

**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:

STEVE CAMSELL

Complainant

-and-

MBOTLAXO INVESTMENTS LTD., operating as “Boston Pizza”

Respondent

Application by the Respondent to dismiss complaints because of delay, denied.

Before: James R. Posynick, Adjudicator

Date of Application: November 25th, 2009

Appearing: Mr. T. Chang, Agent for the Respondent

Sections of the *Human Rights Act* considered:

S. 47, 51, 52, 57, 62, 63;

Rules considered:

Rules 33, 36, 37

REASONS FOR DECISION

Introduction

Mr. Camsell filed a complaint with the NWT Human Rights Commission on April 4th, 2005.

Mr. Camsell's complaint alleges that in March of 2005 he was discriminated against by fellow employees who uttered racist remarks toward him in the workplace. He also alleges he was fired because he supported another employee who filed a Human Rights Complaint against his employer. The other employee successfully prosecuted her complaints of discrimination. The Adjudication Panel received Mr. Camsell's complaint on April 10th, 2006.

A first attempt to schedule a pre-hearing teleconference with both parties on December 3rd, 2007, was unsuccessful.

On May 27th, 2008, the Respondent filed a Withdrawal Notice stating he was dissatisfied with the way his complaint was handled, claiming "there were too many prolonged and unnecessary delays". He attributed those delays to the Respondent. The Respondent consented to the withdrawal.

On August 13th, 2009, Mr. Camsell contacted the Panel's Administrative Clerk by Email and asked that his withdrawn complaint be revived because he was not able to find employment and he attributed the reason to the filing of his complaint.

Despite participating in the fixing of dates for prehearings and despite receiving notices of them, Mr. Camsell subsequently failed to show-up at two consecutive prehearing teleconferences. Only when a hearing date was fixed in his absence did he appear by teleconference to request the hearing be postponed to allow him the opportunity to prepare materials to apply to have his complaint revived.

A fourth prehearing teleconference was fixed for November 25th, 2009 and, again, Mr. Camsell failed to show-up at the appointed date and time. The agent for the Respondent, Mr. Tony Chang, then asked me to dismiss Mr. Camsell's complaint because it was 4 ½ years since it was filed with the Human Rights Commission and because much time, energy and cost has been expended by him in attempts to have Mr. Camsell's complaint disposed of by way of settlement or a hearing. Mr. Chang added that he repeatedly adjusted his work schedule to attend pre-hearing conferences to the point where he incurred related costs and expenses.

Mr. Chang's application for dismissal raises questions about whether the Adjudication Panel can dismiss a complaint without a hearing. For the reasons set out below, I have decided there may be circumstances in which an Adjudicator will find that the failure to follow the Panel's Rules and directions amounts to an 'abuse of process' but the circumstances of this case do not call for such a finding. Consequently Mr. Chang's

application to dismiss is denied with directions to both parties for the continuance of the proceedings.

Applicable Legislation and Rules of Procedure

The Human Rights Act:

Section 47. In this Part, “hearing” means a hearing in respect of a complaint or of an appeal

Section 51. The chairperson of the adjudication panel shall designate one member of the adjudication panel... (a) on the referral of a complaint to the adjudication panel, to adjudicate the complaint...

Section 52 (1) Subject to this Act and 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 prehearing matters that the adjudicator considers appropriate to facilitate the just and timely resolution of the complaint or appeal as the case may be.

Section 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.

Section 62 (1) After the completion of the hearing for the adjudication of a complaint, the adjudicator shall decide whether or not the complaint has merit in whole or in part.

(2) If the adjudicator finds, under subsection (1), that a complaint is without merit, the adjudicator shall order that the complaint be dismissed.

Section 63 On the adjudication of a complaint, an adjudicator may order the party responsible for the complaint or for the conduct to pay all or some of the costs of any other party where the adjudicator is satisfied that (a) the complaint is frivolous or vexatious; (b) the investigation or adjudication of the complaint has been frivolously or vexatiously prolonged by the conduct of the party; or (c) there are extraordinary reasons for making such an order in a particular case.

