Board No.: 2009-03
November 16, 2010

IN THE MATTER OF THE **YUKON *HUMAN RIGHTS ACT***
AND IN THE MATTER OF

Wanda Aschacher &
the Yukon Human Rights Commission
v
Yukon Hospital Corporation

Parties

Yukon Human Rights Commission: Colleen Harrington, Legal Counsel
Respondent: Yukon Hospital Corporation, Susan Arnold, Legal Counsel

Yukon Human Rights Board of Adjudication

Barbara Evans, Chief Adjudicator

Issue

Does the Complaint of Wanda Aschacher filed September 12, 2006, alleging a contravention of the Yukon *Human Rights Act* remain before the Yukon Human Rights Board of Adjudication?

Background and Chronology

The Complainant, Wanda Aschacher, filed a Human Rights Complaint on September 12, 2006, arising from an alleged contravention of the Yukon *Human Rights Act* (the "Act") on June 5, 2006. After investigation by the Yukon Human Rights Commission (the "Commission"), the matter was referred to the Commissioners for determination under Section 21 of the Act.

On January 26, 2009, the Commission made the decision that the Complaint of Wanda Aschacher should be referred for settlement discussions, and, if unsuccessful, referred to the Board of Adjudication for final determination.
The Commission referred the matter by letter dated October 28, 2009, which was received by the Yukon Human Rights Board of Adjudication (the "Board") on November 13, 2009. The Complaint Text stated: Complainant alleges that the Respondent contravened the Act by discriminating against her on the ground of physical or mental disability in connection with employment.

On November 27, 2009, the Board received a letter from the Commission advising that the Respondent had made an application for reconsideration to the Commission of its January 26, 2009, decision to refer the complaint to adjudication.

On November 30, 2009, the Respondent requested a stay of proceedings directly to the Board on the ground that they had requested a reconsideration of the matter by the Commission. In this letter, it was communicated that the Commission was seeking submissions from the Complainant on this reconsideration application and the matter was to be determined at a meeting on December 17, 2009.

The Board responded on the same date that the stay was not granted as the processes of the Commission do not prevent the Board from moving forward to adjudication as required by the Act.

On December 7, 2009, Counsel for the Respondent requested, on behalf of the Commission, Complainant and Respondent, an extension to the deadline for the submissions of Forms 1 and 2 until February 26, 2010.

The Board's response was to schedule a Pre-Hearing Conference for January 21, 2010 at 10:00, waiving the timelines for the submission of the forms. At the Pre-Hearing Conference, there was no discussion or declaration in regard to a reconsideration process or any other impediment to moving forward to adjudication. Rather, the Parties agreed:

- the issues to be decided are outlined in the Human Rights Complaint Text, and the matter involved physical disability;
- they would make an effort to produce a Joint Book of Documents;
- Witness lists were to be exchanged and Parties would advise the Board's Registrar of the witness list and if any subpoenas were required; and
- Dates for Hearing would be June 14 to 16 and June 28 to 30, 2010, inclusive.

On April 7, 2010, the Commission determined that the principles of procedural fairness and natural justice required reconsideration of their earlier decision of January 2009, and full submissions were filed by the Complainant and Respondent. The Commission reconsidered the matter and decided to not refer the matter for adjudication by decision of May 20, 2010. Their position was that the Commission, while it had referred the matter to adjudication pursuant to Section 21, after their reconsideration, the complaint should now be dismissed under Section 21.

By letter dated May 25, 2010, the Board was advised of the decision by the Commission and that, in their opinion, the Board no longer had jurisdiction to consider the matter as the complaint had been "dismissed in accordance with section 21 of the Yukon *Human Rights Act*".

On June 22, 2010, the Board wrote to the Parties expressing its interpretation of the Commission's letter of May 25, 2010, that it appeared that the Commission was withdrawing the Complaint after reconsideration. At that time, the Board was not

standing in judgement of the Commission's jurisdiction, but rather wished to make a fair and proper decision with respect to the Board's own jurisdiction, which requires the Board to consider whether or not a referral was validly withdrawn. The Commission's letter was unclear as to the reason(s) it accepted the reconsideration application by the Respondent. Further, the Board was not in receipt of the Commission's decision on reconsideration. Historically, the Commission has taken the position that once a matter has been referred, the matter lays in the jurisdiction of the Board. For the Commission to reconsider a matter was unusual, and the Board wanted to ensure that it was not breaching the Act by abandoning its role.

