Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 45
Date: October 16, 2023
File Nos.: T2688/6421 & T2689/6521

Between:

Lise Nordhage-Sangster

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency and Mark Pridmore

Respondents

Ruling

Member: Colleen Harrington

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I. Complainant's Motion for Confidentiality Relating to her Medical Records

[1] In preparation for an upcoming inquiry into these complaints, the parties have exchanged arguably relevant documents with one another, as required by the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 [*Rules of Procedure*]. The Complainant, Ms. Nordhage-Sangster, has disclosed to legal counsel for the other parties redacted medical records for the period 2017-2019. She does not want the Respondents themselves, and in particular Mr. Pridmore who she accuses of sexually harassing and assaulting her during her employment with the Canada Border Services Agency ("CBSA"), to view her private medical records. She says that there is a real and substantial risk that the disclosure of her complete personal and private medical information to Mr. Pridmore will cause her to experience undue hardship.

[2] The Complainant has filed a Motion pursuant to section 52(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. In her Motion, the Complainant seeks the following order from the Tribunal:

a) That disclosure of her redacted medical records from 2017-2019 be restricted to counsel for the Respondents and the Canadian Human Rights Commission;

b) That these medical records not be disclosed to Mr. Pridmore, subject to medical documentation the Complainant seeks to put into evidence;

c) That her medical records not be disclosed to any other individual without prior permission from the Tribunal and notification to the Complainant.

[3] The Canadian Human Rights Commission ("Commission") agrees that the Complainant's medical records should not be viewed by Mr. Pridmore outside of the evidence introduced at the hearing, given the circumstances of the complaint.

[4] The Respondents are opposed to, and ask the Tribunal to dismiss, the Complainant's Motion.

[5] CBSA argues in the alternative that the Tribunal could make an order that the Complainant's medical records are not to be used for any purpose beyond the present inquiry and must be returned to her upon the conclusion of the proceedings, and that any medical documents not introduced at the hearing would not become public.

[6] Mr. Pridmore seeks an order that he be permitted to view all of the Complainant's medical disclosure. He argues that the necessary balancing of the right of the Respondents to make full answer and defence with the Complainant's interest in the privacy of her medical records could be achieved by placing constraints upon the circumstances in which he may view the documents.

[7] In her Reply submissions, the Complainant maintains her argument that the most appropriate order is the one set out in her Motion. However, she also proposes an "in the alternative" order ("Alternative Order") should the Tribunal decide that further disclosure is warranted. This proposed Alternative Order proposes the following limits could be placed on the disclosure:

1. That her medical records be disclosed only to counsel for the Respondents and Commission with the exception of medical records that the Respondents and Commission seek to adduce as evidence;

2. That the Respondent CBSA appoint a designated representative to review the proposed evidence and provide instructions to counsel and that the name of this individual be provided to the Tribunal and Complainant;

3. That prior to the disclosure of the proposed medical evidence to Mr. Pridmore or CBSA's designated representative, counsel for the Respondents first provide the documents to the Tribunal for a determination as to their relevance;

4. That the disclosure of the proposed evidence to Mr. Pridmore and CBSA's designated representative take place in person under the supervision of the Respondents' counsel and that no copies be made;

5. That the medical records ordered disclosed shall not be disclosed by the Respondents or by the Commission to any other individuals or entities without prior permission of the Tribunal and notification of the Complainant;

6. That the Complainant's medical records may not be used for any purpose outside of the present inquiry and must be returned to the Complainant at the conclusion of the hearing.

[8] At a Case Management Conference Call held with the parties on October 3, 2023, the Tribunal asked the parties if they could agree to the Complainant's "in the alternative" proposed order, in the interest of efficiency. The parties agreed to discuss this and advise the Tribunal if they could come to an agreement to resolve the issue. They could not and so I am issuing this Ruling, having considered the submissions of all parties.

II. Decision

[9] I agree to make an order for limited confidentiality pursuant to section 52(1)(c) of the CHRA in relation to the Complainant's medical records. I accept that there is a real and substantial risk that the disclosure of all of her personal medical records to the Respondent Mr. Pridmore will cause undue hardship to the Complainant.

