Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Harjinder Kaur Rai

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Sophie Marchildon
Date: March 20, 2013
Citation: 2013 CHRT 6

[1] On March 16, 2012, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], the Canadian Human Rights Commission (the Commission) requested that the Chairperson of the Canadian Human Right Tribunal (the Tribunal) institute an inquiry into the complaint of Harjinder Kaur Rai (the Complainant) against the Royal Canadian Mounted Police (the RCMP or the Respondent). The complaint alleges discrimination on the basis of sex and disability, pursuant to sections 7, 10 and 14 of the *Act*.

[2] The following ruling is with regard to a request from the Respondent for the disclosure of documents from the Complainant.

I. Background

[3] Among other things, the Complainant alleges the Respondent failed to mitigate or avoid the effects of harassment and discrimination on her. In this regard, she has placed at issue in this complaint her mental health related to depression and anxiety and its causation.

[4] On January 24, 2013, the Respondent requested the disclosure of two main types of documents from the Complainant: medical documents and documents from her personal injury action related to her 2007 motor vehicle accident.

II. Positions of the Parties

A. Medical document from April 1, 2007 to present

[5] According to the Respondent, the Complainant has alleged harassment, which began in 2000 and caused her to suffer health problems. However, the Respondent claims the medical documentation disclosed and produced from the Complainant begins only in 2009.

[6] The Respondent wishes to explore whether there are other health issues that undermined her mental state in the circumstances giving rise to her complaint. Specifically, on April 1, 2007, the Complainant was in a motor vehicle accident. She took six weeks off work to recover from

this accident. According to the Respondent, this accident seems to have been the beginning of the Complainant's physical and emotional difficulties.

[7] The Respondent submits that the documents the Complainant has already produced demonstrate that her chronic pain diagnosis from her motor vehicle accident has a psychological component. According to the Respondent, Dr. Badii, the Complainant's medical expert from her 2008 accident claim, outlined that the Complainant's failure to recover from her soft tissue injuries and her development of chronic pain was related to her pre-existing risk factors (female sex, history of stress and depression). The Respondent claims the doctor recommended that she see a "psychiatrist or psychologist to explore whether the MVA-associated physical injuries and psychiatric symptoms have in any way influenced her ability to deal with conflict issues at work, and thus had a negative impact on her readiness to return to work from a psychiatric perspective".

[8] The Respondent also seeks disclosure of the portions of Dr. Bredenkamp's file, her family physician, that were provided to them in redacted form. According to the Respondent, the redactions consist of 18 blank pages, rather than redacted lines within chart pages. It is the Respondent's position that Dr. Bredenkamp's entire file is relevant.

[9] By way of clarification, the Complainant submits she does not claim that she did not suffer psychological issues until 2008. Instead, she asserts that she did not seek treatment for psychological issues until 2008. In this regard, she claims to have disclosed the records of Drs. Sanders and Babbage, psychiatrists, and Dr. Flamer, psychologist. While the Respondent has also requested the records of Dr. Ratheberger, psychologist, the Complainant claims to have made efforts to obtain those records from the doctor, who has confirmed to the Complainant's counsel that no such records exist. The Respondent also requested the records of Dr. Nemetz, psychologist. However, the Complainant does not recall visiting this doctor and does not have any of his records in her possession.

[10] With respect to her medical condition following the 2008 motor vehicle accident, the Complainant claims to have disclosed the portions of her family physician's medical file related to the soft-tissue injuries and chronic pain she developed following the accident. The Complainant also claims to have disclosed the medical files and/or opinions of those care providers who made notations regarding her mental health, which were in her possession.

