

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROIT DE LA PERSONNE**

MICHEL TREMBLAY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(REPRESENTING THE PUBLIC SERVICE COMMISSION,
THE TREASURY BOARD OF CANADA, AND THE
TRANSPORTATION SAFETY BOARD OF CANADA)**

Respondent

RULING ON EXPERT EVIDENCE

MEMBER: Athanasios D. Hadjis

**2004 CHRT 15
2004/05/04**

[1] The Complainant alleges in his complaints that the Respondents discriminated against him due to his disability (multiple sclerosis and epilepsy). He wishes to call his physician as an expert witness at the hearing. He submits that it is in the public interest, as well as his own, to have the physician testify. The physician has requested a fee for the preparation of his expert's report (\$600) and for his testimony (\$200/hour). The Complainant is currently unemployed and is in receipt of social assistance under the Ontario Disability Support Program. He claims, therefore, that he cannot afford to pay the physician the fees requested, and that, as a result, he is unable to have his expert testify.

[2] The complaints were referred to the Tribunal by the Canadian Human Rights Commission on January 6, 2004. The Commission noted at that time that pursuant to s. 49 of the *Canadian Human Rights Act*, it was "satisfied that, having regard to all the circumstances of the complaints, an inquiry is warranted". However, in a letter dated February 5, 2004, the Canadian Human Rights Commission informed the parties and the Tribunal that it would not be participating in the hearing involving these complaints, leaving the Complainant to lead his case on his own, without the assistance of any legal counsel. The Commission has made it known that it will not pay the costs relating to the physician's expert testimony.

[3] The Complainant has consequently made a motion in which he seeks an order from the Tribunal calling the physician to testify as its expert witness. Presumably, the Tribunal would pay his fees. Commission Counsel suggested during a recent case conference that the Tribunal may possess the authority to call an expert as a witness of its own accord. The Commission provided the Tribunal with copies of several judgments

relating to this issue. The Respondents, in turn, argued that the Tribunal cannot call a witness whom the parties themselves do not intend to call, nor can it retain an expert whose evidence will assuredly assist the case of only one of the parties.

[4] I have reviewed the authorities submitted and have concluded that the Respondents' position is well-founded. As is noted in Sopinka's *The Law of Evidence in Canada*, [J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 901] in civil cases, a trial judge does not have the power to call a witness who has not been previously examined. In criminal trials, there is a limited discretion to call a witness not called by the parties and without their consent. This is justified because the liberty of the accused is at stake and the object of the proceedings is to see that justice be done. This discretion must, however, be exercised infrequently and with great care so as not to prejudice the accused or usurp the role of counsel.

[5] Commission counsel remarked that owing to the quasi-constitutional nature of human rights law, it could be argued that the principles relating to criminal law could be extended by analogy to the Tribunal process. However, even if this were the case, the facts surrounding the present complaints do not warrant the exercise of such discretion by the Tribunal. Without minimizing in any way the importance of the allegations made by the Complainant in his complaints, I cannot agree that one's physical liberty is at stake in the present case, in a manner akin to a criminal proceeding.

[6] Furthermore, one finds that in most of the cases in which such a discretion has been exercised by a court, the judge has called witnesses whom none of the parties intended to call themselves. In the present case, the Complainant actually wants his physician to testify, but is faced with the obstacle of having to pay the witness's expenses. Undoubtedly, for a person of the Complainant's modest financial means, the fees requested are very significant. However, the Complainant has the option of seeking reimbursement of these costs from the Respondents, as expenses arising from the discriminatory practice (s. 53(2) d) of the *Act*). This compensation would, of course, be conditional on the Tribunal's finding that the complaints are substantiated and that the Complainant is entitled to this remedy. The Complainant informed the Tribunal during the case conference that he was not prepared to assume the risk of not being eventually reimbursed.

[7] In addition, even if one were to conclude that a human rights tribunal, as master of its own procedure, has the power to appoint its own witnesses, to in fact do so in the manner being proposed would serve to assist the case of only one of the parties, the Complainant. This would result in an unacceptable level of unfairness for the other parties. Although it is evident that the Complainant, as a disabled person of modest financial means, is facing serious difficulties in attempting to lead his own case without legal counsel, the fact remains that the Tribunal process must remain neutral and essentially adversarial. The Tribunal cannot allow itself to be drawn into the legal dispute and assist but one of the parties in making his case, merely because the Commission has decided to no longer participate. Unfortunately, this may result in important evidence failing to be introduced, thereby rendering the inquiry into the human rights complaint incomplete. So be it. The Tribunal will not under any circumstances permit its process to be rendered unfair.

[8] During the case conference, there was some discussion surrounding s. 48.8 (2) of the *Act*, which states that the Chairperson of the Tribunal may engage persons having

technical or special knowledge to assist or advise Tribunal members in any matter. It is my understanding that the Chairperson of the Tribunal has not exercised the power set out in this section of the *Act* to this date. I imagine that this provision could find some application in cases where highly technical and perhaps confusing evidence is introduced by the parties' expert witnesses. In such cases, s. 48.8 (2) provides the Tribunal with the option to engage other experts and seek further elucidation. This is not, however, the situation in which the Tribunal finds itself in this instance.

[9] For all the above reasons, I will not be issuing an order calling the Complainant's physician to testify as the Tribunal's expert witness. The Complainant is always free to call his physician as his own witness. If the witness is to testify as an expert, the Complainant must comply with the Tribunal's Rules of Procedure regarding the testimony of experts. A subpoena will be issued by the Tribunal to summon the attendance of this witness at the hearing, if so requested by the Complainant.

Signed

by

Athanasios D. Hadjis

OTTAWA (Ontario)

May 4, 2004

PARTIES OF RECORD

TRIBUNAL FILES:	T889/0904, T890/1004, T891/1104
STYLE OF CAUSE:	Michel Tremblay v. Attorney General of Canada (Representing the Public Service Commission, the Treasury Board of Canada, and the Transportation Safety Board of Canada)
RULING OF THE TRIBUNAL DATED:	May 4, 2004
APPEARANCES:	
Michel Tremblay	On his own behalf
Giacomo Vigna	For the Canadian Human Rights Commission
Richard Casanova	For the Respondents

