File: 19-13A

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:

WILLIAM LEONARD TURNER

Appellant

-and-

NORTHWEST TERRITORIES BUSINESS DEVELOPMENT AND INVESTMENT CORPORATION

Respondent

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondent

- and –

DIRECTOR OF HUMAN RIGHTS

Party

Reasons for Decision

Ruling on preliminary application

Before: Sheldon Toner, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife, Northwest Territories

Date of Hearing: October 28, 2014

William Leonard Turner, for himself

Anne Walker, Counsel for the Respondents

No one appearing for the Director of Human Rights

Introduction:

[1] The appellant has appealed the decision of the Director of Human Rights ("Director) dated January 27, 2014, dismissing his complaint of discrimination based on disability.

[2] This is my decision on a preliminary application. The appellant seeks an order for the production of documents, or alternatively, an order barring the respondents from using certain material in future proceedings.

[3] I have not yet heard the appeal of the Director's decision. The appeal should proceed based on the record provided by the Director; for the reasons outlined in these reasons for decision, the application is denied.

Issues:

[4] These reasons for decision address the following issues:

1. Should the respondents be required to produce documents, relating to alleged misconduct of the appellant in October 2011, before the appeal is heard?

2. Should the respondents be barred from relying on documents related to the alleged misconduct in future proceedings?

Background:

[5] The complaint under appeal can be summarized as follows: The appellant was an employee of the Northwest Territories Business Development and Investment Corporation ("BDIC"). The appellant claims his supervisor offered him a reference consistent with his performance evaluation from 2011. The performance letter was generally positive, and so the appellant expected a generally positive reference.

[6] When the appellant inquired about an employment reference in 2013, another employee of BDIC stated he would provide a reference consisting of the appellant's position title, duties and

dates of employment. The appellant considered this a change from the respondent's earlier position.

[7] The appellant asserts discrimination on the basis of disability. He asserts he would likely have received a positive letter, as initially offered, except that he has a psychiatric condition which caused him to behave in ways that brought him into conflict with the respondents between 2011 and 2013.

[8] The record provided by the Director in August 2014 includes documents which outline the complaint in greater detail. However, the summary above captures the essential points.

[9] The Director dismissed the complaint on the basis it does not include the kind of act or omission to which the *Human Rights Act*, S.N.W.T. 2002, c.18, applies. The Director reasons state, "It is not a contravention of the *Act* for a person to state what style of reference they intend to provide."

[10] Upon receiving the appeal, I convened a pre-hearing teleconference on September 9, 2014. I asked the parties whether they wished to introduce any new material or whether I could determine the appeal based on the record provided by the Director.

[11] The appellant was initially prepared to argue the appeal on the record provided by Director without *viva voce* evidence. Counsel for the respondents required time to determine whether her clients wished to introduce *viva voce* evidence.

[12] On September 11, 2014, the appellant commenced an application seeking disclosure of documents related to misconduct which allegedly occurred in October 2011, or alternatively, an order precluding the Respondents from relying on the alleged misconduct.

[13] I heard the application by teleconference on October 28, 2014, having provided the parties the opportunity to make written submissions in advance. The appeal was meanwhile postponed.

[14] The Director is a party to the appeal under the *Human Rights Act*. However, the Director advised the Panel beforehand she did not intend to take a position on the appeal. She did not attend the pre-hearing conference or the hearing of the motion.

Appellant's Position:

[15] The appellant's position is that the respondents have a duty to disclose the documents in question. The basis of his complaint is the argument he would have received a positive reference from the respondents but for his disability, which he submits is "inextricably intertwined" with the alleged misconduct in October 2011.

[16] The appellant believes the respondents should have in their possession an investigation report, and possibly an affidavit from Daryl Dolynny, based on e-mails between himself and the respondents. The appellant submits the respondents have documents which may be "exculpatory" and relevant.

[17] The appellant confirmed he is seeking not only an order for production of documents, but also the inclusion of documents into the record on appeal of the Director's decision.

[18] The appellant argues the respondents should either be compelled to provide disclosure of the documents in question, or barred from relying on such documents at the hearing of the complaint on its merits.

