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-

HUMAN RIGHTS COMMISSION

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: September 30, 2015

A.B., for herself with E.F., support person

Michelle Thériault, Counsel for the Respondent, the City of Yellowknife

Yacub Adam, Commission Member, appearing for the Human Rights Commission

Issue:

[1] The respondent has made an application, asking me to recuse myself as the hearing adjudicator.

Background:

[2] The hearing of this matter is currently scheduled to be heard November 16 to 20, 2015 at the City of Yellowknife, Northwest Territories.

[3] The complainant was an employee of the City of Yellowknife for approximately 6 years. The complainant 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.

[4] In the spring and early summer of 2012, the complainant and respondent came into conflict over the complainant's work schedule. The complainant 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.

[5] The parties were unable to resolve their differences. On July 16, 2012, the complainant 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.

[6] The complaint claimed discrimination on the basis of disability and family status. The Director of Human Rights dismissed the portion of the complaint based on disability, and referred the complaint based on family status to adjudication. On December 19, 2014, I dismissed the complainant's appeal of the Director's decision. The matter is proceeding solely on the basis of family status.

[7] The parties have already participated in a number of pre-hearing conferences. I have served as the adjudicator in all of these pre-hearing conferences, since February 2014. I have made rulings, set deadlines and given various directions.

[8] During a pre-hearing conference on September 1, 2015, the complainant indicated she intended to withdraw her complaint as she was finding the process stressful. She gave the example of the parties' recent disagreement over the adequacy of the witness statements. I explained the consequences of withdrawal to the complainant. I also referred her to form of withdrawal in Rules of Practice and Procedure, and said I would have the Office Administrator send her the form.

[9] On September 3, 2015, I wrote a letter to the parties, which I had the Office Administrator send as well as the form of withdrawal. I acknowledged the hearing process can be stressful, especially for unrepresented parties. I expressed a concern that an opportunity may have been lost to clear away pre-hearing issues, and explained the human rights process can be flexible on matters such as witness statements. I also expressed a concern that communications between the parties had not been helpful in alleviating pre-hearing stress.

[10] I asked the complainant to reconsider going through with the pre-hearing conference before making a final decision to withdraw. I also asked both parties to consider submitting the case to alternative dispute resolution. I encouraged the respondent to consider its position having regard to the public interest, which as a public government, it serves. Finally, I indicated that although the complainant was free to withdraw, it would be preferable for the parties to actively engage in concluding this matter.

[11] On September 28, 2015, I held a further pre-hearing conference to explain the letter. At that point, the applicant indicated she was prepared to proceed with the complaint. Counsel for the respondent indicated she wished to seek my recusal on the basis that my conduct creates a reasonable apprehension of bias.

[12] I heard from the parties on the recusal application on September 30, 2015. Counsel for the respondent confirmed she is relying exclusively on my letter, and an omission to send the form of withdrawal immediately on the afternoon of September 1st, as the factual basis for the application. She also confirmed she does not object to me continuing as the pre-hearing adjudicator, but only as the adjudicator at the hearing of this matter.

Respondent's Position (Applicant on this Application):

[13] The respondent's position can be summarized as follows:

- I have taken a position on the City of Yellowknife's conduct in its communications with the complainant.
- I appear to have pre-judged the City of Yellowknife's conduct with the complainant based on limited information or allegations made by the complainant.
- I have held the City to a higher standard than other employers by encouraging the respondent to consider its position having regard to the public interest,
- There is no public interest to be served where the complaint has no merit, and my comments indicate I have pre-judged the case as one having merit.
- I have advocated the City of Yellowknife reach a monetary settlement with the complainant, regardless of the lack of merit.

[14] The respondent relies on Rule 28 of the Rules of Practice and Procedure, which states "An Adjudicator who participates with the parties in a mediation shall not preside over any subsequent proceeding."

Complainant's Position (Respondent on this Application):

[15] The complainant's position can be summarized as follows:

- I have not shown a reasonable apprehension of bias in the letter of September 3, 2015, and I should continue as the adjudicator in this matter.
- I acted reasonably in suggesting the complainant continue with the pre-hearing conference to see if concerns about witness could be addressed.
- It was reasonable for me to suggest the parties consider their positions on alternative dispute resolution since, as an adjudicator, I can also mediate human rights complaints.
- My comments about the public interest and resolution are consistent with the legislative framework of the *Human Rights Act*, S.N.W.T. 2002, c.18.
- I have made pre-hearing decisions in favour of the City of Yellowknife, illustrating I am not demonstrably biased towards the complainant.

Analysis:

[16] The test to be applied on this application is outlined in the case provided by respondent's counsel, *R.* v. *S. (R.D.)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC), para. 31:

> […] what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think it more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

[17] The court in *R.* v. *S. (R.D.)* adopts the reasoning of de Grandpre J. in *Committee for Justice and Liberty* v. *National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R., at pp. 394-395, in outlining the manner in which the test is to be applied (paras. 111 to 112):

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information…
>
> The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to a "very sensitive or scrupulous conscience".

[18] In considering the application in this case, a reasonable informed person would have knowledge of the complaint, the procedural background including the e-mails exchanged before September 1st, the requirements of procedural fairness and the legislative context of the *Human Rights Act*.

