Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 13
Date: March 18, 2021
File No.: T2409/6819

Between:

Joshua Dorais

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] This is a ruling of the Canadian Human Rights Tribunal (the "Tribunal") disposing of the motion filed by the Canadian Armed Forces (the "Respondent" or "CAF") to exclude the testimony of Robert Claypool, a witness for the Complainant, Joshua Dorais, before the hearing.

[2] On April 5, 2017, Mr. Dorais filed a complaint with the Canadian Human Rights Commission (the "Commission") against the CAF. The complaint was referred to the Tribunal on July 19, 2019. Mr. Dorais alleges that the CAF discriminated against him under sections 7 and 10 of the *Canadian Human Rights Act* (the "CHRA") by refusing to enrol him because of his disability.

[3] Mr. Dorais intends to call Mr. Claypool as a witness at the hearing. On September 28, 2020, he filed a summary of his testimony, describing the topics on which Mr. Claypool will testify. The Respondent objects to this testimony.

[4] The Tribunal encouraged the parties to try to resolve the situation themselves and to address the Respondent's concerns regarding Mr. Claypool's testimony; however, the parties were unable to agree. The Tribunal therefore directed that the issue be dealt with through written representations.

[5] For the reasons that follow, the Tribunal dismisses the CAF's motion and allows Mr. Claypool's testimony.

II. Issues

[6] The issue is simple:

> At this stage of the proceedings, should the Tribunal exclude, in whole or in part, Mr. Claypool's testimony?

[7] Since the hearing is scheduled for April 2021, the Tribunal must bear in mind that time is short to dispose of the motion. The CHRA and the Rules of Procedure (the "Rules")

require that the Tribunal act as expeditiously as the requirements of natural justice allow (subsection 48.9(1) of the CHRA and Rule 1(1) of the Rules).

[8] Accordingly, the Tribunal will focus on the arguments of the parties that it considers essential, necessary and relevant to dispose of the issue (*Turner v. Canada (Attorney General)*, 2012 FCA 159 (CanLII) at para 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 (CanLII) at para 54).

III. Whether request premature

[9] The CAF submit that their motion to exclude Mr. Claypool's testimony is not premature. The Tribunal understands that the CAF were anticipating a possible objection from the other parties alleging that the motion was premature. In fact, the Commission argued in its representations that the motion was premature at this stage of the proceedings.

[10] Although the argument is that it is premature, the Respondent's main motion relates to whether Mr. Claypool's testimony is admissible. This is an unusual motion, since the Tribunal does not normally deal with the admissibility of evidence before a hearing.

[11] In the Tribunal's opinion, whether the motion is premature is secondary to the issue that the Tribunal must decide. Determining whether the motion is premature would simply postpone debate on the admissibility of the testimony to a later stage when the Tribunal already has all the information necessary to decide the issue.

[12] Therefore, the Tribunal does not intend to focus its analysis on whether the CAF's motion is premature, since it can dispose of the motion on the basis of the other arguments raised by the parties and the legal principles by which the Tribunal should be guided.

[13] It is settled case law that the Tribunal is the master of its own procedure (*Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 SCR 560 at 568 and 569), and Rule 3(2)(d) of the Rules states that the Tribunal "shall dispose of the motion as it sees fit". Therefore, the panel necessarily has some discretion in how it deals with motions.

[14] Considering the parties' representations, the Tribunal finds that it has enough information to understand the main issues in this motion. In particular, the Tribunal has Mr. Dorais's representations, which specifically define the purpose of Mr. Claypool's testimony. Since it is the Complainant who is calling this witness, it is the Complainant who is defining, to a certain extent, the scope of his testimony. The Tribunal notes that the CAF and the Commission will have the opportunity to cross-examine the witness, as required by the principles of natural justice and fairness.

[15] For these reasons, the Tribunal finds that it must decide immediately the issue of whether Mr. Claypool's testimony is admissible, and it chooses not to consider whether the motion is premature.

IV. Mr. Claypool's testimony

A. Guiding principles

[16] The golden rule for the disclosure of documents is the same as for the admissibility of testimony: it is arguable relevance (*Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11 (CanLII) at paras 27 to 29).