The Rules of Practice and Procedure

Rule 33. A complainant may withdraw a complaint against a respondent, in whole or in part, at any time before a hearing is commenced with the consent of the respondent.

Rule 36. The withdrawal of a complaint or part thereof shall result in its immediate removal from the Panel’s active file list.

Rule 37. The withdrawal of a complaint or part thereof shall have the effect of a final determination of the complaint unless the parties agree otherwise, in writing.

Issues to be decided in this case

1. Does the *Act* authorize an adjudicator to dismiss a complaint for delay?
2. Is there any other authority for an adjudicator to dismiss for delay and, if so, is this such a case?

Positions of the Parties

According to Mr. Chang, the delay of 4 ½ years since the circumstances giving rise to the complaint arose is too long. Mr. Chang stated he has been inconvenienced to the point where he has incurred costs and expenses for failed teleconferences. He attributed all of the delay in resolving the complaint to Mr. Camsell.

Mr. Camsell was not present when Mr. Chang asked for the dismissal of the complaint. However I do not need to hear from Mr. Camsell in this matter for the reasons set out below.

Analysis

Issue 1. Does the *Human Rights Act* authorize adjudicators to dismiss a complaint for delay?

Section 51 requires the adjudication of complaints by an assigned adjudicator. To “adjudicate” is to “act as a judge in a competition, court, tribunal...to decide judicially regarding a claim...” (Oxford Canadian Dictionary, 1998).

The *Act* requires the adjudication of complaints and appeals by way of a “hearing” (section 47).

Further, the *Act* authorizes the dismissal of complaints by an adjudicator in just two circumstances:

- Where a party fails to participate in a hearing after receiving notice of the hearing, (Section 57); and,
- Where, at the conclusion of a hearing, the Adjudicator decides a complaint is without merit [S. 62(2)].

The *Human Rights Act* does not authorize the dismissal of a complaint due to “delay”. If a party does not participate in proceedings leading to a hearing, the statutory remedy appears to be the fixing of a hearing date, service of notice of the hearing upon the non-participating party and a final hearing on the merits of the complaint with or without the participation of that party (section 57 of the *Act*).

The only specific reference to “delay” in the *Act* is found in the remedial part of it, in section 63 (b). The latter section authorizes adjudicators to take into account delay

where, following a decision on the merits of a complaint, an award of costs may be made against a party who is found responsible for unnecessarily prolonging the proceedings.

Therefore the answer to question 1. above is “No”.

Issue 2. Is there any other authority for an adjudicator to dismiss for delay and, if so, is this such a case?

The *Act* clearly authorizes the Panel to make Rules governing practice and procedure in hearings and pre-hearings [S. 52(1) and (2)]. The Rules are guidelines and they are to be applied on a case-by-case basis to ensure a “just and timely resolution of the complaint...” [S. 52(2) of the *Act*].

In my view a “timely resolution” is one that is not delayed unreasonably. Consequently considering the effects of “delay” on a party’s ability to prosecute or defend a case may, in appropriate circumstances, be an issue that arises during the adjudication of complaints, generally.

Further, under the Rules, once a withdrawal of complaint is filed (Rule 33) it is removed from ‘active’ consideration by the Panel (Rule 37) and is treated as though it is concluded (38). In this case I directed Mr. Camsell to apply to have his case revived, e.g. to have it placed back on the ‘active’ list. The Respondent would then have the opportunity to tell me why it should not be revived. It seems to me one important argument that might be raised by a Respondent who objects to the revival of a withdrawn complaint is that the passage of time, i.e. delay, has prejudiced or harmed its ability to defend against it.

Since the *Act* only speaks of the consequences of delay following an adjudication, however, I have looked for direction in what the courts and other tribunals have said about the authority of tribunals to manage and enforce their own practices and procedures.

