

**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:

NORMAN SMITH

Complainant

-and-

UNION OF NORTHERN WORKERS

Respondent

Reasons for Decision

Before: Adrian Wright, Chair, Human Rights Adjudication Panel

Telephone Application

Date of Application: 23 April 2015

**Norman Smith, for himself and Michael Gannon lawyer assisting Mr Smith
Glenn Tait (lawyer) and Roxanna Baisi, for the Respondent, Union of Northern
Workers**

Ayla Akgungor (lawyer) and Bronwyn Watters for the Human Rights Commission

Authorities considered:

Human Rights Act, S.N.W.T. 2002, c. 18, as amended: section 52;

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

Avendano v. Jacobson 2013 HRTO 1513

Slaughter v. Sluys 2010 BCSC 1576

Ivanescu v. Credit Valley Hospital 2012 HRTO 1211

Lan v. Huawei Technologies Canada 2014 HRTO 1529

R. v. Young 2000 SKQB 419

[1] This decision arises from a preliminary application. Mr Smith requests witnesses not living close to Yellowknife testify either by video-conference or telephone. The complaint alleges the respondent Union of Northern Workers (“UNW”) discriminated against the complainant Norman Smith. The prohibited grounds of discrimination are family status and disability.

[2] Mr Smith’s position as a service officer with UNW was relocated from Yellowknife to another community in the Northwest Territories. Mr Smith complains this would force him to live in a separate community from his wife and daughter (who he and his wife assist) or his wife would have to leave her job to be with him. Furthermore, he suffers from adjustment disorder with anxiety. He says UNW has not accommodated his returning to work and obtaining benefits. UNW, on the other hand, submits its actions were unrelated to any prohibited ground of discrimination. Also its actions were consistent with the *Human Rights Act*.

[3] Mr Smith expects a number of witnesses to testify at the hearing. Some of these are non-professional witnesses; others are medical doctors and health care professionals. He supplied a list of witnesses who do not live in Yellowknife – these he says should be able to testify either by video-conference or telephone conference. Some of these witnesses now reside in British Columbia; others live in other parts of Canada. He says he cannot afford to bring these witnesses to Yellowknife.

[4] UNW contends all witnesses should testify in Yellowknife but especially those whose credibility and reliability is in issue. If I decide evidence may be given other than person, only medical witnesses should give evidence by video-conference. No witnesses should testify by telephone.

[5] The Human Rights Commission (“the Commission”) appeared on this application. It argued witnesses should testify by videoconference and – where necessary – by telephone so parties may present their cases fairly and expeditiously.

Legislation and Rules

[6] *Human Rights Act*

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.

[7] *Rules of Practice of Procedure*

42. Hearings may occur by way of:

- written and oral argument;
- teleconference;
- videoconference;
- the calling and examining of witnesses, in-person; or
- any combination of the above.

43. The presiding Adjudicator will decide the appropriate mode of hearing after hearing from the parties.

44. Hearings involving the examination of witnesses in-person before an Adjudicator will take place in Yellowknife unless otherwise ordered by the presiding Adjudicator, after hearing from the parties.

[8] There is no dispute I have the authority under both the Act and Rules to determine how evidence is given. The issue is whether video-conference or telephone should be used in this case.

[9] Until recent advances in technology courts and administrative tribunals were reluctant to allow witnesses to testify other than in person. Decision-makers often determined technology interfered with their ability to evaluate the witness's evidence. This was particularly so when credibility and reliability were in question. These bodies are now more prepared to receive oral testimony by video-conference or telephone. In part this is because tribunals of all kinds use technology in various ways in their processes so there is less resistance to obtaining evidence other than in-person.

