

YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

Sarah Baker and Susan Malcolm

Complainants

AND:

Yukon Human Rights Commission

Commission

AND:

Yukon College, Ray Marnoch, Margot Harvey

Respondents

DECISION ON USE OF TRANSCRIPTS/TAPE RECORDING

Background

During the cross-examination of Ms. Margot Neely (Respondent) by the Complainants, she was provided a document, not entered into evidence. Mr. Page (Counsel for the Respondents) immediately objected to the document and advised the Chief Adjudicator that the document was a purported transcript of a tape recording made by one of the Complainants during a meeting on November 3, 2004 between the Respondents Neely and Marnoch and one of the Complainants, Sarah Baker. Mr. Page argued that the Complainants had agreed prior to the hearing or early on in the hearing not to use this document and/or the tape recording.

Mr. Brown, Counsel for the Complainants, advised that he had stated he would not lead these documents in presentation of his case, but because of the extreme differences between the testimony of Ms. Baker and Ms. Neely in regard to the meeting of November 3, 2004, he believed it necessary to present the document to Ms. Neely during his cross-examination.

Ms. Roothman, Counsel for the Commission, agreed it would be proper for the document to be entered and/or used for cross-examination.

The Chief Adjudicator required Parties to provide submissions in regard to:

- a. The purpose of entering the transcripts/tape(s) into evidence;
- b. Potential prejudice; and
- c. Options for minimizing any prejudice.

Submissions were received from the Respondents, the Commission and the Complainants and a reply was received from the Respondents.

Position of the Respondents

1. To introduce the transcripts/tape(s) at this point in the presentation of the case is disruptive and will create additional delays and expense to the proceeding.
2. If it were known that the transcripts/tape(s) were to be used, the Complainant would have been cross-examined by Counsel in regard to the veracity and purpose of the recording.
3. Because the transcripts/tape(s) were not led they cannot be properly used for cross-examination.
4. If the transcripts/tape(s) are to be admitted, the Parties need to agree the transcripts are incomplete and that the Respondent will not confirm or agree to the transcript/tape authenticity.
5. If the Board decides to allow the transcripts/tape(s), the Respondents should be allowed time to examine the original tape(s) for authenticity and continuity and the Board should allow the witness to stand down, recalling the Complainant, Sarah Baker, to be cross-examined on the tape recording.
6. In reply, the Respondents stated they have no objection to the document being put to the witness as notes from a meeting, but not as a transcript.

Position of the Complainants

1. The purpose of having the transcripts/tape(s) submitted into evidence is to clarify or assist to clarify 'what actually happened at the meeting(s)'.
2. The purpose of using the transcripts on cross-examination is to aid Ms. Neely to refresh her memory of the meeting content and tone.
3. The authority to introduce the transcripts/tape(s) is also related to 'prior inconsistent statements' – to provide the transcripts to the witness to prove earlier statement and provide the witness an opportunity to explain 'inconsistent statements'.
4. While the submissions made relate to the meeting of November 3, 2004, it is relevant to note the same issues and arguments may be raised in regard to the recording of the meeting of November 17, 2004 as well.
5. There is no real prejudice or hardship to any Party by having the transcripts/ tape(s) accepted into evidence.

Position of the Commission

1. The only issue before the Chief Adjudicator is whether the witness, Ms. Neely, may be cross-examined on the statements she made during the meeting as reflected in the transcript of the meeting of November 3, 2004, and that Section 11 of the Yukon *Human Rights Regulations* allows the Chief Adjudicator to receive or view any relevant evidence, irrespective of whether that evidence would be admissible in proceedings in court in fact provides the jurisdiction for the Chief Adjudicator to allow the transcripts/tape(s).
2. The purpose of the introduction of the transcripts/tape(s) is to prove that the witness' evidence before the Board is inconsistent with what she said and what happened at the meeting of November 3, 2004.
3. The role of the Board in making its determination regarding prejudice is to ensure the consideration of relevance and value is balanced against the prejudice it may cause.

Decision and Order

Disclosure has been an ongoing issue in hearing this matter. In this instance, however, the existence of the tape recording and the transcripts done by staff at the Yukon Human Rights Commission were part of the Human Rights Investigator's Report and again disclosed to the Respondents when the matter was referred to the Board of Adjudication. Therefore, all Parties were fully informed of the transcripts and tape(s) pertaining to the November 3 and 17 meetings.

The submissions included Mr. Brown's indication that he would not be leading the transcripts/tape(s) as evidence. It has been suggested that this commitment was made either prior to the hearing before the Board of Adjudication or at the very early stages of the hearing. I have no recollection of such commitment, nor do any of my notes from the hearing support that the matter was previously before the Board. Therefore, I conclude that this commitment was made prior to the hearing.

The matter before the Board is a Human Rights Complaint by Sara Baker and Susan Malcolm against Yukon College, Ray Marnoch and Margot Neely. The issue to be determined is whether or not the Respondents discriminated against the Complainants with regard to the prohibited grounds of age, real or perceived mental or physical disability and/or family status by preventing them from finalizing their studies at Yukon College, and further, that the Respondents harassed the Complainants and failed to accommodate them.

Credibility of the evidence and witnesses will be one of the primary factors in decision-making on this matter. As such, the ability afforded Administrative Tribunals, as confirmed in the Yukon *Human Rights Regulations*, is that the Board may require any relevant evidence to be produced so that a fair and reliable decision may be made. Further, the Board members are charged with the responsibility to weigh all evidence and award appropriate weighing to its relevance, reliability and importance to proving or disproving evidence.

I am not convinced that Mr. Brown's statement or commitment to the Respondent to not lead the transcripts/tape(s) is reason for the Board to disallow their use.

It is the Board's role to discern and weigh probative value and credibility of evidence, not the responsibility of the Parties. The probative value of the use of the notes from the meetings is to provide for full cross-examination.

I am not convinced that any Party will be prejudiced unduly over the other by the delay, or potential for additional expenses. In particular, the Board notes that Ms. Neely will be provided an opportunity to respond to the notes in her evidence. The Board is not prepared to rule that the notes constitute a transcript of what occurred at the meetings in question.

I reserve final decision on awarding costs to my final decision on the matter.

In balancing the probative value and prejudicial effect of admitting the notes, and mindful of the Board's legal authority to receive any relevant evidence under Section 11 of the *Y Human Rights Regulations*, the Board Orders the production of the tape(s) to be made to the Board's Secretariat/Registrar not later than January 28, 2010.

1. The Chief Adjudicator will listen to the tape(s);
2. The Complainants will be allowed to use the notes of the meetings in the cross-examination of Ms. Neely only as an aid to jog her memory and to provide Ms. Neely an opportunity to clarify and/or explain any contradiction, should there be such contradiction; and
3. The Board will reserve decision on whether or not the content or contentiousness of the transcripts/tape(s) require the Respondents to be provided time to authenticate the transcripts/tape(s).

Ordered this 23rd day of January 2010 at the City of Whitehorse, Yukon



Barbara A. Evans