Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

RICHARD W. ROGERS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DECKX LTD.

Respondent

RULING ON MEDICAL RECORDS

Ruling No. 2

2002/04/17

PANEL: Paul Groarke, Member

[1] The following ruling deals with a preliminary motion brought by the Respondent. I do not propose to discuss the facts of the case, which are set out in considerable detail in the particulars supplied by the Commission and the Respondent. It is sufficient to say that the Complainant was employed as a truck driver. He suffers from some form of double vision, which may or may not have interfered with his ability to drive. This appears to be the subject of serious disagreement between the parties.

[2] In a letter dated April 1, 2002, the Respondent's lawyers requested four orders. They are as follows:

1. An order requiring Dr. Wiesenthal, the general practitioner who had treated Richard Rogers from 1989 on, to make disclosure and provide copies of his records, clinical notes, consultative reports, test results and/or laboratory results insofar as they relate to issues relating to double vision, the treatment thereof, the frequency of the occurrence, and any symptoms related thereto including headaches and/or eye strain.

2. An order requiring Dr. Harrington, the ophthalmologist who has been treating Richard Rogers for a considerable number of years, to make disclosure of his records, clinical notes, consultative reports, test results and/or laboratory results relating to Richard Rogers, and treatment for double vision, eye strain and anything related thereto.

3. An order extending the time until April 16, 2002, for compliance with rule 6(1)(f) insofar as it relates to experts.

4. If necessary, an order requiring Richard Rogers to attend to be examined by an ophthalmologist or other physician to be designated by DeckX Ltd.

The two doctors appear to be neutral witnesses, since both the Commission and the Respondent have included them in their witness lists.

[3] The Commission does not oppose the order for production of the medical records. The complainant does. He argues that there is no reason to disclose the medical records for the period prior to 1997, when he was hired by the Respondent. I am forced to disagree. The Respondent has restricted its request to the medical records which pertain to the Complainant's double vision. The medical history of the Complainant's condition may be of significant assistance to an expert in assessing the nature and extent of such a disability. This is a real issue between the parties. Although very little has been said about privilege, I believe that any interest the Complainant may have in protecting the privacy of the records is outweighed by the interest of the public, the process and the parties in ascertaining the truth of the matter.

[4] I am accordingly prepared to grant the first two orders. This comes with a proviso. The Complainant and the Commission have expressed understandable concern about the privacy of the medical records. I am therefore stipulating that the records are for the sole use of the Respondent's lawyers and any experts retained by them. While counsel will inevitably want to discuss the information in the records with their client, I see no reason for the client to have copies. I would also expect the Respondent's lawyers to advise their client that it is obliged to respect the confidential nature of this information. The Complainant's privacy should be protected from the prying eyes of inquisitive employees.

[5] The third request relates to Rule 6(1)(b) of the *Canadian Human Rights Tribunal Interim Rules of Procedure*, under which the Respondent is required to nominate an expert and serve a summary of the expert's evidence on the other parties. I am not aware of anything that would prevent the Respondent from naming an expert before receiving the material from the doctors. It cannot prepare a summary of his evidence, however, before the records have been reviewed. I am accordingly prepared to give the Complainant and Commission a week to supply the Respondents with the necessary records. The Respondent may have an additional week to comply with Rule 6(1)(b).

[6] This brings me to the fourth request, which is expressed in equivocal terms. I am not entirely certain what the words "if necessary" are intended to indicate. They may simply mean that the order is necessary, if the complainant is unwilling to submit to an examination. In my view, however, it is against public policy to grant an equivocal request.

[7] This is a minor issue, since I am not prepared to grant the fourth order at this time. The Commission has taken the position that the Tribunal does not have the jurisdiction to order the Complainant to submit to a medical examination. As the Commission suggests, the Respondent seems to have the process in the civil courts in mind. The problem is that

the authority of the courts to make such orders comes from the Rules of Court. The Tribunal does not have the same statutory or regulatory authority.

[8] The Respondent has referred me to *Lee v. Dept. of National Defence* (2000)(C.H.R.T.), which does not deal explicitly with the jurisdictional issue. In my view, the matter has not been decided. There are number of reasons, nevertheless, why a tribunal should move cautiously in the area. One is that the Tribunal has no express statutory authority to compel a complainant to submit to a medical examination. The gravamen of a human rights complaint is discrimination and medical issues will normally, at least, be subordinate to the major issue in the case. The situation is not the same as private injury litigation.

[9] It is also well accepted that the human rights process is based on the dignity of the person. The *Charter* jurisprudence has at least implicitly recognized that the dignity of the individual is based, in large measure, on personal autonomy. It follows that a tribunal should exercise some prudence before compelling an unwilling complainant to submit to an examination by those in the service of the respondent. I am not prepared to give the Respondent *carte blanche* to examine the Complainant.

[10] The Supreme Court has held, in *M.(A.) v.* Ryan [1997] 1 S.C.R. 157, at para. 30, that "the common law must develop in a way that reflects emerging *Charter* values." Leaving aside any question as to the legal character of rulings from a tribunal, I have no doubt that the same reasoning applies to the human rights process. This leads me to believe that a coercive order must be justified. There may be times where an order to submit to medical examination is appropriate, but the Respondent must demonstrate, at a minimum, that it is necessary. It has not done so here.

[11] The rationale behind the rule in the civil courts is apparently that it puts plaintiffs and defendants on an equal footing in dealing with the medical issues in a case. Although I am expressing no opinion on the jurisdictional issue, there may be room for such an argument under section 50(1) of the *Canadian Human Rights Act*. That subsection places an obligation on a tribunal to "give all parties to whom notice has been given a full and ample opportunity . . . to appear at the inquiry, present evidence and make representations." Since the standard under section 50(1) is fairness, the argument would presumably be that the Respondent cannot participate fairly in the process without an examination. A Respondent would have to establish that the order is necessary if it is to have "a full and ample opportunity" to participate in the inquiry.

RULING

[12] It follows that the Complainant and the Canadian Human Rights Commission are to provide copies of the medical records to the respondent by April 19, 2002. These copies should be returned or destroyed when the legal file is closed. The respondent will have

until April 26, 2002 to nominate an expert and serve a summary of the expert's evidence on the other parties.

[13] The Respondent is free to apply for another order after retaining an expert. Any application for such an order should nevertheless state why the respondent requires such an examination. It should also include the identity and qualifications of the expert in question. This is in keeping with the practice in the courts, which requires that the defendant nominate a specific expert before applying for an order.[(1)] The Respondent is also obliged, in my view, to set out the parameters of the examination and describe the kind of medical procedures that will be followed.

[14] If there is another application for a medical examination, I would ask the parties to provide the Tribunal with additional legal argument on the jurisdictional issue.

"Original signed by"

_____

Paul Groarke, Member

OTTAWA, Ontario

April 17, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T678/6601

STYLE OF CAUSE: Richard W. Rogers v. Deckx Ltd.

RULING OF THE TRIBUNAL DATED: April 12, 2002

APPEARANCES:

Richard W. Rogers On his own behalf

Mark McDonald For the Canadian Human Rights Commission

Mark Newman For the Respondent (Deckx Ltd.)

1. [1] See *Mahoney v. Mahoney* [1997] B.C.J. No. 1448 (B.C.S.C.), for example, at paragraph 15, where the court quotes from *Adelson v. Clint* (1993), 16 C.P.C. (3d) 209 (B.C.S.C.).