Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 42
Date: December 21, 2022
File No.: T2665/4121

Between:

Keith Leonard

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian American Transportation Inc. and Penner International Inc.

Respondents

Ruling

Member: Gabriel Gaudreault

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I. Background

[1] On October 14, 2022, the Respondents, Canadian American Transportation ("CAT") and Penner International Inc. ("Penner"), filed a request seeking to prevent certain of Mr. Keith Leonard's ("complainant") witnesses from testifying. More specifically, the Respondents object to the anticipated testimony of three individuals: Mr. Adam Wolkin, Ms. Sandra Leonard and Mr. Daniel Goyette.

[2] The Tribunal received the Complainant's submission on October 26, 2022, and the Respondents' reply on November 4, 2022. The Commission is not participating in the proceedings and did not file any submissions regarding this motion.

II. Decision

[3] The Tribunal dismisses CAT and Penner's request to prevent Mr. Wolkin, Ms. Leonard and Mr. Goyette from testifying.

III. Analysis

[4] The Tribunal believes that the testimony of Mr. Adam Wolkin, Ms. Sandra Leonard and Mr. Daniel Goyette are all potentially relevant to a fact or a remedy and Mr. Leonard is authorized to call them to testify before the Tribunal.

[5] The Respondents rely on *Dorais v. Canadian Armed Forces*, 2021 CHRT 13 [*Dorais*] and its four guiding principles (relevancy, natural justice and procedural fairness, balance between probative value and prejudicial effect, exceptions) to justify their request.

[6] The Tribunal notes that *Dorais* deals with a specific issue, which is the **admissibility** of evidence. In that decision, the respondent party formally objected to the admissibility of Mr. Clayton's testimony before the hearing even started and therefore, it required that the Tribunal dealt with this issue as a preliminary matter, which is unusual. Admissibility of witness evidence is generally dealt with at the hearing and not as a preliminary issue.

[7] In *Dorais*, the Tribunal wrote that the golden rule to apply when dealing with the anticipated testimonies of witnesses is the same as the principle regarding the disclosure of documents: the golden rule is **arguable relevance** (*Dorais*, at para. 16; *Malenfant v. Videotron S.E.N.C.*, 2017 CHRT 11 (CanLII) at paras. 27 to 29).

[8] This is the golden rule that the Tribunal will apply in our instance, and it will decide if the anticipated testimonies of Mr. Leonard's witnesses are arguably relevant to this matter. At this time, the Tribunal will not determine the admissibility of their evidence, which will be done at the hearing.

A. Mr. Adam Wolkin's testimony

[9] The Tribunal understands that Mr. Wolkin is not only the new employer of Mr. Leonard but was also a former SLH employee at the same time as Mr. Leonard.

[10] The Respondents argue that the Complainant's new employer and his employment terms with his current employer are not relevant to this matter and are beyond the time and scope of the complaint.

[11] The Tribunal disagrees; the current employment of Mr. Leonard may be relevant to some issues in this matter including the remedies that Mr. Leonard may be seeking and among other things, the quantum of damages or loss wages and the application of the principle of mitigation (*Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 (CanLII), at para. 53). Mr. Wolkin will also testify on his understanding of Mr. Leonard's working conditions when they were both working at SLH which is also relevant to this matter.

[12] At this time, removing Mr. Wolkin as a witness will deprive the Complainant of his full and ample opportunity to present his case to the Tribunal (s. 50 of the *Canadian Human Rights Act* ("CHRA")) and the Tribunal is not ready to strike this witness from the Complainant's list of witnesses.

[13] The Respondents will have the full and ample opportunity to defend themselves, to cross-examine Mr. Wolkin regarding his testimony and to object to the admissibility of the

evidence if, for example, the evidence is not relevant. They will also have a chance to argue, in their final arguments, about the weight that the Tribunal should give to such testimony.

[14] For these reasons, the Tribunal dismisses the Respondents' request.

B. Ms. Sandra Leonard's testimony

[15] Ms. Sandra Leonard is the Complainant's spouse. The Respondents argue that her testimony is inappropriate, not relevant to this matter and that the Complainant can provide the evidence by himself. Moreover, they allege that her testimony is prejudicial such that its probative value does not outweigh the prejudicial effect that it will cause to them.

[16] The Tribunal disagrees with the Respondents. The Tribunal understands from the complaint and the Complainant's Amended Statement of Particulars that Ms. Leonard and the Complainant took different arrangements regarding the care of their daughter.

[17] Notably, Mr. Leonard alleges that he was taking care of his daughter while his wife was working the first half of the day. Then, she was taking over for the other half of the day while he was working at SLH. Ms. Leonard will be able to speak to the arrangements between her and the complainant regarding their childcare obligations and the attempts to find alternatives in response to the events that lead to the present complaint.

[18] Moreover, the Tribunal notes that the Respondents are also raising concerns regarding the alternate childcare arrangements of Mr. Leonard and his spouse, more particularly at paragraphs 55 to 61 of their Amended Statement of Particulars. For example, they raise concerns regarding Ms. Leonard's shifts and working hours and they question the choice that Mr. Leonard and she made which appears to simply be convenient or a preference, to use the Respondents' own words.

