File No. 12-10R

THE NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF The Northwest Territories *Human Rights Act,* R.S.N.W.T, 1988. as amended,

BETWEEN:

Jeanie Mantla

Complainant

-and-

Yellowknife Housing Authority, Northern Property REIT, Rosetta Morales and the Government of the Northwest Territories

Respondents

Reasons for Decision (Pre-hearing Application to Dismiss a Complaint)

Before: James R. Posynick, Adjudicator

Appearing:
Glenn Tate, Legal Counsel for Northern Property REIT and Rosetta Morales
Karen Lajoie, Legal Counsel for the Government of the Northwest Territories
Bob Bies, agent for Yellowknife Housing Authority

Sections of the *Human Rights Act* considered:
Sections 51, 52, and 57
Rules of Procedure considered: 16-22

REASONS FOR DECISION

1. Introduction

[1] The complaint in this matter was filed with the Human Rights Commission in October of 2010. It alleges Northern Property REIT ("REIT") and Rosetta Morales ("Morales") discriminated against Ms. Mantla by denying her occupancy as a tenant because of her race, color, ancestry, family status, marital status and social condition contrary to Sections 5 and 12 of the Northwest Territories *Human Rights Act* (the *"Act*"). She also alleges Morales harassed her contrary to Sections 5 and 14 of the *Act.* Lastly, she alleges the Government of the Northwest Territories (the "GNWT") discriminated her in relation to a term or condition of occupancy of a dwelling unit on the basis of social condition contrary to Sections 4 and 12 of the *Act.*

[2] This matter was referred to and received by the Human Rights Adjudication Panel (the "HRAP") on August 8th, 2012. At the time of the referral, the Human Rights Commission notified the HRAP it did not intend to participate in this matter.

[3] As with all referrals, Ms. Mantla was sent by regular mail a letter acknowledging receipt of her complaint and referencing enclosures including a copy of the *Act*, the *Rules of Practice and Procedure* (the "Rules") and the HRAP's website address.

The Prehearing Teleconferences

August 29, 2012

[4] By agreement of all of the parties, a prehearing teleconference was set for 10:45 a.m., MST, August 29th 2012. All of the parties were given notice of the teleconference in writing. The HRAP's office administrator telephoned Ms. Mantla the evening before the hearing and reminded her of the teleconference. At Ms. Mantla's request, the office administrator also called her the morning of the 29th but there was no answer. All of the parties except Ms. Mantla appeared via teleconference and the matter was adjourned to September 10th

[5] The HRAP's office administrator sent a letter to Ms. Mantla noting her non-appearance on the 29th, explaining the purpose of having a pre-hearing teleconference and advising her that the adjudicator may make procedural orders or give directions without hearing from her if she failed to attend the next teleconference, as per Rule 21. Attached was a Notice of Prehearing Teleconference requiring her attendance on September 10th 2012 at 09:30 MST.

September 10, 2012

[6] On the morning of September 10th, the HRAP's office administrator tried to reach Ms. Mantla by telephone before 9:30 a.m. Ms. Mantla's mother answered and said her daughter was not well and could not come to the phone. She said her daughter missed the previous teleconference because of difficulties with child care. She explained her daughter would like to

have the next prehearing conference take place “in-person” and she will arrange to have a “support person” attend with her at that time.

[7] The Respondents expressed concern about the repeated absence of Ms. Mantla. They asked for another prehearing teleconference as soon as possible. I subsequently issued a Memorandum to all of the parties stating:

The Respondents have, in good faith and at no small inconvenience to them, attended both prehearing teleconferences. Ms. Mantla has not despite receiving notices and even telephone reminders.

It is understandable that a party may, for good reason, not be able to attend prehearing teleconferences, i.e. the absence of child care. However the party must have the courtesy of explaining their absence at or before the next teleconference date. Without good and sufficient explanation the adjudicator may make orders or give directions that may have serious consequences for a complainant. Even if the adjudicator decides not to do so, the parties may apply to the adjudicator for appropriate relief.

Prehearing teleconferences are extremely important and often critical to parties who are self-represented.

The purpose of prehearing conferences is to provide information to all parties and give directions to them about the hearing process to ensure that everyone is treated in a procedurally fair manner. Prehearing teleconferences also allow the parties to ask questions of the adjudicator that will assist them in preparing for the hearing. Rules 16 – 22 of the Adjudication Panel’s Rules of Practice and Procedure (found on the Panel’s website) give more detail about the prehearing process.

