Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Shelley Annette MacEachern

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

File No.: T1823/5312
Member: Ricki Johnston
Date: October 23, 2014
Citation: 2014 CHRT 31

I. Introduction

[1] The Complainant, Shelley Annette MacEachern (the "Complainant"), is an employee of Correctional Service Canada (the "Respondent" or "CSC") and describes herself as a diabetic. On May 7, 2012, pursuant to section 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the "*Act*"], the Canadian Human Rights Commission (the "CHRC") requested that the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal") institute an inquiry into a complaint by the Complainant against CSC. The Complainant alleges discrimination in employment, pursuant to section 7 of the *Act*, on the basis of her disability, diabetes.

[2] The Respondent brought a motion for disclosure of various records from the Complainant. The Complainant also sought to amend the list of remedies she is seeking in this matter. The following ruling is with regard to these motions.

II. Background

[3] The Complainant filed a complaint with the CHRC on July 6, 2010 alleging that on or around early January of 2010, CSC refused her employment as a Correctional Officer (a "CX-1") in the Grande Cache Institution ("GCI") as a result of her medical condition, diabetes.

[4] The Respondent's position is that the decision not to offer the Complainant employment as a CX-1 was based on a report from Health Canada regarding the Complainant's fitness for employment as a CX-1 in the context of her diabetes. According to the Respondent, Health Canada found the Complainant able to work as a CX-1, but with restrictions on that work. On April 14, 2010, the Respondent says it provided the Complainant with a letter indicating it could not accommodate those restrictions and that she would therefore not be offered employment as a CX-1.

[5] The Complainant's position before the Tribunal has been that the decision of the Respondent to rely on the Health Canada report and, in the alternative, the failure of the

Respondent to accommodate her based on the restrictions set out in that report, constitutes discrimination under the *Act*.

[6] The Complainant was, at the time of the Respondent's decision not to employ her as a CX-1, and has continued to be, employed by the Respondent in a CR-4 position at the GCI. For a period between October of 2012 and August of 2014 the Complainant was on disability from that position, allegedly for matters unrelated to her diabetes.

III. The Respondent's disclosure motion

[7] On May 4, 2014, the Respondent filed a motion seeking production of various records it argues are relevant to this matter. In person submissions were made with respect to this motion on August 7, 2014 in Grand Cache, Alberta.

[8] The records sought by the Respondent generally fall within four categories.

[9] The first category is medical records relating to the supervision, management and treatment of, or making note or mention of, the Complainant's diabetes from the time period of 2006 up to and including the time the decision was made not to offer her employment as a CX-1. The Complainant's position is that the Respondent is not entitled to the records requested on the basis that they are not relevant to the matter and violate her privacy rights.

[10] The second category of documents is medical records from the time period of 2010 up to and including present that include any information related to the supervision, management and treatment of, or making note or mention of, the Complainant's diabetes; and, any other medical records related to the Complainant's claim for damages, including reinstatement of leave credits and pain and suffering The Complainant's position is again that these records are not relevant as they deal with her health after the time the decision was made not to offer her the position as a CX-1.

[11] The third category of records requested is the file or records related to the Complainant's disability claim and any medical records related to treatment associated with that disability claim. The Complaint's position is that these records are not relevant as her disability claim was unrelated to her diabetes.

[12] The fourth category includes an updated Alberta Health Services Statement of Benefits Paid for the period of January 2013 to the present. The Complainant's position is that her health status after the decision not to employ her as a CX-1 is not relevant and therefore this category of records is not subject to production.

IV. Ruling

[13] Pursuant to section 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case. To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession or care of the opposing party prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case it is up against and, therefore, adequately prepare for the hearing. For that reason, if there is a rational connection between a document and the facts, issues or forms of relief identified by the parties in the matter, it should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (see *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para. 42 [*Guay*]; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6, at para. 28; and, *Seeley v. Canadian National Railway*, 2013 CHRT 18, at para. 6).

[14] However, the request for disclosure must not be speculative or amount to a "fishing expedition". The documents requested should be identified with reasonable particularity. That is, the request should not subject a party or a stranger to the litigation to an onerous and far-ranging search for the documents (see *Guay*, at para. 43).

[15] The facts giving rise to this complaint, according to the Complainant, are that she has type 1 diabetes and applied for a position as a CX-1 in the fall of 2009. She completed training

between September and December of 2009. During this time, she was also subjected to a medical assessment by Health Canada as to her medical fitness for the CX-1 position. As part of that assessment, Health Canada was provided with medical information from several of the Complainant's medical providers. The Complainant was cleared by Health Canada to work as a CX-1 but with restrictions. Health Canada provided a further amended report that again cleared the Complainant to work as a CX-1 but with remaining conditions, including that she was not to work alone or work night shifts.

[16] The Complainant has put her health in issue in this matter. In particular, she has put in issue whether her diabetes can be argued to have restricted the scope of work she was able to do in 2009 and 2010 and is currently able to do. She takes issue with the Health Canada report and its restrictions on her ability to work as a CX-1, but she is also challenging the decision of CSC not to consider medical or other records, in addition to the report of Health Canada, in their review of her medical suitability for employment as a CX-1 in late 2009 and early 2010.

[17] As a result, I find the first category of records relating to the supervision, management and treatment of, or making note or mention of, the Complainant's diabetes from the time period of 2006 to the time of the Health Canada assessment in April 2010 arguably relevant and subject to disclosure. The records are arguably relevant to the question of the Complainant's diabetic status prior to and at the time of the Health Canada assessment.

[18] The records to be produced in this category also include records for any supervision, management and treatment of, or making note or mention of, the Complainant's diabetes by treatment providers not already listed by the Complainant, if any.

