Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 13
Date: May 26, 2020
File No.: T2265/2018

Between:

Robin Lawrence

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway Company

Respondent

Ruling

Member: Colleen Harrington

Table of Contents

I. Overview

[1] Robin Lawrence [the "Complainant"], began her employment with Canadian National Railway Company ["CN" or the "Respondent"] as a Conductor Trainee on June 15, 2014. On November 14, 2014, her employment was terminated while she was still in her probationary period. Ms. Lawrence filed a human rights complaint with the Canadian Human Rights Commission [the "Commission"] in November of 2015 alleging that, during her employment, she had been sexually harassed and discriminated against by some of her coworkers at CN.

[2] During the course of the Tribunal's case management proceedings, the parties have exchanged Statements of Particulars, which include lists of witnesses that each party intends to call to provide evidence at the inquiry into the complaint. Ms. Lawrence initially listed several people, including eight of the nine witnesses that appear on the Respondent's list. However, she has since agreed that, in addition to providing evidence on her own behalf, she is content to cross examine CN's witnesses.

[3] Of the nine witnesses that CN intends to call, it appears that seven are current employees of CN, and two are former employees. CN has provided summaries of the evidence it anticipates each of these witnesses will provide at the hearing. CN has brought this Confidentiality Motion to have the identities of all nine of these witnesses protected, either by having their names redacted from the Tribunal's public decisions and evidentiary documents, or by referring to them only by their initials during the Tribunal's public proceedings.

[4] The Respondent argues that, if the names of these witnesses appear in a publicly available Tribunal decision that associates them with the Complainant's "unsavoury and embarrassing" allegations of sexual harassment, their reputations and careers could be negatively impacted. The Respondent says it would also consent to a request by the Complainant to initialize her own name if she so desires.

[5] The Complainant objects to the Respondent's application, saying that embarrassment is not a valid reason to anonymize the names of these witnesses. She

says the public has a right to know what happened to her, and that individual perpetrators should not be shielded by CN.

[6] While the Commission does not take a position with respect to the Respondent's Confidentiality Motion, it has provided a summary of cases that set out principles the Tribunal should consider in making its decision.

II. Issue

[7] Should I grant the Respondent's request to either redact or anonymize the names of its witnesses? In order to do so I must determine that there is a substantial risk that these witnesses would experience undue hardship if no order is made.

III. Decision

[8] CN's request for a confidentiality order to protect the identities of the non-party witnesses is denied. The Tribunal is required to conduct its proceedings in accordance with the open court principle, and confidentiality orders should only be granted in exceptional circumstances. CN has not provided evidence or a compelling reason to support such an order being made at this time.

IV. Analysis

[9] It is a requirement of the *Canadian Human Rights Act*[1] ["*CHRA*" or the "*Act*"] that the Tribunal's inquiries into human rights complaints shall be conducted in public. This is a codification of what is known as the open court principle.

[10] Exceptions to this requirement may be made, upon application, on a case by case basis. Subsection 52(1)(c) of the *Act* states that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if it is satisfied that, by holding the inquiry in public, "there is a real and substantial risk that the disclosure of

[1] RSC 1985, c H-6.

personal or other matters will cause undue hardship to the persons involved". The need to prevent disclosure must outweigh the societal interest in a public hearing.

[11] The parties agree that the open court principle is important in establishing the independence and impartiality of the justice system, and in fostering public confidence in the integrity of decision-making. The Commission says the open court principle typically requires full transparency, including with respect to the names of witnesses who provide the Tribunal with relevant testimony.

[12] CN says that Ms. Lawrence's complaint includes "sensitive and graphic allegations" of sexual harassment which the non-party witnesses have a limited ability to refute, aside from providing their own evidence. It argues that, even if the allegations are unfounded, the witnesses would face undue hardship because their family and friends could search a public decision that associates them with these embarrassing allegations. CN says this could have damaging impacts on their privacy interests, reputations, and careers.

[13] The Commission submits that CN has the onus of proving with evidence that an exception can be made to the open court principle based on identified facts. It says that, as a general principle, "the more a request would interfere with the public's ability to access information about a proceeding, the greater the evidence needed of real and substantial risk of undue hardship."