[11] The Complainant submits the Respondent has failed to justify why it requires medical documents about other areas of the Complainant's health. Furthermore, the Complainant asserts there is no suggestion in either party's Statement of Particulars that any medical evidence predating October 25, 2008 is relevant to this complaint. According to the Complainant, she has not placed in issue her entire medical history; only her mental health conditions related to depression and anxiety and their causation. She claims the Respondent has failed to provide any rationale for its request for documents prior to the motor vehicle accident, other than its bare assertion that the date "seems to have been the beginning of Cpl. Rai's physical and emotional difficulties".

[12] The Commission agrees that the Complainant's depression and anxiety are at issue in this matter and, as such, the Respondent is entitled to all arguably relevant documents related to those issues. That said, the Commission adds that the Respondent is only entitled to documents related to the medical conditions at issue and not all of the Complainant's medical files.

B. Redacted psychiatrist/psychologist files

[13] The Complainant has disclosed and produced to the Respondent redacted copies of the medical files of Drs. Sanders, Babbage and Flamer, her psychiatrists/psychologists. In the Respondent's view, as the Complainant has placed her mental health at issue in her complaint, it is entitled to the entire medical chart of each of these doctors.

[14] The Complainant submits that during and as part of treatment she had discussions with her psychiatrists/psychologists about the instant proceedings that are subject to litigation privilege. These discussions are noted in the doctors' files and, therefore, have been redacted.

According to the Complainant, disclosure of these discussions would cause her significant prejudice and would undermine the doctor-patient relationship, legal process and the fairness of these proceedings.

[15] The Respondent submits that litigation privilege covers the work product of the lawyer and for a document to be covered by litigation privilege, it must have been created in contemplation of litigation or for use in the litigation. In the Respondent's view, a doctor's chart could not have been created in contemplation of, or for use in, litigation. Therefore, the Complainant's claim of litigation privilege as a basis for redacting information from the medical files is incorrect; therefore, the entire chart of each of her psychiatrists/psychologists should be produced.

C. Documents related to personal injury action

[16] The Respondent claims the Complainant has produced a "heavily redacted" copy of the Complainant's examination for discovery transcript from her personal injury action regarding her 2008 motor vehicle accident. It requests the complete transcript. The Respondent also requests the Complainant's list of documents created for that personal injury action and any documentation substantiating her claim for damages in that action, including loss of past and future earning capacity.

[17] According to the Respondent, while the Complainant alleges harassment that began in 2000, she reported no depression and had no issues at work until her 2008 motor vehicle accident. After the accident, she was unable to work and was diagnosed with depression and chronic pain syndrome. She took almost a year off work to recuperate and has never fully returned to duty. Until her accident, the Respondent claims the Complainant worked full time and was on a normal career path for an RCMP member.

[18] Following the Complainant's motor vehicle accident, she filed a claim for personal injury damages to compensate her for loss of enjoyment of life, lost wages and loss of opportunity. As the current complaint alleges that discrimination caused the Complainant to suffer depression

and caused her career to stall, the Respondent submits there is an overlap between the allegations in her complaint and her motor vehicle claim. According to the Respondent, the full effect of the accident must be explored to ensure that the Respondent's right to a fair hearing is respected.

[19] The Complainant submits that the information produced under compulsion of the Rules of Court, including examination for discovery and lists of documents, is subject to an implied undertaking, owed to the Court, which prevents a party from relying on that information in subsequent proceedings without leave of the Court.

[20] The Commission agrees that documents related to the Complainant's action following her motor vehicle accident in 2008 are not subject to disclosure because of the implied rule of confidentiality. The Commission adds that despite the fact that the requested documents are confidential, the Respondent is already in possession of portions of the Complainant's discovery transcript. According to the Commission, this addresses any concerns related to double recovery in this case.

[21] The Complainant also submits that a list of documents prepared for another proceeding is not relevant for the purposes of this proceeding. While the Respondent may believe there are documents listed therein that are in some way relevant to the current complaint, according to the Complainant, this is indicative that the Respondent is embarking upon a fishing expedition.