[19] It should be noted that although the list of medical practitioners provided by the Complainant is extensive, the Complainant agreed in her response submissions to this motion that some of these records are arguably relevant. Several of the physicians listed appear to work from a single office and likely require production of only a single medical file.

[20] While the first category of medical records deal primarily with the Complainant's historical health status, the second category deals with her health status after the alleged discrimination and on an ongoing basis. The Complainant has confirmed that the loss of income she is claiming is limited to the difference between the amounts that she would have earned as a CX-1 and the amounts she did earn as a CR-4, whether in disability payments or income. However, the Complainant is seeking both lost income and that she be placed in the CX-1 position. In argument, the Complainant has taken the position that her diabetes is not a bar to her ongoing employment as a CX-1 and that she continues to challenge the restrictions set out in the Health Canada report as it relates to her request for future employment as a CX-1. Her position is that she should be placed in a CX-1 position without restrictions, regardless of the directions in the Health Canada report; or, alternatively, that any such restrictions should be based on further assessment by CSC into her medical condition. The Complainant also seeks reinstatement of leave credits, including sick leave credits, and compensation for pain and suffering. Therefore, the Complainant's health status following the alleged discrimination and on an ongoing basis has also been placed in issue.

[21] As a result, I am of the view that the second category of medical records from the time period of the April 2010 decision regarding the Complainant's employment as a CX-1 up to and including the present that include any information related to the supervision, management and treatment of, or making note or mention of, the Complainant's diabetes, along with any other medical records related to the Complainant's claim for damages, including reinstatement of leave credits and pain and suffering, are arguably relevant and subject to disclosure. These records include the records of those physicians already listed by the Complainant, from the time period of 2010 to the present, as well as the records of any treatment providers not already listed by the Complainant, if any.

[22] The third category of records is the Complainant's disability claim file and medical records related thereto. The Complainant was on a disability leave from her position as a CR-4 from the period of October 2012 to August 2014. It is significant that the Complainant is not seeking to recover for loss of income for that period but instead for the difference between

disability benefits she would have received as a CX-1 and that which she received as a CR-4. Nonetheless, while the Complainant states that her diabetes played no role in that disability claim, the Respondent is entitled to test that position. Further, the Complainant has been and continues to seek employment as a CX-1 without restriction and her ongoing health status is arguably relevant to that requested remedy.

[23] As a result, I am of the view that the third category of records, including the Complainant's disability claim file and any medical records related to treatment associated with that disability claim, are arguably relevant and subject to disclosure.

[24] The fourth category of documents for which the Respondent seeks production is an updated copy of the Complainant's Alberta Health Care Statement of Benefits Paid up to and including the present date. For the same reasons given above for the relevance of the Complainant's ongoing medical records, this fourth category of records is arguably relevant and subject to disclose and production.

V. Directions related to the privacy of the medical and disability records

[25] The obligation of the Complainant to disclose arguably relevant documents as set out above must, however, be balanced by her legitimate privacy concerns particularly as it relates to medical and disability records.

[26] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to his or her medical records (see *Beaudry v. Canada (Attorney General)*, 2002 CanLII 61851 (CHRT), at para. 7 [*Beaudry*]; *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 38296 (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 CanLII 85 (SCC); and *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC) [*M. (A.)*]). 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, such as restricting who may see and copy them (see for example *Guay*, at para. 48; *McAvinn*, at paras. 19-20; *Beaudry*, at paras. 7 and 9; *Palm v. International Longshore and Warehouse Union, Local 500 et al.*, 2012 CHRT 11, at para. 19; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6, at para. 37; and, *Yaffa v. Air Canada*, 2014 CHRT 22, at para. 15).

[27] Therefore all documents disclosed pursuant to this ruling are subject to the following restrictions:

(1) The documents shall be disclosed to counsel for the Respondent only, and shall not be disclosed to any other individuals without prior permission from the Tribunal and notification to the Complainant.

(2) Counsel for CSC shall use the documents to prepare for the hearing of this matter and to communicate with his client to seek any instructions necessary. The documents may not be used for any purpose outside of the present inquiry.

(3) Any medical records unrelated to the monitoring, treatment or management of the Complainant's diabetes, or unrelated to her remedial claims (reinstatement of leave credits; pain and suffering, etc.), shall be redacted from the disclosed materials.

[28] The Tribunal will schedule a case management conference call to discuss the process of gathering and disclosing the documents subject to this ruling.

VI. Amendment of the remedies sought by the Complainant

[29] In response to the present motion, the Complainant sought to amend the remedies she requests in this matter. The Respondent, at the hearing of this matter, did not take a position in opposition but raised only that some of the remedies sought may not be within the jurisdiction of the Tribunal to grant and that the Respondent was in no way restricting its ability to make arguments regarding these remedies at the hearing of this matter. That is, the Respondent's

willingness to allow the amendment of the remedies is in no way an admission as to the appropriateness of said remedies.

[30] Given the submissions of the Complainant and the Respondent's reply, the Complainant's request to amend her list of remedies expressly to reflect those set out in her materials dated May 23, 2014 is granted.

Signed by

Ricki Johnston
Tribunal Member

Ottawa, Ontario
October 23, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1823/5312

Style of Cause: Shelley Annette MacEachern v. Correctional Service Canada

Ruling of the Tribunal Dated: October 23, 2014

Date and Place of Preliminary Hearing: August 7, 2014

Grande Cache, Alberta

Appearances:

Shelley Annette MacEachern, for herself

No one appearing, for the Canadian Human Rights Commission

Barry Benkendorf, for the Respondent