

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2019 CHRT 10

Date: March 1, 2019

File No.: T2220/4217

Between:

T. P.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Colleen Harrington

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I. Introduction

[1] The Complainant, who was diagnosed with a learning disability as a child, has twice tried to enroll in the Canadian Armed Forces (CAF). Each time he has written the mandatory Canadian Forces Aptitude Test (CFAT). In 2009, he achieved a score that was low, but he was permitted to proceed to the next stage of the application process, which was the medical assessment. His application file ended up being closed because it lacked certain required medical information. When the missing information was eventually provided, he says he was advised that he would have to re-apply, which meant having to write the CFAT again. It appears that his application process did not continue at that time.

[2] In 2014, he took steps to re-apply to the CAF by taking the CFAT for the second time. This time, his score did not meet the minimum required to enrol in the CAF. He says that, after his 2014 re-write, he was told by the CAF that he could only take the CFAT a third time if he first provided proof of academic upgrading, and that no forms of accommodation would be provided when taking the CFAT. As such, he has filed a human rights complaint alleging that the CAF discriminates in its hiring policies and practices, contrary to sections 10 and 7 of the *Canadian Human Rights Act* (the *Act*).

[3] The Respondent says that there is insufficient proof that the Complainant provided the CAF with notice of his learning disability or that he requested accommodation relating to this disability prior to taking the CFAT, either in 2009 or in 2014. In the alternative, the Respondent says the CFAT is a *bona fide* occupational requirement (BFOR).

[4] The Canadian Human Rights Commission (Commission) argues that, as the CAF's express policy at all times relevant to this complaint has been that no forms of accommodation will be granted or considered with respect to the CFAT, there would have been no point in the Complainant making a request for accommodation, as human rights law does not impose an obligation on a complainant to request accommodation when the respondent's express policy states that any such request will be denied.

[5] As part of the Tribunal's case management process, the parties have exchanged Statements of Particulars and witness lists, and have disclosed to one another

documents in their possession that they believe are arguably relevant to the issues the Tribunal must consider and decide. Upon receiving some of the Complainant's medical documents that include information relating to his psychological, psychoeducational and psychiatric history, the Respondent filed a Motion for Disclosure of further medical documents. The Complainant objects to what he considers the overly broad scope of this Disclosure Motion and, due to the types of documents requested, has filed this Motion for Confidentiality Orders.

[6] Both the Respondent and the Commission consent to keeping the Complainant's identifying information confidential throughout the proceeding. However, the Commission has proposed slightly different terms for the Confidentiality Order than those requested by the Complainant, based upon the Tribunal's recent decision in *Mr. X v. Canadian Pacific Railway*¹. Both the Complainant and Respondent consent to the Commission's proposed terms.

[7] I agree to grant the Complainant's request for an Order of Confidentiality, although I am of the view that if I were to agree to order all of the terms proposed by the Commission, I would not be striking the appropriate balance between the potential undue hardship caused to the Complainant through disclosure of his personal medical information, and the societal interest in conducting a public inquiry.

II. Confidentiality Motion

[8] The Complainant has asked that I make my decision with respect to this Confidentiality Motion prior to issuing my rulings on the Disclosure Motions that have been filed by the Respondent and the Commission, which I have agreed to. The Complainant requests the following: that he, "be referred to as T.P. in all further motions, submissions (both written and oral), hearings, discussions, rulings and decisions over the course of this proceeding." He also requests that there be a ban on the publication of his, "personal information, including, without limitation, name, occupation, date of birth, home address, email address, telephone number and names of family members (the "Identifying Information")."

¹ 2018 CHRT 11 (*Mr. X*)

[9] In support of this Motion the Complainant advises that he has already disclosed certain documents to the Respondent that indicate the following: he was diagnosed with a learning disability when he was 5 years old; his intellectual ability is at the low end of average in academics; he had a modified program in school with resource support; he had a past psychiatric condition. Appended to his Notice of Motion are three medical documents already disclosed to the Respondent, as well as two requests for the release of further medical information made by the Respondent at the time of the Complainant's first application to the CAF, and completed by a psychologist who has treated the Complainant. I note that the Complainant is identified by a different last name in these documents than the one used in this proceeding.

