SUPREME COURT OF YUKON

Citation: *Melew v Yukon Human Rights Commission*, 2022 YKSC 41

Date: 20220915
S.C. No. 21-AP015
Registry: Whitehorse

BETWEEN:

YONIS MELEW

PETITIONER

AND

YUKON HUMAN RIGHTS COMMISSION AND YUKON GOVERNMENT

RESPONDENTS

Before Chief Justice S.M. Duncan

Appearing on his own behalf	Yonis Melew
Counsel for the Respondent, Yukon Human Rights Commission	Vida Nelson
Counsel for the Respondent, Government of Yukon	Lesley Banton

REASONS FOR DECISION

Introduction

[1] This is an application by the Yukon Human Rights Commission (the "Commission") for an order to dismiss for delay the petitioner's application for judicial review. The petitioner's application for judicial review is of a decision of the Commission dated October 16, 2020, to dismiss the complaint because there was no reasonable basis in the evidence to refer the complaint to the Yukon Human Rights panel of adjudicators.

[2] The petitioner brought the application for judicial review on March 1, 2022, 16½ months after the Commission's decision. There are no time limits for bringing an application for judicial review under the *Human Rights Act*, RSY 2002, c 116 (the "*Act*") or the *Rules of Court* of the Supreme Court of Yukon.

Issue

[3] The issue is whether there was unreasonable delay in bringing the application for judicial review.

Preliminary Matter

[4] This application was initiated by the Commission. Yukon government counsel was present but made no submissions. They advised they were in agreement with the Commission's submissions.

[5] In many cases such as this the non-decision-making responding party, in this case the Yukon government, initiates the application, rather than the decision-maker. There may be many reasons for this. One reason may be the choice of the decision-maker to maintain impartiality and neutrality. If the decision-maker is unsuccessful in their application to dismiss and the matter at some point is returned to them, they may have harmed their position as a neutral decision-maker.

[6] In this circumstance, however, I note the Commission was made a party by the petitioner. The submissions made by the Commission on the merits of the case were brief and cursory. Their submissions were focussed on procedural arguments around delay and time limits as they appear in the statute (for other matters) and the case law.

[7] The Commission's initiation of this application is unusual, based on the cases provided in which the non-decision-making respondent generally does so. However, the

procedural nature of the application does not preclude the Commission from doing so in this case.

Background

[8] The petitioner filed a complaint with the Commission on March 1, 2018, alleging the Department of Highways and Public Works, Transport Services, Motor Vehicles ("Motor Vehicles Branch") discriminated against him on the basis of ancestry, including colour and race, national origin, ethnic or linguistic background or origin, and marital or family status. The complaint related to the petitioner's obtaining services at the Motor Vehicles Branch.

[9] The Director of the Commission accepted the complaint for investigation on March 8, 2018. The matter was investigated and a report dated February 20, 2020, was provided to the Commission on May 24, 2020, recommending the complaint be dismissed.

[10] The petitioner provided written submissions to the Commission on July 3, 2020, and June 30, 2020, with attachments and also provided oral submissions on August 18, 2020.

[11] The Department of Highways and Public Works provided a written submission dated July 16, 2020, and further submissions in answer to Commission members' questions on September 3, 2020.

[12] Three Commission members reviewed all the material and met during August and September 2020 to discuss the complaint. On October 16, 2020, they advised the petitioner of their decision to dismiss the complaint because there was no reasonable basis in the evidence to refer it to the panel of adjudicators.

[13] The petitioner telephoned the operations officer at the Commission on October 22, 2020, to ask about next steps. He was advised he could initiate an application for judicial review and that he would have to ask the Supreme Court of Yukon about timelines, because the Commission could not tell him.

[14] On October 27, 2020, the Acting Director of the Commission confirmed by email to the petitioner that his next step would be an application for judicial review to the Supreme Court of Yukon. The operations officer forwarded this email to the petitioner on November 3, 2020. On November 4, 2020, the petitioner advised by reply email to the operations officer that he would be taking his case to the Supreme Court of Yukon.

[15] The petitioner emailed the operations officer again on March 31, 2021, to advise her he went to court to file a judicial review.

[16] The Commission was served with the petitioner's application for judicial review on March 1, 2022.