The position of the Respondent in its letter of July 19, 2010 was that the Commission had not withdrawn the complaint, but rather, had exercised its equitable jurisdiction to reconsider its original decision and vacated the original decision, leaving no referral to the Board.

It was the position of the Complainant in correspondence of July 20, 2010 that the Complaint was still properly before the Board on the grounds that once a matter has been referred to the Board, the jurisdiction of the Commission is extinguished. The Complainant further noted that the reasons for the reconsidered decision had not been released to the Parties by the Commission.

On August 10, 2010 the Commission provided its submissions on the matter of reconsideration and the non-existence of a Complaint referral for adjudication in this matter.

On August 25, 2010 the Board received a legal opinion from Board Counsel. On or about September 20, 2010, the Board circulated that opinion along with the case, *Canadian Museum of Civilization Corp. v Public Service Alliance of Canada, Local 70396*, heard in the Federal Court of Ontario May 30, 2006. The legal opinion noted that in that case the court determined that the principle of functus officio applies to administrative tribunals. A decision cannot be revisited because the tribunal has changed its mind or made a mistake. In essence, to overcome the principal of functus officio, at least as far as the referrals, a tribunal would need to show clear statutory power for it to withdraw it complaint. Further requests for submissions were made to the Parties by the Board.

The text of the Commission's submission of October 14 was succinctly put forward in this way: "Yukon v McBee is clear authority from the Yukon's Court of Appeal establishing that the Yukon Human Rights commission has the power to reconsider its decision to refer a matter to hearing. See in particular paragraph 39 of the decision. It is the law in the Yukon and the decision in Canadian Museum of Civilization Corp. v Public Service Alliance of Canada [2006] F.C.J. No. 884 is not".

The Respondent's submission of October 20, 2010 clarified that it is a recognized exception to the principle of functus officio that, even in the absence of express statutory authority, a tribunal may reconsider a decision where there has been a

breach of natural justice or procedural fairness in the original decision, referring to *Zutter v British Columbia (Council of Human Rights) (1995) 122 DLR(4th) 665 (BCCA) leave to appeal to SCC refused [1995] S.C.C.A. No. 243.* The Respondent further clarified that the Yukon Commission was exercising its power to reconsider in light of its finding that there had been a breach of natural justice and duty of fairness in its original decision.

The Complainant filed submissions on October 25, 2010. The matter of functus officio was put forward from the perspective of the Supreme Court of Canada in *Chandler v Alberta Association of Architects [1989] 2 S.C.R. 848* at page 861 which stated: "As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error with jurisdiction or because there has been a change of the circumstances. It can only do so if authorized by statute or if there has been a slip or error with the exceptions enunciated in *Paper Machinery Ltd v J.O. Ross Engineering Corp. [(1934) S.C.R. 186* – that is, where there was an error in expressing the manifest intention of the court.]"

Analysis and Decision:

The Supreme Court of Canada in *Chandler v Alberta Association of Architects [1989] 2 S.C.R. 848* ruled that as a general rule, once such a tribunal has reached a final decision, that decision can only be reconsidered if there has been a slip or error with the exceptions enunciated in *Paper Machinery Ltd v J.O. Ross Engineering Corp. [(1934) S.C.R. 186 – that is, where there was an error in expressing the manifest intention of the court.]*

In the case of *Zutter v British Columbia (Council of Human Rights) (1995) 122 DLR(4th) 665 (BCCA) leave to appeal to SCC refused [1995] S.C.C.A. No. 243.* a recognized exception to the principle of functus officio is that even in the absence of express statutory authority, a tribunal may reconsider a decision where there has been a breach of natural justice or procedural fairness in the original decision.
In the case of *Canadian Museum of Civilization Corp. v Public Service Alliance of Canada, Local 70396*, heard in the Federal Court of Ontario May 30, 2006, the court determined that the principle of functus officio applies to administrative tribunals and that a decision cannot be revisited because the tribunal has changed its mind or made a mistake.