[10] The Complainant says that, after he provided the Respondent with medical documents he considered to be relevant to his complaint, the Respondent brought a Motion seeking, "very broad document production relating to [his] psychiatric and psychological condition." The Complainant says that the information already provided during the course of this proceeding, and that is being sought by the Respondent, is of a highly personal, sensitive and private nature related to his sense of identity and dignity.

[11] While he realizes he has put his learning disability at issue by bringing this human rights complaint, and that the Tribunal's hearing will be public, he says he did not anticipate the scrutiny into areas of his mental health. He views the issues raised by his complaint to be of national importance, given the CAF's role in protecting Canadians and contributing to international peace and security, and believes his complaint could garner media attention. He points out that the CAF's hiring policies and practices have been in the national news recently with the Chief of Defence Staff himself saying the military has failed to adequately integrate women and minorities based on antiquated recruiting templates.

[12] The Complainant is very concerned that, if his identity becomes public through this proceeding, he will, "experience stigma, both personally and professionally, with respect to perceptions about his cognitive abilities and mental health", and that this stigma could affect his future job opportunities, as well as his own self-respect and sense of self-worth. He says he has never made public his learning disability or his psychiatric or psychological history and that the decision to disclose an intellectual

impairment like his is, “a very personal decision and the chilling effect of a loss of privacy with respect to such information outweighs the public interest in making” his identity known.

[13] In accordance with the request to anonymize the complaint and keep his identity confidential, the Complainant asks that the Order require that his Identifying Information be redacted from any documents filed with the Tribunal, and suggests that the Tribunal maintain one file with the redacted documents as its public record, and a separate, sealed, file with the unredacted documents, that would be unavailable to the public.

[14] The Commission proposes slightly different terms based upon the Decision in *Mr. X*, in which the Tribunal Member ordered that the entire Tribunal record be kept confidential subject to certain limited exceptions. The end result was that the only records that the parties or Tribunal could make available to the public were anonymized versions of the Complaint, the Statements of Particulars and Replies, and the Decision itself. The Commission is proposing a similar Order in this case, as it would avoid the necessity of having to redact several documents, thus imposing a lesser administrative burden on the parties and the Registry while still respecting the Complainant’s interests.

III. Issue

[15] Should I agree to the Complainant’s confidentiality Motion and order terms as proposed by the Commission?

IV. Legal Authority

[16] The Complainant brings the Motion pursuant to Rule 3 of the Tribunal’s *Rules of Procedure* and notes that subsection 52(1) of the *Act* explicitly provides the Tribunal with the authority to make confidentiality orders in appropriate circumstances:

Hearing in public subject to confidentiality order

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

...

(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;

V. Analysis

[17] All of the parties agree that the Complainant's Identifying Information should be anonymized and that the Tribunal's record should be kept confidential as proposed by the Commission. While I agree to anonymize the complaint, I am of the view that, as we are still at the preliminary stages of this proceeding, I cannot agree to such a comprehensive confidentiality order while still complying with the legislative requirement to ensure a public inquiry.

[18] The Tribunal in *Mr. X* was dealing with a somewhat different situation. While the Member had made an oral confidentiality order with respect to medical evidence relating to the Complainant and his immediate family during the inquiry into the complaint, she had the advantage of particularizing the terms of her order at the end of the proceeding, when the Tribunal's record was essentially complete.

[19] While the Respondent in *Mr. X* agreed that the Decision should be anonymized to the extent that it would not contain the names of the Complainant or his family members, it objected to the request to further anonymize the Decision by not naming the cities involved, or many of the witnesses. The Complainant also wanted to keep information about the disability and self-harming behaviour of one of his children confidential; however, the complaint had been made on the basis of both disability and family status, which included the Complainant's parental responsibilities to an adult child with disabilities. The Respondent argued that, by not referring to the child's disability and behaviour, this could undermine the Tribunal's statutory mandate to act fairly and, through its public decisions, provide guidelines for Canadian society on what constitutes a discriminatory practice. With respect to the importance of ensuring Tribunal

proceedings remain public, the Member in *Mr. X* stated: “Tribunal cases are meant not only to provide a place for an individual to have his allegations of discrimination heard and decided, but also to educate the Canadian public and serve as precedents to potential parties on issues of human rights at the federal level and sometimes the provincial level as well.”²

