Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 40
Date: November 4, 2021
File No.: T2387/4619

Between:

Lucyna Loboda

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway Company

Respondent

Ruling

Member: Gabriel Gaudreault

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I. Background of the Motion

[1] This ruling of the Canadian Human Rights Tribunal (the "Tribunal") deals with the motion for disclosure of documents filed by the Canadian National Railway Company (the "Company" or the "Respondent") on June 25, 2021.

[2] By that motion, the Respondent is requesting that the Tribunal order full disclosure of all arguably relevant information from Lucyna Loboda ("Ms. Loboda" or the "Complainant") that is in her possession, in particular:

- All Ms. Loboda's Great-West Life ("GWL") records regarding her disability coverage and return to work from May 1, 2015 to date; and
- All Ms. Loboda's medical records, including medical charts, clinical notes, medical reports, and correspondence of any physician, psychologist or other health care provider who has treated or assessed Ms. Loboda in relation to her disability, return to work, and fitness to work from May 1, 2015 to date, including but not limited to, all records of Dr. Elghol, Dr. Jacquier, Dr. Astorga, Dr. H. Annawi and Karen Bell, Registered Psychologist.

[3] The Canadian Human Rights Commission (the "Commission") takes no position on the request for disclosure of documents dating back to May 1, 2015. However, it generally objects to the disclosure of documents beyond the end of Ms. Loboda's employment and to the disclosure of medical records beyond 2019.

[4] Ms. Loboda's position is similar to that of the Commission: she opposes the disclosure of her GWL records and medical records pre-dating July 8, 2015. She also objects to the disclosure of documents beyond the termination of her employment on December 22, 2015. Finally, she objects to the disclosure of any documents relating to her psychological counselling with Ms. Bell.

[5] For the reasons that follow, the Tribunal will allow the Respondent's motion in part.

II. Legal Bases for Disclosure

[6] The legal bases for the disclosure of documents in Tribunal proceedings are well established in law. The parties quite correctly cited my colleague David L. Thomas, who provided an accurate summary of the case law in this regard in *Kayreen Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28 at paras 4-10. It is useful in this ruling to reproduce those paragraphs:

> [4] Pursuant to subsection 50(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*Act*), parties before the Canadian Human Rights Tribunal (Tribunal) must be given a full and ample opportunity to present their case. To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession or care of the opposing party prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case it is up against and, therefore, adequately prepare for the hearing.
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> [5] In deciding whether the information ought to be disclosed, the Tribunal must consider whether the information at issue is arguably relevant (see *Warman v. Bahr*, 2006 CHRT 18 at para. 6). This standard is meant to "prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" (see *Day v. Department of National Defence and Hortie,* Ruling No. 3, 2002/12/06). This also ensures the probity of the evidence.
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> [6] The standard is not a particularly high threshold for the moving party to meet. If there is a rational connection between a document and the facts, issues, or forms of relief identified by the parties in the matter, the information should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (*Rules*) (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34 at para. 42 (*Guay)*; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6 at para. 28; and, *Seeley v. Canadian National Railway*, 2013 CHRT 18 at para. 6 (*Seeley*)).
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> [7] However, the request for disclosure must not be speculative or amount to a "fishing expedition" (see *Guay* at para. 43). The documents requested should be identified with reasonable particularity. It is the Tribunal's view that in the search for truth and despite the arguable relevance of evidence, the Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the *Rules* are respected, in order to ensure the informal and expeditious conduct of the inquiry (see *Gil v. Canada (Minister of Citizenship and Immigration*), 1999 CanLII 8407 (FC) at para. 13; see also s. 48.9(1) of the *Act*).

> [8] This Tribunal has already recognized in its past decisions that it may deny ordering the disclosure of evidence where the probative value of such evidence would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal should be cautious about ordering searches where a party or a stranger to the litigation would be subjected to an onerous and far-reaching search for documents, especially where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para. 4; *Seeley* at para. 7; see also *R. v. Seaboyer* [1991] 2 S.C.R. 577 at 609-611).
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> [9] It should also be noted that the disclosure of arguably relevant information does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded it in the decision making process (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 at para. 4).
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> [10] Moreover, given that a party's obligation to disclose is limited to documents that are "in the party's possession" under section 6 of the *Rules*, the Tribunal cannot order a party to generate or create new documents for disclosure (see *Gaucher v. Canadian Armed Forces,* 2005 CHRT 42 at para. 17).
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> [See also *Turner v. Canada Border Services Agency*, 2018 CHRT 9 at para 25; *Nur v. Canadian National Railway Company*, 2019 CHRT 5 at paras 13-17.]

