

IN THE MATTER OF the Human Rights Act, S.N.W.T. 2002, c. 18, as amended;

AND IN THE MATTER OF a complaint filed by Dennis Nelner against the Government of the Northwest Territories Department of Industry, Tourism and Investment

Appearances: Dennis Nelner (“the Appellant”) for himself
Erin Delaney, legal counsel for the Government of the Northwest Territories, Department of Industry, Tourism and Investment (“the Respondent”)

Date of hearing: 1 December 2008

Place of hearing: Yellowknife NT (by telephone conference)

Adjudicator: Adrian C. Wright

1. Introduction

This is an appeal from a decision of the Director of Human Rights (“the Director”) dated 12 March 2008. My authority in this case comes from section 45 of the *Human Rights Act*: I hear the appeal and make an order under s. 62 (5). My authority is to either affirm, reverse or modify the Director’s dismissal of a portion of the complaint. I may also provide any direction that I consider necessary.

2. Pre-hearing events

On 16 April 2008, the Appellant filed his Notice of Appeal dated 16 April 2008 with the Adjudication Panel. No issue was made about the notice being filed within thirty days after service of the Director’s decision on the Appellant.

I conducted three pre-hearing conferences. The parties agreed that I had no conflict of interest and that I had jurisdiction to hear and decide the appeal. The parties also agreed that the appeal would be heard and decided on the record, though there was the possibility of other witnesses

and documents. Ultimately, the parties were able to agree on the content of the record, other than two documents. I ruled that one of these documents, a pay stub, would be included. Another document, a legal opinion, was not included because it is not relevant to the issues in this appeal.

Section 53 (3) says the parties to an appeal are the parties to the complaint in respect of which the appeal is made – here the Appellant and Respondent – and the Director. The Director sent a letter dated 29 April 2008 in which she said she would neither participate nor make submissions about the appeal filed by the Appellant. She also noted that the complaint did not name the Union of Northern Workers (“UNW”) as a respondent. Her decision related only to allegations of discrimination against the Respondent.

The hearing of the appeal occurred on 1 December 2008. Both parties provided written argument before the hearing.

3. *Law*

The *Human Rights Act* says:

11. (1) No person shall, on the basis of a prohibited ground of discrimination and without a bona fide and reasonable justification,

(a) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or

(b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

29. (1) Any individual or group of individuals having reasonable grounds for believing that a person has contravened this Act and claiming to be aggrieved because of the alleged contravention of this Act, may file with the Commission a complaint in a form satisfactory to the Commission.

(2) Subject to subsection (3), a complaint must be filed with the Commission

1. (a) within two years after the contravention of this Act that is alleged in the complaint; or
2. (b) if a continuing contravention is alleged in the complaint, within two years after the last alleged instance of the contravention.

(3) The Director may extend the time limit for filing the complaint or part of the complaint under subsection (2) if the Director is satisfied that the delay in filing the complaint or part of the complaint was incurred in good faith and will not substantially prejudice any person.

45. Where a complaint or part of a complaint is dismissed, any party to the complaint may, within 30 days after service of the written notice of the dismissal, appeal the dismissal by filing a notice of appeal with the adjudication panel and serving it on all the parties to the complaint and the Director.

63. (5) The adjudicator may, on hearing an appeal made under section 45,
 - (a) make an order that affirms, reverses or modifies the dismissal; and
 - (b) provide any direction that he or she considers necessary.

4. *Issues*

1. When did the two-year period for filing a complaint to the Human Rights Commission commence on the facts of this case?

Did the two-year time period start on the date the Appellant's employment was terminated? Or, as argued by the Appellant, was this a "continuing complaint" (s. 29 (2)(b)). If it was, when was the last contravention of the Act?

2. Did the Complainant file his complaint in time?
3. Was the delay in filing the complaint incurred in good faith and will that delay substantially prejudice any person?

5. *Facts*

There is no real dispute about the facts. At all times, the Appellant resided in Fort Simpson, NT. He made a complaint to the Human Rights Commission. The complaint is marked as received by the Commission on 16 July 2007.

I set out the facts from a fifteen-page document entitled “Complaint Details” provided by the Appellant to the Director in the course of the investigation of the Complaint. No objection was made by the Respondent to any of these facts. I accept them as facts but only for the purpose of this appeal from the Director’s decision.

