

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

BETWEEN:

Marie Niziol

Complainant

-and-

Aurora College

Respondent

Reasons for Decision

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Telephone application

Date of Argument: 2 June 2016

Marie Niziol, for herself

Karin Taylor, Counsel for the Respondent

Authorities considered:

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

[1] This is an application by the respondent to dismiss this complaint because of delay. The application was commenced by notice of application. Counsel for the respondent relied on an affidavit sworn by Jane Arychuk President of the Respondent. I heard argument on 2 June 2016.

1. Background

Following is a chronology of events in this matter:

June 2000 –June 2003	Dates of alleged discrimination from the complaint
September 27 2004	Complaint filed with the Director of Human Rights
January 26 2006	Decision by Director of Human Rights to dismiss the complaint under section 44 of the <i>Human Rights Act</i>
August 24 2006	Decision by Adjudicator Posynick allowing appeal of Director’s decision to dismiss complaint
April 5 2007	Argument of appeal to Supreme Court to overturn appeal of Director’s decision
May 25 2007	Reasons for decision of Schuler J dismissing appeal
July 9 2009	Referral of complaint to Human Rights Adjudication Panel for adjudication
September 11 2009	Pre-hearing conference 1
October 27 2009	Pre-hearing conference 2 Complainant indicates she will require legal counsel to proceed. She is appealing the denial of her legal aid application
November 13 2009	Pre-hearing conference 3 Complainant obtained legal aid. She will have counsel at next pre-hearing telephone conference.
August 18 2010	Argument of second application to Supreme Court opposing adjudicator’s order to produce investigation report
October 25 2010	Decision on second application to Supreme Court – investigation report not produced
February 7 2011	Pre-hearing conference 4. Hearing date set for May 30 2011 to June 10 2011. Complainant

April 26 2011	then represented by lawyer Donald Large Pre-hearing conference 5. Hearing set for 6 June to 17 June 2011
May 10 2011	Pre-hearing conference 6 Hearing adjourned because complainant did not have legal counsel. She will advise Panel office by 8 July 2011 whether she has retained counsel
August 1 2012	E-mail from Panel office to complainant asking if she had yet obtained counsel
August 14 2012	E-mail from complainant advising she did not then have counsel
February 11 2016	Pre-hearing conference 7
June 2 2016	Argument of application to dismiss for delay

[2] The complaint results from the complainant's attendance as a student in the nursing program at Aurora College. She says she failed the practical portion of her program three times in the years 2000, 2002 and 2003. She says this was the result of harassment by some instructors in the complaint. She alleges she was the subject of discrimination on the basis of race – she is an indigenous person.

2. *Issues*

1. Should this complaint be dismissed for delay?
2. Should this complaint be dismissed for failure to comply with an adjudicator's direction?

3. *Legal Principles*

[3] A proceeding may be dismissed where a party is harmed by delay to the extent continuing with the proceeding would seriously affect its fairness. Such delay must be unreasonable or inordinate. The adjudicator must look at the cause of the delay and any prejudice:¹ the nature of the case and its complexity, the facts and issues, the purpose and nature of proceedings, whether the respondent contributed to the delay or waived it and other circumstances of the case. I am to look at the nature of the various rights at stake to determine whether the community's sense of fairness would be offended by the delay.

[4] Adjudicators may make rules governing the practice and procedure in hearing and pre-

¹ *Camsell v. Mbotlaxo Investments Ltd* [date] at page 5; *Blencoe v. BC (Human Rights Commission)*, 2000 SCC 44 at paragraphs 121 to 122

hearing matters.² Rule 32 (1) allows an adjudicator to dismiss a complaint when the complainant fails to comply with a direction made at a pre-hearing conference.

4. *Positions of the parties*

[5] Respondent's counsel contends:

- The complainant did not respond to the adjudicator's direction in the pre-hearing conference on 10 May 2011 to advise the office of the Human Rights Adjudication Panel ("the Panel") by 8 July 2011 whether she had counsel. There is no evidence the complainant complied with this direction.
- It has a meritorious defence – the complainant could not complete the Northern Nursing program because she could not demonstrate the required core competencies or skill development. It also denies there was any harassment.
- Some of the witnesses it would like to testify may not be located.
- The memories of all witnesses will be affected by the passage of time.
- The delay is indeterminate – a respondent cannot be expected to deal with an ongoing complaint indefinitely without the possibility of resolution.