[17] The petitioner seeks an order from the Supreme Court of Yukon that the Commission reconsider its October 16, 2020 decision on the basis that it was procedurally unfair, irrational, implicitly biased, and contrary to the *Canadian Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*"*)*. More specifically the petitioner says:

a. one of the Commissioners was in a conflict of interest because she was a Yukon government employee and a friend of the petitioner's former supervisor at the Department of Health and Social Services;

b. the investigator was inexperienced and biased as demonstrated by her disregard of the testimony of certain witnesses, failure to interview two key witnesses, and coaching of other witnesses through her questioning;

c. racist language by Motor Vehicles Branch employees was directed at the petitioner;

d. the petitioner's privacy was violated, as determined by the Privacy Commissioner; and

e. there were targeted and malicious fact-finding meetings intended to terminate the petitioner's employment.

Legal principles

[18] The leading case in the Yukon is *Heynen v Yukon Territory (Government)*, 2008 YKCA 14 ("*Heynen*"), where the Court of Appeal of Yukon set out the test for unreasonable delay in bringing an application for judicial review at para. 17. Noting first that it depends on the circumstances of the case, the Court of Appeal stated the judge considering the matter "should bear in mind the apparent merits of the case and the prejudice that may flow to either side on the exercise of the discretion (*MacLean v. University of British Columbia Appeal Board* (1993), 87 B.C.L.R. (2d) 238, 109 D.L.R. (4th) 569 (C.A.)." The circumstances of the case "include the nature of the impugned decision and its place in the legislative scheme, the reason for the delay, and the extent of the delay", although this latter factor is not determinative.

[19] Other courts have stated "[j]udicial review is an equitable and discretionary remedy" and there is an obligation on "an applicant to bring the matter before the court without undue delay." (*Green v Ontario (Human Rights Commission)*, 2010 ONSC 2648

("*Green*") at para. 4; *Jeremiah v Ontario (Human Rights Commission)*, 174 ACWS (3d) 459 ("*Jeremiah*") at para. 45 quoting from *OPSEU v Ontario (Ministry of Labour)*, [2001] OLRB Rep 549 (Ont Div Ct)). In those cases, also decided in the absence of any statutory time limit, the courts expressed concern about any delay greater than six months.

[20] The British Columbia Court of Appeal in *Lowe v Diebolt*, 2014 BCCA 280 ("*Lowe*") commented generally that the importance of the proceeding to each party, and to the public in general, must be considered. As well, they repeated the factor noted by the Court of Appeal of Yukon in *Heynen* that the prejudice caused by the delay to the administrative body must be balanced with the potential prejudice in dismissing a meritorious judicial review proceeding.

[21] The British Columbia Court of Appeal also wrote that in deciding delay cases, the framework for administrative decision-making processes in the human rights context and judicial reviews of those decisions is important. "[G]ood public administration requires that administrative decisions be made quickly, and that they have finality: *R. v. Monopolies and Mergers Commission ex p. Argyll Group PLC*, [1986] 2 All ER 257, [1986] EWCA Civ 8; *O'Reilly v. Mackman* (1982), [1983] UKHL 1, [1983] 2 A.C. 237" at para. 59. Also of importance is the statutory scheme, especially where provisions emphasize the need for decisions to be made quickly, the subject matter of the regime, and whether there will be serious negative consequences if delay is allowed.

Positions of the Parties

[22] The Commission states the grounds of the petition are without merit on a cursory review.

[23] It states that the Commission will sustain substantial prejudice because of the effect of the delay on the evidence. Here the Commission refers to a presumptive inability to locate some essential witnesses who have left the Commission, as well as dimming memories or documents that may be no longer available. On the assumption that the judicial review was not being pursued, the Commission allocated resources elsewhere. The Commission says to allow this petition sends an unsupportable message about the acceptable length of time to initiate a judicial review.

[24] The provisions of the *Act* such as s. 28 requiring an appeal of a decision of the board of adjudication within 30 days, and s. 20(2) providing an 18-month time period in which to initiate a complaint about a contravention of the statute support expeditious hearings and decisions of matters coming before it.

[25] Finally, the Commission says the petitioner did not provide reasonable explanations for the delay: he did not provide medical evidence to substantiate his health issues; those health issues in any event did not prevent him from assisting in the preparation of his defence for his criminal proceedings in August 2021; his absence from the country from some time after October 16, 2020 to February 2021 was not long enough to have precluded him from filing his petition earlier than March 2022; he indicated his intention to pursue a judicial review application in October 2020, giving him ample time to seek information from the Supreme Court of Yukon and/or legal advice and indeed he advised the Commission inaccurately he had gone to court to file a judicial review application in March 2021. The Commission referred to the Director's evidence in which he told the petitioner there was no time limit to file a judicial review in the Yukon and he advised the petitioner in March 2022 to seek legal advice or attend at

the Supreme Court of Yukon. He further said he did not tell the petitioner that 18 months to file a judicial review was a reasonable time limit.