The Appellant was employed commencing April 2002, as the Regional Petroleum Advisor in Fort Simpson, NT for the Department of Resources, Wildlife and Economic Development of the Government of the Northwest Territories.

On 27 February 2004, the Appellant was suspended for ten days by the Respondent. The Appellant served this suspension starting 1 March 2004. On 9 March 2004, the Appellant initiated the collective agreement grievance process regarding this suspension (grievance 04-0521). The Respondent terminated the Appellant’s employment on 23 April 2004. The following occurred after that termination:

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| 11 June 2004 | Pietro deBastiani of the Department of the Executive wrote to Kevin Menicoche, MLA for Nahendeh that there would be no negotiated settlement of the Appellant’s dismissal. The only remaining obligations were pay and pension issues which had then not cleared the system. |
| 19 July 2004 | Appellant wrote a letter to the Minister of Resources Wildlife and Economic Development requesting the Minister’s assistance regarding the Appellant’s dismissal. This letter was copied to Mr. Menicoche. |

- 12 September 2005 Appellant sent an e-mail to the UNW requesting that the arbitration for 12 September 2005 be delayed.
- 14 September 2005 E-mail from Jacquie de Aguayo from the Public Service Alliance of Canada (“PSAC”) to the Appellant advising the arbitration had been postponed.
- 20 February 2006 Letter from de Aguayo to the Appellant advising that the Appellant’s termination of employment was mentioned in neither the grievance (number 04-521) nor in the final level reply. The UNW representative who dealt with the issue at the time of the Appellant’s termination thought that the termination flowed from the ten-day suspension (described above). De Aguayo acknowledged this was an error.
- 19 February 2007 Appellant received a letter from PSAC that the Appellant’s grievance had been referred to arbitration and was scheduled in Yellowknife for 28 and 29 March 2007.
- 24 March 2007 E-mail from PSAC to the Appellant regarding issues in arbitration.
- 28 to 29 March 2007 Arbitration hearing in grievance 04-521.
- 16 April 2007 Arbitrator Tom Joliffe decided he had no jurisdiction over the Appellant’s termination because a grievance was not filed. The arbitration concerning the Appellant’s ten-day suspension could, however, proceed.
- 18 April 2007 PSAC suggested the Appellant consider making a complaint under the *Human Rights Act*.
- May 2007 Appellant applied for a position with the Respondent as a Business Development Officer.
- 28 June 2007 Appellant was advised by the Respondent that the Business Development Officer position was being offered to another person.
- 16 July 2007 Appellant made a complaint to Human Rights Commission.

The above chronology summarizes all the events listed by the Appellant as being relevant to his complaint between the date of his termination, 23 April 2004, and his complaint.

The Appellant maintains that he was more qualified than the successful applicant. As a result, he contends, he was the subject of discrimination on the basis of race.

The Director dismissed the portion of the complaint against the Respondent relating to discrimination between April 2002 and April 2004. She also found that he could pursue his allegation of discrimination regarding the May 2007 job competition.

6. *Analysis*

The standard of review on this appeal is reasonableness: *Aurora College v. Niziol*, 2007 NWTSC 34; *Kwong v. Government of the Northwest Territories* (2008), CHRR Doc. 08-950 (N.W.T. H.R.A.P.). As a result, if I find the Director's decision was reasonable it will be upheld.

1. When did the period for filing a complaint to the Human Rights Commission commence on the facts of this case?

The Appellant argues that his dealings with the Respondent did not end with the termination of his employment. The Respondent contends that its relationship with the Appellant ended in April 2004 when it terminated his employment. No other potential acts of discrimination occurred after that time.

The Director relied on *Lynch v. B.C. Human Rights Commission*, 2000 BCSC 1419: There must be present acts of discrimination of the same character in order to be a continuing contravention; not a single act of discrimination with continuing consequences.

The Director noted the Appellant's argument that there were ongoing impacts of his termination on his ability to earn a livelihood in his community; in May 2007, a refusal by the Respondent to employ him.

The above sequence of events makes it clear that there were no separate acts of discrimination between April 2004 and the job application in May 2007. Everything that happened between those two dates was the result of the Appellant's termination from employment.

The Director found that there was a three-year gap between the termination of the Appellant's employment with the Respondent and the May 2007 job competition. The incidents were two different sets of interactions between the Appellant and the Respondent. As a result, she found that the Appellant's termination by the Respondent and the May 2007 competition did not constitute a continuing contravention.

