Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 25
Date: August 7, 2020
File No.: T2405/6419

[ENGLISH TRANSLATION]

Between:

Karen Hugie

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

T-Lane Trucking and Logistics Ltd.

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background to ruling

[1] In this ruling, the Canadian Human Rights Tribunal (the Tribunal) has to determine whether its hearing involving Karen Hugie (the ”Complainant”) and T-Lane Trucking and Logistics Ltd. (the ”Respondent” or “T-Lane”), scheduled for August 31 to September 4, 2020, should be held by videoconference.

[2] The Complainant filed a motion on July 17, 2020, asking the Tribunal to hold the hearing by videoconference, which T-Lane opposes.

[3] Suffice it to say that the Complainant filed a complaint with the Canadian Human Rights Commission (the “Commission”) in October 2017, and the complaint was referred to the Tribunal in July 2019. Ms. Hugie alleges that she was discriminated against while she worked at T-Lane by reason of her age and physical disability (section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA), and subsection 3(1) CHRA).

[4] The hearing in this case was initially scheduled for February 2020, but had to be adjourned and was postponed to April 2020. Obviously, because of the global health crisis caused by COVID-19, which has affected all of Canada and its provinces, the April 2020 hearing also had to be cancelled. It was as a result rescheduled to the new dates of August 31 to September 4, 2020.

[5] One need not go into the details of the timeline of the global health crisis that has been unfolding since March 2020 as a result of COVID-19 to know full well that the crisis is still ongoing and affects all spheres of Canadian society, including our judicial system and, therefore, the Tribunal itself.

[6] The Tribunal and the parties quickly realized that the August and September 2020 hearing dates would be affected by the crisis. We were all therefore forced to explore new solutions in order to be able to proceed as planned.

[7] The Tribunal and the parties reviewed various options, to no avail. To avoid postponing the hearing dates again and in light of the Respondent’s opposition to using videoconference, the Complainant filed this emergency motion asking the Tribunal to hold the hearing using this technology.

[8] Now that I have explained this, in the interests of concision and, especially, given the urgency of ruling on such a request given how close the hearing dates are, I will focus on the parties' arguments that I deem to be necessary, essential and relevant to making my decision (*Turner v. Canada (Attorney General)*, 2012 FCA 159, at para. 40 [*Turner*]).

[9] Having examined the parties' written arguments, I allow the Complainant's request and authorize that the hearing be held by videoconference.

II. Law, parties' positions and analysis

[10] Neither the *Canadian Human Rights Act* nor the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (the "Rules") in effect on the date of this decision contain clear provisions on the use of videoconferencing or on where Tribunal hearings should take place.

[11] Historically, it has been the Tribunal's practice to hold its hearings in the place where the alleged discrimination occurred. This is not a hard-and-fast rule and is one that can be adapted depending on the circumstances of each case, while considering factors such as the parties' needs and the location where the parties and any witnesses who will have to travel reside (*Baumbach v. Deer Lake Education Authority*, 2004 CHRT 13, at para. 6; *Warman v. Guille*, 2006 CHRT 17, at para. 4; *O'Bomsawin v. Abenakis of Odanak Council*, 2016 CHRT 15, at paras. 4 and 5; *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2018 CHRT 12, at para. 21 [*Duverger 2018*]). Moreover, the CHRA essentially requires the Tribunal to

> ensure the venue for the hearing meets the standards of the CHRA that require a fair, informal, expeditious and open hearing process, where each party is given a full and ample opportunity to appear, present evidence and make representations (see ss. 48.9(1), 50(1) and 52(1) of the CHRA).
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> (*Temple v. Horizon International Distributors*, 2016 CHRT 20, at para. 11)

[12] There is no doubt that the health crisis affecting Canada (and the world as a whole) is exceptional and necessarily brings many challenges. For the Tribunal and its members

and administrative staff, these include an indefinite, full travel ban, restricted access to Tribunal offices and the impossibility of renting hearing rooms.

[13] Consequently, it is clearly impossible for the Tribunal to come to where the parties are, as it would usually do. Videoconferencing is therefore one of the alternatives that the Tribunal and the parties have to explore. As the Respondent is opposed to this alternative, however, I have to make a ruling.

[14] In her request, the Complainant alleges among other things that she has serious health issues, including ischaemic heart disease, high blood pressure and hypercholesterolemia. She adds that she had major heart problems in 2017 and May 2020, leading to a stay in intensive care to save her life. Following this cardiac event, in late May 2020, she also had acute pancreatitis, meaning more emergency care.

[15] She states that her health is deteriorating and that her health problems are worsened by the current proceeding and her full-time job. She further notes that she is still at high risk of a new serious medical event occurring because of her many health issues.

