Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 5
Date: March 25, 2020
File No.: T2252/0718

Between:

Stacy White

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Nuclear Laboratories Ltd.

Respondent

Ruling

Member: Jennifer Khurana

Background

[1] Stacy White (the “complainant”) started working for Canadian Nuclear Laboratories Ltd. (the “respondent”) in January 2012. In August 2013, she experienced an incident of workplace violence when a co-worker grabbed her around the neck. The complainant alleges that as a result of this incident, and other workplace harassment involving the same co-worker, she developed a number of health challenges requiring accommodation. She alleges that the respondent caused or exacerbated her health problems by failing to provide her with the accommodation she needed because it eventually required her to resume face-to-face contact with the co-worker involved in the incident. The respondent argues that it did not know, and could not reasonably have known, that the complainant had a disability that may have required accommodation.

[2] The parties have already exchanged some documents as part of their disclosure obligations under the Tribunal’s Rules of Procedures (“*Rules*”). The respondent requested additional disclosure of medical records from the complainant. The complainant produced some of the requested documents, but in redacted form. She did not agree to provide medical records from her family physician pre-dating the alleged discrimination. The respondent filed this motion asking that the Tribunal order the complainant to provide all the requested medical records in unredacted form.

[3] The complainant requests that the Tribunal anonymize this ruling. She does not want her name to appear in a public ruling on the respondent’s motion.

Decision

[4] The respondent’s motion is allowed, but I have included some safeguards to address the complainant’s privacy concerns about her medical information. The complainant’s request to anonymize this ruling is denied.

Issues

[5] This ruling determines the following issues:

1. Is the respondent entitled to full disclosure of the following:
    i. an unredacted version of the complainant's full medical records provided to the respondent on August 15, 2019;
    ii. all clinical notes held by Ms. Pratt, the complainant's social worker;
    iii. all documents held by the complainant's family physician, Dr. Durante, which relate to his medical treatment of the complainant dating back to at least October 2006?
2. Should this ruling be anonymized because there is a real and substantial risk that the disclosure of personal matters will cause undue hardship to the persons involved that outweighs the societal interest in this inquiry being conducted in public?

Reasons

1. The respondent's disclosure requests

[6] Parties must be given a full and ample opportunity to present their case (s. 50(1) of the *Canadian Human Rights Act* (the "*Act*"). This includes the right to the disclosure of all arguably relevant information held by the opposing party so each party knows the evidence they are up against and can prepare for the hearing. See *Egan v. Canada Revenue Agency*, 2019 CHRT 8 at para. 4. The Tribunal's *Rules* require parties to disclose a copy of all documents in their possession that relate to a fact, issue or form of relief that is sought in the case, including those identified by other parties (Rule 6(1)(d) and (e)).

[7] The threshold for disclosure is arguable or possible relevance. While this threshold is not particularly high, a party seeking production of a document must still show that there is a rational connection between the document it seeks and the issues raised in the complaint. See, for example, *T.P. v. Canadian Armed Forces*, 2019 CHRT 19 at para. 11 ("*T.P.*") *Turner v. CBSA*, 2018 CHRT 1 at para.30 ("*Turner*"). Requests for disclosure

should not be speculative or amount to a fishing expedition. See *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at paras. 31-32 ("*Egan*") and *Turner* at para.30.

[8] The fact that documents are exchanged and disclosed does not mean that they will be admitted as evidence at the hearing. See *Turner* at para. 35 and *Egan*, at para. 33. If a party takes issue with the proposed evidence, it can raise this at the hearing and can also make submissions on the weight that the decision-maker should give that evidence if it is admitted at the hearing.

[9] Beyond arguable relevance, the Tribunal must also consider other possible interests such as confidentiality and privilege. Documents that are arguably relevant may not be ordered disclosed or conditions may be placed on their disclosure if there are privilege or privacy concerns to be addressed.

[10] A complainant has the right to privacy and confidentiality with respect to their medical records. These rights may cease, however, if a complainant puts their health in issue in a proceeding. See *Clegg v. Air Canada*, 2019 CHRT 3 at para. 52 ("*Clegg*"). This does not mean that full disclosure of all medical records is warranted in all cases; disclosure must be balanced with privacy concerns. The Tribunal can take measures to protect privacy interests in different ways by limiting disclosure or putting conditions on the disclosure. See *T.P.* at para. 37, *Egan* at paras. 34 and 50 and *Yaffa v. Air Canada*, 2014 CHRT 22 at para 12.

