SUPREME COURT OF YUKON

Citation: *Yukon Human Rights Commission* v. *Yukon Human Rights Board of Adjudication, Property Management Agency and Yukon Government,* 2009 YKSC 44

Date: 20090501
Docket No.: 08-AP004
Registry: Whitehorse

In the Matter of the Yukon *Human Rights Act*,
R.S.Y. 2002, c. 116, section 28

And

In the Matter of Appeal of the Decision of the Human Rights Board of Adjudication in the Complaint of *Thomas Molloy* v. *Property Management Agency & Yukon Government*

BETWEEN:

YUKON HUMAN RIGHTS COMMISSION

APPELLANT

AND:

YUKON HUMAN RIGHTS BOARD OF ADJUDICATION,
PROPERTY MANAGEMENT AGENCY and YUKON GOVERNMENT

RESPONDENTS

Before: Mr. Justice H. Groberman

Appearances:

Susan Roothman	Appearing for the Appellant Yukon Human Rights Commission
Peter Csiszar	Appearing for the Respondents Property Management Agency and Yukon Government
Debra Fendrick	Appearing for the Respondent Yukon Human Rights Board of Adjudication

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GROBERMAN J. (Oral): In this appeal, the Yukon Human Rights Commission

seeks to overturn a decision of the Yukon Human Rights Board of Adjudication in the matter of a complaint by Thomas Molloy.

[2] Mr. Molloy complained that he was discriminated against by reason of his criminal record in connection with employment or in the performance of a contract that is offered to the public. The Board dismissed the complaint on a no-evidence motion. The Commission argues that it ought not to have done so.

[3] The statutory provisions relevant to the complaint are ss. 7(i), 9(b) and (e) and 10(b) of the *Human Rights Act,* R.S.Y. 2002, c. 116. Section 7 defines discrimination. It states:

> 7. It is discrimination to treat any individual or group unfavourably on any of the following grounds
>
> …
>
> (i) criminal charges or criminal record ....

[4] Section 9 sets out the forms of discrimination that are prohibited:

> 9. No person shall discriminate
>
> …
>
> (b) in connection with any aspect of employment or application for employment;
>
> …
>
> (e) in the negotiation or performance of any contract that is offered to or for which offers are invited from the public.

[5] Section 10(b) sets out a defence. It states:

> 10. It is not discrimination if treatment is based on

> …
>
> (b) a criminal record or criminal charges relevant to the employment.

[6] The factual background of this case is that Mr. Molloy has a substantial criminal record. It includes convictions for sexual assault and assault. On September 9, 2004, he was convicted of an assault on his common-law wife that occurred on June 23, 2004. The assault occurred at her place of employment with the Yukon Territorial Government. Other serious charges against Mr. Molloy were not proceeded with in exchange for his guilty plea on the assault charge.

[7] In late 2004, the Yukon Government decided to engage a facilitator to provide a number of workshops on team-building and customer service – the "Service Best" program – to groups of employees within the Property Management Agency. This was apparently in order to correct some perceived problems within the Agency. The government engaged Yukon Tourism Education Council ("YTEC"), to provide the facilitation for the sessions and it entered into a memorandum of understanding with YTEC setting out the terms upon which YTEC would provide its services. YTEC in turn contracted with Mr. Molloy to actually facilitate some of the sessions. YTEC was to pay him $750 per day.

[8] Mr. Molloy provided one two-day session on November 29 and 30, 2004. He was facilitating a second session on December 1 and 2. At noon on the second day of that session, the session was cancelled. The cancellation was as a result of complaints by certain participants that they felt uncomfortable attending the sessions with Mr. Molloy.

[9] Plans to present further sessions were abandoned when YTEC was unable to provide a different facilitator. While the evidence is cryptic in some respects, it is accepted that the discomfort of participants was not a result of anything that actually occurred during the sessions, but rather a result of Mr. Molloy's history, including a newspaper article that appeared following his conviction for assault.