Prehearings take place by telephone as a convenience to everyone and as a matter of economy, i.e. parties do not have to leave their office or home and there are no long distance charges incurred. In this case at least one party does not reside in Yellowknife making face-to-face participation in prehearing conferences (there will be more than one) costly if not impossible.

Parties are entitled to have their legal counsel or support people attend prehearing conferences. Support people can attend with the party and simply listen or connect via speakerphone or, on request, receive the dial-in information so that they can listen and participate in the teleconference. The extent of participation by them will be decided by the adjudicator presiding at the teleconference. Their participation is usually minimal because the adjudicator needs to speak to and hear from the party directly.

This case was received in the Panel Offices on August 7th. A teleconference was fixed for the 29th of August and then for today’s date. In my view there has not been any undue delay yet however if Jeanie Mantla continues to miss scheduled teleconferences, the other parties may bring such applications or motions as they feel are necessary in the circumstances.

The Respondents have agreed to attend another prehearing teleconference. They have agreed to do so to accommodate [her mother's] work schedule because she will attend the next teleconference as a support person. The next teleconference date is fixed for Thursday, **November 1st at 0930 a.m., MST**, more than six weeks from today on condition that Jeanie Mantla attends in person with her mother and any other support person(s) she requires. I urge her to do whatever is necessary so that she will not miss that telephone appearance.

[8] I also directed Ms. Mantla attendance on November 1st be mandatory and stated "… upon the non-appearance of Jeanie Mantla, the parties may apply for relief in accordance with the Rule of Practice and Procedure or I may, on my own motion, give order or directions in the absence of Ms. Mantla."

November 1, 2012

[9] Ms. Mantla did not appear on this date either. Once again the HRAP office administrator tried to reach her (and her mother) at least twice via telephone, without success. All of the Respondents were present. They asked me to dismiss the complaint because her repeated non-appearances demonstrate she does not intend to fulfill her obligation to prove she was discriminated against. I advised the parties that they may bring applications in accordance with the Rules, e.g. on notice to Ms. Mantla.

2. The Applications to Dismiss

Service of Notice

[10] The parties obtained the date of Thursday, April 4, 2013 at 4 p.m. MST to bring applications to dismiss Ms. Mantla's complaints without a hearing. Affidavits of Service were filed with the HRAP showing that she was served personally, weeks before April 4th, with a Notice of Application, prehearing memorandums and related documents and affidavits of the Vice President, Operations, REIT and Legislative Counsel for the GNWT.

[11] On April 4, 2013, neither Ms. Mantla nor any person on her behalf, appeared.

3. Issues for Decision

1. Does an HRAP adjudicator have jurisdiction to dismiss a complaint referred to it by the Human Rights Commission, without a hearing?
2. Is the complaint against the GNWT "moot"?

4. Sections of the *Human Rights Act* and *Rules* considered

51. The chairperson of the adjudication panel shall designate one member of the adjudication panel, including the chairperson,
(a) on the referral of a complaint to the adjudication panel, to adjudicate the complaint; or
(b) on an appeal to the adjudication panel, to hear the appeal.

52. (1) Subject to this Act and the regulations, the adjudication panel may make rules governing the practice and procedure in hearings and pre-hearing matters.

(2) Subject to this Act, the regulations and any rules made under subsection (1), the adjudicator may determine the practice and procedure for the conduct of the hearing and pre-hearing matters that the adjudicator considers appropriate to facilitate the just and timely resolution of the complaint or appeal, as the case may be.

(3) Without limiting the generality of subsection (2), the adjudicator may
(a) require the parties to the complaint to attend a pre-hearing conference in order to discuss issues relating to the complaint and the possibility of simplifying or disposing of issues;
(b) require the parties to the appeal to attend a pre-hearing conference in order to discuss issues relating to the appeal, the possibility of simplifying or disposing of issues and the content of the record for the appeal; and
(c) determine the practice and procedure respecting
    (i) the disclosure of evidence, including but not limited to prehearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit,
    (ii) the form of notices to be given to a party, and
    (iii) the service of notices and orders, including substituted service.

57. The adjudicator may, on proof of service on a party of a notice of the hearing, proceed with the hearing in the absence of the party and determine the validity of the complaint or determine the appeal, as the case may be, in the same manner as though that party was in attendance.