[16] Moreover, relying on the case law of various courts and tribunals, including decisions of this Tribunal, the Ontario Superior Court of Justice, the Human Rights Tribunal of Ontario and the Federal Court, the Complainant submits that the Respondent has to demonstrate to the Tribunal that videoconferencing will cause substantial prejudice. She states that videoconferencing does allow parties and the trier of facts to ensure that witnesses are testifying without help and without documents that were not previously disclosed. It also makes it possible to see witnesses' reactions, in contrast to a hearing held only over the telephone. The Complainant further notes that the global pandemic has speeded up acceptability of videoconferencing as a valid option, or tool, for the hearings of both tribunals and courts of justice. In her opinion, using this technology may, moreover, prevent further unnecessary delays in the proceedings.

[17] In turn, the Respondent believes that using videoconferencing will be highly prejudicial to it, and undermine its full and ample opportunity to appear at the inquiry, present evidence and make representations. The Respondent claims in this regard that it absolutely has to be present when the Complainant testifies. It submits that there is limited

documentary evidence in this case and that, consequently, Ms. Hugie's testimony and the findings of fact the Tribunal will make are all the more crucial.

[18] The Respondent adds that virtual hearings are not always suitable, this depending on the circumstances of each case. It believes that virtual hearings are unsuitable when credibility issues are at stake or when there is extensive evidence. According to the Respondent, it must have an opportunity to cross-examine the Complainant and the various witnesses in person, especially considering its burden of proof. It alleges that there are to be nine witnesses at the hearing, and further states that some of the facts that will be presented are irreconcilable and that the credibility issues will be critical.

[19] The Respondent believes that a videoconference will limit the ability to assess the witnesses' non-verbal behaviour and to ensure that the correct procedures are followed. As examples, the Respondent cites fidgety witnesses, witnesses who may have documents before them that were not admitted into evidence, the fact that other individuals may be present helping the witness, and witnesses discussing their testimony with other individuals during breaks.

[20] In 2020, in the midst of the pandemic, the Honourable F. L. Myers wrote about the use of videoconferencing in *Arconti v. Smith*, 2020 ONSC 2782, at paragraph 19:

> In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

[21] Not only am I in full agreement with these comments by the Honourable F. L. Myers, I already supported this proposition in 2018, as explained in *Duverger 2018*, above. In that decision, I held that videoconferencing is an entirely appropriate alternative to an in-person hearing, one that is fair and equitable and that protects the principles of natural justice and procedural fairness.

[22] Today, because of the world health crisis, I am even more convinced that that decision was fair. Indeed, I continue to believe, to this day, that, contrary to what T-Lane

alleges, videoconferencing ensures a fair and equitable trial by, among other things, optimizing and enhancing access to justice for all parties.

[23] In accordance with subsection 50(1) of the CHRA, parties must be given a full and ample opportunity to present evidence and make representations. T-Lane claims, on the contrary, that a videoconference would prejudice it by not giving it a full and ample opportunity to defend itself against the Complainant's allegations.

[24] I do not share this viewpoint. On the contrary, a videoconference would allow the Tribunal to ensure a fair and equitable proceeding for all parties and to give them full and ample opportunity to present evidence and make representations in a timely manner. The parties would still have the opportunity to question and cross-examine witnesses and to present evidence. Hearings using videoconferencing technology remain *viva voce* hearings (*Duverger 2018*, above, at para. 34), and the parties and the member are all able to see each other live.

[25] The Respondent also believes that a videoconference would restrict its ability to cross-examine the Complainant and limit the Tribunal in its assessment of the credibility of witnesses, including non-verbal behaviour. Once again, I do not share the Respondent's opinion in that I continue to believe that videoconferencing is a tool that still allows the member to assess and determine whether witnesses are credible.

[26] In this regard, I continue to agree with the comments of Member Hélène Panagakos, of the Immigration and Refugee Board, Refugee Protection Division (IRB), who wrote at page 4 of her interlocutory decision (*X (Re)*, 2004 CanLII 56771 (CA IRB):

> Furthermore, Canadian courts have determined that the requirements for procedural fairness are met and that a hearing by videoconference does not substantially differ from a hearing in person.
>
> > The videoconference procedure …. allows the witness to be brought electronically into the Court where the Court has the opportunity to hear and see the evidence as it is given and to control the evidentiary process while it is taking place. The witness is live before the Court and the Court is live before the witness. R. v. Dix (1998) 1998 ABQB 370 (CanLII), 125 C.C.C. (3d) 377 (Alberta Court of Queen's Bench)

> The evidence (by videoconference) had all the features of evidence given in court except for the actual presence of the witnesses (…). There was nothing about the manner in which the witnesses testified that suggested that the remote location of the Court and the mode by which the evidence was being taken had any influence upon them. Bradley v. Bradley (1999) B.C.J. No. 2116 (B.C. Supreme Court)

