File: 11-12

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:

A.B.

Appellant

-and-

THE CITY OF YELLOWKNIFE

Respondent

-and-

DIRECTOR OF HUMAN RIGHTS

Party

Reasons for Decision
Ruling on appeal from the Director

Before: Sheldon Toner, Adjudicator, Human Rights Adjudication Panel
Place of Hearing: Yellowknife, Northwest Territories
Date of Hearing: October 17, 2014
A.B., for herself, and E.F. for support
Kerry Penney, Counsel for the Respondent, the City of Yellowknife
No one appearing for the Director of Human Rights

Introduction:

[1] This is an appeal from the decision of the Director of Human Rights ("Director") dated August 29, 2013. The appeal concerns the decision of the Director to dismiss a portion of the appellant's complaint of discrimination based on disability.

[2] The remainder of the complaint, based on family status, has been referred to the Northwest Territories Human Rights Adjudication Panel for hearing. The only question on this appeal is whether the portion based on disability should be included.

[3] I have concluded the complaint is properly framed as a complaint based on family status; for the reasons outlined in these reasons for decision, I deny the appellant's appeal and affirm the Director's decision.

Issue:

[4] The issue addressed in these reasons for decision is as follows:

> Should the portion of the complaint based on disability be referred to hearing, along with the complaint based on family status?

Background:

[5] The record provided by the Director includes the appellant's and the respondent's summaries of the evidence they expect to adduce at hearing. The facts relevant to this appeal are briefly outlined below.

[6] The appellant, A.B., was an employee of the City of Yellowknife for approximately 6 years. The appellant has a child who has been diagnosed with autism spectrum disorder ("ASD"). She and her husband have sought accommodations from their respective employers, to enable them to provide the care required for their child as a result of his disability.

[7] In the spring and early summer of 2012, the appellant and respondent came into conflict over the appellant's work schedule. The appellant maintains she needed to be accommodated by

having time off to care her child while his school was closed for the summer. The City of Yellowknife proposed to accommodate A.B. by offering alternative hours, including weekends and evenings.

[8] In the course of discussions between the appellant and respondent, the City of Yellowknife proposed alternative work schedules. When asked why she could not accept the employer's proposed solution, A.B. responded it would be too tiring, stressful and hard to do so.

[9] The City of Yellowknife then asked A.B. to provide medical documentation indicating how many hours, if any, she would be able to work during the summer months. The appellant eventually provided a note from Dr. Ewan Affleck, which concludes by stating, "I support on compassionate grounds any accommodation you can provide in her work schedule that will allow her to spend meaningful time with her son during the summer months".

[10] The doctor's note does not indicate whether the appellant is physically able or unable to work certain hours. However, the appellant appears to appreciate the limitations faced by the physician in writing the letter; she recognizes she was physically able to work, so the doctor could not state otherwise.

[11] The appellant took issue with the respondent's entire approach to the medical note, since she has consistently maintained she does not have a disability. The issue for her is being able to assist her child, who does have a disability.

[12] On July 16, 2012, the appellant resigned from her position with the City of Yellowknife. At that point, the parties were still at an impasse as to how the employer would accommodate A.B. during the summer months.

[13] The appellant submitted her complaint to the Director in June 2012. In the complaint, she alleged discrimination on the basis of disability and family status. The Director referred the complaint based on family status to adjudication, so the complaint will be scheduled for adjudication. The question on appeal is whether the adjudicator should also hear that portion of the complaint based on disability.

[14] The Director is a party to the appeal under the *Human Rights Act.* However, the Director chose not to participate in the appeal, other than to provide a record of the relevant documents she considered in reaching her decision to dismiss the portion of the complaint based on disability.

Appellant's Position:

[15] The appellant's position is that the City of Yellowknife treated her as if she has a disability. In the notice of appeal dated September 27, 2013, A.B. describes how she regarded the request for a medical note as a "complete distraction" from dealing with her request for leave during the summer months.

[16] The appellant questions the respondent's right to request medical documentation from her, and she considers their conduct in doing so prejudicial. During the appeal hearing, A.B. submitted the respondent should be accountable for requiring medical documentation when she did not have or assert a disability.

Respondent's Position:

[17] The City of Yellowknife's position, as outlined in counsel's submission to the Director, is essentially that the appellant did not notify the respondent of a disability or provide documentation to support a claim of discrimination based on disability.

[18] During the appeal hearing, counsel for the respondent submitted the Director's decision was reasonable, since the appellant has not established an evidentiary basis for the claim of discrimination based on perceived disability.

Analysis:

[19] Subsection 62(5) of the Human Rights Act, S.N.W.T. 2002, c. 18, provides that an adjudicator may affirm, reverse or modify the decision of the Director, or provide any further direction deemed necessary.

[20] In considering an appeal, I have to apply the appropriate standard of review. The Supreme Court of the Northwest Territories considered the standard of review on appeal from the Director

in *Aurora College* v. *Niziol*, 2007 NWTSC 34. The Court concluded the standard was reasonableness (at para. 36). In *Diavik* v. *Boullard et al*, 2007 NWTSC 83, the Court reached the same conclusion (at para. 28).

[21] During the appeal hearing, counsel for the respondent gave an overview of the case law concerning the reasonableness standard and what it means in the context of this appeal. The case law offers guidance as to how to apply the reasonable standard, once that standard has been identified.