[26] The petitioner says he has raised legitimate and substantive issues about the fairness and thoroughness of the Commission's process in his petition and the Court needs to consider whether there is a real possibility of injustice by dismissing his petition.

[27] The petitioner says he will suffer more prejudice than the Commission if his application does not proceed. His dignity, sense of self-worth and sense of responsibility to the Black community will be negatively affected if the petition is dismissed. The Commission's investigation report and accompanying documents and witness statements provide ample material for the judicial review and could also serve to refresh memories if necessary.

[28] The petitioner says the *Act* does not suggest a short timeline is implicit. Time is necessary for matters to be carefully evaluated and decided in accordance with the objectives of the *Act*. He refers to the example of the 18-month time frame in which a complaint is permitted to be made.

[29] The petitioner says he has valid reasons for the delay: employment uncertainty; defending a complex criminal proceeding; deaths in his extended family; travel outside of Canada to Ethiopia; his physical and mental health issues; and his caring for a spouse with mental illness. He says he advised the Commission of his intention to bring a judicial review several times.

[30] Finally, he notes the extent of the delay is not determinative as delays of six, eight, and fifteen years have not precluded judicial reviews. The length of the delay needs to be considered in the context of the explanation and prejudice caused by it.

Analysis

[31] There are no cases in the Yukon to provide guidance on the time limits for judicial reviews of Commission screening decisions as in this case.

[32] In the absence of statutory guidance on time limits for judicial review applications, there are a number of considerations as noted above. Given the discretionary nature of judicial reviews, the Court may decline to provide a remedy where there has been inordinate delay in commencing the judicial review. The following analysis is based on the factors set out by the Court of Appeal for Yukon in *Heynen*.

[33] **Merits of the case**: The purpose of a preliminary review of the merits is to assess the strength of the case and to ascertain whether real injustice will be done by failing to hear the case (*Lowe* at para. 68). The grounds raised by the petitioner do not suggest a grave injustice will occur if they are not pursued.

[34] **a**. The Commission member allegedly in a conflict of interest was not employed by the petitioner's employer department (Health and Social Services). Her friendship with the petitioner's former supervisor is unlikely to create a conflict of interest in a case that is not related to the petitioner's employment, but to his ability to obtain service at the Motor Vehicles Branch. In a small community, with the large number of government employees in the community, to impose this high a standard on a perceived conflict of interest would inhibit the work of the Commission.

[35] **b.** There does not appear to be merit to the concern that the investigator did not interview all necessary witnesses, disregarded some witnesses and questioned witnesses inappropriately. The investigator, an articling student with human rights law experience took almost two years (March 2018-February 2020) to produce a 227-page report. The petitioner raised in his submissions before the Commission his concern about the two witnesses she did not interview. The Commission concluded that interviewing them would not have changed the result because neither of them was a witness to the events in question but were present at Motor Vehicles Branch either before or after those events. I note in one of the cases referred to by the Commission, the court held that investigators are required to be neutral and thorough, *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574. The court in that case also held "[i]t should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted" (para. 57). An investigator's investigation and report are not produced after a formal hearing and there are no rules as there are before a court or a tribunal about how to ask questions.

[36] **c.** The complaint about racist language used by a Motor Vehicles Branch employee was investigated, included as part of the report and addressed by the Commission members in their decision.

[37] **d.** and **e.** The allegations of violation of privacy and fact-finding meetings leading to termination of employment are irrelevant to the complaint. The violation of the petitioner's privacy was confirmed by the Information and Privacy Commissioner in another process, vindicating the petitioner. The fact-finding meetings related to the

termination of employment are not part of this complaint, which related to the services obtained by the petitioner at the Motor Vehicles Branch.

[38] Based on a cursory review of the grounds of the petition, especially in the context of the thorough investigation report and detailed decision by the Commission members, the nature of the substantive issues sought to be argued does not present a strong argument for the petitioner.

[39] **Prejudice to the parties**: The Commission's argument that it is substantially prejudiced by the delay because of the impact on the evidence is not persuasive. Dimming memories and availability of witnesses are generally not relevant in a judicial review such as this. The petitioner is correct that this application is a review of the record of the complaint and its resolution and is unlikely to require *viva voce* or new evidence. The Commission's argument that their resources have been deployed elsewhere is also unpersuasive. The petitioner made the Commission aware in November 2020, March 2021, and March 2022, and perhaps even more often based on the Director's evidence that he met with the petitioner regularly to discuss his complaints, that he intended to bring an application for judicial review. These interactions indicated to the Commission the ongoing possibility of a judicial review from the petitioner.

