Board of Adjudication File # 2006-04
August 22, 2008

BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION

In the matter of the *Human Rights Commission*

Commission

and

Thomas Molloy

Complainant

and

Property Management, Government of Yukon

Respondent

Panel of Adjudicators

Barbara Evans, Chief Adjudicator

John Wright

Michael Riseborough

MOTION
brought by the Respondent on May 27, 2008

> That the Board dismiss the Complaint on the basis that there is no evidence there was a contractual or employment relationship between the Respondent and the Complainant at the time the alleged discrimination took place and there is no evidence of discrimination on the basis of the Complainant's criminal record.

This Human Rights complaint was forwarded to the Yukon Human Rights Board of Adjudication [the "Board"] by the Yukon Human Rights Commission [the "Commission"] arising out of a Complaint by Thomas Molloy [the "Complainant"] which initially included the Government of Yukon [the "Respondent"] and the Yukon Tourism Education Council [YTEC] alleging that both had discriminated against him in the area of employment and/or contract for services on the grounds of criminal record and/or criminal charges. The Yukon Human Rights Commission dismissed the Complaint against YTEC and forwarded the Complaint against the Respondent to the Board of Adjudication for determination.

At the conclusion of evidentiary presentation to the Board by the Complainant and the Commission, the Respondent submitted to the Board a **No Evidence Motion** to dismiss the Complaint on the basis that neither was there a contractual or employment relationship between the Respondent and the Complainant at the time the alleged discrimination took place nor was there evidence of discrimination on the basis of the Complainant's criminal record contrary to the provisions of the Yukon Human Rights Act (the Act).

The Commission, with the Complainant, argued first that the panel had no jurisdiction to entertain a No Evidence Motion because the Commission, in putting the complaint before the Panel, had already made the determination that there was sufficient evidence, if left unchallenged, to support the allegation that there was a contractual or employment relationship between the Respondent and the Complainant and that the Respondent had discriminated against the Complainant contrary to the Act.

They argued that if there was doubt about the jurisdiction of the Panel on a No Evidence basis, the Respondent should have applied to the Supreme Court for a stay of proceedings. The Board rejects this argument by the Complainant and the Commission. The Board cannot have its jurisdiction fettered by the Commission. At the outset of the hearing, the Board confirmed that the issues for determination in the hearing were the contract/employment relationship and discrimination on the basis of criminal record. The parties agreed at that time the Board was within their jurisdiction to do so. The Board concludes that the Respondent's No Evidence motion is therefore properly before the Board and it will deal now with the merits of that motion.

In *Maughan v UBC, 2008 BCSC14* the Court made the following comments regarding assessing evidence in the context of a no evidence motion:

'In Sopinka, et al, The Law of Evidence in Canada…the test for a no evidence motion is described as thus:

> *"The trial judge in performing this function does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point.*
>
> *I conclude therefore that in considering the no evidence motion in this case I am obliged in the case of elements of torts being advanced which are supported by direct evidence, not to weigh the evidence, but only to consider whether it meets a threshold of reasonableness such that a properly instructed jury could make the requisite finding. In the case of elements supported solely by circumstantial evidence, on the other hand, I am obliged to engage in a limited weighing of the evidence to ensure that*

it is reasonably capable of bridging the inferential gap between the evidence proffered and the element to be proved."'

The Respondent's No Evidence Motion was characterized by their lawyer as "two-pronged". The first part of the motion is that there is no evidence that could lead a reasonable person to conclude that there was either a contractual or an employment relationship between the Complainant and the Respondent. The second part of the Respondent's No Evidence Motion is that there is no evidence put forward by the Commission or Complainant that on the face of it, (that is, without challenging it and taking it at face value) would lead a reasonable person to conclude that the Complainant was a victim of discrimination on the basis of his criminal record or criminal charges.

With regard to the first "prong", the Respondent asserts that the evidence put forward by the Complainant and the Commission clearly shows that there was a contractual relationship between the Complainant and YTEC who, in turn through a signed Memorandum of Understanding ["MOU"], had a contractual relationship with the Respondent. They argue further that the evidence put forward by the Commission, on the face of it, confirms this insofar as that Complainant was to deal only with YTEC and not directly with the Respondent in any way other than to deliver the training to selected groups of the Respondent's employees.

The Respondent noted that the evidence clearly shows that those matters of concern to the Complainant — the content of the course, the payment of the Complainant for services, the schedule for course delivery and costs for training materials and other expenses — were matters negotiated directly between the Complainant and YTEC, without the participation of the Respondent.