[7] It is also useful to reproduce my colleague Edward P. Lustig's comments in *Egan v. Canada Revenue Agency*, 2017 CHRT 33 (CanLII) at para 34 [*Egan*], about the disclosure of medical documents:

> [34] Where medical documents are concerned, this Tribunal has held that where confidentiality or privacy is at issue, these interests are overridden by the respondent's right to "know the grounds and scope of the complaint against it" (*Guay* at para. 45). As stated in *Guay*, "[i]n human rights proceedings, justice requires that a respondent be permitted to present a complete defence to a Complainant's arguments. **If a complainant bases the case on his/her medical condition, a respondent is entitled to relevant health information that may be pertinent to the claim**" (see *Guay* at para. 45; see also *Palm* at para. 11).
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> [Emphasis added.]
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> [See also *Yaffa v. Air Canada*, 2014 CHRT 22 at para 12.]

[8] In *T.P. v. Canadian Armed Forces*, 2019 CHRT 19 [*T.P.*], my colleague Colleen Harrington expressed some reservations about the disclosure of medical documents. She was of the view that the parties' rights with respect to the obligation to disclose must be weighed against the right to privacy. At paragraph 37, she writes as follows:

> [37] While a complainant's right to privacy or confidentiality with respect to medical records may cease if they put their health at issue in a proceeding, **the obligation to disclose must be balanced with these legitimate privacy concerns**. As the Commission notes, **even if a complainant puts some aspects of their health in issue, this does not automatically mean that full disclosure of all medical records is required**.
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> [Emphasis added.]

[9] It is with these principles in mind that the Tribunal will analyze the Respondent's motion.

III. Issue

[10] The issue is a simple one:

> Should the Tribunal order disclosure from Ms. Loboda of the documents sought by the Respondent?

[11] To answer this question, the Tribunal must determine, in particular, whether the documents sought by the Company are arguably relevant to the proceeding, or, to put it another way, relevant to a fact, a legal issue, or a relief sought.

IV. Analysis

[12] Should the Tribunal order disclosure from Ms. Loboda of the documents sought by the Respondent? The Tribunal answers in the affirmative, but with certain limitations, for the following reasons.

[13] It is useful to briefly review some of the relevant elements of Ms. Loboda's complaint against the Company in order to understand the impact of the Tribunal's decision.

[14] Ms. Loboda worked for the Respondent between February 2011 and December 2015. In 2010, she was diagnosed with Graves disease, and in 2014 she was diagnosed with anxiety and depression.

[15] During her employment, she was absent on various occasions because of her medical condition. Among other things, she was on medical leave between September 2014 and July 2015. Her medical leave was subsequently extended from July to August 2015.

[16] In the end, Ms. Loboda left her employment on December 22, 2015.

[17] Ms. Loboda alleges that she was discriminated against, within the meaning of section 7 of the Canadian Human Rights Act (the "CHRA") on the basis of her physical and mental disability. She alleges, among other things, that the Respondent failed to accommodate her disability when she returned to work in July 2015, which ultimately led her to leave the Company on December 22, 2015, the only alternative to avoid compounding her difficult financial situation.

[18] The Complainant is claiming, among other things, compensation for pain and suffering in the total amount provided for in the CHRA, i.e. $20,000 (paragraph 53(2)(e) of the CHRA). She is also claiming under paragraph 53(2)(c) of the CHRA the wages she was deprived of between the end of her coverage with GWL on August 24, 2015, and the end of her employment on December 22, 2015, as well as the difference between the wages she was receiving at the Company and the wages she received in her subsequent employment, up to and including 2019. In her view, but for the discrimination she experienced, she would have successfully returned to work with the Respondent and would not have suffered any financial loss.

A. GWL Records

[19] The Respondent argues that Ms. Loboda's psychological and physical condition is at issue in the complaint before the Tribunal, both in terms of the assessment of reasonable accommodation, her return to work and her medical restrictions, and in terms of the compensation she is claiming, for pain and suffering and the wages she was deprived of.

[20] It is not disputed that the Complainant has already disclosed a series of documents regarding her medical condition. The Tribunal understands that the disclosed documents are limited to the period from July 8 to December 22, 2015. But the Company alleges that the Complainant should have disclosed her medical records and GWL records from May 1, 2015; that is when the process of her return to work with the Company was initiated.