Rules

Pre-hearing Conferences

16. On receipt of an Appeal or Referral, the Panel's Office Administrator will contact the parties to determine their availability for a pre-hearing conference. If the Office Administrator is not able to contact the parties using a means other than by registered mail, the Office Administrator will issue a Notice of Pre-hearing Conference to the parties requiring that the parties reply within a reasonable period of time, providing their available times and dates for a pre-hearing conference.

17. If a party fails to respond to a Notice of Pre-hearing within a reasonable period of time, the Panel may issue a Notice of Pre-hearing Conference fixing a date and time for a Pre-hearing to take place.

18. Parties shall be prepared to discuss all matters relating to a Referral or Appeal at Pre-hearings, including:

- The names and addresses and other contact information of the parties and their legal representatives, advocates or agents;
- The names and contact information of any other person who may be added as a party or who may give evidence before the Adjudicator at a Hearing;
- The issues that are to be decided by the Adjudicator on the hearing of the Referral or Appeal;
- The number of witnesses to give evidence at the hearing and the need, if any, to exchange statements of what they will say at the hearing;
- The remedies that are sought by the parties, including any remedy as to costs.
- The appropriate means of filing materials with the Panel and effecting service on the parties;
- Any accommodation needs of the parties;
- Deciding the content of the Record, if any, to be used by the Adjudicator;
- Deciding the mode of hearing that is appropriate and where the hearing will take place;
- Establishing deadlines for the exchange of written arguments and the disclosure and production of will-say statements, documents and records;
- Setting dates to discuss or argue any preliminary matters or to have additional pre-hearings and to hear the Referral or Appeal;
- Discussing whether the parties wish to engage in Adjudicator-led mediation before proceeding with a hearing.

19. The Adjudicator who holds a pre-hearing may not be the same Adjudicator who presides over the hearing of an Appeal or Referral.

20. Proceedings at pre-hearings are not recorded. A party may make application to have a pre-hearing recorded or an Adjudicator may decide to record a pre-hearing, on his or her own motion.

21. If a party fails to attend a pre-hearing, the Adjudicator may, without further notice to that party, make rules governing the practice and procedure in the proceedings and may schedule the next step in the proceedings, including another pre-hearing or a hearing.

22. Following a pre-hearing, the Adjudicator shall prepare and serve on the parties a Pre-hearing Memorandum summarizing the issues discussed and setting out any orders made or directions given to the parties.

5. The Position of the Respondents

REIT, Morales and the YKHA

[12] The Vice President, Operations' Affidavit said REIT intended to call several employees as well as tenants who lived adjacent to Ms. Mantla's suite, to testify at her hearing. The employees and tenants had been identified as potential witnesses during an investigation of Ms. Mantla's complaint by the Human Rights Commission. The Affidavit says of six tenant witnesses, five are no longer tenants of REIT and their whereabouts is unknown. It also states five of eight employee/witnesses have left REIT and their whereabouts is unknown.

[13] Accordingly the delay in hearing this case, i.e. from the filing of the complaint in October 2010 to April, 2012, has seriously prejudiced their ability to defend Ms. Mantla's complaint.

[14] They also ask me to conclude Ms. Mantla's failure to appear on four occasions demonstrates she has no intention of proceeding with her complaint and that it has been effectively abandoned. They say it would be extremely unfair to put the parties to the cost and inconvenience, including the costs associated with returning Morales (and possibly other witnesses) to a hearing in Yellowknife, and hearing evidence before dismissing a complaint under section 57 of the *Act* because Ms. Mantla has given no indication of her intention to prove her case.

[15] It was also argued the use of the word "adjudicate" in section 51(a) does not preclude a final result, e.g. a dismissal, as the result of a preliminary application.

[16] Finally my attention was drawn to section 52(2) which suggests one of the objectives of the *Act* is to secure a "just and timely" disposition of complaints. Further, section 52(3)(a) gives adjudicators the authority to require the attendance of parties at prehearings and to dispose of "issues" before a hearing. It is suggested that one of those "issues" might be whether there ought to be a hearing at all where a complainant fails repeatedly to attend prehearing conferences.

[17] In support of the delay argument, I was referred to several Ontario Human Rights Tribunal decisions where complaints were dismissed after a series of non-appearances by complainants (Ouwroulis v. New Locomotion et al 2009 HRTO 335; Jenkins v. Steeves 2013 HRTO 187; Milkovic v. Lowe's Companies Canada, ULC, 2013 HRTO 255).

[18] The YKHA adopted the submissions of REIT and Morales.