[6] The complainant submits:

- She has tried several times to obtain a lawyer. The lawyers have said they are not taking on new clients or have a conflict-of-interest. Also the complainant could not afford any retainer requested by a lawyer. She also understands legal aid does not fund human rights cases.
- She was dealing with other matters in 2011 and 2012. As a result she found it difficult to deal with this complaint.
- If this went to a hearing she would have a lawyer. Her family would help her find a lawyer.

5. *Analysis*

- a. *Issue 1: Should this complaint be dismissed for delay?*

[7] The above chronology shows the delay up to referral to the Adjudication Panel on 9 July 2009 was not the responsibility of the complainant: it resulted from investigation, initial dismissal of the complaint by the Director of Human Rights and litigation arising from that decision. The complainant is also not responsible for the delay between 13 November 2009 and 18 August 2010. Furthermore from then until 10 May 2011 she attempted to move the case forward to a hearing. Since then the delay has been the responsibility of the complainant. She

² *Human Rights Act*, section 52

says she requires counsel to put her case forward but has not been able to find a lawyer.

[8] The affidavit of Jane Arychuk deposes to the witnesses the respondent would expect to call to give evidence at the hearing. There are eleven in total all of whom have been interviewed by respondent's counsel. Ms Arychuk indicates six of these have left the Northwest Territories and live throughout Canada. She says this relocation prejudices the ability of the respondent to defend this complaint. Furthermore the expense of bringing them to Yellowknife further prejudices the respondent. Finally the passing of time will impact the quality of evidence the respondent may present.

[9] The question is whether the delay is inordinate. Clearly the period from July 2011 to the date this application was argued is the responsibility of the complainant. I must, however look at the entire length of time since the complaint because all the delay affects the fairness of the hearing. It appears much of the evidence will come from witnesses. They will not be able to clearly remember many events as they could have if the hearing had been held earlier.

[10] The respondent has not proved any witnesses will be unavailable for the hearing. Many of its witnesses have left the Northwest Territories but they may well still be available. As I said in *Smith v. Union of Northern Workers*³ witnesses may testify by video-conference or by telephone. I am satisfied an adjudicator can properly evaluate credibility and reliability of witnesses testifying by video-conference. As a result I put little weight on the cost of having them to travel to the hearing. I am also not persuaded any of the respondent's witnesses will be unavailable either because of the distance they have to travel, they live outside the Northwest Territories or are no longer employed by the respondent.

[11] My main concern is with the effect of the passage of time on the fairness of the hearing. This is the most important consideration in this case. The complaint describes what the complainant said transpired at some meetings with employees of the respondent. I expect this will be disputed by those employees. The adjudicator will be required to sort this out on the basis of testimony from witnesses attempting to recall events occurring as much as 17 years ago. As a result it will be very difficult to have a fair hearing. Too much time has gone by for any witness to clearly remember what happened between 2000 and 2003. I expect at least some of the witnesses the respondent wishes to testify will not clearly remember what happened in meetings so many years ago. This seriously affects the respondent's ability to mount a defence.

[12] Human rights complaints are serious issues. This is reflected in the *Human Rights Act*. The community expects such complaints to receive a fair hearing. I am satisfied the community's sense of fairness would be offended if the respondent was required to participate in a hearing of this complaint after the length of delay in this case. The community would feel the

³ 2015 CanLII 27467

quality of the evidence would not be of the standard to justify a fair determination of whether discrimination occurred in this case.

[13] I find the delay in this case is inordinate. It makes it unlikely there can be a fair hearing. Five years of the delay is the complainant's responsibility. In addition the overall passage of time since the events described in the complaint make a fair hearing unlikely if not impossible. I dismiss the complaint.

b. Issue 2: Should this complaint be dismissed for failure to comply with an adjudicator's direction?

[14] I address this even though I need not because of my decision on the first issue. The respondent says the complainant did not comply with an adjudicator's direction to advise the Panel office of her new lawyer by 8 July 2011. The pre-hearing conference memorandum for the 10 May 2011 pre-hearing conference states "[the complainant] will advise the HRAP office by July 8, 2011 whether she has retained legal counsel." I do not consider this a direction. Although the adjudicator may have directed the complainant to do this the memorandum does not clearly say so. This may well have been an indication from the complainant she would have a lawyer by 8 July 2011 and would advise the Panel office who this was. Not complying with an adjudicator's direction is a serious matter. I am not satisfied this occurred in this case. I find the respondent has not proven the complainant did not comply with an adjudicator's direction.

6. Conclusion and Order

[14] I dismiss this complaint.

Adrian Wright
Adjudicator
Human Rights Adjudication Panel
2 April 2017