[40] However, there is prejudice to the Commission in the lack of finality to the process, involving witnesses and incidents starting in April 2017, and a Human Rights proceeding that began in March 2018. As noted by the Court of Appeal in *Lowe*, "good public administration requires that administrative decisions be made quickly, and that they have finality" (para. 59). To allow this petition to be heard after an almost 17-month

delay does not satisfy the requirements for good public administration in the circumstances of this case, explored further below.

[41] It is clear the petitioner believes there is prejudice to him not to have his case heard because the negative effect on his dignity and self-worth, especially as he sees himself as a representative of the Black community. However, I note that the series of incidents about which he complains were thoroughly canvassed after a two-year investigation and a thorough analysis by the Commission members who reviewed the report and requested further information from Motor Vehicles Branch employees. The Commission members acknowledged the existence of systemic racism in Yukon society; acknowledged the petitioner was adversely and unfairly treated by Motor Vehicles Branch employees; but ultimately found that what happened to him was not caused by discrimination on any of the prohibited grounds. In this context, any prejudice to the petitioner is outweighed by the prejudice to the system of administrative decision-making of not having a final decision. Finality is required in part so that any needed corrective measures can be instituted in a timely way to address the immediate problem giving rise to a complaint and to help to prevent future similar problems. If no corrective measures are required, then all persons involved in the complaint process need to be permitted to move forward with their lives.

[42] **Explanation for the delay:** In reviewing the cases provided in which applications were dismissed for delay, many of the courts noted there was no explanation provided for the delay. For example, in *Green*, no explanation was given by the applicant. In *Jeremiah*, the applicant's argument, through her counsel, was that the time limit for the complaint had not crystallized and could not be filed until the ongoing related criminal

matter was resolved. Conversely, in the cases in which the dismissal for delay was denied, the courts accepted the explanation for the delay provided by the petitioner. For example, in *Heynen*, the Court of Appeal accepted the petitioner's attempt to settle the matter by talking to his member of the legislative assembly, among other things, was an appropriate reason for the delay.

[43] Here, I do not find the petitioner's explanations for this 16½ month delay reasonable. He said he had difficulty finding a lawyer to assist him which I do not doubt. But he had a lawyer representing him for his criminal proceedings whom he could have asked for advice or at least obtained assistance with a referral to a lawyer on the question of the time limitation. He was able to participate fully in preparing for his criminal defence between February and August 2021 and was not prevented by any of the reasons he provided for the delay in this case – that is, travel to Ethiopia, his illnesses, his wife's illness, family deaths, or employment issues. He did not provide any medical evidence of his or his wife's illnesses, usually a requirement if this is relied on for the delay. Given his repeated stated intention to the Commission to bring the application for judicial review, it is hard to accept that he could not have brought it earlier, especially given that he was not working between February and June 2021. After his trial in August and September 2021, before he apparently travelled outside of Canada again, based on material he provided to the Court after the hearing, he provided no explanation why he could not have prepared his material, consisting of a two-page petition and three-page affidavit (with exhibits). He also provided no explanation as to why he told the Commission in March 2021 that he had filed the petition at the Supreme Court of Yukon but then filed nothing until March 2022. Most or

all of the same stressors apparently still existed in March 2022 – his health issues and those of his wife, ongoing employment challenges, need to travel to Ethiopia – but he was able to file his petition then. The petitioner acknowledged the lengthy delay himself but requested the Court take into account his difficult personal circumstances.

[44] The petitioner clearly has many stresses and difficulties in his life which are deserving of understanding and sympathy. However, for a matter that appeared to the petitioner to be important to him, he does not provide a reasonable explanation as to why he could not have carved out the necessary time earlier than 16½ months after receiving the Commission's decision to file his petition.

[45] **Length of delay:** Finally, the delay itself is substantial, as acknowledged by the petitioner himself. It is far beyond the rule of thumb of six months set by other courts in the absence of any statutory time line.

[46] This case raises the existence of a gap in the legislation or Rules and I thank the Commission for including the chart in the authorities showing Yukon is the only Canadian jurisdiction without a specified time limit for applications for judicial review. This should be brought to the attention of the Government of Yukon and the Civil Rules Committee of the Supreme Court of Yukon.

Conclusion

[47] The Commission's application to dismiss for delay the petitioner's application for judicial review is granted. There will be no order as to costs.

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DUNCAN C.J.