The GNWT

[19] The GNWT adopted the submissions of REIT and Morales in relation to "delay". It also said section 49(3) of the RTA (denying security of tenure to tenants in subsidized housing) was

repealed in May of 2010, albeit after Ms. Mantla's eviction. It argued Ms. Mantla's complaint about the provision in the *Act* being discriminatory is now "moot".

[20] Relying primarily on *Borowsky v. Canada* [1989] 1 S.C.R. 342, the GNWT said courts have adopted a policy that cases raising a hypothetical or abstract question and which no longer affect or potentially affect the rights of a party, are "moot" and should not be heard. In this case, since the rights of Ms. Mantla are no longer in issue as a result of the repealed section, the issue has "disappeared rendering the issues academic" (headnote, Ibid).

Supplemental Submissions

[21] During my subsequent review of the cases provided by the parties I discovered an unreported HRAP decision I made in 2009, in which a similar application to dismiss was made by a Respondent [*Camsell v. Mbotlaxo Investments Ltd.* (No. 08-05R]. In that case I decided the Respondent had not shown serious prejudice and a dismissal application was denied. I provided a copy of that case to the parties and invited further submissions.

REIT and Morales

[22] These parties noted my reference in *Camsell* to a Supreme Court of Canada decision called *Blencoe v. B.C. (Human Rights Commission)* for the proposition that where delay has a serious affect on the "fairness" of the proceedings, an "abuse of process" may be found, resulting in a dismissal.

[23] They argued continuing the proceedings in this case will result in an abuse of process because they have been unfairly impeded in their ability to defend against the complaint since many witnesses are no longer available and because the length of delay is "inordinate".

[24] The unfairness arises because their ability to make full answer and defense has been prejudiced (harmed) by delay resulting in a denial of "natural justice". The inordinate or unreasonable delay arises because when all of the circumstances relating to delay are viewed objectively, e.g. by the community at large, even the community's sense of fairness would be offended.

YKHA

[25] Although I did not hear further from YKHA, I take it from its previous position, it would adopt the submissions of REIT and Morales.

The GNWT

[26] The GNWT reiterates its submissions on "delay" and the mootness of Ms. Mantla's complaint against it. It says that proceeding with a hearing on an issue that is moot would also be an abuse of process.

6. Analysis and Decision

Does an HRAP adjudicator have jurisdiction to dismiss a complaint referred to it by the Human Rights Commission, without a hearing?

REIT, Morales YKHA

[27] In *Camsell* I decided there *may* be circumstances in which a party is harmed by delay to the point where continuing proceedings would render them unfair, an abuse of process and result in a complaint being dismissed without a hearing. Relying on *Blencoe* I found that that such delay must be "unreasonable or inordinate" after considering the circumstances of each case including any harm caused by delay and the cause of the delay. Further, where delay is found to be "unreasonable or inordinate", a tribunal must consider whether going ahead with a hearing would damage the public's perception of justice more than dismissing the proceedings.

[28] Nonetheless there may be justification for delay. In this case, for instance, Ms. Mantla's mother said (during the second prehearing teleconference) her daughter could not attend the first due to child care issues. Her mother said on the second occasion Ms. Mantla was too ill to come to the phone. These may have been acceptable reasons for her absence however she failed to attend the next properly scheduled prehearing teleconference despite being informed her attendance was mandatory. No explanations were received from Ms. Mantla personally. She did not respond to the Respondents' notices of application for dismissal of her complaint. In the meantime, the Respondents' witnesses have become difficult if not impossible to locate.

[29] Section 52(3) of the *Act* authorizes the making of Rules that "facilitate the just and timely resolution of the complaint". Clearly timeliness in the resolution of a complaint is an aspect of "fairness" to all parties. "Fairness" in the context of Human Rights proceedings simply means adherence to fundamental rules (the "Rules of Natural Justice"). In addition to timeliness, both parties are entitled to know the case they will have to meet at hearings. Consequently prehearing conferences are designed to help parties obtain information from each other that will help them prove and defend the allegations, respectively. Prehearing conferences are the primary means of ensuring cases proceed to hearing in a fair and timely fashion. Attending scheduled prehearing conferences is not "optional" and parties who do not attend do so at their peril.