[21] The Commission takes no position on this request. The Complainant, on the other hand, believes that the Respondent's request is moot, since GWL accepted her doctor's recommendations that she was not ready to return to work with the Company and extended her sick leave beyond July 8, 2015. Ms. Loboda notes that the discrimination began on July 8, 2015, and that it is the arguably relevant documents from that date that must be disclosed.

[22] The purpose of this decision is not to make any findings of fact in this case. At this stage, only the disclosure of documents that are arguably relevant to a fact, a question of law or a relief is at issue. It is at the hearing that the evidence will be presented, tested, and admitted or not, and it is then that the Tribunal will be in a position to draw any conclusions about the evidence admitted.

[23] It appears from the Respondent's Statement of Particulars ("SOP") that GWL's involvement began before July 8, 2015. GWL allegedly contacted an employee at the Respondent's, Stephanie Wright, informing her that Ms. Loboda could return to work in early June 2015 under a gradual return to work plan. The Commission, in its SOP, also notes that the Complainant was scheduled to return to work in early June 2015 and that GWL's return to work plan was dated May 21, 2015. The Complainant, also in her SOP, refers to certain elements suggesting that her return to work was discussed in May 2015. To that end, she mentions, among other things, that her return was scheduled for June 6, 2015, but that she did not feel ready to return to work; a meeting with her endocrinologist in May 2015 had revealed a worsening of her Graves disease.

[24] With these elements, it takes little to satisfy the Tribunal that the Company's claim is well-founded. Indeed, it appears that there may be documents relevant to the dispute from

May 1 to July 8, 2015, since not only did Ms. Loboda consult at least one health care provider during this period, but also GWL started planning her return to work in May 2015.

[25] These documents are undoubtedly relevant to the dispute. They may relate to the Complainant's medical condition and state of health, which are at issue in the complaint, as well as to the process of her return to work with the Company and her restrictions, which are also relevant to the dispute.

[26] The Tribunal needs no further argument to be satisfied of the arguable relevance of the documents from May 1 to July 8, 2015, that the Respondent is seeking. Given this conclusion, it is not necessary for the Tribunal to deal with the alternative request made by Ms. Loboda in paragraph 20 a. of her response to the motion for disclosure.

[27] The Respondent is also seeking disclosure of GWL records from May 1, 2015 to date. The Commission objected to the disclosure of documents beyond the termination of Ms. Loboda's employment.

[28] The Tribunal is not persuaded that it is necessary to disclose the GWL records beyond the Complainant's termination of employment.

[29] Indeed, from the time Ms. Loboda left her employment with the Company on December 22, 2015, a return to work became impossible. There is nothing in what has been presented by the Respondent to show that Ms. Loboda would have continued to have any connection with GWL after December 22, 2015. Nor is there any evidence that Ms. Loboda would have continued to receive any benefits from GWL after she left the Company. On the contrary, on the basis of the Complainant's Statement of Particulars and the remedies the Complainant is seeking, it appears that her coverage with GWL ceased on August 24, 2015.

[30] The Respondent has not been able to establish the arguable relevance of Ms. Loboda's GWL records beyond December 22, 2015.

[31] Of course, only those of Ms. Loboda's GWL records that relate to the facts, legal issues and relief identified in the complaint before the Tribunal should be disclosed. This includes documents concerning, among other things, Ms. Loboda's medical condition, the benefits she received, and her return to work, and which are connected to the Company.

[32] It should be added that Ms. Loboda has indicated that she does not wish to disclose any more medical records than she has already done to date in the case. While the Tribunal understands the Complainant's position and is sympathetic to her concerns, this is not conclusive for the purposes of its analysis. The Tribunal must decide on the arguable relevance of the documents being sought.

[33] In the present case, the Respondent has satisfied the Tribunal that the documents being sought are arguably relevant to the facts alleged in the complaint. Ms. Loboda must therefore disclose them.

[34] Now, and this may alleviate Ms. Loboda's concerns, it is important to remember that we are merely at the document disclosure stage. The documents are not part of the Tribunal's official record, are not available to the public and are protected by the implied undertaking of confidentiality. I explained the scope of this undertaking in *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 at paras 153-155:

> [153] Documents that have been disclosed in court proceedings, such as the Tribunal's, are governed by a well-established common law principle, that of the **implied undertaking of confidentiality**.
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> [154] This rule restricts the use of documents that have been disclosed to the sole purpose of the proceedings in question. More clearly, a party who received documents at the stage of communication, disclosure, discovery, etc., is **deemed** to have given an undertaking to the Court that said documents will not be used for any purpose other than the judicial proceedings for which they were produced. The use, even ulterior, of these documents for other purposes can constitute a contempt of court (*Seedlings Life Science Ventures LLC v. Pfizer Canada Inc.,* 2018 FC 443, at para 3).
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> [155] However, when documents are filed as exhibits at the Tribunal hearing, they necessarily become public unless a confidentiality order is preventing their distribution (subsection 52(1) CHRA). In that respect, a member of the public may file an application with the Tribunal to have access to it.