[10] I am of the view that the Tribunal's order, which varies slightly from the Complainant's proposed Alternative Order, strikes the appropriate balance between the interest of the Respondents to know and respond to the case against them, and the interest of the Complainant to maintain privacy over her disclosed medical records that are not relevant to the issues before the Tribunal.

III. Analysis

[11] The Tribunal's proceedings, like those of courts, are presumptively open to the public (*A.B. and Gracie v CSC*, 2022 CHRT 15 (CanLII) at para 11). There are times, however, when discretionary limits must be placed on court openness in order to protect other public interests. Section 52 of the CHRA provides the Tribunal with broad powers to take any measures and make any orders it considers necessary to ensure the confidentiality of an inquiry in certain circumstances.

[12] The relevant paragraph of section 52(1) of the CHRA states:

> **Hearing in public subject to confidentiality order**
>
> **52 (1)** An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
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> > **(c)** there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[13] It is the Complainant's position that disclosing her medical records to Mr. Pridmore will result in a real and substantial risk of undue hardship to her. She says he sexually harassed and assaulted her during her employment and because of these events she experienced depression and symptoms of PTSD. The Complainant argues that disclosing private and sensitive medical information to the person who assaulted her will compound the violation she has already experienced and will result in added psychological trauma in the form of humiliation, triggers and flare-ups of her depression and PTSD symptoms, and panic attacks.

[14] Mr. Pridmore denies the allegations of sexual harassment and assault by the Complainant, saying that their relationship was consensual at all times and was in fact initiated by the Complainant. I appreciate that the issue of whether Mr. Pridmore sexually harassed the Complainant pursuant to the CHRA is squarely before the Tribunal in this proceeding and I make no findings of fact with respect to the allegations in this Ruling.

[15] In her Motion for confidentiality, the Complainant notes that, where a complainant has placed their health and medical information at issue in their complaint, the Tribunal has attempted to balance the complainant's privacy and confidentiality rights with the principles of natural justice by limiting access to medical records. The Complainant argues that, in her case, the need to protect her privacy is further heightened by the sexual nature of the allegations and the disproportionate impact that the disclosure of her medical documentation to Mr. Pridmore will have on her mental health. She argues that disclosure of these documents to legal counsel for the Respondents meets the Tribunal's procedural fairness obligations while also preserving her privacy.

[16] The Complainant argues that Mr. Pridmore's right to know the case against him will be met because he will have the opportunity to inspect and cross-examine any document that the Complainant seeks to have admitted into evidence.

[17] This Motion differs somewhat from the case law that the Complainant refers to in her submissions because she has already provided disclosure of her arguably relevant medical documents to the other parties. Most of the Tribunal case law relied upon relates to applications by Respondents for disclosure of medical documents from the complainant, in

the course of which conditions were imposed as to who could view the documents once disclosed by the complainants (e.g. *Guay v Canada (RCMP)*, 2004 CHRT 34 (CanLII), *Rai v RCMP*, 2013 CHRT 6 (CanLII), *T.P. v Canadian Armed Forces*, 2019 CHRT 19 (CanLII), *MacEachern v Correctional Service Canada*, 2014 CHRT 31 (CanLII), *Yaffa v Air Canada*, 2014 CHRT 22 (CanLII)). The present Motion requests an order for confidentiality in relation to already disclosed documents, pursuant to section 52 of the CHRA.

[18] CBSA argues in its submissions that, when undertaking an analysis under section 52 of the CHRA, the Tribunal must ensure the appropriate balance between confidentiality and the societal interest in a public hearing by following the test set out in *Sherman Estate v Donovan,* 2021 SCC 25 (CanLII) [*Sherman Estate*].

[19] The Tribunal has previously concluded that the Supreme Court of Canada's decision in *Sherman Estate* is consistent with and may inform the Tribunal's analysis when considering a confidentiality motion filed pursuant to section 52 of the CHRA (*SM, SV and JR v RCMP*, 2021 CHRT 35 (CanLII) at para 7).