[10] Mr. Molloy complained to the Human Rights Commission on May 5, 2005, against YTEC, the Property Management Agency and the Yukon Government. The Commission dismissed the complaint against YTEC but found the complaint against the Yukon Government and the Property Management Agency to be an appropriate one to proceed to the Board of Adjudication. The Property Management Agency is no longer in existence, so the Yukon Government is effectively the only respondent.

[11] The government made application to dismiss the complaint immediately, alleging that the Board lacked jurisdiction, there having been no employment or contractual relationship between it and the complainant. The chief adjudicator, sitting as a one-member panel, dismissed the application, holding that the matter could not be determined without assessing evidence.

[12] The hearing of the complaint proceeded before a three-member panel of the Board over a period of nine days. The Commission called evidence, including evidence from employees or former employees of the Yukon Government and the Property Management Agency. The complainant called no evidence, relying instead on the evidence presented by the Commission. The government then brought a no-evidence

motion.

[13] The Commission objected to the motion on jurisdictional grounds, arguing firstly that the Board of Adjudication would, in effect, be usurping the role of the Commission in making such a finding, and secondly that the Board was *functus officio*, having already rejected the preliminary application to dismiss the case. The Board rejected these arguments and proceeded to hear the no-evidence motion.

[14] The Board was asked to find that there was no evidence on two elements of the complaint. First the government contended that there was no evidence of an employment or contractual relationship between it and the complainant. Second, it argued that there was no evidence that the complainant had been dismissed by reason of his criminal record.

[15] The Board found that the record did not contain any evidence of an employment or contractual relationship between the complainant and the government. It found that the government lacked the necessary degree of control over Mr. Molloy to constitute it an employer.

[16] The Board's reasons on the question of whether Mr. Molloy's criminal record was a ground for the termination of services are somewhat less clear. The Board said that the arguments before it focused on the role of convictions for non-violent crimes in the termination of the sessions. It found that there was no evidence that the government was aware of those crimes. It seems to have been of the view that any convictions for violent crimes were relevant to Mr. Molloy's role as a facilitator or, at least, that there

was an onus on the complainant to show that they were not relevant. There was no evidence establishing a lack of relevance. The Board also found that reliance on s. 9(e) of the *Human Rights Act* was misplaced.

[17] In my view, the Board was correct in finding that it had jurisdiction to hear the no-evidence motion. In hearing such a motion, it was neither usurping the role of the Commission nor dealing with any matter that had already been finally determined. The role of the Commission was not an adjudicative one, even though it had to evaluate the merits of the complaint before it proceeded. In some ways, its role is analogous to that of Crown counsel in the charge approval process. The mere fact that the Commission or Crown decides that there is sufficient evidence to engage the Board of Adjudication or the courts, respectively, does not preclude the relevant adjudicative body from determining, on the basis of the evidence produced before it, that there is no evidence to support an element of the case. That was within the jurisdiction of the Board.

[18] I am also of the opinion that any preliminary decision of the Board did not render the question of whether there was evidence *res judicata*, nor did it render the Board *functus officio*. The Board's preliminary decision was an interlocutory ruling that it was free to reopen. In any event, I find that the issue that it considered on the no-evidence motion was different from the jurisdictional question that it considered as a preliminary matter.

[19] It is, however, my view that the Board erred in finding no evidence on the two issues that it considered. On the question of employment, I am of the opinion that while

the Board of Adjudication might have been correct in holding that there was no evidence that could support a finding that the Board was the complainant's employer, it misdirected itself in law in finding such a relationship necessary in order to found a violation of the *Human Rights Act*.

[20] It is understandable that it did so; it relied in part on human rights jurisprudence from other Canadian jurisdictions. However, in relying on comments from cases in other jurisdictions, it failed to appreciate that the legislation in this territory is quite different from legislation in most other jurisdictions.