The Respondent asserts that if the No Evidence test is applied — that is, could a reasonable person conclude on the face of the unchallenged evidence that there was either a contractual or employment relationship — then the Complainant has failed to prove that there was such a relationship.

The Complainant and the Commission argue that the Respondent was in such powerful a position vis à vis YTEC and the Respondent that, in effect, they controlled every aspect of the work to be done. They argue further that the MOU between the Respondent and YTEC was not a contract in the sense of establishing a contractual agreement in the usual manner of Government of Yukon contracts. Therefore, in effect, by the absence of a formal contract, it should be accepted that YTEC together with the Complainant were in a contractual relationship with the Respondent under the conditions of the MOU. The Complainant and the Commission argue further that the Complainant, because of the extent of control exercised by the Respondent over all aspects of the work to be undertaken by the Complainant, was in effect in an employment relationship with the Respondent.

Regarding the first part of the Respondent's two-part No Evidence Motion, the Board concludes there was no employee/employer relationship or contractual relationship between the Complainant and Respondent.

Of all the case law presented by the parties, the Board finds that the Canadian Pacific (CP) case is most relevant. The case forwarded for consideration was the Appeal to the Federal Court of Appeal [the "Court"] from a decision by the Canadian Human Rights Tribunal [the "Tribunal"]. In that case, it was alleged that CP had a contract with R. Smith Ltd. ["Smith"] to provide catering services; Smith hired the complainant, Fontaine, to perform the service of cooking, ordering, and kitchen maintenance for the road gang between Boardview and Moosejaw, Saskatchewan. While in camp, the Roadmaster for CP, J. Fowlie engaged Fontaine for additional services as watchman, part of a distinct employment arrangement between Fontaine and CP, independent of his cooking job. When it was 'discovered' that Fontaine was infected with HIV, Fontaine left the camp position(s). The Tribunal found that he had been constructively dismissed. Fundamental to that finding was the established fact that Fowlie told Fontaine of his personal concern about the safety of his men and the danger of the spread of AIDS and further that his men might attack Fontaine if he remained in camp. Smith wanted Fontaine to stay on site, not for the purpose of conducting an investigation, but to buy time to send a replacement.

In applying the contractor-versus-employee tests, the Tribunal found that there was, in essence, an employee/employer relationship between Fontaine and CP because there was only one contract, the services provided were directed by CP as to time, place and service standards, the tools used belonged to CP and there was no risk of loss/gain on the contractors.

In the Discussion and Disposition of the Fontaine matter, the Court considered a number of key elements:

1. CP said it never employed or contracted with Fontaine with regard to his cooking duties, which were the focus of the termination.
2. The Tribunal found that the language of the Canadian Human Rights Act, Section 7, "is broad enough to include discriminatory practices by someone who, by reason of his position, can induce a breach of an employment arrangement".
3. The Court agreed with the Tribunal insofar as, "in looking at the purpose of the CHRA and the wording of section 7, CP contravened its provisions." The Court quoted Laycraft, C.J. who indicated that 'employ' and 'employment' can be used in the sense of master/servant relationship where control is a principal factor, and also in the sense of 'utilize'.
4. The Court then went on to confirm the importance of 'control' by saying that: *"in s.7 the words are used in a sense broader than the ordinary master/servant relationship. The Act does not purport to intervene in purely private relationships, but where a person provides a service to the public it seems clear the Act does intervene. It does so, not primarily by*

aiming at the offender, but by establishing a mechanism to remedy the wrong done or about to be done to the victim of the discrimination. So, can it be said that in the instant case CP refused to continue to 'utilize' Mr. Fontaine as a cook? This brings us to a closer look at section 7 of the CHRA. As stated above, section 7 provides that it is a discriminatory practice directly or indirectly to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. On the facts as found by the Tribunal, especially that CP was the only customer that Smith had at the time in question and the influence that CP would undoubtedly call the shots as to who would work as a cook on its railroad gangs, it was clearly open to the Tribunal to conclude the CP indirectly refused to continue to employ Mr. Fountain interpreting 'employ' to mean 'utilize' as already discussed."

The Board is persuaded that the element of control is a necessary factor in recognizing when discrimination has occurred by the direct or indirect action of a presumed uninvolved party. If YTEC were dependent on the Respondent for their business existence or viability, the Respondent may be in a position to apply sufficient pressure to force YTEC to commit discriminatory termination, and by extension, become culpable for that discriminatory conduct.