The Appellant had the onus of proving a connection between his termination and the May 2007 competition. He indicated only -- both in the "Complaint Details" document dated 25 November 2007 and a four-page document received by the Commission on 7 February 2008 -- that he was more qualified than the successful applicant and had lived longer in the community. He established no other connection between his termination and his not being successful in the May 2007 job competition. The issues identified by the Appellant do not allow an inference to be drawn: that his not getting the position in 2007 flowed either from his termination in 2004 or his relationship with the Respondent before his termination. As a result, in my view, the Director's conclusion on this issue was reasonable.

As a result, the Director's conclusion -- the two-year period in s. 29 (2) started on 23 April 2004, the date his employment was terminated by the Respondent and expired two years later, on 23 April 2006 -- was also reasonable.

2. Did the Complainant file his complaint in time?

The above discussion makes it clear that the Complainant did not file his complaint on time. His complaint was filed on 16 July 2007 after the period expired on 23 April 2006.

3. Was the delay in filing the complaint incurred in good faith and will that delay substantially prejudice any person?

The Director correctly found that she may extend the period for filing the complaint if the delay in filing it was both

- a. incurred in good faith and
- b. will not substantially prejudice any person. (s. 29 (3)).

There is authority for the onus being on the complainant (here the Appellant) to prove both good faith and substantial prejudice: *Maki v. Hagemayer Canada*, 2008 BCHRT 404 at paragraph 17; *O'Hara v. British Columbia*, 2002 BCSC 559, at paragraph 20. The Director addressed good faith first. She did not consider substantial prejudice. As a result, I also will deal with good faith first. I will only consider substantial prejudice if I find the filing of the complaint after the two-year period was incurred in good faith.

I note the two-year period in s. 29 (3) is intended to ensure both that complainants pursue their human rights remedies in reasonable time and to allow respondents to carry on without the possibility of dated complaints: *Chartier v. School District No. 62*, 2003 BCHRT 39, at paragraph 12; *Pepper v. Bowman Employment Services Inc.*, 2008 BCHRT 370, at paragraph 29.

Good faith

The Director concluded that,

... the delay in filing the complaint was not in good faith. Mr. Nelner has not provided reasons for the delay in filing his complaint that warrant extending the time limit. Mr. Nelner sought legal counsel in April 2004 and pursued a union grievance. He argues that he was not advised of his option to file a human rights complaint. However, the information demonstrates that he was capable of advocating on his own behalf in the two years following the termination of his employment and has had opportunity to allege that his termination was discriminatory and to file a human rights complaint.

The Appellant argues that he continuously pursued his issue with the Respondent from the date his employment was terminated until he filed his complaint. As he put it, “there was always something going on”. He did nothing about filing his human rights complaint before July 2007 because “no one told him that the file [that is, the collective agreement grievance of his termination] was over”. No one told him (before 18 April 2007) that he could make a human rights complaint. He said that he had little, if any, knowledge of the human rights process before April 2007. He perhaps saw a press release or some brochures about the *Human Rights Act*. He pointed to his communication with the UNW in February 2006 that he never stopped seeking resolution of his dispute with the Respondent concerning his termination from employment.

The Respondent argues that the Director appropriately determined that the Appellant’s delay in filing the complaint was not incurred in good faith. The Respondent relies on *Visic v. Ontario Human Rights Commission*, [2008] O.J. No. 1768, at paragraphs 39 and 40:

...the Director’s not being satisfied that the Complainant was incurred in good faith is not equivalent to finding that he acted in bad faith. It may only mean that the Appellant had not provided sufficient reasons or evidence to satisfy the onus on him. Also, that the Appellant’s not pursuing a human rights complaint earlier might be the result of him wishing to first pursue the grievance and not to invest any money or energy into the human rights process while that was going on.

The Respondent pointed to the Appellant’s reference in his original complaint to the Human Rights Commission that the Respondent had violated his “charter of rights and freedoms (freedom of association)”. The Respondent argued this is “human rights language”.

The Respondent also argued the Appellant’s real issue was with, if anyone, the UNW for failing to grieve his termination. The UNW’s failure to grieve the termination was not the Respondent’s fault or responsibility.

The Respondent also pointed to the Appellant having legal counsel in 2004, at the time of his termination. At that time, at least, he could have received advice about the human rights process.

Finally, the Respondent pointed to the Director's comment that the Appellant showed that he could advocate for himself.

