COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Yukon v. McBee*,
2010 YKCA 8

Date: 20101005
Docket: 09-YU647

Between:

Government of Yukon

Respondent
(Appellant)

And

Yukon Human Rights Commission

Appellant
(Respondent)

And

**Donna McBee a.k.a. Donna Molloy and
Yukon Human Rights Board of Adjudication**

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: Supreme Court of the Yukon, November 13, 2009
(*Government of Yukon v. McBee, Yukon Human Rights Commission and Yukon Human Rights Board of Adjudication*, 2009 YKSC 73)

Counsel for the Appellant:	C. Harrington
Counsel for the Respondent, Government of Yukon:	P. Csiszar
Counsel for the Respondent, Donna McBee (Molloy):	S. Roothman

Place and Date of Hearing:	Whitehorse, Yukon Territory May 21, 2010
Place and Date of Judgment:	Vancouver, British Columbia October 5, 2010

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The issue before this Court is the extent of a judge's ability to make remedial orders on an appeal from a decision of the Yukon Human Rights Board of Adjudication (the "Board") under the *Human Rights Act*, R.S.Y. 2002, c. 116 (the "*Act*") and regulations.

Background

[2] The complainant in the proceedings below, Ms. Donna McBee, also known as Ms. Donna Molloy (whom I will refer to as Ms. Molloy), was an employee of the Government of Yukon (the "Government"). She worked as a Staff Development Consultant with the Public Service Commission, where her primary responsibility was to arrange training for Government workers.

[3] On 12 January 2005, Ms. Molloy's employment was terminated. As a result of the termination, Ms. Molloy filed a complaint with the Yukon Human Rights Commission (the "Commission") on 19 January 2005. She alleged the Government had contravened the *Act* and discriminated against her with respect to employment on the basis of her marital or family status. She contended she was terminated because of her relationship with her common-law partner, which was known in the community. She sought damages and reinstatement to her previous position.

[4] Following an investigation, the Commission referred the complaint to the Board for a hearing and determination on 16 October 2006. After a hearing in which Ms. Molloy failed to return to the hearing to complete her testimony, the Board issued its decision on 10 December 2008. The majority of the Board found the Government had discriminated against Ms. Molloy with respect to her employment. The majority ordered the Government to conduct a wide-ranging investigation into the issue of spousal abuse in the workplace, but no award was made to Ms. Molloy. The minority would not have found any discrimination.

[5] The Government appealed the matter to the Yukon Supreme Court under s. 28 of the *Act*, seeking to set aside the Board's decision. Ms. Molloy filed a cross-appeal. The Human Rights Commission took no position, appearing only on the issue of jurisdiction and remedy.

[6] The appeal was heard by Madam Justice Nation in November 2009. Her reasons for judgment were issued 13 November 2009. Madam Justice Nation allowed both the appeal and the cross-appeal (indexed as 2009 YKSC 73).

[7] The relevant passages from her reasons are as follows (at paras. 55-59):

> [55] So as a result, the appeal and counter-appeal are allowed, as I have identified a number of errors that amount to errors of law in the sufficiency of the reasons, in the application of the rules of natural justice and procedural issues, and the one jurisdictional issue relating to remedy.
>
> [56] The appellant [Government] suggested that it is in the power of this Court to review the transcripts and substitute the Court's decision or to adopt the decision of the dissent. This is wrong as a remedy. It is not a power of this Court, in the circumstances of this appeal, and specifically offends many of the principles of administrative law.
>
> [57] The remedy for each error, in some circumstances, could be considered separately. For example, if the only error were in relation to remedy, it would be possible to send this matter back to the Board to hear evidence and submissions on remedy. However, the errors of law in relation to the failure of the majority to articulate or consider the weight given to the evidence and the failure to articulate reasons, when considered in circumstances here where there is a dissent, go to the essence of the decision and are substantial. The failure to give reasons in this case is not easily remedied; not only due to the passage of time, but also the pervasiveness of the problem that resulted.
>
> [58] As a result, the decision of the majority should be set aside.
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> [59] It would generally follow that a re-hearing would occur. I am not specifically directing that in this case, as the parties will have to assess their position as a result of this appeal. <u>The matter should return to the Commission, which shall make an assessment of the next steps in the circumstances. If it wishes to pursue the complaint before the Board, a new hearing will need to occur.</u>
>
> [Emphasis added.]

[8] In allowing the appeal and the cross-appeal, Nation J. declined to substitute her own decision on the merits of the complaint. The decision of the majority was set

aside, but the complaint was not sent back to the Board for a re-hearing. Instead, the judge made the following order:

> 1. The appeal and cross-appeal are allowed, and the decision of the Yukon Human Rights Board of Adjudication is set aside;
> 2. The matter is returned to the Yukon Human Rights Commission; and
> 3. The parties shall bear their own costs.

[9] The Commission appeals solely with respect to paragraph 2 of the order remitting the matter back to it. Neither Ms. Molloy nor the Yukon government appealed the decision of Nation J. Consequently, the only issue on this appeal is whether the judge had the authority to remit the complaint to the Commission.

