

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

**IN THE MATTER OF The Northwest Territories
Human Rights Act, S.N.W.T, 2002, c. 18 as amended,**

BETWEEN:

MIKE ZALENCHUK

Appellant

-and-

NORTH OF SIXTY CAMPS LTD

Respondent

Reasons for Decision

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife NT (by telephone)

Date of Hearing: 8 November, 2012 and 23 August, 2013

Mike Zalenchuk, for himself

Diana Bellinghausen, Agent for the Respondent, North of Sixty Camps Ltd

Authorities considered:

***Human Rights Act*, S.N.W.T. 2002, c. 18, as amended: Sections 7 and 52;**

Rules of Practice and Procedure of the Human Rights Adjudication Panel, Rules 42 and 43.

[1] This decision arises from the hearing of this complaint. It is a final decision. The complaint alleges the respondent North of Sixty Camps Ltd (“North of Sixty”) discriminated against the complainant Mike Zalenchuk. The prohibited ground of discrimination is age. Mr Zalenchuk says North of Sixty either refused to employ him or refused to continue to employ him because of this prohibited ground; North of Sixty, on the other hand, submits it did not employ him for reasons unrelated to the prohibited ground.

[2] I will address my jurisdiction to hear this complaint. I will then discuss the procedure I used. I will summarize the evidence, set out the issues and then come to my decision.

1. Jurisdiction

[3] I first address jurisdiction. As will be apparent all dealings involving the parties occurred outside the Northwest Territories. The employment would have involved work to be done at one of North of Sixty's camps in the Northwest Territories – either Flett Lake or Obre Lake. As a result, if there was discrimination, it occurred concerning employment in the Northwest Territories. Section 7 prevents anyone from refusing to employ or refusing to continue employ an individual or class of individual on the basis of a prohibited ground of discrimination. Although the section does not say this, this must relate to this occurring in the Northwest Territories.

[4] As a result, I conclude I have jurisdiction over this complaint.

2. *Procedure*

[5] Mr Zalenchuk resides in Saskatoon; Ms Bellinghausen in Plymouth Minnesota USA. Both told me they could not travel to the Northwest Territories for a hearing. Both also told me they were comfortable my deciding this case after hearing their evidence over the telephone and reviewing the documents.

[6] As a result, I heard their evidence in a telephone conference on 8 November 2012. After reviewing their evidence I gave them an opportunity to ask questions of the other on 23 August 2013.

[7] I have the authority under section 52 (2) of the *Human Rights Act* to determine the practice and procedure for the hearing and pre-hearing matters I consider appropriate. Rule 42 of the Panel's Rules of Practice and Procedure provides hearings may occur by any combination of written and oral argument, teleconference, videoconference, the calling and examining of witnesses in-person or any combination of these. Rule 43 says the adjudicator will decide the mode of hearing after hearing from the parties.

[8] In this case, after hearing from the parties, I decided it was impractical to hold an in-person hearing. The parties were comfortable with my hearing their evidence by telephone. I allowed them to each to produce documents. By the time of the telephone conference, they knew the position of the other party and had reviewed the documents. They each made reference to the relevant documents when they went through their evidence on the telephone. They each had an opportunity to ask questions of the other.

[9] The main reason for an in-person hearing is to allow the decision-maker the opportunity to see the parties. This may assist in evaluating the parties' credibility and reliability.

[10] In this case, I determined there were some differences between the parties' evidence. For the most part, the parties agreed on the important facts. On issues in dispute, I evaluate the parties' evidence using the normally accepted criteria – motive, appearance and demeanour, internal consistency, external inconsistency, opportunity to observe and probability. Although I cannot evaluate appearance and demeanour over the telephone, this is usually considered the least reliable of the various indicia of credibility and reliability. I was able to evaluate the parties' credibility and reliability over the telephone and by examining the documents.

[11] I note the parties did not give their evidence under oath or after promising to tell the truth. I am satisfied both did their best to be truthful.

Evidence of Mike Zalenchuk:

[12] The Complainant Mike Zalenchuk applied for a job with the Respondent North of Sixty Camps Ltd as Outpost Manager and Cook. Mr Zalenchuk supplied a page from the web site "Sask Jobs.ca". The page indicates applicants were to fax a resume and a cover letter to Diana Bellinghausen. Mr Zalenchuk also provided a copy of the resume he sent in response. The deadline for applications was 29 April 2011.