B. Medical Records

[35] The Respondent is also seeking disclosure of all the Complainant's medical records, including medical charts, clinical notes, medical reports, and correspondence of any physician, psychologists or other health care provider who has treated or assessed the

Complainant in relation to her disability, return to work and fitness for work from May 1, 2015 to date, including but not limited to, all records of Dr. Elghol, Dr. Jacquier, Dr Astorga and Dr. H. Annawi. The Tribunal will discuss the documents of the psychologist, Ms. Bell, in the next section of this decision.

[36] The Tribunal's analysis in the previous section with respect to Ms. Loboda's GWL records also applies to her medical records.

[37] As the Tribunal has found, Ms. Loboda's physical and mental disability and its effect on her and her ability to return to work with the Respondent is undoubtedly an issue in the complaint before the Tribunal. This is clear to the Tribunal from a reading of the parties' SOPs.

[38] The Complainant indicated that she had consulted at least one health care provider in May 2015, and the evidence before the Tribunal demonstrates that the process of her return to work with Company began in May 2015. GWL's involvement and Ms. Wright's contact with the Company to discuss Ms. Loboda's return supports this.

[39] This is all that is required for the Tribunal to conclude that Ms. Loboda's medical records from May 1 to July 8, 2015 – records of any health care provider that are connected to her complaint and relate to, among other things, her physical and mental disability at issue (Graves disease, depression, anxiety), her return to work process and her restrictions – are arguably relevant to the dispute.

[40] Ms. Loboda has filed a complaint that involves her medical condition and her return to work with the Respondent. The Respondent is therefore entitled to obtain health information that is arguably relevant to this matter (*Egan* at para 34), and the right to privacy and confidentiality with respect to these medical records then ceases (*T.P.* at para 37).

[41] The Tribunal does not grant the Respondent's request for disclosure of the medical records to date of the health care providers who have treated Ms. Loboda.

[42] Again, the Tribunal's analysis in the previous section is relevant. The Complainant has already disclosed her medical records up to December 22, 2015, the date her

employment with the Company ended. However, she refuses to disclose her medical records beyond that date.

[43] Ms. Loboda is claiming compensation for pain and suffering in the amount of $20,000 under paragraph 53(2)(e) of the CHRA. She argues in her SOP that what took place between her and the Company has had a long-term impact on her health, the symptoms of which will take months or even years to recover from.

[44] She is also claiming, under paragraph 53(2)(c) of the CHRA, the wages she was deprived of between the end of her coverage with GWL on August 24, 2015, and the end of her employment on December 22, 2015.

[45] Finally, Ms. Loboda is claiming the wages she was deprived of after her employment was terminated, which is the difference between her wages while employed by the Company and the wages she received in her subsequent employment from December 22, 2015 up to and including 2019.

[46] This is not a fishing expedition, as the Complainant argues. She has chosen to make claims for pain and suffering and the wages she was deprived of after her employment with the Company was terminated. Because these issues are now part of the case, she cannot refuse to disclose arguably relevant documents relating to them. These documents are arguably relevant, for example, to calculating any compensation the Tribunal may order or to analyzing the question of mitigation of damages.

[47] The Tribunal is persuaded by the Respondent's arguments that Ms. Loboda must disclose all arguably relevant medical records of her health care providers that relate not only to the facts or issues in her complaint, but also to the relief, the financial compensation, she is seeking up to and including 2019.

[48] As Ms. Loboda did not specify a final date for her claim, the Tribunal agrees with the Commission's submission that the appropriate date for the time being is December 31, 2019. The Complainant must therefore disclose the documents up to that date.

[49] In this regard, the Complainant proposes to make changes to the remedies she is seeking, including by reducing the compensation for pain and suffering she is seeking and by removing the phrase "[t]here were long term repercussions as well". This is not determinative in the Tribunal's decision as Ms. Loboda is maintaining her claim for compensation for pain and suffering and lost wages beyond her employment, which in itself justifies disclosure of these documents.

C. Records of Psychologist Bell

[50] The Respondent is also seeking disclosure of records of Ms. Loboda's treating psychologist, Ms. Karen Bell, that are arguably relevant to the dispute. The Complainant objects to the disclosure of these records in their entirety.