[20] The *Sherman Estate* test requires the party seeking the confidentiality order to establish all three of these prerequisites:

i) That court openness poses a serious risk to an important public interest;

ii) That the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

iii) That, as a matter of proportionality, the benefits of the order outweigh its negative effects (at para 38).

(i) There is a serious risk to an important public interest

[21] In her Motion, the Complainant states that, if the Respondents, and in particular Mr. Pridmore, are permitted to view her medical documents, she will experience undue hardship in the form of "psychological trauma, humiliation, flareups of her depression and PTSD symptoms, triggers and panic attacks."

[22] In her Reply submissions, the Complainant takes her argument a step further, citing *R v O'Connor,* 1995 CanLII 51 (SCC), [1995] 4 SCR 411 in which the Supreme Court of

Canada confirmed that an individual's right to security of the person encompasses the right to be protected against psychological trauma (para 112). In that case, the Supreme Court stated that, for sexual assault complainants, disclosure becomes a vehicle for this type of trauma as "these people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family" (at para 112).

[23] The parties acknowledge that there is risk to the Complainant in having her medical records viewed by the Respondents, that there is highly sensitive information in the materials, and some information is irrelevant to the proceedings.

[24] CBSA accepts that the disclosure of her medical records to Mr. Pridmore will cause the Complainant discomfort and have an impact on her mental health that could rise to the level of "hardship." However, it does not concede that this would amount to undue hardship as required by section 52, that would justify the order sought in her Motion.

[25] Mr. Pridmore also asserts that the Complainant's concerns do not rise to the level of "undue hardship", saying while it is reasonable to suppose a complainant would suffer a certain degree of embarrassment at the prospect of her medical records being disclosed, she has provided no evidence beyond mere assertions that it would rise to the level of being "undue."

[26] The language of section 52(1)(c) of the CHRA which requires a finding that a public inquiry poses a real and substantial risk of undue hardship to a person involved is consistent with the first part of the *Sherman Estate* test, that court openness poses a serious risk to an important public interest.

[27] The Supreme Court in *Sherman Estate* states that the "important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity" (at para 85). However, the "risk to this interest will be serious only when the information that would be disseminated as a result of court openness

is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity" (*Sherman Estate* at para 85). The Supreme Court recognized that, where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (at para 72).

[28] I disagree with the Respondents' submissions that the Complainant's privacy concerns do not rise to the level of undue hardship. While the Complainant has not provided affidavit evidence about the psychological impact of having Mr. Pridmore view her confidential medical records, I accept that there is a real possibility that permitting him to do so would cause her psychological distress. The Complainant's interactions with the parties and Tribunal during case management has at times demonstrated that her mental health has been fragile.

[29] A fully open inquiry, without some confidentiality measures in place, poses a real and substantial risk of undue hardship to the Complainant, beyond the ordinary intrusions inherent when one participates in a judicial process, such as stress, discomfort or embarrassment (*Sherman Estate* paras 7 and 84). Without a limited confidentiality order relating to her medical records, there is a real and substantial risk that the Complainant will experience an affront to her dignity and mental health that would cause her undue hardship.

(ii) The order sought in the Complainant's Motion is not necessary to prevent this serious risk to the identified interest because there is a reasonable alternative order the Tribunal will make instead

[30] CBSA notes that the Tribunal has previously concluded that confidentiality orders should only be granted in exceptional circumstances (*Lawrence v Canadian National Railway Company*, 2020 CHRT 13 (CanLII) at para 8). It agrees that exceptional circumstances exist when the Tribunal is satisfied there is a real and substantial risk that the disclosure will cause undue hardship to the persons involved, in which case the Tribunal may make any order necessary to address this risk. In doing so, the Tribunal must balance the public interest of openness and transparency with the individual's interest in privacy on

a case-by-case basis (*Egan v Canada Revenue Agency*, 2019 CHRT 27 (CanLII) at para 37).

[31] In this case, the Complainant argues that limiting disclosure of her medical records to the other parties' lawyers meets the statutory objective of the open court principle while also considering the psychological harm resulting from full disclosure.