[14] CN does not agree that the case law fully supports this assertion. It says that evidence of undue hardship is not an absolute requirement for a confidentiality order as, in some cases, "the nature of the pleadings, the issues raised, and the circumstances of the proceedings are sufficient to meet the requirements for a confidentiality order."

[15] In support of its argument, CN refers to the Tribunal's decision in *Day v. Department of National Defence and Michael Hortie*.[2] In that case, the Tribunal initially agreed to prohibit the publication of any of the evidence or matters arising from the hearing, on the basis that their publication, "would undermine the fairness of the inquiry and cause undue hardship to the persons involved."[3] CN notes that, in coming to this

[2] 2003 CHRT 12 ["*Day*"]
[3] *Ibid* at para.25.

decision the Tribunal did not expressly refer to any evidence. Instead it focused on the nature of the allegations, which related to sexual abuse. CN says the Tribunal was able to infer that sexual allegations can create shame, humiliation, and enormous personal and public damage for third parties, and so granted the publication ban.

[16] CN takes the position that I can also infer that Ms. Lawrence's allegations of sexual misconduct and harassment will cause disproportionate embarrassment to the non-party witnesses, which is sufficient to grant the confidentiality order sought.

[17] I would note that the Tribunal in *Day* agreed to the publication ban due to both the nature of the allegations and because the respondent planned to cross-examine the complainant in detail about her mental health, taking the position that she suffered from a psychological illness and delusions. The Tribunal was of the view that this raised "the most serious privacy concerns."[4] The Tribunal actually revoked the publication ban in a subsequent decision in which it also dismissed the complaint, concluding that the complainant had failed to deduce evidence to support her allegations, and that she lacked the capacity to represent herself in the proceedings.[5] In revoking the publication ban, the Tribunal stated:

> [24] … The mere fact that the allegations are offensive is not sufficient to justify a ban on publication. Mr. Hortie may take the dismissal of the complaint as a vindication of his position and anyone who recites the allegations is obliged to respect the fact that the complaint has been dismissed. If they misrepresent the matter, or fail to respect the truth, Mr. Hortie and others have the usual remedies.

[18] In further support of its argument that the Tribunal can grant anonymization orders on the basis of "judicial notice and the nature of the pleadings, issues raised, and the circumstances of the proceedings", CN refers to the case of *C.M. v York Region District School Board*.[6] In that case*,* an application for a publication ban and anonymization order was brought by the father of an eleven-year-old complainant who had been excluded from school after treatment for head lice. The respondent opposed the request on the basis that

---

[4] *Ibid* at para.23.
[5] *Day v. Canada (Department of National Defence)*, 2003 CHRT 16
[6] 2009 HRTO 735 ["*C.M.*"]

the applicant did not provide a declaration or affidavit to support the request and had not established that genuine harm would occur in order to justify the ban.

[19] The Human Rights Tribunal of Ontario ["HRTO"] rejected the request for a publication ban, but did grant the anonymization order. The HRTO concluded that the use of initials in its decisions was justified in the circumstances of that case based on the potential stigma to a young child as a result of the application, the fact that she had no decision-making power in the proceedings, and the special importance of protecting children in our legal system.[7] The Tribunal stated: "The applicant is a child and in my view, the possible effects on her are a factor of which judicial notice may be taken."[8]

[20] CN says it is notable that the HRTO in *C.M*. did not refer to any direct evidence in support of the anonymization order and, in fact, rejected a late-filed letter from a physician in support of a publication ban. With respect to the doctor's letter, the HRTO stated: "I do not believe it provides any information relevant to this issue beyond what is properly the subject of judicial notice."[9]

[21] I note that, in most of the cases referred to by the Commission and Respondent, the applications for confidentiality orders were made by parties or witnesses who were seeking to protect their own identities[10], with the exception of *A.B. v. Eazy Express Inc*.[11] In that case, the Commission requested that the Tribunal anonymize the names of the complainant and a witness. According to the Commission, personal matters that did not deal with the issue of discrimination were discussed during the hearing, which would have caused undue hardship to the persons involved in the events if they were made public.