[20] However, the Tribunal Member did not want her Decision to negatively impact the Complainant’s child, whose situation was material and relevant to the inquiry, but who was not a complainant or witness at the hearing and who had not asked to be involved in the proceeding. There was evidence that the child was very vulnerable and had experienced bullying and exhibited, “self-harming, possibly suicidal behaviour.”³ The Member was of the view that, “there is a real and substantial risk that the disclosure of the names of many of the witnesses and individuals named in the documentary evidence, and the naming of the cities involved in this Complaint, would reasonably lead to the identification of the Complainant and his family”, which in turn would cause undue hardship to the Complainant’s children, each a “person involved”, such that the need to prevent disclosure of their names outweighed the societal interest that the inquiry be held in public.⁴ The Member did not agree, however, to anonymize the child’s disability and its physical, cognitive and psychological impacts, as to do so would, “gut the rationale of ... a significant portion of” her Decision and would negatively affect its “precedential and educational” value.⁵

[21] As the Tribunal is a venue of public record, members of the public with an interest in a particular case, including the media, may request access to documents filed by the parties to a complaint. The Member in *Mr. X* considered that, even if the medical documents were kept confidential, the Complainant’s name could appear on other documents in the Tribunal’s file, thus negating the purpose of the confidentiality order. In order to protect the Complainant’s child she decided to seal the Tribunal’s record, with the exception of the anonymized Decision, Complaint, and Statements of Particulars of the parties, excluding the document and witness lists.

² *Ibid*, at para.13.

³ *Ibid*, at para.17.

⁴ *Ibid*, paras.16-22.

⁵ *Ibid*, para.23.

[22] Again, the Member in *Mr. X* had the benefit of knowing exactly what was in the Tribunal's record and knew that no additional documents, aside from her Decision, would become part of the record. In the present case, we are still in the preliminary stages of the proceeding: the parties are awaiting the results of a psychoeducational assessment of the Complainant, there are still pre-hearing Motions for Disclosure to be decided, and it is possible that others could be filed before the matter proceeds to hearing.

[23] The Complainant in this matter has not requested that the nature of his medical conditions be kept confidential in the proceeding. He does not object to the hearing taking place in public or, necessarily, to his *relevant* medical information becoming public, given that he has filed a complaint on the basis of his disability. He is only asking that his identity be concealed as part of the proceeding, given the nature of the medical information requested by the Respondent and the stigma he could face relating to his perceived cognitive abilities and mental health.

[24] It is difficult to dispute that there is still a stigma surrounding mental illness, real or perceived, in our society, and I understand the Complainant's concerns about the disclosure of such medical information. His concern about the impact of the public disclosure of this information on his feelings of self-worth and possible future job prospects is legitimate.

[25] I note that, even if I agree to order disclosure of the documents sought by the Respondent, this does not necessarily mean they will become evidence at the hearing. At this preliminary stage, these documents will only be shared amongst the parties; they do not become part of the Tribunal's record. The issue of what documents or medical issues are relevant has not yet been decided and I see no reason for the Complainant's medical information to become part of the public record at this time. The Tribunal is already in possession of some of the Complainant's medical documents appended to the Respondent's Disclosure Motion and his own Motion for Confidentiality Orders and I agree that, at this pre-inquiry stage, any medical documents in the Tribunal's possession should remain confidential.

[26] However, if I were to grant the Order as suggested by the Commission, which would result in the entire Tribunal record being sealed with the exception of the anonymized Complaint, Statements of Particulars and Replies, and any Rulings or Decisions made in this matter, this would mean that all of the evidence filed by the parties during the hearing will remain confidential. This would include not only medical information about the Complainant, but other documentary evidence as well. While I can of course refer to evidence filed by the parties in my Decision, members of the public who seek to view the exhibits filed with the Tribunal during the inquiry would be prevented from doing so.

[27] The Commission's suggested Order would also make *all* pre-hearing motion documents confidential, including the Commission's November 9, 2018 Notice of Motion for the production of documents by the Respondent, even though none of the parties has raised any confidentiality issues with respect to that Motion. I cannot agree to such a broad Order affecting the public nature of the inquiry at this time.