[17] If the parties plan to call witnesses, they must not only identify the witnesses but also provide a summary of their testimonies of each witness. They must summarize and communicate the nature of the testimony to the Tribunal and the other parties (Rule 6(1)(f) of the Rules).

[18] The Tribunal may summon and enforce the attendance of witnesses and compel them to testify before it (paragraph 50(3)(a) of the CHRA). However, issuing a subpoena is not a purely administrative act (*Schecter v. Canadian National Railway Company*, 2005 CHRT 35 (CanLII), at paragraph 21 [*Schecter*]; *Canadian Telephone Employees' Association v. Bell Canada*, 2000 CanLII 20416 (CHRT) [*CTEA*]).

[19] In this regard, Parliament has specifically granted the member or panel the power to issue subpoenas and compel witnesses to testify. As provided for in paragraph 50(3)(a) of the CHRA, the member or panel may

> . . . in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;

[20] The language used by Parliament supports the member or panel's discretion in this regard, in that a member **may** issue a subpoena if the member **considers** it necessary for the hearing and consideration of the complaint (*Schecter* and *CTEA*, *supra*). Inversely, if the member does not consider the testimony to be necessary, the member has the discretion not to summon the witness.

[21] How does a member or panel determine whether testimony is necessary? This is where the golden rule becomes important: there must be relevance, a connection between the evidence that a party is seeking through the testimony of a witness and a fact, a question of law or remedy relating to the complaint. The crucial element is this relevance or rational connection between the anticipated testimony and the complaint (*Schecter*, at para 21).

[22] It is also understood that testimony, like documents included in the disclosure, is not meant to be speculative: the hearing is not a fishing expedition where a party may call any number of witnesses or present testimony irrelevant to the dispute. Testimony should not be redundant and should not distract from the essence of the dispute (*Grant v. Manitoba Telecom Services Inc.*, 2010 CHRT 29 (CanLII) at para 9).

[23] That said, here the Tribunal is being asked by the CAF to consider, in advance, whether Mr. Claypool's testimony is admissible. The CAF give five main reasons for rejecting his testimony in advance, namely (1) it is similar fact evidence; (2) it is irrelevant; (3) its probative value does not outweigh its prejudicial effect; (4) it is a distraction; and (5) there is collusion between the potential witness and the Complainant.

[24] Member Kirsten Mercer has thoroughly analyzed the key, guiding principles that the Tribunal follows in assessing the admissibility of evidence (*Clegg v. Air Canada*, 2019 CHRT 4 (CanLII) at paras 63 and following [*Clegg*]).

[25] She summarizes the following four key principles at paragraph 84 of her decision:

> [84] Based on the above-described general approach to admissibility at the Tribunal, in the face of a question about the admissibility of a piece of evidence, the Tribunal will consider whether:
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> a) the evidence is relevant;
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> b) the admission of the evidence is consistent with the principles of natural justice and procedural fairness;
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> c) the probative value of the evidence is outweighed by its prejudicial effect; and
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> d) there is any bar to the admission of the evidence, including consideration of s. 50(4) and s. 50(5) of the *Act*.

[26] It is with these principles in mind that the Tribunal will conduct its analysis.

B. Analysis

[27] The CAF's main argument is that Mr. Claypool's testimony is inadmissible. They believe that his testimony is of little or no probative value in the dispute and that admitting the testimony could be highly prejudicial to the CAF.

[28] The CAF submit that the evidence Mr. Dorais is seeking to introduce is similar fact evidence and that such evidence is presumed to be inadmissible. The CAF also submit that it is up to the party seeking to introduce this type of evidence to demonstrate, on a balance of probabilities, that the probative value of the evidence outweighs any prejudicial effect it may have on the other parties. They believe that the sole purpose of Mr. Claypool's evidence is to demonstrate the CAF's tendency to engage in specific acts.

[29] The CAF's understanding is that Mr. Dorais intends to have Mr. Claypool discuss the implementation of the new measures that the CAF have adopted to rectify certain discriminatory situations in their recruitment process. The CAF do not believe that such testimony is necessary because their own witnesses are in a better position to discuss recruitment policies and can be cross-examined by Mr. Dorais and the Commission if they so wish.

