an alternate determination based on a complete comprehension of the Complainant's medical evidence.

[88] Therefore, ordering the Complainant to obtain and disclose her medical records is the most informal, timely and efficient manner of retrieving any of these arguably relevant documents. It also involves the Complaint obtaining possession of documents over which she already has a unique right of access. Aside from the potential cost of having to obtain these records, there does not seem to be any prejudice to the Complainant in proceeding in this manner.

B. Protecting the Confidentiality of Ms. Clegg's Confidential Medical Records

[89] The Tribunal acknowledges the sensitivity of the records at issue, and recognizes the need for all parties to feel that their privacy is protected to the greatest extent possible, subject only to the requirements of the Tribunal's proceedings.

[90] As such, limits on use and access to such information may be warranted and can be justified as appropriate limits on the disclosure of otherwise privileged information, or through the Tribunal's statutory authority to make orders to protect confidential information in pursuant to section 52 of the *Act*.

[91] Both in her written submissions on this motion and in her oral submissions already made at the hearing into her Complaint, the Complainant has spoken passionately about how difficult it is to have her deeply personal medical records made even somewhat public in the course of these proceedings.

[92] The Tribunal acknowledges this difficulty, and also recognizes the efforts made by all parties to proceed with care and sensitivity as we navigate this challenging aspect of the hearing into this Complaint.

[93] While each of the parties made some submissions on the request for confidentiality measures, there does not appear to be a dispute among them in this regard.

[94] As the Tribunal has previously ruled, "the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure" (*Yaffa,* para. 12, citing *M. (A.)* at para. 33). In cases where the Tribunal has ordered the disclosure of medical records, it has on occasion put conditions on the disclosure to protect the privacy and confidentiality of the information (see, for example, *Guay*, para. 48; see also *McAvinn,* para. 20; *Beaudry,* para. 9; and *Palm v. International Longshore and Warehouse Union, Local 500, et al.*, 2012 CHRT 11, para. 19(3)).

[95] Furthermore, the *Act* provides the authority to make a confidentiality order in appropriate circumstances.

[96] Section 52 of the *Act* states:

> **52 (1)** An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
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> **(a)** there is a real and substantial risk that matters involving public security will be disclosed;
>
> **(b)** there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
>
> **(c)** there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or
>
> **(d)** there is a serious possibility that the life, liberty or security of a person will be endangered.
>
> **(2)** If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

[97] Based on the submissions of the Complainant on the motion, and her comments on the issue surrounding her personal medical information at the hearing, I find that the public disclosure of her personal medical information is likely to cause Ms. Clegg genuine anguish. That being said, procedural fairness requires that the Respondent know the case that it must meet.

[98] As this is a motion for disclosure, I do not believe, at this stage, that there is a need to resolve the issues of the broader public access to this information.

[99] There may be a real and substantial risk that the disclosure of personal matters in the public forum of a hearing could cause undue hardship to Ms. Clegg. While I am not required to make such a determination at this stage, the Tribunal remains open to making further orders pertaining to the confidentiality of the Requested Medical Records, as required and pursuant to the *Act*.

[100] I am satisfied that some confidentiality measures (such as limitations on access and use of the Requested Medical Records described herein) are appropriate in the circumstances of this Complaint to protect the privacy of Ms. Clegg's medical records at this stage. As such, the records ordered disclosed below shall be disclosed only to counsel for the Respondent and to counsel for the Commission.

[101] In addition, the Respondent and the Commission may each identify one representative to review the medical records that have been ordered disclosed herein, for the sole purpose of providing instructions to counsel (the "Designated Individual"), and will provide the Tribunal with notice in writing of the name of that representative.

[102] The medical records ordered disclosed on this motion shall not be disclosed by the Respondent or by the Commission to any other individuals or entities without prior permission from the Tribunal.

[103] Additionally, the documents may not be used for any purpose outside of the present inquiry, and the documents must be returned to the Complainant at the conclusion of the inquiry.

[104] It should be noted that this ruling relates to the question of the disclosure and production of medical documents. Any question regarding the admissibility of these documents into evidence, or confidentiality measures arising therefrom can be addressed at the hearing.

V. Order

A. Disclosure

[105] Exercising my discretion in accordance with the purposes of the Canadian Human Rights Tribunal's *Rules of Procedure (03-05-04)*, I make the following orders:

1. The Complainant shall obtain and disclose Pre-Departure Medical Records pertaining to:

    - the Complainant's state of mind; and/or

- the Complainant's physical health, to the extent that it contributed to her sick leave.

2. The Complainant shall obtain and disclose Post-Departure Medical Records, subject to any exceptions provided for by the Tribunal in the present ruling.

3. The Complainant shall make a personal health information access request for her Personal Claims History of the Ministry of Health and Long Term Care and disclose the resulting OHIP Summary to the parties.

B. Confidentiality

[106] Exercising my discretion in accordance with the purposes of the Canadian Human Rights Tribunal's *Rules of Procedure (03-05-04)*, and pursuant to s. 52 of the *Act*, I make the following orders:

1. The documents ordered disclosed herein shall be disclosed only to counsel for the Respondent and to counsel for the Commission.

2. The Respondent and the Commission may each appoint one representative to review the documents that have been ordered disclosed herein for the sole purpose of providing instructions to counsel.

3. The parties shall provide notice to the Tribunal in writing of the name of the Designated Individual.

4. The documents ordered disclosed herein shall not be disclosed by the Respondent or by the Commission to any other entities without prior permission from the Tribunal.

5. The documents ordered disclosed herein may not be used for any purpose outside of the present inquiry.

6. The documents ordered disclosed herein must be returned to the Complainant at the conclusion of the inquiry.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
January 31, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T257/3116

Style of Cause: Jane Clegg v. Air Canada

Ruling of the Tribunal Dated: January 31, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Jane Clegg, for the Complainant

Daniel Poulin, for the Canadian Human Rights Commission

Karen M. Sargeant and Rachel Younan, for the Respondent