[22] The Complainant adds that the claims for damages in her personal injury action do not overlap with those made in the current complaint. According to the Complainant, she has disclosed all portions of her discovery transcript which relate to her injuries, including where she states that she does not believe that she suffered depression and anxiety as a result of the accident. The Complainant claims that the defendant from the motor vehicle action would not have agreed to compensate her for damages to her mental state in the face of this admission.

[23] As for lost wages, the Complainant contends that she has limited her claim in this matter to losses that exclude the period following her motor vehicle accident, which is addressed in her

personal injury action, so as to avoid double recovery. She claims to have disclosed all portions of her discovery transcript, which relate to her claims for lost wages, and that she has also disclosed medical reports that set out a period of time beyond which the authors conclude her injuries no longer relate to the motor vehicle accident. The Complainant has also retained an expert to make a calculation as to lost wages for the purposes of this complaint. In making those calculations, the Complainant asked the expert to exclude the period of October 24, 2008 to July 6, 2009, that being the period during which the Complainant was off duty as a result of her motor vehicle accident.

[24] The Respondent states that the Complainant has misunderstood what loss of past and future earning capacity compensates. According to the Respondent, where a loss of earning capacity is awarded, compensation is awarded for loss of earning capacity over the course of the plaintiff's lifetime. Therefore, excluding any claim for lost wages from October 2008 to July 2009 does not eliminate the possibility of double recovery in this case.

D. Settlement agreement from personal injury action

[25] The Respondent also requests the signed release that discontinued the Complainant's personal injury action following her 2008 motor vehicle accident. The Respondent submits that the release will inform the Tribunal of the amount the Complainant was compensated by her tortfeasors in her accident claim and, therefore, will avoid the potential for double recovery. Without the release, the Respondent claims that there is no way of determining what compensation the Complainant has already received for loss of earning capacity, and lost past and future income.

[26] According to the Complainant, the settlement documents from her personal injury action are covered by settlement privilege. The Complainant submits that she cannot waive settlement privilege without the consent of the other party to the lawsuit, as settlement privilege belongs to both parties to the settlement. The Complainant adds that the Respondent has failed to make any submissions as to why there is an overriding public interest in disclosure in this case.

[27] While the Respondent agrees that privilege exists to protect settlement communications, it points out that there are exceptions to this rule. In particular, there is an exception where settlement documents are necessary to determine if a Plaintiff has already been compensated for loss of earning capacity and lost earnings.

III. Ruling

[28] Pursuant to subsection 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case. Therefore, for fairness reasons and in the search for truth, it is in the public interest to ensure that all arguably relevant evidence is disclosed between the parties appearing before the Tribunal. If there is a rational connection between a document and the facts, issues, or forms of relief identified by the parties, it should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure* (03-05-04) [the *Rules*] (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para. 42 [*Guay*]; and *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28, at para. 4).

[29] With these principles in mind, the following is the Tribunal's ruling on the Respondent's request for the disclosure of documents.

A. Medical document from April 1, 2007 to present

[30] With regard to medical records, the Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to medical records (see *Beaudry v. Canada (Attorney General)*, 2002 CanLII 45930 (CHRT), at para. 7 [*Beaudry*]; *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 25855 (CHRT), at para. 3 [*McAvinn*]). However, that right to privacy and confidentiality may cease when that person puts his or her health in issue (see *McAvinn* at para. 4; *Guay* at para. 45; *Communications, Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*, 2005 CHRT 9, at paras. 9-11; see also *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 SCR 647 [*Frenette*]; and, *M. (A.) v. Ryan*, [1997] 1 SCR 157). That said, "the need to get at the truth and avoid injustice does not automatically

negate the possibility of protection from full disclosure" (*M. (A.)* at para. 33). In cases where the Tribunal has ordered the disclosure of medical records, it has usually put conditions on the disclosure to protect the privacy and confidentiality of the information (see for example *Guay*; *McAvinn*; *Beaudry*; and *Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2012 CHRT 11).

