

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2020 CHRT 2
Date: February 18, 2020
File No.: T1941/2113

Between:

Cheryl Lynn Bezoine

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

City of Ottawa

Respondent

Ruling

Member: Lisa Gallivan

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I. Background

[1] This Decision determines a Motion filed by the City of Ottawa (the “Respondent”) for Disclosure of Additional Medical Information and a request to speak with the authors of medical documents relied upon by the Complainant in the hearing in advance of hearing or, essentially, pre-hearing discovery.

[2] The case relates to a human rights complaint filed by the Complainant on August 20, 2010 alleging that her employment was terminated because of disability related absences.

[3] The Complainant was hired by the Respondent as a unionized spare Bus Operator in 2010.

[4] On June 22, 2010, the Complainant’s employment was terminated. The reasons for termination were stated as “failure to provide regular and reliable attendance”.

[5] On August 20, 2010 the Complainant filed a human rights complaint alleging that she was terminated on the basis of disability related absences.

[6] On December 4, 2015, the Respondent filed a motion to dismiss the Complaint as an abuse of process.

[7] On January 25, 2017 the Tribunal issued a decision dismissing the Respondent’s motion.

[8] On November 17, 2017, the Respondent filed a Motion for Non-Suit.

[9] On October 17, 2018, the Tribunal issued a decision dismissing the Motion for Non-Suit.

[10] On October 25, 2019 the Respondent filed the present motion for access to additional medical records and an order that would allow the Respondent to speak to the Complainant’s treating physicians in advance of hearing.

A. Respondent's Motion

[11] The Respondent is seeking an Order granting access to what it deems relevant medical documentation held by certain identified practitioners and a right to speak with the authors of those documents. These documents and the authors thereof have been identified in the Respondents submissions of December 17, 2018 and this decision relates specifically to those documents.

B. Commission's Position

[12] The Commission does not object to the disclosure of "arguably relevant" medical documents but objects to the Respondent's request for "any" records pertaining to the Complainant's visits at the Montfort Hospital on the basis that such request is without merit and a "fishing expedition". The Commission submits that the request is overly broad and that there is no evidence that the Complainant's entire medical record of visits to the Montfort Hospital is arguably relevant to the case.

C. Complainant's Position on the Motion

[13] The Complainant provided her submissions to the motion on November 25, 2019. The Complainant objects to the contacting of medical practitioners prior to a hearing.

II. Issues

- i) Should the Respondent's motion for production of medical documents from a third party be granted?
- ii) Does the Tribunal have jurisdiction to make an order allowing the Respondent to contact the Complainant's treating physicians in advance of the hearing?

III. The Law

- i) Should the Respondent's motion for production for additional medical documents from a third party be granted?

[14] In *Clegg v. Air Canada* 2017 CHRT 27 (CanLII) the Tribunal summarized its General Authority to compel production of medical information as follows:

31. As I have already outlined in an earlier ruling in this case...the Tribunal's authority to order pre-hearing production of a document flows from subsection 50(1) of the Canadian Human Rights Act, RSC 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 thorough counsel, to appear at the inquiry, present evidence and make representations".

[15] The standard test for documentary disclosure pursuant to the *Tribunal's Rules of Procedure* is that documents must be arguably relevant to a fact, issue or form of relief sought or identified by the parties. This means that there must be a rational connection or nexus between the document and a fact, issue or form of relief sought or identified by the parties

[16] In this case, the Respondent is seeking access to any records related to the Complainant's visits at various medical clinics which have been referenced in documents entered into evidence during the hearing of this matter in November 2017. These records have already been deemed "potentially relevant" and admitted into evidence. The Complainant provided extensive *viva voce* evidence during the hearing on the reasons for her absences and her Complaint is based entirely on the allegation that she was terminated due to her absences from the workplace. It is therefore difficult to conclude that documents and/or information relating to those absences is anything but relevant to this hearing and that the Respondent has a right to documents that both prove and/or may potentially disprove these absences.

[17] For these reasons, I conclude that the documentation requested by the Respondent in its December 17, 2018 correspondence is arguably relevant to a matter in issue in this proceeding and the Respondent should therefore have access to this information.

[18] As discussed more fully below, while I have concluded that the documentation is arguably relevant to a matter in issue, I have not concluded that this allows the

Respondent to conduct a pre-hearing discovery. I must now consider the Respondent's request to contact the Complainant's treating physicians in advance of the hearing.

- ii) Does the Tribunal have jurisdiction to make an order allowing the Respondent to contact the Complainant's treating physicians in advance of the hearing?

[19] There is no argument that the Tribunal has the authority to issue *subpoena duces tecum* to compel third parties to produce medical records. This does not mean that the Tribunal has authority to order what would essentially constitute pre hearing discovery.

[20] The Tribunal's authority is granted under the *Canadian Human Rights Act* and the Tribunal's Rules. Neither of these sources provide authority for the Tribunal to order pre-hearing examinations which is essentially what is being requested by the Respondent in this case.

[21] The issue of pre-hearing examinations was considered by the Tribunal in *Phyllis McAvinn v. Strait Crossing Bridge Ltd.* 2000 CanLII 20422 (CHRT), Ruling No.1 at para 13-14. In this case the Tribunal confirmed that its Draft Rules of Procedure (at the time and which have since remained unchanged) did not contain provision for discovery proceedings:

13 In Nelson, not only was the Board empowered under the Statutory Powers Procedure Act(2) of Ontario to make rules regarding its practice, but the Board had in fact adopted Rules of Practice which contained a specific provision dealing with discovery prior to a hearing. At the present time the Tribunal's Draft Rules of Procedure contain on provision concerning discovery proceedings.

[22] The issue was also more recently considered by the Tribunal in *Vivian Wirth v. Saddle Cree Nation*, unpublished ruling, July 10, 2019, where the Tribunal concluded:

....nothing in the Canadian Human Rights Act or the Canadian Human Rights Tribunal Rules of Procedure provides for the conduct of pre-hearing examinations. Further, that discovery should take place in only the most rare circumstances as deteriorating health.

[23] This is not a case of rare circumstances that would justify going beyond the Tribunal's stated authority. I therefore deny the Respondent's request for an order

allowing contact with the Complainant's treating physicians without her consent prior to hearing.

IV. Ruling

[24] After analyzing the relevant evidence and applicable case law, I have concluded that the documentation requested by the Respondent in its December 17, 2018 correspondence is arguably relevant to a matter in issue in this proceeding and the Respondent should therefore be granted access to this information. This can be gained by calling any of the authors to the documents identified on December 17, 2018.

[25] I have further concluded that the Tribunal does not have authority, except in cases of rare circumstances, to order prehearing examination. This is not one of those rare cases. I therefore deny the Respondent's request for an order allowing contact with the Complainant's treating physicians without her consent prior to hearing.

Signed by

Lisa Gallivan
Tribunal Member

Ottawa, Ontario
February 18, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1941/2113

Style of Cause: Cheryl Lynn Bezoine v. City of Ottawa

Ruling of the Tribunal Dated: February 18, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Cheryl Lynn Bezoine, for herself

Ikram Warsame, for the Canadian Human Rights Commission

David Patacairk, for the Respondent