[11] The respondent submits that since the complainant has put her health squarely in issue in this case, it requires full and unredacted disclosure of the complainant's medical records, including those that pre-date her employment with the respondent, to fully answer the complainant's allegations.

[12] The complainant consents to some of the respondent's requests, but wants to maintain certain redactions, as set out below. She also objects to the respondent's requests for medical records that pre-date the alleged discrimination and her employment with the respondent.

[13] The Commission does not take a position on the respondent's motion. Instead, it filed a letter summarising key case law principles applicable to the issues raised by the respondent's motion. These principles are generally reflected in the criteria for determining disclosure requests that I have outlined above.

[14] I agree with the respondent that the records it seeks are arguably relevant to the issues in this complaint. I also find that there are some reasonable conditions that can be placed on the requested disclosure to address the complainant's privacy interests.

The August 2019 medical records

[15] The respondent contacted the complainant and requested an unredacted version of the medical records initially disclosed in August 2019 ("the August 2019 documents"). The complainant did not provide the unredacted records. Instead, she provided an outline of the redactions summarising their content. She also indicated that the usefulness of the unredacted medical records would be an issue for the respondent's expert to determine because the notes are made by medical professionals.

[16] The complainant now consents to the disclosure of the August 2019 documents, subject to the redaction of names and references to family members and personal identification information, including the complainant's contact information, health card details and social insurance number (the "requested redactions"). The complainant wants the Tribunal to restrict disclosure of the medical records to counsel for the respondent and the Commission. She also seeks an order from the Tribunal restricting the use of the documents to the purpose of the Tribunal proceedings and asks they be returned to her at the end of the Tribunal proceedings.

[17] The respondent opposes any redactions. It submits that the complainant previously made significant redactions that went beyond names and identifying information, as evidenced by the summary of the redactions provided by the complainant's counsel. The respondent argues that without unredacted copies of the documents, it will have no confidence that the redactions were merely of personal identifying information, as opposed

to arguably relevant information. It argues justice must not only be done, but must be seen to be done.

[18] The respondent also submits that the complainant's requested redactions are "a patently disingenuous afterthought". The respondent argues that there is no point to these redactions since it already has the information the complainant purports to want to redact. According to the respondent, the complainant did not redact this information from some documents previously disclosed as part of this proceeding. Further, as the complainant's employer, the respondent also already has access to much of this information, namely the complainant's social insurance number and the names and birth dates of her dependents. It suggests that as a practical matter, information such as names, addresses and phone numbers will be of use at the hearing and could add context to certain elements of the complainant's medical records.

[19] Since the complainant now consents to the disclosure of the August 2019 documents, subject to the requested redactions, I will only deal with the issue of whether the requested redactions and the conditions on disclosure mentioned in paragraph [16] are warranted.

[20] To be clear, arguable relevance is a legal concept that the Tribunal must decide. It is not for a doctor to determine. The complainant appears to have previously argued that retention of a medical expert could be a factor in determining whether further disclosure is warranted. The complainant did not provide authority for her position that it is up to a medical expert to decide the legal concept of arguable relevance.

[21] I agree with the respondent that at the pre-hearing stage of disclosure, there is no basis to make the requested redactions. Much - if not all - of the information the complainant now seeks to redact has already been disclosed by her, and/or was already available to the respondent as the complainant's employer. I am therefore not persuaded that there is any prejudice to the complainant or to her privacy interests in making complete disclosure of these records. There has also already been considerable back and forth between the parties in this disclosure process. To simplify matters, and to ensure there is no further dispute about what has been redacted and the nature of the redactions

made, the complainant is directed to produce a full unredacted copy of the August 2019 materials.

[22] While the complainant must provide an unredacted copy of the August 2019 documents to the other parties, I accept that some limitations on this disclosure are warranted to address the complainant's legitimate privacy concerns. Accordingly, the documents disclosed may only be used for the purposes of the proceedings and must also be returned to the complainant at the end of Tribunal proceedings.

[23] The respondent submits that requiring the parties to return the materials would be costly and asks instead that the Tribunal order the materials destroyed. The respondent did not present any information in support of its claim that returning documents to the complainant would be cost-prohibitive, and I am not persuaded by this argument.