Respondents' Position:

[19] The respondents submit I should not accept the unsworn *viva voce* evidence of the appellant on the application, since his evidence has not been subject to cross-examination.

[20] The respondents further submit the application is moot since the appellant originally indicated he was prepared to argue the appeal based on the record provided by the Director.

[21] The respondents further submit the appellant has failed to establish a nexus between the documents in question and the Director's reasons for decision.

[22] The respondents' finally submit I do not have the jurisdiction to preclude the respondents from relying on evidence of the alleged misconduct in any context other than these human rights proceedings.

[23] Counsel for the respondents acknowledge an investigation was commenced into events concerning the appellant in October 2011. She is informed the investigation was not completed because the applicant was unable to participate in interviews. Counsel does not believe there is an affidavit of Daryl Dolynny.

[24] If the appeal succeeds and this matter goes to hearing, the respondents could not indicate whether they intend to rely on the alleged misconduct in October 2011. This would have to be decided.

Analysis:

[25] The appellant's application for production raises questions as to the degree of disclosure to which he is entitled at this stage in the proceedings. It is important to note the appeal from the Director's decision has not yet been heard.

[26] I will first address the argument of mootness. I am not particularly concerned about the appellant's change in position. Parties will occasionally change or modify positions. If a genuine issues is raised, it is not moot because it did not come up before. In this case, I also note the appellant brought his application before the respondents finalized their position on the record. The contents of the record were as yet undetermined.

[27] I will next address my jurisdiction to consider the application. Section 52 of the *Human Rights Act* provides that an adjudicator may determine practice and procedure, including the practice and procedure regarding the production and disclosure of evidence.

[28] Rule 18 of the Rules of Practice and Procedure specifically provides for pre-hearing conferences to address all matters relating to an appeal, including determination of the content of the record and provisions for the exchange of disclosure and production.

[29] In the context of an appeal, section 62 allows an adjudicator to provide directions to the parties, and I take this to include directions regarding disclosure and production.

[30] There is also case law which affirms my jurisdiction in this matter. The Supreme Court of the Northwest Territories has confirmed that adjudicators have the authority to make inquiries or

compel production of materials beyond that which was before the Director. (*Aurora College* v. *Niziol*, 2007 NWTSC 34, at paras. 29-30)

[31] Based on the legislation and the case law, I have the jurisdiction to consider the appellant's application. The next step is to consider whether it is appropriate to order the production of material not included in the record provided by the Director.

[32] At this stage, it is important to understand the nature of the Director's decision. The adjudicator's task on an appeal is to re-evaluate the Director's decision, as opposed to conducting the a full-fledged hearing.

[33] The Court has described the Director's decision as administrative, as opposed to adjudicative (*Niziol*, at para. 22). The Court has also stated, "the adjudicator's task on such an appeal is not to adjudicate on the merits of the complaint, but only to decide whether it should have been dismissed by the Director." (*Niziol*, at para. 29)

[34] In making this decision, I have to consider next the appropriate standard of review to be applied. The Court has concluded the standard of review is reasonableness, unless a question of law or jurisdiction is involved, and the Director is entitled to considerable deference in the performing what is essentially a "screening function". (*Niziol*, at para. 22; *Diavik* v. *Boullard et al*, 2007 NWTSC 83, at paras. 30-32)

[35] The decision under reviewing is administrative, and the test is reasonableness. In this context, there is something to be said for limiting the record to materials before the Director, unless there is an indication the Director missed something in applying the low threshold for referral.

[36] The next steps is to apply the test of reasonableness to the facts. In this case, the Director dismissed the complaint on the basis the act or omissions alleged in the complaint are not the kinds of acts or omissions covered by the legislation, under subsection 44(1)(b) of the *Human Rights Act*. In other words, the complaint was dismissed on jurisdictional grounds.

[37] The appellant claims the respondents offered him a reference consistent with his performance evaluation from 2011. When he inquired about an employment letter in 2013, the respondents stated they would provide a reference consisting of his position title, duties and dates of employment.

[38] I have considered the respondents' objection to the appellant's *viva voce* evidence in support of his motion. I am not sure how else the appellant could have proceeded, since he is not privy to the material he seeks. The parties informed me on the application, appropriately, recognizing section 56 of the *Human Rights* allows for flexibility with the rules of evidence.