Positions of the Parties

[10] The appellant Commission challenges the jurisdiction and power of the Supreme Court sitting on appeal from the Board under the *Act*. The Commission argues the court does not have the power to make the order it did: it says that the wording of the provision in the *Act* dealing with remedies is initially permissive—in that it allows the court to choose one of a number of remedies—but once the choice is made, the provision limits the form of order.

[11] The Commission also argues that it has no power to re-assess a complaint already heard and determined by the Board. It seeks to uphold the substance of Nation J.'s decision, but seeks to vary the order referring the matter to the Commission for an order directing the Board to conduct a new hearing of the complaint.

[12] The respondent Government disagrees. The Government submits that this order was a practical and equitable result, and made eminent sense in the circumstances. The Government argues the court's inherent jurisdiction allows it to make such an order. In addition, the Commission is not *functus officio*, and it has a statutory obligation to make a decision on how to proceed with the complaint. It says the Board itself is *functus*, because it can only decide a complaint referred to it by the Commission. Where there is no valid, subsisting complaint, there is nothing for

the Board to decide. The Government seeks to have the appeal dismissed with costs.

[13] Ms. Molloy endorses the submission of the Commission with respect to jurisdiction. Ms. Molloy raised other issues in her factum. We informed her at the hearing that we would not consider her other submissions, as she did not appeal the Supreme Court order.

[14] The Board takes no position on this appeal, and filed no submissions.

The Yukon Human Rights Regime

[15] The Yukon *Human Rights Act* is legislation intended to further the objects of individual freedom, equality, dignity, the elimination of discrimination, and affirm the plural and multi-cultural nature of Yukon society (ss. 1-6). It enshrines basic rights and freedoms and forbids discriminatory practices on a wide range of prohibited grounds (ss. 7-15).

[16] The *Act* establishes a dual body structure for the enforcement of the human rights regime: a Commission responsible for the investigation and assessment of complaints of discrimination (ss. 16-21), and a Board responsible for the adjudication of any matter referred to it by the Commission (ss. 22-24).

[17] When a complaint is made to the Commission, the Commission must investigate it (absent one of the exceptions outlined in s. 20(1)). After investigation, the Commission shall (s. 21):

> (a) dismiss the complaint; or
> (b) try to settle the complaint on terms agreed to by the parties; or
> (c) ask a board of adjudication to decide the complaint.

[18] When the Commission refers a matter to the Board, the Chief Adjudicator must establish a board of adjudication (s. 22(4)) to hear the matter. The Board of adjudication is not a permanent tribunal, but rather a type of *ad hoc* panel established when needed.

[19] If the complaint is established, the Board is endowed with a variety of remedial powers (s. 24).

[20] Appeals may be taken from the Board's decisions. Section 28 provides:

> 28 (1) Any party to a proceeding before a board of adjudication may appeal final decisions of the board to the Supreme Court by filing a notice of appeal with the court within 30 days after the order of the board is pronounced.
>
> (2) The procedure for the appeal shall be the same as for an appeal in the Court of Appeal.
>
> (3) An appeal under this section may be made on questions of law and the court may affirm or set aside the order of the board and direct the board to conduct a new hearing.
>
> (4) The only proceeding that may be taken to set aside or vary decisions of the board is the right of appeal given by this Act.

[21] The *Act* binds the Government and its agents and is paramount, absent express legislative declaration (ss. 38-39).

The Court's Remedial Jurisdiction

[22] This appeal requires this Court to address the scope of a court's power to make a remedial order in the hearing of an appeal from the Board, in light of the specific provisions of the *Act*.

[23] Central to this question is the wording of s. 28(3):

> (3) An appeal under this section may be made on questions of law and the court **may** affirm or set aside the order of the board and direct the board to conduct a new hearing. [Emphasis added.]

[24] The appellant Commission submits that the court has a choice of remedy in s. 28(3): A judge may choose to *either* affirm the order of the Board *or* set aside the order of the Board. The Commission argues that, if the court chooses to set aside the order, then it *must also* direct a new hearing. It says the court's powers on appeal are limited to this choice of remedies. The Commission submits the judge below erred when she set aside the order of the Board and failed to also order a new hearing.

[25] The Government argues that the *Act* does not restrict the court in this way. I agree. The court can set aside the decision of the Board without ordering a new hearing. This is based on both the language of the provision and common sense. On the Commission's reading, the court would also have to direct the Board to conduct a new hearing if it affirms the decision. The language used is "affirm or set aside the order of the board and direct the board to conduct a new hearing", not "affirm the order of the board, or set aside the order of the board and direct the board to conduct a new hearing." The "and" underlined above cannot force the court to order a new hearing. Such an interpretation would compel the court to always order a new hearing. That would be a nonsensical reading of the provision. It is open to the court, on appeal from a decision of the Board, to send the matter back for rehearing, but it is not necessary.