I find that the Appellant has not shown any error in the Director's decision. I find the Director's decision was reasonable. In addition, the existence of the grievance arbitration had no impact on the two-year limitation period. I rely on the following passage from *Chrunik v. British Columbia Institute of Technology*, 2004 BCHRT 39, at paragraph 25:

My decision would not be otherwise had Mr. Chrunik been unrepresented, as, again, given that few complainants are represented when filing complaints, if this were considered a compelling reason, the requirement in [the British Columbia equivalent of s. 29 (3)] would be rendered meaningless. *Similarly, the fact that complainants are pursuing other avenues to redress their complaints is not a sufficient reason to relieve against the time limit absent any other compelling factors. While each case will be decided on its facts, generally complainants should file their human rights complaint in a timely manner while they pursue other options.* [Emphasis added]

The Appellant could have made a complaint under the *Human Rights Act* and held it in abeyance until the grievance arbitration was resolved. I note s. 43 (4) allows the Director to defer consideration of a complaint if there is another proceeding capable of dealing with the substance of the complaint. The existence of a grievance arbitration does not suspend the limitation period in the *Human Rights Act*.

Furthermore, the Appellant had two years to file a complaint. This is a longer time period for the filing of complaints than in many Canadian jurisdictions. He had plenty of time to file a complaint. His knowledge of the *Human Rights Act* and the complaint process are not relevant. The reasons for the two-year period are addressed earlier in this decision and in the above extract from *Chruniak*. The Legislature's intention must be respected.

Substantial prejudice

As indicated above, the Director determined the Appellant had to satisfy both sections 29 (3)(a) and (b) if she was to extend the time limit for filing a complaint. She found the Appellant did not meet s. 29 (3) (a). As a result, she did not address s. 29 (3) (b).

In light of my decision on the “good faith” issue, I also will not address whether there was “substantial prejudice”.

7. *Conclusion*

The appeal is therefore dismissed.

I indicated at the outset of these reasons that the Director advised the Adjudication Panel that her decision only dealt with allegations of discrimination against the Respondent. The reason was that, in her view, the complaint did not name the UNW.

I have reviewed the complaint. It indicates that both the “GNWT and UNW” discriminated against the Appellant. The contents of the complaint request relief against the UNW. Further, the fifteen-page document entitled “Complaint Details” includes allegations about the actions of the UNW.

The UNW appears not to have been involved in the investigation of this complaint. There is no indication that the UNW was ever served with a copy of the complaint as required by s. 30 (3). As a result, it was not asked for its response to the complaint; nor, did it get a copy of her report (s. 41 (2)).

The jurisdiction of an adjudicator is confined to hearing appeals from the Director’s dismissal of a complaint (s. 45); or complaints referred to the adjudication panel (ss. 46 and 51). I therefore have no jurisdiction to hear a complaint against the UNW. I therefore direct, pursuant to s. 62 (5), that the portion of the complaint relating to the UNW be referred to the Director for investigation and eventual decision under ss. 45 and 46.

Finally, the Director dismissed only the portion of the complaint relating to discrimination between April 2002 and April 2004. The “Complaint Details” document to which I have

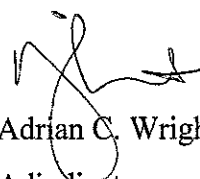
referred, describes events up to 19 July 2004; and then continues with events starting on 12 September 2005. Strictly speaking, the Director made no order about the events between 23 April 2004 and 19 July 2004. It appears consistent with her ruling, however, that those also would be barred because they occurred more than two years before the complaint was made. Any events occurring after 16 July 2005 occurred less than two years before the complaint was made.

As a result, I direct that it is open to the Appellant to have an adjudicator conduct a hearing on events occurring on or after 16 July 2005 which the Appellant contends contravene the *Human Rights Act*.

I further order that the Appellant has fifteen days from the date these reasons are sent to him to decide whether he wishes to proceed with a hearing on events occurring on or after 16 July 2005. I further direct that if he does not contact the Office of the Human Rights Adjudication Panel by that time, a pre-hearing conference date will be set.

Costs are not addressed in these reasons. I remain seized of this matter solely to hear submissions from the Appellant and Respondent on costs pursuant to s. 63. Both parties have thirty days from the date of these reasons to provide their submissions to the office of the Adjudication Panel on costs.

DATED at the City of Yellowknife in the Northwest Territories this ^{15th} day of December 2008.


Adrian C. Wright
Adjudicator