

**YUKON HUMAN RIGHTS BOARD OF ADJUDICATION**

**In the matter of**

**Thomas Molloy**

**Complainant**

**Yukon Human Rights Commission**

**and**

**Government of Yukon**

**Respondent**

**Appearances by:**

Thomas Molloy, Complainant, appearing on his own behalf  
Heather MacFadgen, appearing on behalf of the Human Rights Commission  
Peter Csiszar, Counsel for the Respondent

**DECISION**

**RE: HEARING NEW EVIDENCE FROM THE COMPLAINANT**

**Introduction**

This Human Rights complaint was forwarded to the Yukon Human Rights Board of Adjudication [the "Board"] by the Yukon Human Rights Commission [the "Commission"] alleging that the Complainant was discriminated against by the Respondent in the area of employment and/or contract for services on the grounds of his criminal record and/or criminal charges.

## **Background and Chronology**

On August 22, 2008, the Board of Adjudication upheld a No Evidence Motion brought by the Respondent. This decision was appealed to the Yukon Supreme Court, who referred the matter back to the Yukon Human Rights Panel of Adjudicators, to be heard by a newly constituted Board.

In his decision, Justice Groberman stated: "The Board of Adjudication may, in its discretion, consider whether the complainant or the Commission ought to be given the opportunity to adduce further evidence. The Board will, of course, hear any further evidence that the Yukon Government wishes to present." (para. 27)

On June 16, 2010, the Board's Registrar wrote to the Parties outlining the process for this matter being heard by the newly constituted Board. Among other things, Mr. Molloy was requested to advise the Board, by July 19, 2010, if he wished to proceed with his Human Rights Complaint, if he wished to continue participating in the matter, and if he wished to apply to reopen his presentation with new evidence.

On July 18, 2010, the Complainant responded indicating that he wants to pursue this matter and that he wants to participate in the proceeding. Mr. Molloy also alluded to needing to speak with legal counsel regarding whether or not he would be requesting to reopen his case with new evidence as he indicated he did not "know what was expected" of him.

On July 19, 2010, the Board provided all Parties with a legal opinion from its counsel regarding the Complainant's participation, and a cover e-mail asking the Parties to provide their witness lists and an indication of how much time they would need to proceed with this matter.

On July 20, 2010, the Commission indicated that it does not intend to apply to reopen its case.

On August 13, 2010, the Respondent advised that before it could determine whether or not to make a No Evidence Motion, or provide a list of potential witnesses, it needed to know if the Complainant was going to ask to reopen his case to present further evidence and whether the Board would allow this request.

On August 20, 2010, the Board sent correspondence to the Parties outlining the evidence that is before this Board of Adjudication and stating that the Complainant had not addressed the question of whether or not he has new evidence or intends to reopen his case. The Board directed the Complainant to advise the Board, in writing, by September 20, 2010:

- Whether or not he will be represented by Counsel;
- Whether or not he will reopen his case and present new evidence;
- Whether or not he will attend the hearing in person; and

- Dates he and his counsel are available for the hearing.

The Board also directed the Respondent and the Commission to provide the dates they would be available for hearing.

On September 20, 2010, the Complainant wrote to the Board indicating, among other things, that he intends to be represented by Susan Roothman, and that he wishes to present new evidence based on the Supreme Court decision. He estimated that presenting his new evidence would take approximately one hour.

On September 22, 2010, the Board asked all Parties to provide their dates of availability for a Pre-Hearing Conference, by September 27, 2010. The Parties were also advised that as the Complainant indicated he would be represented by legal counsel, all correspondence should be copied to Ms. Roothman. Ms. Roothman responded on September 23, 2010, indicating that she was not retained and that all correspondence should be directed to Mr. Molloy until such time that she confirms she has been retained. She also asked that she be removed from the e-mail exchanges until retained.

The Respondent and the Commission provided their dates of availability for a Pre-Hearing Conference. No response was received from the Complainant.

On September 28, 2010, all Parties were advised that a Pre-Hearing Conference was scheduled for October 27, 2010 at 10:00 a.m., and that Parties were free to participate by teleconference. Parties were also advised that an agenda would be distributed prior to the Pre-Hearing Conference, which would include a list of procedural matters to be discussed at the Pre-Hearing Conference, including the scheduling of hearing dates. The Parties were informed that the Board would be proceeding with the Pre-Hearing Conference as scheduled, even if it is in the absence of any Party's participation.

On October 21, 2010, the Complainant e-mailed the Board saying that he could not find the e-mail indicating the date of the Pre-Hearing Conference and asking if it was scheduled for that day. The Board's Registrar replied to the Complainant that the Pre-Hearing Conference was scheduled for October 27, 2010, at 10:00 a.m., and asked him to clarify his dates of availability for the hearing. The Complainant did not respond.

