

**YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS**

Between:

**Peter Budge**

“Complainant”

And:

**The Yukon Human Rights Commission**

“Commission”

And:

**Charles Eikland**

“Respondent”

And:

**Talbot Arms Motel Ltd.**

“Respondent”

**REASONS FOR DECISION**

1. P. Gawn (Chief Adjudicator): An application has been made on behalf of the Respondent Charles Eikland to adjourn the hearing before the Board of Adjudication of the complaint. For the reasons and on the conditions set out below, the adjournment will be granted.

**BACKGROUND**

2. Peter Budge’s complaint to the Commission is dated July 24, 2015 and references a period of his employment by the two Respondents from May to September 2014. The

complaint referred to the Panel of Adjudicators on October 19, 2016 alleged that the Complainant was discriminated against by being sexually harassed in the course of his employment, contrary to the *Human Rights Act (the Act)*.

3. Pursuant to the Panel's *Rules of Procedure*, notice of the referral was sent out to the parties by the Registrar along with a copy of the *Rules of Procedure* and forms. Forms 2 were filed in response by the Commission, the Complainant and the Respondents. At that time the Respondents were both represented by legal counsel Meagan Hannam. The Complainant was and has continued to be self-represented, and the Commission is represented by counsel, Colleen Harrington.

4. A case management conference was held on December 13, 2016 with counsel for the Commission and Respondent attending along with the Complainant. The requirements for disclosure of documents and notice of witnesses were confirmed and a further case management conference was to be held February 7, 2017 to address the hearing dates and location.

5. The Registrar was subsequently informed by Suzanne Tremblay on behalf of the Respondents that she was taking over the file from Meagan Hannam. The Registrar provided Ms. Tremblay with a copy of the December 13, 2016 case management order as well as another copy of the *Rules of Procedure*.

6. On January 30, 2017, Ms. Tremblay sent an email advising that she was not able to deal with this complaint at this time and attaching a doctor's note saying that:

*"Due to medical reasons she is unable to respond and defend any current human rights complaints to the human rights board of adjudicators for at least 3 months."*

7. On February 7, 2017, an email from the Respondent Eikland was received by the Registrar advising he was unable to attend this afternoon's meeting and attaching a doctor's note from the same doctor saying that:

*"Due to medical reasons he is unable to respond and defend any current human rights complaints to the human rights board of adjudicators for at least 3 months."*

8. No application to adjourn or reschedule the case management conference of February 7, 2017 was received from the Respondents and the case management conference proceeded in the presence of the Commission counsel and the Complainant. The case management order issued on that date was sent to the Respondents as well as to the other parties; it directed the Respondents to attend, or to have someone representing them attend, a further case management conference on April 10, 2017, to schedule hearing dates.

9. Prior to the April 10, case management conference, on April 6<sup>th</sup> a note was received from the Respondent Eikland advising that he was unable to attend this meeting, as he was "out the Territory attending to my only brother's estate who recently passed away unexpectedly. I have a doctor's appointment on May 5, 2017 and will contact you after that". At that case management conference, in consultation with the parties present, hearing dates were set for November 6 to 10, 2017 "to proceed even in the absence of the Respondents, unless they apply beforehand, and in accordance with the *Rules of Procedure*, to adjourn the hearing." That case management order was sent to the parties including both Respondents on April 12, 2017.

10. On October 10, 2017, Commission counsel provided its list of witnesses to the

other parties and noted that the Respondents still had not provided its disclosure as ordered and reminded them of the case management conference on October 13, 2017.

11. The Respondents did not attend the October 13<sup>th</sup> case management conference and the case management order confirmed that the hearing would proceed on November 6 to 10, 2017, in accordance with the April 10 case management order. A doctor's note dated October 13 was provided on that date, on behalf of the Respondent Eikland from the same doctor, advising as follows:

*"For medical reasons he is unable to participate in the upcoming human rights complaint for which he is involved at this time. He can be reassessed in clinic in three months time".*

12. After further email correspondence between the Registrar and Ms. Tremblay took place regarding the *Rules of Procedure*, this application for adjournment in Form 8 was made by Ms. Tremblay on behalf of Respondent Eikland on October 27<sup>th</sup>, relying on the above-quoted doctor's note.

13. Response and Reply submissions were then received from the Commission and the Complainant (Form 9), and from the Respondent (Form 10), and a further case management conference was convened in order to address and discuss issues raised in the materials filed. That case management conference took place on November 6, 2017, and was attended by legal counsel Shaunagh Stikeman, appearing on behalf of the Respondent Eikland with the limited purpose only of representing him regarding the adjournment application. Counsel for the Commission and the Complainant also attended. A written submission was requested on proposed questions for the doctor and was provided November 7<sup>th</sup> by the Commission with a submission in response from

counsel for the Respondent being received November 8<sup>th</sup>. On November 8, 2017, the parties were advised that the hearing would be adjourned on conditions, with written reasons to follow.