[21] In Yukon, s. 9(b) of the *Human Rights Act* says that:

> 9. No person shall discriminate:
>
> …
>
> (b) in connection with any aspect of employment or application for employment;

Elsewhere, the legislation is more specific as to the nature of the relationship that must be involved, often using language prohibiting persons from refusing to employ or discriminating regarding terms or conditions of employment.

[22] The language used in other jurisdictions fairly clearly requires a relationship of employment (or prospective employment) between the complainant and the person alleged to have been guilty of discrimination. The Yukon legislation, in my view, focuses not on that relationship but on the activity engaged in by the complainant. Thus, the correct question here was not whether the respondent employed the complainant but rather whether the complainant was discriminated against in connection with his

employment. The issue, in other words, was not whether the government employed Mr. Molloy but rather, whether he was engaged in employment.

[23] There was some evidence on which it could be found that sufficient control was exercised over Mr. Molloy's operations by YTEC such that Mr. Molloy could properly be regarded as an" employee" for the purposes of the *Human Rights Act*. I note that in that context, a broad definition of employee is appropriate: *Canadian Pacific Ltd.* v. *Canada (Human Rights Commission) (C.A.)*, [1991] 1 F.C. 571. The fact that he was not an employee of the Yukon Government itself would not preclude a complaint against the government under s. 9(b) of the *Human Rights Act*.

[24] On the issue of whether Mr. Molloy was engaged in employment, there was some evidence worthy of consideration and which should have been weighed by the Board; the no-evidence motion on the employment issue ought not to have succeeded.

[25] In view of my conclusion that the no-evidence motion should not have succeeded with respect to the complaint under s. 9(b), it is unnecessary for me to consider whether the complaint properly engaged s. 9(e) of the *Human Rights Act*, though it seems to me that the proposition is doubtful.

[26] The other issue on which the Board found that there was no evidence was the question of whether Mr. Molloy's criminal record was a factor in the discontinuance of his services. It is evident that the tribunal erred by dealing not with that question but with a different question, that being whether any criminal conviction was relevant to his employment. In effect, the Board of Adjudication jumped to a consideration of s. 10(b) of

the *Human Rights Act*. The Board wrongly thought that the onus was on the complainant to negate this defence. As the onus was on the defendant to establish the defence, it was not open to the Board to deal with that issue on a no-evidence motion.

[27] Counsel for the respondent has carefully taken me through the transcript and evidence and suggests that, notwithstanding that the Board may have erred in its reasons for finding no evidence on the criminal record issue, nonetheless there was no evidence, and therefore the order of the Board dismissing the complaint was valid. He cites, in respect of the test for a no-evidence motion, the decision of the British Columbia Supreme Court in *Maughan* v. *University of British Columbia*, 2008 BCSC 14. In that case Cullen J. dealt extensively with the test to be applied on a no-evidence motion. At paragraph 20, he cited Sopinka et al. *The Law of Evidence*, 2d ed. (Toronto: Butterworth's, 1999) for the following proposition:

> 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. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.

[28] He continued, at para. 21, saying:

> I conclude therefore that in considering the no-evidence motion in this case, I am obliged in the case of elements of the torts being advanced which are supported by direct evidence, not to weigh the evidence, but only to consider whether it meets the 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.

[29] Cullen J. also cited from the decision of the British Columbia Supreme Court in *Bingo City Games Inc.* v. *British Columbia Lottery Corp.*, 2004 BCSC 1496. In the course of that judgment at para. 15, Rogers J. said:

> The test is whether the plaintiff has failed to adduce evidence on which a properly instructed jury, acting reasonably, could find for the plaintiff. Acting reasonably means more than simply speculating, and does not mean relying on a mere scintilla of evidence. On the other hand, it is not open to the trial judge to weigh the evidence against contrary evidence, or to assess its reliability.
> [citations omitted]

[30] In the case at bar, the Board of Adjudication had no direct evidence to show that the accused's criminal record was a factor in the discontinuation of his services. The evidence capable of raising any inference that the criminal record was a factor is fairly meagre. It consists of evidence that Mr. Molloy had a criminal record, that the government was aware of it, that it had been well publicized in the months preceding the event and that at least one person who complained about attending the sessions referred to a newspaper article which dealt with Mr. Molloy's convictions.