On October 22, 2010, the Board corresponded with all Parties reminding them of the Pre-Hearing Conference scheduled for October 27, 2010, outlining information in preparation of the upcoming Pre-Hearing Conference and attaching an agenda.

On October 25, 2010, the Complainant e-mailed the Board asking for clarification about the scheduled time of 10:00 a.m., asking for confirmation that it was PDS Time. The Board's Registrar responded confirming that it was referring to 10:00 a.m. Yukon time. The Complainant then responded as follows:

"For my clarity... I think you mean ***the time IN the Yukon.... not Yukon Time***. Is this correct? I just want to be clear and do not want to make an error in scheduling time because this is a quasi-Legal matter. As you know, **Yukon Time** is an Official standard of time and is 2 hours different than (behind) Alberta and 1 hour difference (behind) PDST – which is the official time use in Whitehorse, Yukon."

The Board's Registrar replied confirming that the Pre-Hearing Conference was scheduled for 10:00 a.m. in the Yukon, which would be 11:00 a.m. Alberta time, in which province the Complainant resides.

The Commission and the Respondent attended the Pre-Hearing Conference held on October 27, 2010. The Complainant did not participate. The Respondent objected to the Complainant leading new evidence through his own testimony, or by any other manner that could have been done at the original hearing. The Respondent's argument was that the Complainant gave very extensive evidence during the first three days of the original hearing, and requested that the Board exercise its discretion and not allow the Complainant to lead new evidence. The Commission agreed that this matter is within the Board's discretion; but took no position on the Complainant's request, given that she was not aware of the details of the Complainant's request or of the evidence the Complainant planned to lead.

As the Complainant did not attend the Pre-Hearing Conference to clarify his request, the Board decided to ask him to clarify what new evidence he planned to introduce, and then to decide whether or not to allow any new evidence.

A summary of the Pre-Hearing Conference was distributed to all Parties on November 14, 2010, along with a letter to the Complainant, copied to the Commission and Respondent, in which the Complainant was advised that hearing dates were being set down for January 27 and 28, 2011, and that final written submissions would be due by January 17, 2011. The Complainant was also requested to clarify by November 26, 2010, the nature of any new evidence he anticipated leading and to explain how it would be different from the evidence already before the Board.

On November 26, 2010 at 11:59:55 p.m., the Board received an e-mail from the Complainant stating:

“Regarding your request arising from the hearing that has been set down for two days: Thursday, January 27 and Friday, January 28, 2011. The following is my best response to your question, as I have not heard back from Counsel. In the September 20, 2010 correspondence to the Board, I requested to reopen my case to lead new evidence for approximately one hour. The nature of the evidence arises from the hearing in front of the Yukon Superior Court of Appeal that decided to order a new hearing with a new panel. I will rely upon the decision and comments of the Justice at the hearing. This material evidence and legal opinion was not available at the time of the original hearing. If you need more information I am happy to try to provide it or my counsel may be better able to answer it. Thus I ask for a 4 day extension if this answer is not satisfactory. Thank you.”

On November 29, 2010, the Board granted the Complainant’s November 26 request for an extension and allowed the Complainant until December 3, 2010 to respond. The Board advised the Complainant that, after this date, it would decide whether or not to allow him to lead any new evidence.

The Board received no response from the Complainant.

### **Analysis and Decision**

During the Pre-hearing Conference held on October 27, 2010, the Board considered the Complainant’s request to present new evidence based on the Supreme Court decision. Mr. Molloy was given an opportunity to explain to the Board the nature of the new evidence he anticipated introducing. Mr. Molloy requested a four-day extension on November 26, as he indicated he had not heard back from his legal counsel and required more time to provide further information.

Although the Board granted the four-day extension, from November 26, 2010 to December 3, 2010, no correspondence or filings were received from Mr. Molloy with respect to the nature of the new evidence he anticipated introducing.

The Board has considered all of the information before it in this matter, and has determined that the Complainant was provided with ample opportunity to clarify what new evidence he wished to introduce. The Complainant did not explain to the Board the nature of the new evidence he wished to introduce, or its importance to the rehearing of the matter. As a result, the Board is not persuaded that it is necessary for the Complainant to provide new evidence. The Board’s decision is that the Complainant will not be permitted to lead any new evidence in this matter when the hearing reopens on January 27, 2010. The Complainant is entitled to make submissions and argument on the basis of any of the evidence

that is already before the Board. These final written submissions are due by 12:00 noon on January 17, 2011. The Complainant will also have an opportunity, through his final oral reply, which will be heard by the Board on January 27 and 28, 2011, to reply to the Respondent's final submissions.

**Dated this 9<sup>th</sup> day of December 2010**



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Vicki Hancock  
Chair  
On behalf of the Yukon Human Rights Board of Adjudication