[32] CBSA objects to the order sought by the Complainant in her Motion, where only counsel can view the Complainant's medical records, and the Complainant is the sole gatekeeper deciding which of her records can become evidence. It notes that her proposal would limit the Respondents to only being able to put to witnesses, or to cross-examine the Complainant on, documents introduced by her or her doctor through direct examination. CBSA points out that parties must have a full and ample opportunity to present their case, pursuant to section 50(1) of the CHRA. The Tribunal must ensure all parties may appear at the inquiry and present evidence, in person or through counsel.

[33] CBSA argues that the order sought is overbroad and disproportionately impedes the Respondents' abilities to mount complete defences. CBSA argues that an order preventing the Respondents from choosing which of the Complainant's medical documents they seek to adduce into evidence would cause real prejudice to them that could not be repaired.

[34] Mr. Pridmore objects to the position that he be barred from personally seeing any medical records except those that the Complainant chooses to adduce. He says that asking that he not view any of the materials until the Complainant puts them into evidence "clearly hamstrings" his ability to respond to the allegations. He echoes CBSA's concern about not being able to introduce any of the Complainant's medical records into evidence that she has not put before the Tribunal, arguing that credibility is at issue in relation to the allegations against him. He says that the Complainant is seeking considerable compensation based on the impact of Mr. Pridmore's alleged actions on her health and wellbeing and it is essential that he be able to challenge her credibility, which may well include the use of her own medical files in cross-examination.

[35] I agree with the Respondents that the order sought by the Complainant in her Motion would result in procedural unfairness to them, as it would limit the documents they may seek

to put into evidence in support of their own cases. As such, I find that the order sought in the Complainant's Motion does not meet the second part of the *Sherman Estate* that "the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk."

[36] I do not, however, agree with CBSA that its proposed order – that the Complainant's medical records are not to be used for any purpose beyond the present inquiry and must be returned to her upon the conclusion of the proceedings and any medical documents not introduced at the hearing would not become public – is a reasonable alternative to that sought by the Complainant.

[37] Documents disclosed by a party as part of the pre-hearing process should never be publicized by another party. There is an implied undertaking of confidentiality which all parties are bound by when they disclose their arguably relevant documents in preparation for the hearing. This also means that a party's disclosed documents may not be used by another party for any purpose beyond the Tribunal proceeding in which they are disclosed. Returning medical documents to a Complainant following the conclusion of the proceedings is a sensible practice in any case involving confidential personal documents such as medical or financial records.

[38] In addition, CBSA's proposed order does not address the Complainant's legitimate concern that having Mr. Pridmore view her private medical documents would cause her undue hardship. CBSA and Mr. Pridmore are separate Respondents responding to two complaints, but the complaints have been joined so they may be heard together.

[39] In her Reply submissions, the Complainant cites an article called "Compelled Production of Medical Records" which states that, for a complainant, "it may be disclosure to the defendant, her alleged abuser and the person to whom production is most likely to be granted, that is most resented and feared. Limiting wider circulation may do nothing to alleviate that concern" (John Dawson (1998) 43 McGill L.J. 25 at 56-57).

[40] In this case, the Complainant notes that the implied undertaking proposed by the Respondents does nothing to address the undue hardship she will face if Mr. Pridmore has unrestricted access to her medical records. She says her objection stems "not from a fear

of misuse of these documents, but from the psychological trauma that results from having her most vulnerable moments with healthcare professionals exposed to an individual who has already violated [her] consent and bodily autonomy."

[41] CBSA's proposed order therefore is not a "reasonable, proportionate alternative that mitigates any risk to the Complainant while limiting the constraints on court openness as much as possible", as they argue. It does not mitigate the risks to the Complainant's privacy that exist if all of her medical records are viewed by the Respondents. It simply proposes protections for the use of the records that largely already exist.

[42] Nor do I agree with Mr. Pridmore that he should be permitted to view all of the medical disclosure provided by the Complainant, even with constraints upon the circumstances in which he may view the documents. The Commission's submissions indicate that there are approximately 1000 pages of medical documents. All parties, including Mr. Pridmore, agree that some of this information is clearly not relevant to the issues to be decided.