Considering the evidence at face value, the Board concludes that while it appears the situation involving CP, the catering company (Smith) and its employee (Fontaine), appears to be strikingly similar to the matter before the Board, the Board finds the fact differences result in the finding that the issue of 'employment' defined as 'to utilize' does not apply in this case for the following reasons:

A. The Respondent identified a need for staff training and pursued YTEC for the provision of the training;
B. The MOU between the Respondent and YTEC, on its face, contains all the essential elements of a contract and is therefore a contract;
C. The communications regarding the MOU were exclusively between YTEC and the Respondent and dealt with all the elements normally addressed in a contract for services;
D. Arrangements regarding the delivery of the training were exclusively between the Complainant and YTEC;
E. The Respondent was unaware of the identity of the YTEC trainer;
F. The training services of the Complainant Molloy were not essential, but rather, desirable, which is distinguished from the cooking services being provided by the Complainant which were essential to operating the railroad gang;
G. YTEC's viability or income was not dependant on the MOU with the Respondent as compared to Smith and the CP catering contract.
H. The contract between YTEC and the Complainant was a casual, incidental contract, and not intended to be a singular relationship, as compared to the employment between Smith and Fontaine;

I. The Complainant had chosen to relocate to the Yukon and historically made his living pursuing opportunities to serve multiple clients providing multiple services; and,
J. The scope of the work in this contract with YTEC could in no way be interpreted as establishing a financial dependency by the Complainant on YTEC, or by extension, the Government of Yukon.

Accordingly, the first part of the Respondent's No Evidence Motion succeeds in that there was, in the Board's view, no contractual or employment relationship between the Respondent and the Complainant at the time the discrimination is alleged to have taken place.

Having concluded there was no contractual or employment relationship between the Complainant and the Respondent, the Board could conclude there is no need to deal further with the Complaint. The Board is aware, however, that the Complainant and the Commission may choose to appeal its decision to the Supreme Court and in the event that Court may find fault with the Board's decision, and because the Board believes it would be in the interest of all the parties, it will also deal with the second part of the Respondent's No Evidence Motion at this time.

The second part of the Respondent's No Evidence Motion is that there is no evidence put forward by the Complainant that on the face of it, (that is, without challenging it and taking it at face value) would lead a reasonable person to conclude that the Respondent discriminated against the Complainant because of his criminal record or criminal charges.

The Respondent argues that the action taken by the Respondent to cancel the course underway at the time the alleged discrimination took place was based on expressions of personal safety concerns voiced from two participants and a report of concern to the Respondent from the Victoria Faulkner's Women's Center. These three reports were based on concerns about the Complainant's alleged propensity for violence against women. The Respondent, in the interest of the safety of their employees attending the training session underway, cancelled that session and, in accordance with a section of the MOU with YTEC, asked YTEC to find a more "suitable" instructor. YTEC was unable to identify a replacement for the Complainant and the contract between YTEC and the Respondent was cancelled. YTEC advised the Complainant his services were no longer required.

The Respondent argues that in the face of the reports of safety concerns expressed to them by government employees, the action they took was reasonable and that no discrimination on the basis of the Complainant's record that is contrary to the Act occurred.

The Complainant and the Commission appear to focus their argument on the use of the Complainant's criminal record for offences other than those offences involving allegations and convictions for violence. The Complainant and Commission argue that the Respondent, at the time it cancelled the training course, relied on the entire criminal record of the Complainant including those offences not related to violence and therefore not relevant to his employment as a facilitator.

There is no evidence that the Government of Yukon, at the material time of cancelling the course, knew about his whole criminal record which included both violent and non-violent offences.

Further, the Act at section 10(b) states, in effect, that relying on an individual's criminal record or charges in terminating an employment or contractual relationship is justified if the criminal record or charges are relevant to the employment.

This Complaint rested on the presumption of the Commission that there was a contractual or employment relationship between the Respondent and the Complainant. Yet, even if a contractual or employment relationship was established, the Commission failed to lead evidence related to S. 10(b). The Board holds that the burden of showing these charges or convictions as not relevant to the Complainant's performance of the contract with YTEC rested with the Commission. Further, the evidence of the Commission's witnesses, if taken at face value, could lead the Board to find that S. 10(b) was a necessary and relevant factor in the Respondent's cancellation of the course. No evidence was presented to displace 10(b) of the Act.

The complaint is dismissed.

Barbara Evans
Chief Adjudicator
On behalf of the Panel of Adjudicators