[24] I am not, however, prepared to limit disclosure to counsel for the respondent and for the Commission, as requested by the complainant. The complainant has acknowledged these are medical records that an expert may review. The respondent has indicated that it intends to call an expert medical professional, and it is entitled to answer the case against it. The complainant's health is a central issue in this complaint, including with respect to the remedial claims she makes. She attributes her health problems and their impact to the employer's alleged failure to accommodate her in the workplace. I agree with the respondent that as it is intending to call a medical expert, this individual and the respondent's instructing representative will need to review the records.

[25] The complainant may wish to renew her request to redact certain personal and identifying information depending on what is admitted in evidence. I may require the respondent to redact names, addresses and other related information from proposed exhibits and to return a redacted copy to the Tribunal for the record to protect the privacy interests of family members, and particularly any children. I am not yet persuaded that it is necessary to use names and identifying information at the hearing as suggested by the respondent, simply for practical purposes. We will cross that bridge when we get to the hearing or as that stage approaches. For now, all of the August 2019 documents, in unredacted form, must be disclosed to the other parties within 21 days of this ruling.

[26] Finally, I will take care to avoid any mention of any identifying information or any personal information that is not relevant to the issues in dispute in any rulings or decision in this matter.

Ms. Pratt's records and notes

[27] The complainant consents to disclosure of her social worker's notes and records, subject to the requested redactions set out in paragraph [16] above.

[28] As set out above, these documents have not yet been admitted into evidence. The complainant may renew her request to redact names or identifying information related to her family members if these documents are tendered to form part of the Tribunal's record.

[29] The complainant is therefore ordered to disclose a full unredacted copy of all of Ms. Pratt's records and notes as they relate to her treatment of the complainant within 21 days of this ruling. As with the August 2019 documents, the documents may only be used for the purposes of these proceedings. The records must be returned to the complainant at the end of Tribunal proceedings.

Dr. Durante's records

[30] The respondent requests all documents, including test results and reports, held by the complainant's family physician, Dr. Durante, which relate to his medical treatment of the complainant and date back to October 2006. The respondent submits that the records disclosed to date indicate that the complainant had medical issues going back to at least 2006.

[31] While the complainant consents to disclosure of Dr. Durante's records as of 2012, subject to the requested redactions, she disputes the arguable relevance of any records pre-dating that period.

[32] The complainant submits that any prior medical condition that the complainant might have had in the course of her life is not arguably relevant to the respondent's obligation to inquire as to any possible accommodation of a disability. According to the

complainant, any harm and/or damages claimed by the complainant are as a result of the respondent's failure to exercise this duty to inquire.

[33] The complainant also relies on two decisions of the Ontario Workplace Safety and Insurance Appeals Tribunal ("WSIAT") in support of her claim that contributory factors or triggers to a workplace incident are irrelevant (see 2017 ONWSIAT 2503 at paras 36-37 and 2014 ONWSIAT 1883 at para 31). She argues that the only issue before the Tribunal is whether the complainant's medical condition was a direct result of the workplace incident, notwithstanding the "thin skull" tendencies of the complainant pre or post incident.

[34] I do not accept that these decisions stand for the proposition that contributory factors are "irrelevant", as the complainant contends. Rather, in the 2017 decision, WSIAT finds that the medical reports demonstrate that any previous psychological condition at play had been in remission for at least ten or more years such that the worker could be considered "asymptomatic" prior to the accident at issue in that case. It is not that the Tribunal found that past medical records or contributory factors were "irrelevant" to a determination of a complex web of causation. Rather, the Tribunal considered that despite the susceptibility of the worker due to his past history, he had no symptomatic condition that would affect his entitlement to benefits at the relevant time.

[35] The complainant alleges she is permanently disabled and that her many health problems flow from the respondent's handling of her interactions with her co-worker. While the complainant maintains that any prior disposition to a "short-lived" medical condition is not relevant to the issues in dispute, the records already disclosed indicate that some of the same symptoms or conditions that the complainant attributes to the respondent's alleged discrimination were present prior to her employment by the respondent. The complainant did not, however, argue that she had been asymptomatic for a significant period of time prior to her employment. Further, reference is also made in the records to contributory factors that are not related to work.