[30] The CAF also submit that Mr. Claypool's testimony is not linked to Mr. Dorais's complaint and is not relevant since the complaint focuses on the Complainant's personal experience when he tried to re-enroll in the army. Mr. Claypool's testimony would therefore not be relevant in this context.

[31] The Commission considers, on the contrary, that the evidence is relevant in order to address the new recruiting process implemented by the CAF. This process includes an individual interview, which the CAF explain in their Amended Statement of Particulars. The Commission states that Mr. Claypool attempted to re-enroll in the Army when the new system was in place, which was not the case when Mr. Dorais attempted to enroll. Nonetheless, Mr. Claypool's application was rejected because of his post-traumatic stress disorder ("PTSD"), as was Mr. Dorais's, and the individual interview was never offered to him.

[32] The Commission adds that Mr. Claypool's testimony is also relevant to the case in that he suggests that the CAF superficially dismiss candidates with a past or recent history of PTSD. This would then support the existence of systemic discrimination in this type of situation. In its view, this is not similar fact evidence.

[33] The Commission states that the purpose of Mr. Claypool's testimony is not to show that because the CAF allegedly discriminated against him, they necessarily discriminated against Mr. Dorais when he attempted to re-enroll in the army in 2016. Instead, his testimony is related to a pattern the Respondent followed in its recruiting process with regard to individuals with a history of PTSD.

[34] As for Mr. Dorais, it is clear in his representations that his intention in calling Mr. Claypool as a witness is merely to speak about the latter's experience when he attempted to re-enroll in the Army. He repeats that the limits of Mr. Claypool's testimony are strictly defined in the summary dated September 28, 2020. He considers that it will add contextual evidence rather than similar fact evidence.

[35] Mr. Dorais adds that the CAF will call witnesses who will discuss the recruitment measures that have been implemented. Moreover, Mr. Dorais feels that the content of one of Mr. Claypool's refusal letters seems to support this tendency of the Respondent to

categorically dismiss candidates who, like him, have a history of PTSD. He adds that the nature of his complaint is, to a certain degree, systemic.

[36] The CAF reiterated their disagreement with this aspect in their reply and maintain that Mr. Dorais's complaint is strictly individual, not systemic.

[37] It is clear that the parties do not agree on whether Mr. Dorais's complaint includes systemic aspects or not. The Tribunal will return to this aspect later in its decision.

[38] While the complaint may or may not have systemic aspects, it is nonetheless important to bear in mind that the fundamental question is relevance. Is Mr. Claypool's testimony, as described in the summary, relevant to this case?

[39] Based on the representations made with regard to this motion, the parties' Statements of Particulars and the summary of Mr. Claypool's testimony, the Tribunal finds that his testimony is indeed relevant to the case.

[40] The Respondent considers that the Complainant and the Commission have not shown that the probative value of his testimony overrides the prejudicial effects that could result. The CAF's main argument is that Mr. Claypool's testimony would be similar fact evidence. Such evidence is generally inadmissible, so it is the responsibility of the party that wishes to introduce it to show that the prejudicial effect does not outweigh its probative value.

[41] However, the CAF have not convinced the Tribunal that this is indeed similar fact evidence. In *Constantinescu v. Correctional Service Canada*, 2020 CHRT 4 (CanLII) at para 69, the Tribunal reiterated what generally constitutes similar fact evidence:

> [69] Similar fact evidence derives from the criminal law and its admissibility is significantly limited and restricted in both criminal and civil law. As the Tribunal noted in *Hewstan v. Auchinleck,* D.T.7/97, August 27, 1997, at pages 2 and 3:
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> > Past conduct similar to that at issue in proceedings may be admitted as evidence in proceedings provided its probative value exceeds its prejudicial value, R. v. Morin 1988 CanLII 8 (SCC), [1988] 2 SCR 345. Such evidence must **be relevant to an issue in the case** apart from its tendency to show propensity on the part of the accused, or it may not be received.

[Emphasis in original.]