[22] Based on my review of the law, an adjudicator considering the reasonableness of the Director's decision must consider whether the Director made a decision based on reasoning that is capable of withstanding probing examination. (*Diavik* v. *Boullard et al*, at para. 60)

[23] The test is not whether the Director's decision is "correct". It is a matter of determining whether the decision is consistent with the law and makes logical sense. (*Battaglia* v. *Hay River Health and Social Services Authority*, 2013, decision by Adjudicator James R. Posynick).

[24] The next step in the analysis is to apply the test to the Director's decision. The Director's reasons for dismissing the disability portion of the complaint are set out at pages 9 and 10 of the decision dated August 29, 2013.

[25] In setting out the appellant's position, the Director states, "[A.B.] says that she does not have a disability but she believes the City perceived her as having a disability because they kept asking her for unnecessary medical information." Based on my review of the record, I accept this is an accurate summary of the appellant's position.

[26] The Director goes on to state, "It is well established that human rights protection extends to perceived as well as actual disabilities." Based on my understanding of the law, this is a valid proposition.

[27] The Director then goes on to note that, in order for a complaint of perceived disability to succeed, the complainant must provide evidence to establish the respondent perceived the complainant to have a disability. Referring to same authority as the Director, counsel for the

respondent likewise argues the appellant bears this onus. (*Johnson* v. *D&B Traffic Control* (2010), 71 C.H.R.R. D/190, 2010 BCHRT 287)

[28] The Director dismissed the portion of the complaint based on disability on the basis there was insufficient evidence the City of Yellowknife believed A.B. had a disability. In reaching this conclusion, the Director also notes there is evidence the respondent asked for medical information because the City of Yellowknife believed A.B. was capable of working nights and weekends but preferred not to do so.

[29] The Director dismissed the disability complaint under subsection 44(1)(c) of the *Human Rights Act*. This provision allows the Director to dismiss all or part of a complaint if she is satisfied it is trivial, frivolous, vexatious or made in bad faith.

[30] In considering the application of this provision, the Supreme Court of the Northwest Territories has described the Director's role as a screening or "gatekeeping" function. The threshold for referring a complaint to adjudication is low. There must be "reasonable basis" in the evidence for the complaint to move forward, and that is enough. (*Niziol*, at para 34 ff.; *Diavik*, at para. 10 ff.)

[31] In my view, the Director's reasoning warrants particular examination at the point where she determines there is insufficient inference to support A.B.'s assertion the City of Yellowknife perceived her to have a disability.

[32] Given the manner in which the request for the medical note came about, I can appreciate why A.B. might infer the respondent perceived her to have a disability related to stress or fatigue.

[33] The respondent's explanation, as outlined in the City of Yellowknife's submission to the Director, is essentially that the respondent concluded it had accommodated A.B.'s family status, as the mother of a child with a disability, by offering alternative hours. The respondent was willing to consider further accommodation upon A.B. establishing a medical basis for leave throughout the summer.

[34] The Director's focus should certainly have been on the appellant's evidence, regardless of

the weight of the respondent's explanation (*Diavik*, at paras. 43 ff.). This must also be the focus of the adjudicator on appeal.

[35] In this case, the Director was presented with differing interpretations of the discussions about the medical note. There is no indication of any particular acts or omissions flowing from the request for the medical note, or of any link between the request for the note and a change in the City of Yellowknife's position. The differing interpretation are about the request itself.

[36] The Court has held that the Director's screening function is a fact-driven exercise, and although some deference must be given to the Director, the adjudicator must exercise his or her own judgment on appeals. (*Niziol*, at paras. 35-36.).

[37] The potential stress and fatigue A.B. might expect to encounter became a subject of the discussion between the parties. However, the Director would have had to rely on inference and speculation to find a reasonable basis in evidence for a complaint based on the perceived disability of the appellant. The consistent information of both parties is that A.B. does not have a disability. In the circumstances, it is difficult to find the Director's decision unreasonable.

[38] Based on my review of the record, the issue in this case is whether or not the City Yellowknife adequately accommodated A.B. as the mother of a child with autism. The case is fundamentally a complaint of discrimination based on family status.

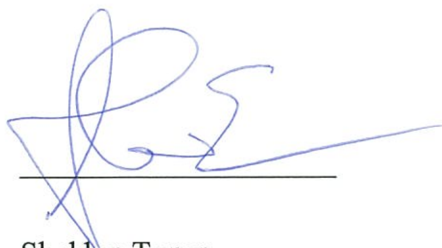
[39] I considering this appeal, I have listened carefully to the appellant's submissions. The appellant says the City of Yellowknife allowed the request for a medical note to become a "distraction" from the main issue. The appellants seeks to challenge the respondent's approach, and to hold them accountable for getting it wrong.

[40] For the sake of clarity, I do not see why the appellant should not be able to make those arguments within the complaint that has been referred to hearing. In a complaint based on family status, it is legitimate to inquire as whether the acts or omissions of the respondent seriously interfere with parental obligations. (*Health Sciences Assoc. of B.C.* v. *Campbell River and North Island Transition Society*, 2004 BCCA 260)

[41] There is no need to expand this matter by adding a secondary complaint. When the complaint is heard, the parties may seek to adduce facts surrounding the City of Yellowknife's request for a medical note. The adjudicator hearing the matter will be open to assess the weight and admissibility of those facts, and to follow the evidence where it leads.

[42] For these reasons, the appeal is denied and Director's decision to dismiss the complaint based on disability is affirmed.

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



Sheldon Toner

Adjudicator

Human Rights Adjudication Panel