[31] The Complainant has put in issue her mental health related to depression and anxiety. Therefore, pursuant to the principles outlined above, any arguably relevant medical documents related to these conditions should be disclosed to the Respondent. The Complainant has also put in issue the causation of her depression and anxiety. Based on the Respondent's submissions, I am satisfied that there is a possibility that the Complainant's physical injuries following her motor vehicle accident may have had an effect on her mental health. Therefore, any arguably relevant medical documents related to the treatment of the Complainant's physical injuries following her motor vehicle accident should also be disclosed to the Respondent. Any medical documents about other areas of the Complainant's health that are not mentioned above are not in issue in this case and are not relevant for the purposes of disclosure.

[32] Based on the Respondent's submissions, I also find the request for medical documents from April 1, 2007, that being the date of the Complainant's motor vehicle accident, to be reasonable. I am satisfied that the Respondent's request in this regard is not in the nature of a fishing expedition, as it is based upon documents already disclosed to it from the Complainant. If the Complainant's motor vehicle accident has had an effect on her mental health, its relation to the allegations made in the present complaint need be examined in order to provide the Respondent with a full and ample opportunity to present its case. The disclosure of these arguably relevant documents will also ensure that the Tribunal has all relevant evidence before it and may assist it in crafting an appropriate remedy should the complaint be substantiated.

[33] The Complainant argues that the Tribunal's *Rules* only require her to disclose documents in her "possession" and are silent about documents within a party's "control". As the medical

records requested by the Respondent are not in the Complainant's possession, she submits there is no obligation to list, obtain and disclosed such documents.

[34] However, Rule 1(2) of the Tribunal's *Rules* states that they are to be "…liberally applied by each Panel to the case before it so as to advance the purposes set out in 1(1)". Among other things, the purpose of the *Rules* is to ensure that: "arguments and evidence be disclosed and presented in a timely and efficient manner" (Rule 1(1)(b)); and that "all proceedings before the Tribunal be conducted as informally and expeditiously as possible" (Rule 1(1)(c)). I would add that Rule 1(1)(c) reflects subsection 48.9(1) of the *Act*.

[35] In the circumstances of this case, having the Complainant obtain and disclose the arguably relevant medical documents will ensure that the purpose of the Tribunal's *Rules* is advanced. It is the Complainant who has the right to privacy and confidentiality with respect to her medical records. Barring a subpoena and holding a hearing, it is only the Complainant who has the power to obtain these records. Therefore, ordering the Complainant to obtain and disclose her medical document is the most informal, timely and efficient manner of retrieving any of these arguably relevant documents. Aside from the potential cost of having to obtain these records, there does not seem to be any prejudice to the Complainant in proceeding in this manner.

[36] Therefore, the Complainant is ordered to disclose any medical documents from April 1, 2007 to present that relate to symptoms of or treatment for depression and anxiety and treatment of physical injuries related to her motor vehicle accident. In satisfying this order, the Complainant should also disclose any arguably relevant documents identified by the Respondent in Schedule A of its January 24, 2013 request for disclosure or confirm that they do not exist.

[37] To protect the Complainant's right to confidentiality of her medical records, the documents shall be disclosed to counsel for the Respondent and the Commission, and shall not be disclosed to any other individuals without prior permission from the Tribunal and notification to the Complainant. Additionally, the documents may not be used for any purpose outside of the

present inquiry and the documents must be returned to the Complainant at the conclusion of the inquiry.

[38] It should be noted that this ruling relates only to the question of the disclosure of medical documents. Any question regarding the admissibility of these documents into evidence can be addressed at the hearing of this case.