[26] In other words, the wording of the statute is permissive. The employment of the word "may" does not force a choice between the options outlined in the statute: See Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 9-15.

[27] The choices outlined by the statute should be read as two options but not as the only possibilities.

[28] There is support for this interpretation in the *Interpretation Act*, R.S.Y. 2002, c. 125, s. 5(3):

> The expression "shall" shall be read as imperative and the expression "may", as permissive and empowering.

[29] See also *Re Baker, Nichols v. Baker* (1890), 44 Ch. D. 262 at 270, in which Cotton L.J. said:

> I think that great misconception is caused by saying that in some cases "may" means "must". It can never mean "must" so long as the English language retains its meaning; but it gives a power and then it may be a question in what cases, where a Judge has a power given him by the word "may" it becomes his duty to exercise it.

[30] Moreover, obliging the court to order a new hearing every time it sets aside a decision of the Board is neither practical nor economical. There may be situations in which a new hearing is required, but the court is free to make such determination in each case on its particular facts.

[31] For these reasons, I conclude that the statute authorized the judge to decline to remit the matter to the Board for a new hearing. Whether the Commission has the capacity to deal with the remittal is the subject of the next issue.

The Ability of the Commission to Deal with the Complaint

[32] The second aspect of the Commission's argument is that its powers are limited by ss. 20-23 of the *Act* and that none of those powers allow it to re-assess a complaint once it has been heard by the Board. Effectively, the Commission argues it is *functus officio* and its jurisdiction is spent.

[33] The Government responds that the Commission has jurisdiction to reconsider its decision, and that, while nothing in the *Act* or regulations prohibits reconsideration, the Commission must fulfil its statutory duties under s. 21. In addition, the Government submits that the Board is *functus*, because there is nothing for it to decide.

[34] Section 21 of the *Act* provides:

> 21 After investigation, the commission shall
>
> (a) dismiss the complaint; or
>
> (b) try to settle the complaint on terms agreed to by the parties; or
>
> (c) ask a board of adjudication to decide the complaint. [Emphasis added.]

[35] Section 22 of the *Act* provides:

> 22 (1) There shall be a panel of adjudicators to be called on as required to adjudicate complaints.
>
> ...
>
> (4) When the commission asks that a complaint be adjudicated, the Chief Adjudicator shall establish a board of adjudication and determine its membership. [Emphasis added.]

[36] I note, parenthetically, that this provision was amended in May 2009. The amendment does not affect the appeal.

[37] In my respectful view, the parties have not asked the right question in terms of the remedial provisions open to Nation J. It is not a question of whether the Board or the Commission was *functus officio* to hear the matter. The decision of the Commission to refer the matter to the Board was never before the Chambers judge. Therefore, the Chambers judge did not have the ability to refer the matter back to the Commission for reconsideration.

[38] The court set aside the Board's decision for a failure to provide adequate reasons and for granting a remedy without hearing submissions. Additionally, the remedy the Board granted exceeded its jurisdiction. Accordingly, it is as though the Board never decided the matter. The complaint, however, still exists and must be addressed in some way. The chambers judge chose not to direct a new hearing. This decision may leave it open to the Commission to reconsider its position on whether the referral was correct based on the reasoning at para. 32 in *Zutter v. British Columbia (Council of Human Rights)* (1995), 122 D.L.R. (4th) 665 (B.C.C.A.), leave to appeal to SCC refused, [1995] S.C.C.A. No. 243:

> The equitable jurisdiction to reconsider was recognized to exist in, and found to have been properly exercised by, the administrative tribunals under consideration in *Re Lornex Mining Corporation Ltd.*, [1976] 5 W.W.R. 554 (B.C.S.C.), in *Re Ombudsman of Ontario and the Minister of Housing* (1979), 103 D.L.R. (3d) 117 (Ont.H.C.), aff'd, (1980), 117 D.L.R. (3d) 613 (Ont.C.A.), and more recently in *Attorney General of Canada v. Grover and Canadian Human Rights Commission* (4 July, 1994), T-1945-93 (F.C.T.D.). In each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute. The judge below applied the first two of these authorities when reaching his conclusion that the Council had jurisdiction to reconsider its decision to discontinue Zutter's complaints in the circumstances of this case, and I am of the view that he was right to do so.

[39] As the matter now stands, Ms. Molloy has a subsisting complaint which has been referred to the Board. The Commission may reconsider its decision to refer this case to the Board. However, if it does not withdraw the referral, the Board will proceed with the hearing and the Commission is then *functus officio*.

Conclusion

[40] In summary, the chambers judge decided to set aside the Board's decision and her decision was not appealed. However, the effect of her order remitting the case back to the Commission is to set aside the decision of the Commission which was not under review before her.

[41] 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 Ms. Molloy) withdraws the request to the Board to decide the case.

[42] I would allow the appeal and set aside paragraph two of the order remitting the matter to the Commission.

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The Honourable Madam Justice Bennett

I Agree:

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The Honourable Madam Justice Saunders

I Agree:

_____
The Honourable Madam Justice Garson