[36] The respondent is entitled to defend these allegations at a hearing and to prepare accordingly. I agree with the respondent that as a matter of fairness, it needs to know what was going on, medically speaking, with the complainant for a considerable period of time

prior to her going off work. Despite the complainant's arguments to the contrary, in the event of a finding of liability, the Tribunal will necessarily have to consider any pre-existing symptoms and conditions and assess the degree to which they may have been exacerbated by the discriminatory practice. The Tribunal will have to determine whether all of the harm can be attributed directly to the discriminatory practice and what conditions or symptoms are compensable as a result of the discriminatory practice to quantify the compensation to be awarded to the applicant (See *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183, at paras 24-33).

[37] In addition, as part of its liability finding, the Tribunal will have to determine whether, on the basis of the symptoms exhibited by the complainant at work, the respondent knew, or could reasonably be expected to have known that she had a disability requiring accommodation at the relevant time.

[38] The complainant relies on the Tribunal's findings in *T.P* and *Clegg* in support of her objection to disclosing medical records pre-dating the alleged discrimination. The facts in those cases are distinguishable from this complaint. In both *T.P* and *Clegg,* the Tribunal found that the respondent had failed to establish a sufficient connection between the requested documents and the specific issues raised by the complainant.

[39] That is not the case in this complaint for all the reasons set out above. This is also not a situation where disclosure can be limited to records relating to a specific medical condition or health issue as in some of the other cases cited by the complainant and the Commission. The respondent is properly entitled to consider the medical basis for the complainant's health issues and to challenge whether, and to what extent, her extensive health problems are due to the alleged discriminatory conduct as opposed to other contributory factors that pre-dated or co-existed with her employment.

[40] Further, the arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case. See *Turner*, *supra* at para. 34, citing *Warman v. Bahr*, 2006 CHRT 18 at para.9.

[41] As I have already indicated above, the parties may make submissions as this case progresses on the admissibility of any proposed evidence at the hearing, and on the weight to be given to any document admitted into evidence.

[42] Accordingly, I find all of the records held by Dr. Durante which relate to his medical treatment of the complainant that date back to 2006 arguably relevant to the issues in this complaint. The complainant must disclose them within 21 days of this ruling. The records may only be used for the purposes of these proceedings and must be returned to the complainant at the end of Tribunal proceedings.

2. Should this ruling be anonymized?

[43] No. There is a public interest in open and transparent legal processes. Human rights hearings are intended to be public proceedings (Section 52(1) of the *Act*). The Tribunal and its processes are accountable to the public. Anonymization requests or other confidentiality orders are not to be granted without balancing the societal interest in the proceeding occurring in public with the specific privacy interests of the party requesting a confidentiality order.

[44] The Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if it is satisfied that there is a real and substantial risk that the disclosure will cause undue hardship to the persons involved. It must also be satisfied that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public (Section 52(1)(c) of the *Act)*.

[45] The complainant asks that this ruling be anonymized because she is concerned that Tribunal decisions are posted on the Tribunal's website, on CanLii and on other public sites. She worries that her family could look up this ruling and read details of her health history and that of her family. She argues that the respondent's motion includes mention of personal issues not related to the alleged discrimination and these details could cause undue hardship to her and to her family if made public.

[46] The complainant also asks that all documents placed into evidence be redacted to remove references to her family and to events that pre-date her employment with the

respondent. I find this request premature. Nothing has been admitted into evidence, and we are still at the pre-hearing disclosure stage. The complainant may wish to renew her request for confidentiality at the appropriate time.

[47] The Commission, acting in the public interest, does not oppose the complainant's request for anonymization. It does not explain why or how the public interest in transparent legal processes is outweighed by a real and substantial risk that the disclosure of information will cause undue hardship to the complainant or her family. The respondent also does not oppose the request.

[48] The Tribunal has issued anonymization orders in certain cases in which it found that the identification of the complainant could cause undue hardship and risk of harm to the complainant's children or might result in the disclosure of highly personal or sensitive information, for example in sexual harassment complaints (see, for example, *Mr. X v. Canadian Pacific Railway*, 2018 CHRT 11 and *N.A. v. 1416992 Ontario Ltd*. *and L.C.* 2018 CHRT 33 at paras 15-30) (*N.A*.). In other cases, the party seeking the confidentiality order satisfied the Tribunal that there was a very real possibility they would experience harm as a result of stigma that could impact future job prospects. (see, for example, *T.P. v. Canadian Armed Forces*, 2019 CHRT 10 at paras. 24-30).