[19] The Tribunal understands that Ms. Leonard will have personal knowledge of these facts and therefore, it concludes that her testimony is appropriate and potentially relevant to this matter. The Complainant also has the right to present his full evidence (s. 50 of the *CHRA*) and again, the Tribunal is not ready to strike Ms. Leonard from the Complainant's list of witnesses.

[20] Finally, the Respondents have not provided any compelling reasons that would demonstrate that Ms. Leonard's testimony would be prejudicial to them in a way that outweighs its probative value. The Respondents will have a full and ample opportunity to cross-examine Ms. Leonard at the hearing, object to the admissibility of the evidence if, among other things, it is not relevant, and argue in their closing submissions about the weight that the Tribunal should afford to such testimony.

[21] The Tribunal dismisses the Respondents' request.

C. Mr. Daniel Goyette's testimony

[22] The Respondents argue that the testimony of Mr. Goyette is not relevant to this matter and that he has little to no knowledge of the facts alleged in this case.

[23] The Tribunal agrees with the Complainant that it appears that Mr. Goyette's testimony is potentially relevant to the case including to the alleged liability of CAT and the determination of the existence of discrimination by the Respondents, CAT and Penner.

[24] As the Tribunal explained in its decision *Leonard v. Canadian American Transportation Inc. and Penner International Inc.*, 2022 CHRT 20 (CanLII) [*Leonard*] at paragraphs 116 to 121, it can't determine, without hearing any evidence in this regard, "[…] whether CAT is in any way, directly or indirectly, connected to the allegations of discrimination raised by the Complainant, and to what extent" (*Leonard* at para. 121).

[25] Similarly, the involvement of Mr. Goyette, who is the president of CAT and a director of Penner, is unclear. Mr. Goyette is the president of one of the two Respondents that are now involved in this matter, and among other things, his name appears in a letter that was sent to the Complainant regarding his employment and in different records of different entities that are involved in this matter.

[26] Again, the threshold is arguable relevance, and the Tribunal believes that at this time, Mr. Goyette's anticipated testimony may be relevant to some issues in this matter. Mr. Goyette will have to appear before the Tribunal and answer the questions that will be

asked of him. As any other witness, he will provide his responses to the best of his knowledge, memories and recollection of the events.

[27] Regarding the Respondents' argument that Mr. Goyette still did not receive a subpoena to appear as a witness for the Complainant, the Tribunal notes that the service of a subpoena has nothing to do with the identification of witnesses by a party as it is required by the *Canadian Human Rights Tribunal Rules of Procedures, 2021*, SOR/2021-137 ("Rules of procedure").

[28] The Rules of procedures provide that the parties must identify their witnesses, provide their names and a summary of their **anticipated** testimony (Rules 18(1)(e), 19(1)(d), 20(1)(d) Rules of procedure). If they do not do so, they may not call them as witnesses at the hearing (Rule 37(b) Rules of procedure).

[29] In our circumstances, this is exactly what the Complainant did; he identified Mr. Goyette as a potential witness in his amended list of proposed witnesses and has provided a summary of his anticipated testimony.

[30] When the Tribunal and the Parties get closer to the hearing, which is scheduled for June 2023, the Parties will have the opportunity to ask the Tribunal to issue subpoenas for their witnesses. They will then have the responsibility to serve the subpoenas upon their witnesses.

[31] And to be clear, if the Tribunal receives a request to issue a subpoena for a witness to attend the hearing, the same assessment that the Tribunal considered in this ruling will apply: the principle is the **necessity** of issuing a subpoena.

[32] In other words, and as provided for by s. 50(3)(a) of the *Canadian Human Rights Act* ("CHRA"), the Tribunal can summon and enforce the attendance of a witness to testify before it if it considers the witness's testimony **necessary** for the full hearing and consideration of the complaint.

[33] The Tribunal wrote in *Dorais*, at paragraphs 21 and 22, the following:

> [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).

[34] Therefore, if Mr. Leonard requests a subpoena for the attendance of Mr. Goyette in this matter, the Tribunal will necessarily come to the same conclusion that it made in this ruling which is that the testimony of Mr. Goyette may be relevant to some issues in this complaint.

[35] Finally, the fact that the Respondents, through their counsel, mention that Mr. Goyette has “little to no knowledge” of the facts alleged in this matter is not convincing. This assessment is done through the Respondents’ lens, the Respondents’ point of view, which might be different from the Complainant’s perspective. Mr. Goyette will have to answer the questions that will be asked of him, and the Tribunal will decide the weight to give to such evidence in due course.

[36] In any event, the Tribunal believes that the testimony of Mr. Goyette is, at this time, arguably relevant to some issues in this matter and therefore, dismisses the Respondents' request.

IV. Amendments to Mr. Leonard’s will-say statements

[37] In light of the additional information provided by the Complainant in his submissions that lead to the present decision and considering that it appears that the identity of Mr. Wolkin was confused, the Tribunal requests that he amends and files a summary of his anticipated testimony by no later than January 13, 2023.

V. Order

[38] The Tribunal **DISMISSES** the Respondents' request in its entirety and **ORDERS** the Complainant to amend and file a summary of Mr. Wolkin anticipated testimony by no later than January 13, 2023.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
December 21, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2665/4121

Style of Cause: Keith Leonard v. Canadian American Transportation Inc. and Penner International Inc.

Ruling of the Tribunal Dated: December 21, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Oleksii Sudarenko, for the Complainant

Zoya Alam, for the Respondent