## **JURISDICTION**

14. The Chief Adjudicator has jurisdiction to adjourn the hearing, in accordance with section 9 of the *Human Rights Act* regulations:

9. (1) The Chief Adjudicator may change the date previously established for beginning a hearing, but the time between the making of the change and the new date for the hearing to begin shall be at least 30 days unless the commission, complainant, respondent, and any intervenor consent to a shorter time.

(2) After the hearing has begun the board of adjudication may in its discretion adjourn the hearing as required.

(3) No hearing may be adjourned without first giving each party an opportunity to make representations about the proposed adjournment.

## **ANALYSIS**

15. The October 27 adjournment request stated these reasons why the application should be granted:

*“Charles Eikland is not able to attend to these matters due to medical reasons. He will be reassessed in 3 months from the date on the Doctor’s order.”*

16. The application was opposed by the Commission which requested a hearing “in order to determine the nature of the ongoing medical delays, as well as a plan to proceed to the resolution of this complaint.” The Commission also requested that the doctor be summoned to appear before the Board “in order to clarify the nature of the medical delays.”

17. I share the Commission's concern about the delays that have taken place to date in this proceeding. Those delays are amply demonstrated by the history of pre-hearing processes summarized above. The pattern of non-participation and non-attendance by the Respondents to date does not inspire confidence in their respect for the process. The absence of any participation by or representation of the Respondent Talbot Arm Motel Ltd. in this application is submitted by Commission counsel to demonstrate "the Respondents' continued non-compliance with the Board's process." The repeated failure of the Respondents to comply with the *Rules of Procedure* or the timelines set for providing disclosure of documents and witness lists is also a concern.

18. Nevertheless, the overarching consideration in this matter must be the requirement confirmed in section 23 of the *Act* for hearings to be conducted "in accordance with the principles of fundamental justice". Fundamental justice includes fairness to all parties and requires that each party be given an opportunity to be heard.

19. Although I disagree with counsel for the applicant's assertion that there is no prejudice to the Complainant, I am persuaded that the adjournment sought should be granted in order to try to ensure fairness and the opportunity to be heard to the Respondent Eikland.

20. The prejudice this causes to the Complainant is not insignificant. He has dutifully attended numerous case management conferences and meetings with the Commission, traveling to Whitehorse in order to do so; he has had to prepare to testify at the hearing and he has waited a long time to finally have his complaint heard by the tribunal. The adjournment granted will therefore be on strict conditions so that, if at all possible, further

delays will not have to be endured by the Complainant.

21. As requested, the Commission has provided a list of proposed questions for the doctor, in order to ensure that adequate information regarding the unexplained “medical reasons” be made available to the parties and the tribunal.

22. Counsel for the Respondent Eikland responded to the proposed questions on November 8, 2017. I have reviewed and considered the 18 questions provided by the Commission and the submission in response that 12 of those questions should be struck, based on applying the test in *Slavutych v. Baker* (1975) 55 DLR (3d) 224, which requires balancing the interests of justice against the public interest in protecting personal privacy and confidential communications.

23. I agree with the Respondent’s counsel on some but not all of her submissions in this regard, and have therefore removed 7 of the questions objected to, from the Commission’s list. The remaining 11 questions do, in my view, meet the test described, and will further the interests of justice by allowing for proper consideration of the case for further adjournment and the development of a plan to ensure a path to the hearing of the complaint. A list of the 11 questions will be included with this decision and incorporated in the order made.

## CONCLUSION

24. The application to adjourn the hearing which was to commence November 6 is granted, subject to the following conditions:

- 1) new hearing dates, and a pre-hearing conference to take place in advance of those dates, will forthwith be arranged and scheduled by the Registrar as soon as practicable after January 13, 2018;
- 2) prior to the further medical assessment of Respondent Eikland to take place by his doctor, on or about January 13, 2018, Respondent's counsel will provide that doctor with the attached list of questions;
- 3) the report by the doctor in response to the list of questions is to be included with any further adjournment application on medical grounds by the Respondent Eikland;
- 4) if either or both of the Respondents seek to adjourn the new hearing dates, they are to complete an application in Form 8 and provide it to all parties and the Registrar, on or before the next pre-hearing conference date;
- 5) the Commission and the Complainant are at liberty to then renew their request for a hearing to clarify the nature of the medical delays, including summoning the doctor to testify, in the event that the report by the doctor is unclear, incomplete, or not provided.

25. I thank the participants for their helpful submissions.

Whitehorse, Yukon, November 10<sup>th</sup>, 2017



**Penelope Gawn, Chief Adjudicator**

**Yukon Human Rights Panel of Adjudicators**