[27] The Federal Court's recent decision in *Rovi Guides, Inc. v. Videotron Ltd.*, 2020 FC 596, at paragraphs 20 and 21 [*Rovi*], still supports these observations:

> [20] Although oral testimony should generally be provided in open court and attendance in person is the rule and generally preferable, it does not necessarily follow that the ability of the Court to assess the credibility of a witness or that the effectiveness of counsel in examining the witness will or may be impaired as a result of videoconferencing.
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> [21] Until a vaccine to prevent COVID-19 is widely available in Canada, or until public health officials lift stay-at-home orders and relax restrictions so as to allow people to travel safely, assemble and return to work, hearings of the Federal Court will have to be conducted remotely using the appropriate, available technology. Given that Court facilities will remain closed for the foreseeable future, Videotron's objection must be rejected since it would result in delaying the trial indefinitely.

[28] In a virtual hearing held by videoconference, the witness is live before the member, and the member, live before the witness. As when a witness appears in person before a member, the member can observe the witness's non-verbal behaviour, but also ensure and control that the correct procedures with respect to testimony are being followed (*Duverger 2018*, above, at para. 36).

[29] When the Tribunal has to decide whether a videoconference is a possible alternative in proceedings, the Tribunal balances the parties' various interests against the prejudice that might result, guided by the principles set out in its enabling legislation. Various tribunals and courts of justice, such as the Federal Court in *Rovi*, above, at paragraph 18, have engaged in that balancing exercise (see also *Pack All Manufacturing Inc. v. Triad Plastics Inc.*, [2001] O.J. No. 5882, 2001 CanLII 7655 (ONSC), at para. 9 [*Pack All Manufacturing*]).

[30] In the context of the health crisis caused by COVID-19, it seems to me impracticable if not impossible for the Tribunal to agree to adjourn all hearings where certain parties oppose a videoconference when we have the technology to conduct hearings in this manner. There are consequences to adjourning hearings before the Tribunal, and the Tribunal must avoid having COVID-19 cause delays in the processing of cases and lead to backlogs.

[31] It is not only in the parties' interest, but also in the public interest for the Tribunal hearings to continue despite the pandemic. As noted in *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2018 CHRT 5, at paragraph 59:

> Every time allegations of discrimination are made under the *CHRA* the public interest is obviously involved (see *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)* (Ont. Div. Ct.), 1988 CanLII 4794 (ON SC)). There is no question that public interest notably demands that complaints related to discrimination be dealt with expeditiously (see *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 FTR 44, 1997 CanLII 4851 (FC), [*Bell Canada*], see also subsection 48.9(1) of the *CHRA*).

[32] As for the alternatives proposed by the Respondent in its reply, I have two observations to make. First, the Respondent states that it has offered that the parties and the witnesses gather at the same location, in British Columbia, with the member and the registry officer joining by videoconference from the National Capital Region. There is nothing stopping the parties from arranging this if the government restrictions in their area allow it. Having said that, the member cannot be involved in such an arrangement.

[33] Second, the Respondent notes that it would agree to another member being assigned so that the case can proceed more quickly. To begin with, it is not for the Respondent, or any other party, to agree to the case being reassigned. It is the prerogative of the Tribunal's chairperson to assign a member and that of the member to agree to the assignment (subsection 49(2) CHRA). Second, even if another member were to be assigned to inquire into the complaint, it would not change the fact that we are in the middle of a health crisis and that federal and provincial restrictions have been imposed on Canadians. As of this day, there is no way of knowing when these restrictions will be lifted

and when the parties and Tribunal will be able to gather in person again to hear the complaint.

[34] Furthermore, if the Tribunal accepted the arguments of the Respondent, who is opposed to using videoconferencing, the hearing might, for all intents and purposes, end up being adjourned indefinitely.

[35] To sum up, I find that the Respondent's reasons have not persuaded me that a videoconference would cause it substantial prejudice (*Duverger 2018*, above, at para. 37; *Rovi*, above, at para. 18; *Pack All Manufacturing,* above, at para. 9*).*

[36] On the contrary, considering the restrictions and uncertainties resulting from the health crisis and considering the Complainant's fragile health, I believe that we must hold the hearing on the scheduled dates, by videoconference. **If the parties respect the federal government's restrictions and those of the province in which they reside**, the lawyers, their clients and their witnesses are always free to gather and to attend the hearing together.

III. Ruling

[37] I allow the Complainant's request and authorize the use of videoconferencing at the hearing scheduled from August 31, 2020, to September 4, 2020.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
August 7, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2405/6419

Style of Cause: Karen Hugie v. T-Lane Transportation and Logistics

Ruling of the Tribunal Dated: August 7, 2020

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