[19] The parties had a number of directions they were required to fulfill by August 14, 2015. The purpose of the pre-hearing conference on September 1st was to address any issues arising and ensure everything was in place for the hearing in November. The conference was scheduled in advance, recognizing the complainant is unrepresented and has had procedural questions throughout.

[20] As the adjudicator, I became aware of the parties' disagreement over the adequacy of witness statements through e-mails from the parties. I was prepared to deal with this issue at the conference on September 1st, but the complainant expressed her intention to withdraw before this could happen.

[21] There was no indication the complainant was considering withdrawal in any pre-hearing conferences before September 1st. However, the dispute about witness statements had been the subject of e-mails which the parties copied to me through the Office Administrator. Upon reviewing the e-mails, the reasonable informed bystander would appreciate the complaint's statement of experiencing stress with the process.

[22] The e-mail from respondent's counsel dated August 18, 2015 illustrates the state of communications at that time. In the e-mail, respondent's counsel requests a pre-hearing teleconference as soon as possible, based on concerns about the complainant's conduct and communications with the Office Administrator. The e-mail contains a number of statements about the respondent's conduct, including the following:

> The complainant has not met that deadline [for witness statements], and has failed to communicate with me…
>
> I had e-mailed the Complainant several times on the issue of her witness statements and she has simply not responded…
>
> There has been no extension of the deadline for witness statements, nor any request for the extension of the deadline… As such we had every right to expect the timely disclosure of witness statements.
>
> The City is disadvantaged by the Complainant's consistent failure to meet deadlines in this manner. The City is further disadvantaged being left in the dark on communications between the Complainant and the Adjudicator. Not only has the Complainant failed to copy me on all communications with the Administrator/Adjudicator, despite being told to do so by the Adjudicator, but the Administrator also failed to inform me of these communications until I asked if any had occurred…
>
> We are left wondering if there have been previous communications from the Complainant that we have not been privy to, and if they have affected our position…
>
> At this point, the City is disadvantaged by the Complainant's conduct, as well as communication between the Complainant and the Administrator/Adjudicator that we are not a party to.

[23] In assessing the matter realistically and practically, I expect a reasonable informed person having knowledge of the e-mails, would appreciate why I wrote expressing concerns that

communications between the parties had not been helpful in alleviating pre-hearing stress. Respondent's counsel advocated strongly on behalf of her client in the e-mail, but in a manner which could be unfamiliar and stressful to an unrepresented party.

[24] In the circumstances, it was only fair to offer the complainant an opportunity to reconsider before withdrawing her complaint. I would not expect the complainant, being unrepresented, to fully appreciate she would have the opportunity to make her own submissions in response to counsel's assertions about her conduct. It was within my role as adjudicator to ensure procedural fairness by informing the complainant that issues around witness statement could be addressed.

[25] I also expect a reasonable informed person, thinking the matter through, would appreciate the letter was no different, in tone or content, from any of my communications with the parties. I had explained the process, canvassed alternative dispute resolution, and suggested engagement on as many issues as possible. The respondent has not taken issue with my conduct in delivering these messages, verbally, as I have done in pre-hearing conferences since February 2014.

[26] The arguments for recusal offered by the respondent would require an informed person to draw inferences and reach conclusions not stated in my letter. The letter does not state I have taken a position with respect to the City of Yellowknife's conduct, pre-judged the case, held the City to a higher standard or suggested the respondent reach a monetary settlement.

[27] The reasonable informed person would consider that adjudicators, although not judges, are appointed to adjudicate within the "traditions of integrity and impartiality" acknowledged by the court in *R.* v. *S. (R.D.)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC), at para. 111. The respondent is willing for me to continue as the pre-hearing adjudicator. The respondent has not offered any evidence of impropriety, and takes no issue with my conduct before September 1st. My ability to adjudicate impartially has not been challenged, and is to some extent recognized.

[28] The informed person would understand, realistically and practically, that my role was to inform the complainant and ensure procedural fairness, recognizing the complainant's stress and unfamiliarity with the process. The letter I wrote in fulfilling this role takes nothing away from the complainant's freedom or ability to withdraw the complaint at any time.

[29] Since neither party has an issue with me continuing as the pre-hearing adjudicator, I will continue in that role. I am satisfied I am able to decide all matters fairly and impartially, and that I am in no different position with the hearing itself as with pre-hearing issues. The informed person, having thought the matter through, would also be satisfied I can continue.

[30] Rule 28 of the Rules of Practice and Procedure does not preclude me from continuing as the hearing adjudicator at this stage. I have not assumed the role of mediator, and I have not been privy to the parties' settlement positions or any discussion of the merits, since the parties have chosen not to subject the complaint to mediation.

[31] At this point, the matter should proceed as scheduled. The complaint is more than two years old, and the parties have had time to prepare. The process will not be served by further delay in assigning another hearing adjudicator when the test for reasonable apprehension of bias has not been met.

Decision:

[32] The respondent's application is dismissed for all of the reasons outlined above.

DATED at Yellowknife, Northwest Territories, this 27th day of October 2015.

Sheldon Toner

Adjudicator

Human Rights Adjudication Panel