[30] The need to avoid delay is apparent in the Ontario cases the Respondents put before me. The adjudicators in those cases typically considered the following factors in determining whether a complaint ought to be dismissed for delay:

- Commencing a legal proceeding against someone requires a defense that involves significant preparation and resources
- Filing a human rights complaint engages significant public resources, e.g. the Human Rights Commission and the HRAP;
- Each application must be treated seriously, fairly and expeditiously;

- Compliance with Tribunal Rules is required out of respect for the seriousness and significance of the process;
- Failure to comply with Tribunal rules or directions, without justification, may result in the dismissal of an application.

[31] These factors reveal the very serious consequences of initiating and proving or defending a human rights complaint and it is no different in the N.W.T. Repeated failure to attend prehearing conferences and the failure to follow directions given by an adjudicator are bound to raise concerns about a party's commitment to full participation. Consequently parties who fail to attend prehearing conferences and fail to follow directions risk having orders or directions made without their participation.

[32] As the *Blencoe* decision suggests, the public have an interest not only in the outcome of human rights proceedings but in seeing all parties treated fairly and that public resources are not misused as a result of the actions or inactions of parties to a complaint. In my view where a party repeatedly fails to show up for prehearing conferences and fails to defend an application for dismissal – all after proper notice of the proceedings is given – without adequate or any explanation, and the delay has harmed another party's ability to make its case, the resulting delay is properly characterized as "inordinate" and an "abuse of process".

[33] have considered all of the circumstances in this case. Ms. Mantla had notice of three prehearing teleconferences and did not attend any of them. She had notice of the Respondents' applications to dismiss her complaint and did not respond to it or attend the dismissal applications. I accept the undisputed affidavit evidence produced by REIT indicating the loss of contact with important witnesses since the complaint was filed. The delay has caused harm to the Respondent's ability to defend against the allegations of discrimination. Ms. Mantla's failure to attend prehearing conferences has contributed to the delay. Public resources in the form of prehearing conferences and a hearing to determine whether her complaints ought to be dismissed have been afforded to her but she has not participated nor provided any explanations. For all of these reasons I am satisfied this is a case where the continuation of these proceedings is not in the public interest and would be contrary to the interests of justice. I dismiss the complaints against Reit and Morales.

The GNWT

[34] The GNWT says section 40(3) of the NWT *Residential Tenancies Act* (which excluded subsidized public housing tenants from security of tenure leading to her eviction) was repealed and therefore the Claimant's argument is now "moot" and that to continue with the hearing would amount to another "abuse of process".

[35] In reviewing the GNWT's cases (*Borowski*, *Collins* v. *Abrams* [2002] BCSC 1774; *Burrows v. Ontario (Ministry of Community and Social Services)* 2004 O.H.R.T.D. No 6), the following legal principles emerge:

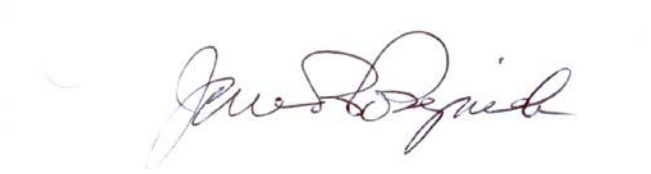
- Decision-makers may decline to decide a case that raises a merely hypothetical question;
- The first step is to determine whether there is any "tangible or concrete" dispute or simply an academic question to be resolved;
- If the question is academic, the decision-maker may exercise its discretion to deal with the question considering:
    - Whether the dispute is deeply rooted in the adversarial system;
    - Whether hearing a case will be an appropriate use of resources;
    - Whether there is some broad public interest in hearing the case;
    - Whether a decision may have some future effect

[36] Ms. Mantla's complaint says section 40(3) facilitated her early eviction from public housing. The complaint says in subsequent proceedings before a Residential Tenancies tribunal on May 30, 2010, her eviction was found to be illegal and the Respondent YKHA was required to compensate her but in an amount less than if Section 40(3) did not apply to her. The complaint says the lack of automatic renewal harmed her legal position before the Residential Tenancies tribunal. It says Section 40(3) affects more people than just the complainant and the same thing could happen to other tenants in public housing.

[37] In my view the question of whether Section 40(3) constituted discrimination based on social condition is now entirely academic. Its repeal addressed any public interest component and I do not have before me any evidence of how hearing the matter at this point in time would have a future effect on anyone else.

[38] I also consider Ms. Mantla's non appearances and the resulting delay experienced by the all of the parties in exercising my discretion not to hear her case against the GNWT. The use of further public resources is not warranted.

[39] The complaint against the GNWT is dismissed.



James R. Posynick, Adjudicator