B. Redacted psychiatrist/psychologist files

[39] Litigation privilege "…relates to information and materials gathered or created in the litigation context" (*Blank v. Canada (Minister of Justice)*, 2009 FC 1221, at para. 37 [*Blank FC*]). It contemplates communications between "…a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties" (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 27 [*Blank SCC*]). The test to determine whether litigation privilege should attach to a document needs to satisfy the following critera: "…1) it is a communication; 2) prepared or obtained; 3) for the "dominant purpose" of reasonably anticipated litigation" (*Blank FC*, at para. 37; see also *Blank SCC*, at paras. 59-60).

[40] Without more information regarding the redacted communications between the Complainant and her psychiatrists/psychologists, it is not possible for the Tribunal to determine their "dominant purpose". Affidavit evidence setting out the factual basis of the privilege claim and/or allowing the Tribunal to view the documents (whether by the current Member or another Member) would be an appropriate procedure for ascertaining whether privilege applies (see *M. (A.)*, at para. 39). In this regard, I would like to get the parties' views on proceeding in this manner. The Complainant is to provide submissions on this issue by **April 5, 2013**. A response from the Respondent and the Commission is requested by **April 19, 2013**. Any reply from the Complainant can be provided by **April 26, 2013**.

C. Documents related to personal injury action

[41] According to the Supreme Court of Canada, "the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers disclosed during discovery for any purposes other than securing justice in the civil proceedings in which the answers were compelled…" (*Juman v. Doucette*, 2008 SCC 8, at para. 27 [*Juman*]. As the Tribunal stated in *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3, at para. 24:

> This principle of confidence protects individual privacy interests and preserves the integrity of the process of civil litigation as without this protection of privacy, parties to a law suit might fail to make complete disclosure of all of the facts relevant to a law suit.

[42] However, the implied undertaking may be trumped by a more compelling public interest (see *Juman*, at para. 30). Examples of such public interest include statutory exceptions (see *Juman*, at para. 39); public safety concerns (see *Juman*, at para. 40); impeaching inconsistent testimony (see *Juman*, at para. 41); or, the prevention of certain crimes (see *Juman*, at paras. 42-50). Overall, in order to relieve against an implied undertaking, there must exist "…a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation" (*Juman*, at para. 32). However, the Supreme Court cautioned that "…unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose" (*Juman*, at para. 32).

[43] I am not convinced that there is a public interest of greater weight in this case that trumps the implied undertaking. While the Respondent is concerned with the potential for double recovery, the discovery transcript, list of documents and any documentation substantiating her claim for damages in her personal injury action will not assist in this regard. As the action was settled, only the settlement agreement can specify the actual amount received by the Complainant in compensation for dropping her personal injury action. The Respondent has also requested the disclosure of the settlement agreement, which is discussed below.

[44] The Respondent also claimed that it may use the discovery transcript to impeach the Complainant at the hearing of this matter. This bare assertion, without something more specific, also does not convince me to trump the public interest of the implied undertaking rule.

[45] Therefore, the Respondent's request for documents related to the Complainant's personal injury action is denied.

D. Settlement agreement from personal injury action

[46] Settlement agreements may be privileged and/or confidential (see *Groupe d'aide et d'information sur le harcèlement sexuel au travail de la province de Québec inc. v. Barbe*, 2003 CHRT 15; *Leslie Palm v. International Longshore and Warehouse Union, Local 500 and Cliff Willicome and Richard Wilkinson*, 2011 CHRT 12; and *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4). Prior to ruling on the request for disclose of the settlement agreement, and in order to ensure that the Tribunal makes a fully informed decision in this regard, it would be helpful to receive submissions from the other party to the settlement agreement. Therefore, the Complainant is ordered to provide the Tribunal with the name and contact information of the defendant in her personal injury action resulting from her motor vehicle accident. The Tribunal will then contact this person and solicit his/her views on this issue, and will give an opportunity for each party to respond. The Complaint is asked to provide the necessary information by April 5, 2013.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
March 20, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1795/2512

Style of Cause: Harjinder Kaur Rai v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: March 20, 2013

Appearances:

Allison Tremblay, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Sarah Eustace, for the Respondent