---

[7] *Ibid* at para.26.
[8] *Ibid* at para.23.
[9] *Ibid* at para.33.
[10] See, for example*, Egan v. Canada Revenue Agency*, 2019 CHRT 27 in which a doctor who had treated the complainant requested that her name be anonymized; *T.P. v. Canadian Armed Forces*, 2019 CHRT 10 in which the complainant requested that his identity be protected*; N.A. v. 1416992 Ontario Ltd. and L.C.,* 2018 CHRT 33 in which the complainant and individual respondent requested that their names be anonymized; *Clegg v. Air Canada*, 2017 CHRT 27 in which a pilot who had been the subject of a previous report that the Tribunal had ordered be disclosed requested that her identity be kept confidential*; A.A. v Canadian Armed Forces,* 2019 CHRT 34 in which the complainant sought to keep his identity confidential.
[11] 2014 CHRT 35 ["*A.B*."]

The Tribunal agreed to anonymize their names on the basis that the personal matters discussed "could potentially be harmful" to them.[12]

[22] The Commission stresses that, in *A.B*., the decision to anonymize was made after the Tribunal heard evidence at the inquiry into the complaint. CN says this does not support the argument that there is an onus on the moving party to prove with evidence that an exception can be made to the open court principle. It says that, even though the Tribunal heard evidence in *A.B*., "that does not imply that it went to the material fact of potential harm from the evidence being disclosed." CN says the Tribunal's reasons suggest that it relied on an inference, rather than direct evidence, of potential harm to justify granting the anonymization order. While this may be the case, one cannot discount the fact that the Tribunal in *A.B.* heard evidence during the hearing from which it was able to draw an inference about the potential harm to the complainant and witness if their names were not anonymized.

[23] Due to the preliminary stage of the proceeding at which CN has brought this Motion, the Tribunal is aware of the allegations as set out in the human rights complaint and the Statements of Particulars, but has not yet received any evidence from the parties. Nor has CN provided any information from the witnesses themselves in the form of affidavits or declarations in support of its application to protect their identities.

[24] I accept that, in some cases, the Tribunal may be in a position to rely on judicial notice and the nature of the pleadings, the issues raised, and the circumstances of the proceedings in order to grant confidentiality orders. However, it is clear from the case law that, in order to do so, the Tribunal must be in possession of sufficient information to determine that the need for confidentiality outweighs the societal interest in a public hearing.

[25] The onus to prove that there is a real and substantial risk of undue hardship if a confidentiality order is not granted rests with the party seeking the order. As the HRTO stated in *Visic v. Elia Associates Professional Corporation*, the "Tribunal must be satisfied that the personal and public interests collate in favour of safeguarding privacy, thereby

[12] *Ibid* at para 7.

outweighing the principle of disclosure and the desirability of a transparent human rights process."[13]

[26] Human rights complaints often include information of a personal or sensitive nature. The mere fact that the allegations relate to sexual harassment is not sufficient to justify an order for confidentiality. Rather, "exceptional conditions of sensitivity or privacy necessitating anonymity"[14] should be present before such an order is granted by the Tribunal.

[27] In the present case, CN is asking the Tribunal to redact or anonymize the names of all nine of its witnesses because some of the Complainant's allegations relate to comments or behaviours of a sexual nature. Most of these witnesses are not accused of engaging in conduct that could be characterized as sexual harassment with respect to the Complainant. Nor is CN's request based on any information from the witnesses themselves that would support a conclusion that there is a real and substantial risk of undue hardship if their names are not anonymized or redacted.

[28] It seems unlikely that all nine witnesses would be facing the same level of risk from being associated with this complaint, but CN did not provide enough detail about the impact a public hearing could have on each of them in order for me to determine whether this is the case or not.

[29] I am of the view that the request to redact or anonymize all of the witnesses' names because it could be embarrassing for them to be associated with the Complainant's allegations of sexual harassment is speculative and overbroad. Without more information either from CN or, preferably, the witnesses themselves, I cannot conclude that all of them face a substantial risk of experiencing damaging impacts to their privacy interests, reputations or careers.