In the current Yukon Supreme Court case of *Yukon Human Rights Commission v Government of Yukon, Donna McBee a.k.a Donna Molloy and Yukon Human Rights Board of Adjudication, 2010 YKCA8*, the issue on appeal to the Court of Appeal was whether or not Justice Nation of the Yukon Supreme Court erred in ordering that the complaint be "returned to the Yukon Human Rights Commission" rather than the Board of Adjudication. The Court of Appeal found that Justice Nation had erred in referring the complaint back to the Commission as there is no jurisdiction in the Yukon *Human Rights Act for* such a disposition on appeal. The result is that the

matter remains properly before the Board of Adjudication, as a new hearing, since the earlier decision by the Board of Adjudication was quashed.

The separate issue raised in the Court of Appeal decision was that the Commission has the ability to reconsider a decision to refer a case to the Board. Since this was not before the Court of Appeal, it could therefore be construed as "non-binding comments made by the court on an issue that isn't before the court". Board counsel has referred to this as "obiter dicta", defined in *Black's Law Dictionary* as "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."

It is noteworthy that the Commission argued at appeal that the court erred in not referring the matter back to the Board of Adjudication once the decision had been set aside. The Commission argued that its power under Sections 20 to 23 of the Act does not allow for reconsideration, and that it was functus officio. The Court of Appeal clarified that the Judge had the right to quash the decision, and was not required to order a new hearing because of the permissive use of the word "may" in the Act, and the reading of that paragraph separating the permission to confirm, quash and/or send a matter back to the Board of Adjudication.

Following that logic, in the absence of a referral back to the Board of Adjudication, the decision of the Board was quashed. The Court of Appeal, however, determined that the net effect of the Judge's order to return the matter to the Commission was that he had effectively set aside the decision of the Commission, which was not under review before the court. As a result, the Court of Appeal set aside the paragraph of the order remitting the matter back to the Commission, negating a need for reconsideration of the complaint.

The net effect of setting aside the referral back to the Commission in the McBee case is that the complaint, as it was referred to the Board by the Commission, still exists, and must proceed to a new hearing before a Board of Adjudication unless the Commission or the Complainant withdraws the request of the Board to decide the case. It seems that if the court had referred the matter back to the Board, there would be no option for the withdrawal of the Complaint.

Under Section 7 of the Yukon Human Rights Regulations, the Director of Human Rights, the Complainant, or the Respondent may request the Commission to ask a Board of Adjudication to decide the Complaint. The decision to ask a Board of Adjudication to decide the complaint may be made only by the Commission and shall not be made until after the Commission has given the Complainant and the Respondent at least 30 days' notice of when the Commission will consider whether or not to ask a Board of Adjudication to decide the complaint, and considered any written or oral submission by or on behalf of the Complainant or the Respondent; and if the complaint has been investigated, consider the Director's report about the investigation.

Under usual circumstances, once the Commission has made a determination, the complaint is either dismissed, submitted for settlement discussions, or referred for adjudication, sometimes after settlement discussions have been ordered. Such process presumes that the rules of natural justice and procedural fairness are upheld through the Commission's processes.

Based on the Board's review of the application for reconsideration (which it requested and received on November 2, 2010 from the Respondent), it is clear that the Commission decided to review its decision in light of the allegation that the prior decision breached these standards.

The rules of natural justice and procedural fairness are tantamount to the "laws" of administrative justice. Every matter, procedure and decision by any administrative tribunal is held to these standards on an ongoing basis.

In the opinion of this Board, where a decision is challenged on the grounds of an alleged breach of natural justice or procedural fairness, it is inconceivable that a tribunal could not, and would not, revisit the matter to ensure that the standards were upheld in a decision before moving forward.

It is clear from case law that a re-consideration for reasons that the Commission "had changed its mind, made an error in jurisdiction or because there had been a change in circumstance on the grounds of disagreement" is not allowed. The Commission did not re-consider the Complaint for any of these 'reasons'. Rather, it was a re-consideration based on issues much more fundamental than content issues.

In considering all of the submissions and the case law referred to in each, the Board of Adjudication can now accept that there was a challenge on the basis of a possible breach of natural justice and/or procedural fairness in the original decision of January 2009. In such a circumstance, the Commission could do no less than review the allegations of breach of natural justice and procedural fairness and amend any decision that was improperly made based on any such breaches.

The Board of Adjudication accepts that in these particular circumstances, the vacating of the January 26, 2009 decision by the Commission to refer the matter for adjudication has effectively eliminated the need for the Board of Adjudication to proceed. The matter is closed.

Dated this 16th day of November 2010.

Barbara A. Evans, Chief Adjudicator
Yukon Human Rights Board of Adjudication