[13] Ms Bellinghausen called Mr Zalenchuk on 26 May 2011 to tell him he got the job. Because of Mr Zalenchuk's past experience, Ms Bellinghausen wanted Mr Zalenchuk to go up with the opening crew on 9 June. A truck would be going through Saskatoon to La Ronge with supplies for the camp. This might pick up Mr Zalenchuk; or he might take the bus to La Ronge. They would meet at the Riverside Motel. They would fly out to camp the next day.

[14] She asked Mr Zalenchuk if he had a fax number so she could fax some pre-employment forms. Mr Zalenchuk said he did not have a fax. Mr Zalenchuk suggested they could pay him at the end of the season. Also he was not concerned about EI (employment insurance) contributions because he was past the age he could claim EI. Ms Bellinghausen agreed they would pay him at the end of the season and not bother with deductions. Ms Bellinghausen suggested Mr Zalenchuk bring his own bedding and personal care needs. She also asked Mr Zalenchuk "by the way, how old are you?" Mr Zalenchuk said he was 75. He said this came up because he told her he was past the age for claiming employment insurance. He also told Ms Bellinghausen he was in good shape. He had just had a yearly checkup with his physician who told Mr Zalenchuk he was in very good health. Ms Bellinghausen said she would call back with dates they would go to the camp.

[15] On 28 May Ms Bellinghausen called Mr Zalenchuk to tell him they had hired someone else. As a result, Mr Zalenchuk would not be needed.

[16] Mr Zalenchuk says he did not hear the name of the outpost camp where he would be working in either conversation.

Evidence of Diana Bellinghausen:

[17] Ms Bellinghausen was responsible for hiring employees for the various camps operated by North of Sixty. North of Sixty's office is in Plymouth Minnesota in the United States. She reviewed the applications received, checked references and determined five people who were her top five candidates. One of those people was Mike Zalenchuk. At first she was looking for managers for the camps located at Obre Lake and Flett Lake. It then became apparent the camp at Flett Lake would be iced in and not opening that season. The Flett Lake camp was in the Northwest Territories.

[18] Ms Bellinghausen agrees there was a call on 26 May 2011. She says, however, she did not offer Mr Zalenchuk a job in that call. Instead, she says she called to tell Mr Zalenchuk about the job. She told him every detail about the job. She asked for a fax number because she would send employment forms before she hired anyone. She called all five of her candidates to tell them the details about the job. If one of them had a problem with any part of the job – for example with riding a truck to La Ronge – she would not hire that person. She has to know the person she hires is going to be fine with everything going on with the job. As a result, she told Mr Zalenchuk the details about the job.

[19] In Ms Bellinghausen's mind, no one had a job until employment papers were signed. She has no specific memory about calling Mr Zalenchuk – she agrees what Mr Zalenchuk said happened in the call is what she told candidates for the job. Usually she would not agree to not make deductions but she thought she might have done so in this case because the job was only going to last two weeks.

[20] Ms Bellinghausen disagrees she offered Mr Zalenchuk a job. She also does not remember asking Mr Zalenchuk his age. She says she has never – in forty years of hiring people – asked anyone about their age. She does not care about people's ages – she cares about people's experience – about what people have done.

[20] Ms Bellinghausen checked references for all the individuals she considered for manager of the Flett Lake Camp. No one would have got on her list to be a top candidate for that job without her checking references. Mr Zalenchuk was in the list of top five candidates.

[21] North of Sixty produced some documents. One is a list entitled "North of Sixty Camps LTD – Employment". Immediately below the title is "Obre Lodge 2011". This document appears to be a list of the employees who would be going to the Obre Lodge in June and July of 2011. One of the guides is "Mike". I infer this is Mike Zalenchuk, the complainant.

[22] North of Sixty also produced a handwritten document. I understand this is Ms Bellinghausen's handwriting. At the top of the documents appears "5/27/11" and "To Do". I infer this document is a reminder of tasks Ms Bellinghausen wanted to accomplish. I infer "5/27/11" is the date this document was prepared – 27 May 2011.

[23] This document includes the following lines:

“-Call Top 5 Mgrs – Flett – not opening” (a tick mark appears to the left beside this line). [I infer “Top 5 Mgrs” means top five managers – a phrase Ms Bellinghausen used a few times.]

Abel [name stroked out], Mike [name stroked out but appears to be Zalenchuk], Joel [name stroked out], [illegible]

– “- Call Guest [for the most part illegible though the name “Fred” is legible] – Flett not opening”. (Again there is a tick mark to the left of this line. The phrase “Flett not opening” has a stroke through it.)