[30] CN also suggests the fact that the Complainant recorded conversations with some of these witnesses without their knowledge or consent further impacts their privacy interests in the hearing. I do not know which witnesses' conversations were recorded,

---

[13] 2011 HRTO 1230 at para.10.
[14] *Mancebo-Munoz v. NCO Financial Services Inc.,* 2013 HRTO 974 at para.6.

what these conversations were about, or what harm they may have caused to the witnesses' privacy interests, if any. The simple fact of recording conversations, without more information, does not amount to a serious or significant privacy concern that would necessitate an extraordinary measure such as a confidentiality order.

[31] If any of the witnesses wish to make an application for a confidentiality order during the hearing, either on their own or through the Respondent, they can do so at that time, although they should be prepared to provide information in support of such an application.

[32] CN takes the further position that publicizing the names of the witnesses would not advance a purpose of the *Act*, since doing so would amount to the punishment of non-parties "with no proportionate educative or deterrence function." CN is correct that the purpose of the Act is to prevent discrimination, not to punish wrongdoing.[15]

[33] CN raises this argument in response to comments the Complainant made during a Case Management Conference Call about wanting to involve the public or the media in her complaint, as well as statements in her response to the Confidentiality Motion suggesting that those who engage in harassment and discrimination in the workplace should not be shielded by CN, but should be "called out" and "fined and fired". She argues that the Tribunal must impose change by holding both the company and individuals accountable so they can endure the consequences of their actions, otherwise "they will not stop." She suggests that, if the Respondent's request for a confidentiality order is granted, "[i]t will set a precedent for allowable behavior by employers."

[34] CN says that the limited nature of the confidentiality order sought will maintain the educative value in publishing a decision in this matter. The public will still be able to understand the nature of the complaint and who the parties are. Regardless of whether a confidentiality order is made, the hearing itself will still be public and the decision posted online, which will outline legal principles and make findings of fact. CN says the confidentiality order sought properly balances the public interest in human rights hearings and the privacy interests of the witnesses.

---

[15] See, for example, *Desmarais v. Correctional Service of Canada*, 2014 CHRT 5 at para.92.

[35] CN suggests that recent Tribunal decisions have recognized that anonymizing an individual's identity has little impact on the goals inherent in the open court principle. It refers to *T.P. v. Canadian Armed Forces*,[16] in which the Tribunal agreed to protect the complainant's identity, concluding that to do so would not interfere with the public's ability to understand the evidence or issues in the case. CN says its request in this case is similarly limited and could be granted for the same reasons.

[36] In *T.P.*, the Tribunal received evidence from the complainant in the form of an affidavit setting out his concern about the stigma he could face relating to his perceived cognitive abilities and mental health. The Tribunal accepted that there is still a societal stigma surrounding mental illness, real or perceived, and agreed that the complainant's apprehension about publicly disclosing his identity was valid. Given the nature of the medical information being sought by the respondent, the Tribunal agreed that the complainant's concern about the impacts of a public hearing on his feelings of self-worth and possible future job prospects was legitimate.

[37] I note that, in *T.P.*, the other parties consented to the complainant's name being anonymized, so the evidence that he would face undue hardship if his identity was not protected was not contested. There is no similar consent among the parties in this case. Nor have I heard from the witnesses themselves with respect to the application to protect their identities.

[38] I find that CN has not met the onus of proving that, without a confidentiality order, there is a real and substantial risk that its witnesses will experience undue hardship. It has not identified any unique concerns or issues of privacy that would justify such an extraordinary measure. Accordingly, its request to redact or anonymize the names of its witnesses is denied.

[39] Finally, the Respondent has argued that, as most of the Complainant's March 6, 2020 submissions do not even address the Confidentiality Motion, I should not consider them until a full hearing of the matter. I agree, and I have not considered those parts of the submissions that do not address the Confidentiality Motion in making this decision.

---

[16] 2019 CHRT 10

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
May 26, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2265/2018

Style of Cause: Robin Lawrence v Canadian National Railway Company

Ruling of the Tribunal Dated: May 26, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Robin Lawrence, for herself

Giacomo Vigna, for the Canadian Human Rights Commission

Roark Lewis, for the Respondent