[43] Mr. Pridmore has not explained why he personally needs to review every page of the Complainant's medical records. He is not a doctor or a lawyer. He is, however, ably represented by counsel who has a clear understanding of the case against him and the type of evidence he intends to call. His counsel is perfectly capable of reviewing the disclosure and making a determination as to what may be relevant to his case.

[44] I do agree, however, that if counsel determines that there are certain medical records that would assist Mr. Pridmore to defend himself against the allegations and they are not going to be entered by the Complainant herself, but rather through cross-examination of the Complainant or her doctor, he should be permitted to view them. The same is true for CBSA's instructing client.

[45] I find that, for the most part, the Alternative Order proposed by the Complainant in her Reply submissions is reasonable and addresses the concerns of the Respondents while protecting her privacy as much as possible in an adversarial proceeding. It suggests that, if the Respondents wish to introduce any of the Complainant's medical records as evidence,

they may do so and that Mr. Pridmore and a "designated representative" of CBSA may view the proposed evidence.

[46] The only full paragraph of the Complainant's proposed Alternative Order that I do not view as being necessary is the third paragraph: "That prior to the disclosure of the proposed medical evidence to Mr. Pridmore or CBSA's designated representative, counsel for the Respondents first provide the documents to the Tribunal for a determination as to their relevance." I am confident that counsel will ensure that only evidence relevant to the complaints is put before the Tribunal and that only such proposed evidence will be shown to their clients.

[47] The order that I agree to make, set out below, is based on but not identical to the Complainant's Alternative Order, and I am content that it satisfies the second part of the *Sherman Estate* test.

(iii) As a matter of proportionality, the benefits of the Tribunal's order outweigh its negative effects

[48] I am also satisfied that the order I agree to make meets the third part of the *Sherman Estate* test that, "as a matter of proportionality, the benefits of the order outweigh its negative effects." This accords with the second part of section 52(1)(c) of the CHRA, "that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public."

[49] The Tribunal's order, set out below, will ensure that the Respondents' procedural fairness rights are protected by permitting them to adequately prepare for the hearing and call their own evidence relevant to their case, while also protecting the Complainant's privacy interest in her medical records to the extent possible, given that her complaint raises issues related to her health.

[50] I agree that, by permitting Mr. Pridmore and the designated representative of CBSA to view the medical records that will be adduced as evidence in their counsel's office with counsel present, and that such documents may not be copied or forwarded to anyone aside from the Tribunal and counsel for the other parties, the Complainant's privacy in relation to her medical records is further protected.

IV. Order

[51] I make the following order:

1. That the Complainant's medical records be disclosed only to counsel for the Respondents and Commission with the exception of medical records that any party seeks to adduce as evidence ("Proposed Evidence"), as determined by their legal counsel;

2. That the Respondent CBSA appoint a designated representative to review the Proposed Evidence and provide instructions to counsel and that the name of this individual be provided to the Tribunal and Complainant;

3. That the disclosure of the Proposed Evidence to Mr. Pridmore and CBSA's designated representative take place in person under the supervision of the Respondents' counsel and that no copies be made;

5. That the Complainant's medical records shall not be disclosed by the Respondents or by the Commission to any other individuals or entities without prior permission of the Tribunal and notification of the Complainant;

6. That the Complainant's medical records may not be used for any purpose outside of the present inquiry and must be returned to the Complainant at the conclusion of the hearing.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
October 16, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2688/6421 & T2689/6521

Style of Cause: Lise Nordhage-Sangster v. Canadian Border Services Agency & Mark Pridmore

Ruling of the Tribunal Dated: October 16, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Amarkai Laryea and Amanda Therrien, for the Complainant

Caroline Carrasco, for the Canadian Human Rights Commission

Lynn Marchildon and Amanda McGarry, for the Respondent, Canada Border Services Agency

Kathleen Kealey, for the Respondent, Mr. Pridmore