Jurisprudence

The leading case dealing with “delay” in administrative law proceedings is *Blencoe vs. British Columbia (Human Rights Commission)* 2000 SCC 44. The case involved allegations of delay caused by the tribunal itself.

The court in *Blencoe* found that in order for that court to direct a stay (or a stoppage) of the proceedings the Respondent would have to show an ‘abuse of process’ had taken place. The court stated:

“120] In order to find an abuse of process, the court must be satisfied that “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted”... For there to be abuse of process, the proceedings must, in the words of L’Heureux-Dube, J., be “unfair to the point that they are contrary to the interests of justice”.

In other words, where a party is harmed by delay to the extent that continuing the proceedings would seriously affect the fairness of the proceedings, the proceedings ought to be stopped. To proceed further would amount to an “abuse of process”.

The court in *Blencoe* also decided that proof of delay alone would not be sufficient to warrant a finding of abuse of process. The delay must be “unreasonable or inordinate” taking into account the circumstances of each case including the cause of the delay and the extent of the harm (or “prejudice”) to the party alleging abuse of process.

The reasoning in *Blencoe* has been applied by a number of adjudicative agencies and tribunals, including human rights tribunals (*Walsh v. Mobil Oil Canada* (2002) 42 C/J/R/R/ D247 (Alta.H.R.P.), partially reversed *Walsh v. Mobil Oil Canada* (2004) ABQB 675; *Cremasco v. Canada Post Corp.* CanLii 45933 (C.H.R.T.), Aff’d *Canada H.R.C. v. Canada Post Corp.* (2004) FCA 363; *Commission Des Droits De La Personne Et Des Droits De La Jeunesse v. Desrosiers, et al* 2006 QCTDP 11 (CanLii); *Snow v. Honda of Canada Manufacturing, et al.* (2007) HRTO 45; *Zhang v. Victoria Police Department* 2008 BCHRT 227 (CanLii); *Canada (Attorney General) v. Grover (No. 3)* (2009) CHRT 1).

In my view the answer to the first part of Issue #2 is there *may* be circumstances before an adjudicator under the *NWT Human Rights Act* where the effects of delay may lead to the dismissal of a complaint without a hearing. Now I will turn to the question of whether this is such a case.

Conclusion:

The allegations in this case are serious. Mr. Camsell alleges he was taunted at work because of his race. He alleges that he was fired because he supported a person who filed a human rights complaint against his employer.

Mr. Camsell has certainly been responsible for some of the delay in this case at least since his initial request to withdraw his complaint in May of 2008. Most recently he has chosen not to attend prehearing conferences.

The Respondent submits the passage of time since the complaint was filed 4 ½ years ago has created inconvenience and warrants the dismissal of Mr. Camsell’s complaint. However the passage of time alone is not evidence of serious prejudice. On the other hand, the question of costs arising from unreasonable or vexatious delay can be addressed by way of application after a hearing. Without evidence of how delay has or will affect the fairness of the hearing process, I am unable to conclude that continuing these proceedings is, or will lead to, an abuse of process.

I therefore dismiss the Respondent’s application with the following direction:

I direct both parties to give the Panel's Office Administrator at least two (2) available dates during each of the months of January, February and March, 2010, during which a sufficient number of prehearing conferences may be scheduled to deal with Mr. Camsell's application to revive his Withdrawal and, if necessary, to discuss hearing procedure. The purpose of this direction is to ensure that the parties will have ample opportunity to prepare for future teleconferences and the hearing and to establish some certainty in their schedules and my own.

If Mr. Camsell fails to respond to this direction or if he fails to attend future proceedings, the Respondent may ask me to reschedule the hearing, on notice to Mr. Camsell, on a peremptory (unchangeable) basis.

The parties are reminded that the Panel's *Rules of Procedure* and other resources can be found on-line at www.hrap.nt.ca and that any remaining questions about practice and procedure can and should be asked of me during prehearing conferences.

James R. Posynick, Adjudicator