[42] It seems that Mr. Claypool's testimony does not aim to establish that since he had allegedly experienced discrimination, Mr. Dorais also necessarily experienced discrimination. Moreover, the Respondent stated in its Amended Statement of Particulars that it implemented a recruitment process that included, among other things, an individual interview in cases where there were concerns about a candidate. Therefore, it submits that it individualized the process and that it considers the medical information submitted by each candidate. Mr. Dorais confirms that this is exactly what Mr. Claypool will testify to, as stated in the summary of his testimony.

[43] The CAF state that it will be possible to cross-examine some of their witnesses on this subject. The Tribunal believes that Mr. Dorais must also have a full and ample opportunity to present his arguments on this subject and must be allowed to present evidence against the CAF's allegations (subsection 50(1) of the CHRA). If the CAF feel their witnesses can be cross-examined on the subject, why would Mr. Dorais not have the opportunity to present his own evidence on the subject, including through Mr. Claypool's testimony?

[44] In their reply, the CAF countered this argument, explaining that they understand Mr. Dorais's intentions: they believe he wants to show that the CAF have not implemented their new recruitment measures. The Tribunal understands that Mr. Claypool will address this matter of the Respondent's recruitment process during his testimony.

[45] As for the issue of prejudicial effects on the Respondent, the CAF have not persuaded the Tribunal that they override the probative value of Mr. Claypool's testimony. If the Respondent considers that additional documents should be disclosed, it can always amend its list of documents and disclose them. There is still time before the hearing, which is to begin on April 6, 2021, for the parties to make the efforts required to finalize the disclosure of the evidence.

[46] Moreover, the hearing is scheduled over seven days, as agreed between the Tribunal and the parties following the evaluation of the case and the time required to complete it. This

seems to be more than enough time to hear the entire case, including Mr. Claypool's testimony.

[47] Once Mr. Claypool has testified on the elements included in his summary, the parties will be free to guide the Tribunal along in its understanding of the evidence, the weight to be given to it and the conclusions to be drawn from it. At this stage, the Tribunal will not determine how much weight to give Mr. Claypool's testimony, nor will it draw any conclusions with regard to this evidence, which, we must recall, has not yet been presented. Mr. Claypool's testimony has not yet been tested at the hearing, and once the Tribunal has heard all of the evidence, it will be able to assess the weight to grant each element. At this stage, the Tribunal is only ruling that the evidence is generally relevant and admissible and that there is no reason to exclude it from the hearing. Additionally, the Tribunal finds no limitation to the admissibility of the testimony, whether it is related to natural justice, procedural fairness, or any other legislative limitation (*Clegg*, *supra*).

[48] Moreover, the CAF's argument that Mr. Claypool's testimony would distract the Tribunal from its mandate is not persuasive. The Tribunal is more than able to focus on the evidence presented and assess the weight to grant it. Mr. Dorais was specific about the purpose of Mr. Claypool's testimony, and it does not seem to be an attempt to distract the Tribunal in any way. Nor does it seem that the evidence likely to be presented is speculative or redundant.

[49] The Respondent's argument that there is collusion between Mr. Dorais and Mr. Claypool is also not persuasive at this stage. This argument would apply in the evaluation of the credibility and reliability of the testimony rather than its relevance or general admissibility. If the Respondent wishes to present this sort of argument to the Tribunal, it can do so at the hearing, taking into account the evidence presented.

[50] Lastly, while the Tribunal has sufficient evidence to allow it to determine that Mr. Claypool's testimony is relevant, that its probative value is more important than the prejudicial effects that might result and that there are no other limitations that would justify excluding it, the fact remains that there is a serious disagreement between the parties regarding the systemic aspect of Mr. Dorais's complaint. The Commission and Mr. Dorais

submit that the complaint includes systemic aspects because of the recruitment policies adopted by the CAF, which have an impact on the enrollment of individuals with a history of PTSD or depression.

[51] From the outset, in its representations on this ruling, the Respondent has been arguing that Mr. Dorais's complaint is individual and not systemic. The Commission instead considers that the complaint includes a systemic aspect and that Mr. Claypool's testimony could enlighten the Tribunal on this subject. Lastly, Mr. Dorais believes his complaint includes a systemic aspect, to some extent.