[31] That limited evidence, in my view, while not strong, would be sufficient to support an inference that the criminal record formed a part of the decision. While far from concurring with Ms. Roothman's suggestion that the only possible inference is that Mr. Molloy's criminal record was a factor, I do conclude that there was some evidence upon

which a reasonable jury, properly instructed, could conclude that it was one factor. Since that conclusion was open to the Board of Adjudication, it ought not to have found that the no-evidence motion could succeed. I therefore find that the Board was in error in allowing the no-evidence motion.

[32] Mr. Csiszar, on behalf of the Yukon Government, argued strongly that even if the no-evidence motion ought not to have succeeded, no harm was done because the case is so weak that the only reasonable outcome would have been that the claim would be dismissed. I am unable to come to that conclusion. Firstly, as I have said, while the evidence was not particularly strong, it was open to the Board to accept the evidence. Even assuming that the Board in its reasons indicates an inclination not to accept that evidence or draw the inference, the Board ought to have put the Government of Yukon to an election as to whether or not it would call evidence. We do not know what choice the Government of Yukon would have made, and so we do not know whether there would have been further evidence from which inferences could be drawn. In the result, I find that the decision of the Board of Adjudication cannot stand and must be vacated.

[33] Ms. Roothman argued, though not strenuously, that the Court ought to substitute its own view for that of the Board of Adjudication. In my view, it would not be procedurally fair to do so, as the Government of Yukon has not been put to its election and may wish to call further evidence. In the result, the matter is remitted to the Yukon Human Rights Board of Adjudication.

[34] Now, as I understand it, the panel that heard the complaint cannot be

reconstituted, so there is no need for me to consider whether a differently constituted panel ought to hear the matter. I do not know whether I should be making any direction as to whether members of the previous panel not sit on this matter. I also do not know whether I should be making a direction that the record, including the transcript of the previous proceeding, should be admissible evidence on the further hearing of the Board of Adjudication. Do counsel have any submissions on that issue or should that be left to the Board?

(PROCEEDINGS AJOURNED)
(PROCEEDINGS RECONVENED)
(SUBMISSIONS BY COUNSEL)

[35] THE COURT: Okay. I think we are all *ad item* on this. The order that I will make is this: the matter is remitted to the Board of Adjudication for adjudication. The panel that hears the matter shall be a differently constituted Board, that is, no member who sat on the previous panel should sit on the panel that hears this matter.

[36] The transcript and such portions of the record as were actually in evidence before the previous panel of the Board of Adjudication will be evidence before the new panel of the Board of Adjudication.

[37] The Board of Adjudication may, in its discretion, consider whether the complainant or the Commission ought to be given the opportunity to adduce further evidence. The Board will, of course, hear any further evidence that the Yukon Government wishes to present.

[38] The parties have agreed that there will be no costs of the appeal. Are there any other provisions or issues that I have not dealt with?

[39] MR. CSISZAR: I would just seek clarification, My Lord, when you say they are not restricted from further evidence. I take it, then, the evidence of those witnesses, the evidence that is in the transcript, the option on the further evidence is if they want -- it would be at the discretion of the new Board of Adjudication whether further evidence would be allowed beyond that? I just want to clarify.

[40] THE COURT: What I intend is this: the Commission and the complainant have closed their case. If the Board of Adjudication considers it appropriate, it may allow them to reopen their case. It may allow them to recall witnesses in its discretion. That is something for the Board to decide on in the exercise of their discretion over their own procedure. The only order that I am making is that the evidence taken thus far will be admissible evidence, including the transcript, and it is open for the Board of Adjudication to hold that the complainant's case and the Commission's case is closed, although it is also open to the Board to allow those cases to be reopened, in its discretion.

_____

GROBERMAN J.