[24] Ms Bellinghausen agrees she called Mr Zalenchuk on 28 May but disagrees she told Mr Zalenchuk she hired someone else. She says she called all the candidates on her top-five list. She told them the Flett Lake camp was not opening because it was iced in. She said she told guests if they wanted to go to Obre Lake that would be fine. She said she would not have told Mr Zalenchuk he could go to Obre Lake – she would have said that to guests.

Issues

[25] From the above summary of evidence, it is clear there are two issues:

1. Did Ms Bellinghausen ask Mr Zalenchuk his age in the telephone conversation on 27 May 2011?
2. If she did, was Mr Zalenchuk’s age a reason he was not employed as an outpost manager and cook?

Issue 1 -- Did Ms Bellinghausen ask Mr Zalenchuk his age in the telephone conversation on 27 May 2011?

[26] Mr Zalenchuk says Ms Bellinghausen asked him how old he was. This occurred after Mr Zalenchuk told her he was not concerned about EI contributions because he was past the age he could claim employment insurance. The question flowed from the other things being discussed at the time. It was a logical question after Mr Zalenchuk said he was too old to claim employment insurance. Ms Bellinghausen has no memory whether she asked this question or not; her only response is she has never asked a person’s age – only experience matters to her.

[27] I find Mr Zalenchuk’s evidence on this point credible and reliable. He had reason to remember the question. He provided detail about the conversation. His memory was clear. His memory is not inconsistent with the documents. It was also consistent with the rest of his evidence. Ms Bellinghausen has no memory about this so Mr Zalenchuk’s evidence is not inconsistent with her memory of the conversation. Ms Bellinghausen also acknowledged it is possible she asked Mr Zalenchuk his age.

[28] As a result, I find on a balance of probabilities Ms Bellinghausen did ask Mr Zalenchuk his age. I also find on a balance of probabilities Mr Zalenchuk told Ms Bellinghausen he was seventy-five.

Issue 2 - If Ms Bellinghausen did ask Mr Zalenchuk his age, was Mr Zalenchuk's age a reason he was not employed as an outpost manager and cook?

[29] Ms Bellinghausen said the Flett Lake camp was not opening and this was the reason she did not offer Mr Zalenchuk a job. She produced her notes which are consistent with this recollection – there are notes about Flett “not opening” and she was to call some people – one of whom was “Mike Zalenchuk” - to tell them it was not opening.

[30] Ms Bellinghausen also says she told Mr Zalenchuk about the job; she did not offer him the job.

[31] Mr Zalenchuk was not able to refute or contradict Ms Bellinghausen's evidence about Flett Lake not opening.

[32] I find Ms Bellinghausen's evidence credible and reliable generally and on this point in particular. Her evidence is consistent with the documents. She admitted things not necessarily in her interest – for example she has no specific memory of the conversation with Mr Zalenchuk and it was possible she asked him he was seventy-five. Her evidence is also consistent with most of Mr Zalenchuk's evidence.

[33] Ms Bellinghausen evidence is also probable for the following reasons:

- She called Mr Zalenchuk and gave him information about the job – what clothing and equipment he should take, where he would be picked up, and how he would be paid.
- She wanted to be sure all people taking the job could handle all parts of it. These people would be employed for a two-week period in which they would drive by truck to a remote place (La Ronge Saskatchewan) and then flown to an even more remote place. As a result, it makes sense she would first go through the job with them on the telephone to ensure they were fine with it. In any event, in my mind, it is not material whether Mr Zalenchuk was offered the job or was told about the job in the first telephone conversation.
- She is in the best place to know about the reason North of Sixty did not hire Mr Zalenchuk. She knew whether the camps were open or not. Mr Zalenchuk knew nothing about this. I also accept Mr Zalenchuk was disappointed about not going to a camp and may not remember exactly the reason he was given.

[34] As a result, I find the reason Mr Zalenchuk was not employed by North of Sixty at any of its camps in the spring or summer of 2011 was there was no position – the position he could have filled would not be needed because the camp at Flett Lake would not open.

[35] Since there is no connection between Ms Bellinghausen's asking Mr Zalenchuk his age and Mr Zalenchuk's not being employed by North of Sixty in the spring and summer of 2011, Mr Zalenchuk's complaint must fail. North of Sixty did not refuse to hire or refuse to continue to hire Mr Zalenchuk on the basis of a prohibited ground of discrimination.

[36] As a result, I dismiss Mr Zalenchuk's complaint against North of Sixty Camps Ltd.



Adrian Wright
Adjudicator
Human Rights Adjudication Panel
3 February 2014