[51] The Tribunal understands that the Complainant has not disclosed any records to date relating to her psychological counselling with Ms. Bell.

[52] The Respondent argues that Ms. Bell treated the Complainant, particularly with respect to her return to work. Ms. Bell also allegedly prepared a report dated May 1, 2015 for GWL, assessing Ms. Loboda's condition and her ability to return to work at the Respondent's as of June 1, 2015.

[53] The Complainant herself states in her SOP that GWL relied, among other things, on the recommendations of her psychologist, Ms. Bell. She also states that her psychologist, who is not a physician, did not take into account the worsening of her symptoms from Graves disease in her recommendations to GWL regarding her return to the workplace.

[54] Again, nothing more is required to persuade the Tribunal of the arguable relevance of the documents requested by the Respondent.

[55] Although Ms. Loboda does not wish to disclose these documents and considers that they are immaterial to the dispute and that their disclosure is a moot point, the Tribunal is not convinced.

[56] The Tribunal is sensitive to the Complainant's comments on the impact of reviewing the documents relating to her complaint. However, it is the Complainant who has raised her

medical condition and her return to work with the Respondent. The parties are entitled to a full answer and defence (subsection 50(1) of the CHRA). The evidence presented by the Respondent shows that Ms. Bell, the psychologist who treated the Complainant, was involved in her return to work process. The documents that exist in this regard are necessarily arguably relevant to the dispute, and the Complainant must disclose them to the other parties.

[57] As a reminder, Ms. Loboda must disclose what is arguably relevant, that is, what concerns her relationship with the Company, her former employer, including her return to work, her ability to do so, and her physical and mental disability, all of which are at issue in these proceedings.

[58] The Respondent is seeking disclosure of Ms. Loboda's records relating to her psychological counselling with Ms. Bell from May 1, 2015 to date. The Tribunal will limit disclosure to the period between May 1, 2015 and the termination of Ms. Loboda's employment on December 22, 2015.

[59] Indeed, as appears from the Complainant's SOP and Reply, it appears that Ms. Bell met with Ms. Loboda at GWL's request. Thus, Ms. Bell appears to have been involved during a specific time, for a specific purpose and at the request of GWL. Nothing in the Respondent's submissions leads the Tribunal to believe that Ms. Loboda had any psychological counselling with Ms. Bell after her employment with the Respondent ended.

D. Request to Protect Disclosed Documents

[60] The Complainant is asking the Tribunal to make an order to protect the disclosed documents.

[61] As the Tribunal has already noted, documents that have been or will be disclosed are and will be protected by the principle of the implied undertaking of confidentiality.

[62] It is unnecessary to make an order to that effect, since the parties, whether represented or not, are bound by such an undertaking. Breaching the undertaking could

have consequences (*Constantinescu v. Correctional Service Canada*, 2020 CHRT 4 at paras 138-141).

[63] It should be noted that these documents are not currently part of the official record of the Tribunal. They have not, at this stage, been introduced and filed in evidence by the parties. Nor have they been admitted into evidence by the Tribunal.

[64] Thus, it would also be premature at this stage to order the protection and confidentiality of these documents under section 52 of the CHRA. It is understood that the Tribunal will be able to deal with such a request, if made by either party, in due course.

V. Orders

[65] For these reasons, the Tribunal orders the disclosure of documents arguably relevant to a fact, a question of law, or a relief, namely:

- All the Complainant's GWL records relating regarding her disability coverage and return to work from May 1, 2015 to December 22, 2015;
- All the Complainant's medical records, including medical charts, clinical notes, medical reports, and correspondence of any physician, psychologist or other health care provider who has treated or assessed the Complainant in relation to her disability, return to work, and fitness to work from May 1, 2015 to December 31, 2019, including but not limited to all records of Dr. Elghol, Dr. Jacquier, Dr. Astorga and Dr. H. Annawi; and
- The records of Ms. Karen Bell, Registered Psychologist, relating to the dispute from May 1, 2015 to December 22, 2015.

[66] At this stage, the Tribunal is not ordering any measures under subsection 52(1) of the CHRA as the question is premature.

Signed by

Gabriel Gaudreault

Tribunal Member

Ottawa, Ontario
November 4, 2021

English version of the Member’s decision

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2387/4619

Style of Cause: Lucyna Loboda v. Canadian National Railway Company

Ruling of the Tribunal Dated: November 4, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Lucyna Loboda, for herself

Julie Hudson, for the Canadian Human Rights Commission

Alison Walsh, for the Respondent