[49] While there are cases such as *N.A.,* relied on by the complainant, where the Tribunal has found that anonymization is warranted, in my view a general statement about the privacy interests of the complainant is insufficient to demonstrate a "real and substantial risk" of undue hardship to the complainant and her family. Human rights issues are difficult, often deeply personal matters for the parties involved, including complainants. The complainant has not established what is unique about her case as opposed to other human rights matters which similarly address personal matters and which often refer to disability and health issues.

[50] I acknowledge that the parties consent to the anonymization request. But this consent cannot be determinative. In other words, the parties' consent is not sufficient for me to disregard the wording of s.52(1)(c) of the *Act* or the principles set out in the jurisprudence that require decision-makers to engage in a balancing exercise. It is not

because a party asks for a confidentiality order and no one objects, that I can dispense with the binding analytical framework to be applied in deciding whether to make a confidentiality order. I am required to consider the openness of legal proceedings and determine whether the party seeking the order has established that there is a serious risk, well-grounded in the evidence, which poses a threat to an important interest in the context of the litigation because reasonably alternative measures will not prevent the risk (See *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 S.C.R.522 at paras 48 and 53, and *Dagenais v. Canadian Broadcasting Corp.,* 1994 3 S.C.R. 835, [1994] S.C.J. No.104 and *R. v. Mentuck,* 2001 SCC 76, [2001] 3 S.C.R.442).

[51] I also distinguish the facts surrounding the complainant's request from a recent Federal Court of Appeal decision that reviewed the relevant test to apply when considering whether a confidentiality order is necessary to preserve or promote an interest engaged by legal proceedings (*Canada (Attorney General) v. Philps*, 2019 FCA 240 at paras 22-35 ("*Philps*")). Mr. Philps grieved his suspension for inappropriate acts involving female subordinate employees. Employee witnesses testifying on behalf of the employer had been given assurances that their full names would not be published, and asked for their names to be redacted from any rulings or decisions.

[52] The Court found that the adjudicator failed to reasonably balance the relevant interests and did not apply the well-established test in denying the witnesses' redaction request. The Court recognised the legitimate privacy interests to be protected in a situation involving a grievor who had been accused by younger female subordinates of inappropriate behaviour. The Court also found the Board's decision unreasonable as the adjudicator did not consider whether publishing the witnesses' names could have a chilling effect on the reporting of inappropriate workplace conduct on the part of superiors.

[53] *Philps* involved requests made by witnesses who also expressed concerns related to their status as current employees and the possible negative impact that disclosure could have for their careers. Beyond the fact that *Philps* is distinguishable on its facts as it involved what the Court referred to as "unusual circumstances", in my view the complainant has not made anything other than general statements about the ruling raising personal matters that could be potentially harmful.

[54] The onus is on the party seeking the confidentiality order to establish that this limit is necessary because of the particular circumstances of the case. The test referenced in *Philps* and reflected in the wording of s.52(1)(c) of the *Act* requires me to weigh important personal and public interests and privacy considerations. On the very limited submissions provided to me, I am not persuaded that the complainant has met the required threshold or established a "real and substantial" risk that is well-grounded in the evidence.

[55] Finally, I have taken care to avoid reference to personal details that are not relevant to determining the limited issues in this ruling. This is also a reasonable alternative to anonymizing this ruling.

Order

1. Within 21 days of the date of this ruling, the applicant shall arrange for disclosure to the parties of a full and unredacted version of the following:

    i. the August 2019 documents;

    ii. all clinical records held by Laurie Pratt in her capacity as the complainant's social worker;

    iii. any and all documents and records held by Dr. Lino Durante which relate to his medical treatment of the complainant from 2006 to the present.

    The documents set out above may only be used for the purposes of the Tribunal proceedings. These records will be returned to the complainant at the end of the Tribunal proceedings.

2. The applicant's request to anonymize this ruling is denied.

3. The parties are directed to participate in a case management conference call following the disclosure set out above. The Registrar will contact the parties to schedule this call. The parties should be prepared to provide projected dates for the filing of any expert reports and for the hearing of this matter. The Tribunal will send details of the conference call and an agenda when the date has been confirmed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
March 25, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2252/0718

Style of Cause: Stacy White v. Canadian Nuclear Laboratories

Ruling of the Tribunal Dated: March 25, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Christine Roth, for the Complainant

Sasha Hart, for the Canadian Human Rights Commission

Kevin MacNeill, for the Respondent