[52] Considering the nature of the issue, and especially since the parties have provided detailed representations on it in the context of this ruling, the Tribunal finds it necessary to address this aspect to avoid any confusion at the hearing. The Tribunal believes that it can rule on this issue while respecting the principles of natural justice and procedural fairness (subsections 48.9(1) and 50(1) of the CHRA).

[53] The Tribunal agrees with the CAF that Mr. Dorais's complaint is, in itself, individual. That said, an "individual" complaint is not necessarily the opposite of a "systemic" complaint. In other words, it is completely possible for an individual complaint to include certain aspects that are systemic in nature. In addition, it is also recognized that the Tribunal may indeed hear an individual complaint and order remedies under section 53 of the CHRA which have systemic effects (*Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2019 CHRT 21 (CanLII) at paras 24 to 26).

[54] In *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1991 CanLII 387 (CHRT), T.D. 4/91, 1991-04-29 at 9, the Tribunal wrote the following:

> The concept of systemic discrimination, on the other hand, emphasizes the most subtle forms of discrimination, as indicated by the judgement of Dickson, C.J. in CN v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, at 1138-9. It recognizes that long-standing social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious.

[55] In *Emmett v. Canada Revenue Agency,* 2018 CHRT 23 (CanLII), at paragraph 73, the Tribunal also stated:

> [73] Recently, in *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.,* 2008 QCTDP 24 [*Gaz métro QCTDP*], aff'd 2011 QCCA 1201, the Human Rights Tribunal of Québec defined systemic discrimination as:
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> > [36] [...] the cumulative effects of disproportionate exclusion resulting from the combined impact of attitudes marked by often unconscious biases and stereotypes, and **policies and practices generally adopted without taking into consideration the characteristics of the members of groups contemplated by the prohibition of discrimination**.
>
> [Emphasis added.]

[56] The Commission mentions some of these systemic aspects in its Statement of Particulars, including at paragraph 59, where it refers to the CAF's general rule excluding all individuals diagnosed with PTSD or depression. Mr. Dorais also refers to it in his amended reply, specifically, at paragraphs 5 and 6. The Commission restated the same arguments in its representations regarding this ruling, at paragraphs 10 and 11, and Mr. Dorais did the same at paragraphs 4 and 5 of his representations.

[57] For its part, the Respondent argues that the complaint is not systemic, but responds specifically to the Commission's allegations regarding the general rule excluding individuals with a history of PTSD or depression (see its Amended Statement of Particulars at paragraphs 23 and following). The CAF respond to the allegations, defend themselves and assert that they have not put in place a general policy excluding those individuals.

[58] The Tribunal also notes that Mr. Dorais included in his complaint section 10 of the CHRA, which deals with discriminatory practices related to policies or practices. Although it is impossible to generalize in this regard, section 10 of the CHRA is usually relied on in support of complaints of a systemic nature. This makes sense since section 10 focuses on the policies and practices themselves that deprive or **tend to** deprive and individual or class of individuals of any employment **opportunities**.

[59] The Tribunal understands from their arguments that the Commission and Mr. Dorais believe the CAF put in place policies and/or practices that deprive individuals with a history of PTSD or depression of employment opportunities. The Tribunal understands that this is

what the Commission is referring to when it uses the term “blanket exclusion”. Instead of arguing that allegations of systemic discrimination were not part of Mr. Dorais’s complaint, the CAF chose to respond to the Commission’s and Mr. Dorais’s arguments in the Amended Statement of Particulars.

[60] Although the parties do not agree on this matter and have different points of view on the issue, the Tribunal considers that the issue of systemic discrimination is before it and that it will be able to give all parties the opportunity to present their evidence and arguments on the matter at the hearing.

V. Ruling

[61] For these reasons, the Tribunal dismisses the CAF’s motion and authorizes Mr. Claypool’s testimony at the hearing, as described in the summary of the testimony filed by the Complainant on September 28, 2020.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
March 18, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2409/6819

Style of Cause: Joshua Dorais v. Canadian Armed Forces

Ruling of the Tribunal Dated: March 18, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Joshua Dorais, for himself

Caroline Carrasco and Sarah Chenevert Beaudoin, for the Canadian Human Rights Commission

Jennifer Lee and Samantha Gergely, for the Respondent