[28] I do agree that the Complainant's Identifying Information should be anonymized throughout this proceeding, including at hearing and that there be a ban on the publication of his identity. Anonymizing the Complainant's identity will not change the public's ability to understand the evidence or the issues to be decided in this case, nor will it affect the fairness of the Tribunal's proceeding or the precedential value of any decisions. However, there is a very real possibility that the Complainant could experience undue hardship if his identity is publicized, and information relating to his cognitive and intellectual abilities and past psychiatric condition becomes publicly available in the course of the proceeding. As such, I will require that any documentary evidence filed with the Tribunal at hearing, including the Report of the Expert retained by the Commission to conduct a psychoeducational assessment of the Complainant, be anonymized by redacting the Complainant's Identifying Information. If a party wishes to argue during the inquiry that documentary evidence admitted at hearing should also be kept confidential, either by sealing the Tribunal's record or otherwise, this should be raised with me at the time.

[29] I recognize that the Commission's suggested terms for the Confidentiality Order are meant to avoid the necessity of having the parties and the Tribunal's Registry Office

redact many documents and, as in *Mr. X*, there are many documents in the Tribunal's record that identify the Complainant, such as summaries of the Case Management Conference Calls. In considering the particular facts and circumstances of this case, I have decided to modify the terms proposed by the Commission in order to adequately balance the Complainant's privacy interest in relation to his past or present medical conditions with the *Act's* requirement that the Tribunal's inquiry and record remain public. As the Tribunal stated in *Clegg v. Air Canada*⁶: "The Tribunal is empowered to take any measures necessary to ensure the appropriate balance between confidentiality and the societal interest in a public hearing."

VI. Order

[30] As such, I make the following Order:

Pursuant to section 52(1)(c) of the *Act*, certain aspects of the Tribunal's record shall be kept confidential, as follows:

1. The Complainant must be referred to as T.P. in all further motions, submissions (both written and oral), hearings, discussions, rulings and decisions over the course of this proceeding.
2. There is a ban on the publication of the Complainant's personal information including, without limitation, names, occupation, date of birth, home address, email address, telephone number and names of family members (the "Identifying Information").
3. The Complainant will deliver a copy of his Complaint to the Tribunal Registry Office, the Commission and the Respondent, that anonymizes any Identifying Information.
4. The Complainant, Commission and the Respondent will file and exchange copies of their respective Statements of Particulars and/or Replies (including witness lists and document lists) that anonymize any Identifying Information.
5. The Complainant, Commission and the Respondent will file and exchange copies of their respective submissions relating to the Commission's November 9, 2018 Notice of Motion (relating to the Respondent's draft DAOD on "Learning Disabilities") that anonymize any Identifying Information.

⁶ 2017 CHRT 27 at para.47.

6. The Commission and the Respondent must keep confidential all Identifying Information.
7. The parties may only use the documents produced in this proceeding for the purposes of the proceeding and must not disclose them to any outside person or entity.
8. The Tribunal's pre-inquiry record in this matter shall be kept confidential (i.e. sealed), with the only exceptions being that the following documents may be made available to the public:
 - a. The anonymized Complaint referred to in para.3 above.
 - b. The anonymized Statements of Particulars and/or Replies referred to in para.4 above;
 - c. The anonymized submissions relating to the Commission's November 9, 2018 Notice of Motion referred to in para.5 above;
 - d. Any other anonymized pre-hearing Motions and replies filed by the parties not relating to the Complainant's medical records;
 - e. Any anonymized Rulings that the Tribunal may come to issue in the proceeding.
9. The Tribunal does not agree at this time to order that documents filed as evidence during the inquiry into the complaint (i.e. at hearing) shall be kept confidential, aside from ensuring that the Complainant's Identifying Information is redacted or otherwise anonymized. Any party wishing to request that documentary evidence be sealed must make an application during the hearing or in closing submissions, and the Tribunal will address this in its final written Decision.
10. The ban on the publication of the Complainant's Identifying Information remains in effect during the inquiry into the complaint (i.e. the hearing).

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
February 28, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2220/4217

Style of Cause: T.P. v. Canadian Armed Forces

Ruling of the Tribunal Dated: March 1, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Tom Beasley, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Helen Park, for the Respondent