[39] I am also satisfied the appellant described the type of materials he seeks with sufficient particularity, recognizing he is not the party in possession. Although the respondents question the existence of an affidavit or investigation report, the respondents were able to correlate the request with an investigation undertaken but not concluded during the relevant timeframe.

[40] Given the nature of the complaint, I understand what the appellant is seeking and why he is seeking it. The appellant has alleged facts and inferences which may or may not be corroborated through discovery. He has requested the production of documents relating to misconduct alleged to have occurred during a distinct timeframe in October 2011. The application is not a fishing expedition.

[41] Without limiting the inquiry to a specific report or affidavit, there may be documents in the respondents' possessions which are arguably relevant to establishing the respondents' evaluation of him as an employee, as well as any changes in their evaluation, as a result of alleged misconduct in October 2011. The requested production might assist the appellant establish whether or not the respondents' position changed as a result of misconduct, which he says is linked to his psychiatric condition.

[42] This does not necessary mean the documents disclosed to the respondent would be admissible. There is a distinction to be drawn between disclosure and admissibility, and it is far too early to consider admissibility.

[43] It is important to recall this matter has not yet been referred for a hearing. The Director dismissed the complaint on jurisdictional grounds under subsection 44(1)(b). The focus of the appeal should be on whether or not the *Human Rights Act* applies to the acts or omission alleged in the complaint.

[44] This is not a case where the Director dismissed the complaint because it failed to meet the low threshold under subsection 44(1)(c). If it were, the hearing of this matter on appeal might be more of a fact-driven exercise than an argument regarding jurisdiction.

[45] In deciding whether or not to order production at this time, I have considered whether I have sufficient information to decide the appeal, regardless of whatever arguments the parties wish to make at the hearing of the appeal.

[46] The approach to be taken at this stage is to consider the whether the appellant's version of events, if accepted, would support the complaint. (*Diavik*, at paras. 42-44) In this case, I understand the appellant wishes to draw an inference there is a connection between the alleged misconduct and the respondents' position on a reference letter.

[47] While the process of discovery might yield relevant evidence, I am not at the point of weighing evidence to decide the complaint. I am satisfied I can address the appeal by assuming the appellant will be able to establish the facts and inferences he has made.

[48] For these reasons, I am not prepared to grant the order for production at this time. The appeal can be properly addressed on the basis of the record the Director has provided.

[49] This brings me to second issue. The appellant seeks an alternative order barring the respondents from relying any evidence of the alleged misconduct in October 2014.

[50] I will first address the issue of jurisdiction. The respondents argue I do not have the jurisdiction to bar them from relying on evidence of the alleged misconduct beyond these human rights proceedings. I do not see the appellant as asking for any such relief. Regardless, there is really no question that any order I make would apply only in the human rights context.

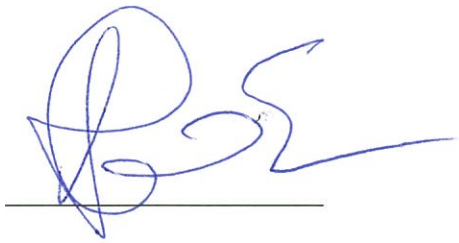
[51] Again, I can also appreciate why the appellant has requested the order he seeks. The respondents have not revealed their defence; it is conceivable they will rely upon the alleged misconduct to explain their position on the employment reference. The appellant should not be caught by surprise, and there should be mutual production and disclosure in the event his appeal succeeds.

[52] If the appeal is successful and this matter proceeds to adjudication, and if the respondents fail or refuse to disclose arguably relevant information before adjudication, I would be inclined to grant the request.

[53] The difficulty I have is that none of these preconditions have been met. Ultimately, the appellant's application has been brought before its time. The appeal of the Director's decision must be determined first. I therefore deny the appellant's alternative request.

[54] The parties will bear their own costs. The application does satisfy any of the costs provisions in section 63 of the *Human Rights Act*.

DATED at Yellowknife, Northwest Territories, this 19 day of December 2014.



Sheldon Toner

Adjudicator

Human Rights Adjudication Panel