[10] On this application, I had the benefit of extensive argument including many cases from courts and human rights tribunals. I found the following decisions of greatest assistance:

- *Avendano v. Jacobson* 2013 HRTO 1513
- *Slaughter v. Sluys* 2010 BCSC 1576
- *Ivanescu v. Credit Valley Hospital* 2012 HRTO 1211
- *Lan v. Huawei Technologies Canada* 2014 HRTO 1529
- *R. v. Young* 2000 SKQB 419

I apply the following considerations in ruling on this application:

- (a) Where possible, witnesses should attend in person to testify.
- (b) The importance of the *Human Rights Act* is set out in the preamble. As a result human rights adjudicators should be open to receiving witness testimony in other ways than in-person.
- (c) The adjudicator must balance its interest in receiving relevant evidence with the need to evaluate it and weigh it. It should not use video-conference and telephone where doing so substantially prejudices a party's ability to test the credibility and reliability of a witness's testimony.
- (d) The party contending it will be prejudiced by the use of video-conference and telephone to receive testimony must establish the prejudice. Prejudice should not be presumed – it must be proven. Some of the cases arise from Ontario where the Statutory Powers Procedure Act (section 5.2 (2)) places a burden on the party opposing an electronic hearing to show it may be significantly prejudiced if the hearing is held by telephone. No such statutory burden exists in the Northwest Territories. Nevertheless, it is incumbent on a party opposing video-conference or telephone testimony to explain how it will be prejudiced if evidence is received in that form.
- (e) The adjudicator should not place undue significance on his or her ability to look at a witness's demeanour as a means of evaluating credibility and reliability. Demeanour is only one means of assessing credibility and reliability. Demeanour is affected by cultural and individual factors. As a result, it may not be a reliable test of credibility and reliability. I also agree with the following comment from *Lan* at paragraph 7:

“... the inability to observe a witness' [sic] demeanour when testifying by telephone is not a compelling reason to require a witness to testify in person. This concern will obviously be eliminated if video conferencing is available.

- (f) The nature of the witness's testimony. Credibility and reliability may not be important ways of assessing the weight of an expert's testimony.
- (g) The cost of having a witness testify in person is an important consideration but it is not the only consideration – it should be weighed along with the other factors.
- (h) Some cases refer to difficulties in questioning a witness by video-conference or telephone as being a reason not to allow the taking of evidence in this way. It seems to me this is similar to witnesses testifying through an interpreter – which also makes questioning more difficult. UNW referred to the difficulty in examining a witness on documents - this should not any longer be an impediment with technology presently available. The parties should cooperate in making documents available to the witness who is testifying by video-conference or telephone. Any non-cooperation may be a reason to require the witness to appear in person. Furthermore, I expect the parties to work together to organize documents to facilitate a witness giving evidence by video-conference or telephone.
- (i) The adjudicator must be satisfied the mechanism used – whether conventional video-conferencing, Skype or other systems – does not interfere with the accurate transmission of questions or answers from the witness.

[11] In this case, I am not persuaded there is any prejudice to UNW in having any of the witnesses in this case testify by video-conference. UNW is mainly concerned about my ability to evaluate credibility and reliability – and in particular assess demeanour. As has been indicated this is not a compelling reason to require a person to testify in person.

[12] On the other hand, I am concerned the witnesses residing outside Yellowknife may not testify if they cannot provide evidence either by video-conference or telephone. This prejudice to Mr Smith's ability to present his case outweighs any prejudice to UNW arising from these witnesses not testifying in person.

[13] As a result, the witnesses identified by Mr Smith at the application who reside outside Yellowknife may testify by video-conference. I prefer receiving evidence by video-conference rather than telephone. I will allow these witnesses to testify by video-conference so long as they are not physically present in Yellowknife at the time of the hearing. In this respect, I rely on Mr Smith's statement the witnesses he named no longer live in Yellowknife. If that changes, I expect witnesses to testify in-person at the hearing.

[14] I leave it open to Mr Smith to persuade me a particular witness cannot testify by video-conference and can only give evidence by telephone.

[15] I also recognize UNW takes the position it has not received adequate disclosure of the evidence Mr Smith expects to present at the hearing. As a result, I leave it open to UNW – once it has full disclosure - to persuade me of the prejudice it will suffer by having any witness testify by video-conference or telephone.

[16] The parties may contact me through the Panel office for any further direction arising from this decision.



Adrian Wright
Chair
Human Rights Adjudication Panel
20 May 2015