

T.D. 19/93

Ruling rendered on October 25, 1993

**THE CANADIAN HUMAN RIGHTS ACT**  
R.S.C. (1985), chap. H-6(as amended)

**HUMAN RIGHTS TRIBUNAL**

BETWEEN:

BRIAN TWEEDIE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HENDRIE AND COMPANY LIMITED

Respondent

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RULING OF TRIBUNAL

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**TRIBUNAL:** Keith C. Norton, Chairman

Janet Ellis, Member

Jane Armstrong, Member

**APPEARANCES:**

Michael Horan Counsel for the Respondent

Prakash Diar Counsel for the Commission

**DATE AND LOCATION:** September 10, 1993

**OF HEARING** Toronto, Ontario

**INTRODUCTION:**

At a pre-hearing conference held on July 14, 1993, Respondent counsel advised the Tribunal of his intent to move a preliminary motion requesting a stay of proceedings on the grounds of the delay which has occurred from the date of the incident giving rise to the complaint and from the date of the filing of the complaint and the denial of natural justice and the breach of duty for fairness arising from the same delay.

This hearing was convened on Friday, September 10, 1993 for the sole purpose of hearing evidence and argument on the preliminary motion of the Respondent counsel and not for dealing with the merits of the complaint.

**FACTS IN EVIDENCE:**

The following are the facts relevant to the issue of delay, in chronological order:

### **1. October 25, 1985**

On this date, an incident between Mr. Brian Tweedie and his supervisor, Mr. Guy Joubert, took place during which Mr. Tweedie was informed he was dismissed.

### **2. October 28 or 29, 1985**

Mr. Tweedie attended at his doctor's office regarding a recurring health problem which he testified was bothering him on October 25, and which was the result of an earlier work-related injury. His doctor arranged for him to go on Workers Compensation Board (WCB) disability for a period of three months.

### **3. October 30, 1985**

A hearing was held regarding Tweedie's dismissal at which time the disciplinary action was reduced to a 5 day suspension. This was held in accordance with the provisions of the Collective Agreement between the Respondent and The Canadian Brotherhood of Railway, Transport and General Workers (CBRT) in effect at the time.

Present at this meeting were:

Brian Tweedie - the Complainant

Cecil Cooper - CBRT Shop Steward

Tom Singer - CBRT Shop Steward

Guy Joubert - Tweedie's supervisor

Ernest Cripps - Terminal Manager

George C. Hendrie - Director of Operations

Timothy Harris - Sales Manager and Trainee to succeed Cripps

Also, at this meeting Tweedie advised the Respondent that he was on disability.

4. At some unspecified date after this meeting, Tweedie was placed in a retraining program by his WCB rehabilitation worker. Ultimately, he was not successful in this program.

5. In February of 1986, following his three months on WCB disability, Tweedie sought to return to work with the Respondent. His request was refused until he satisfied the Respondent with respect to reasons for his absence pursuant to the provisions of the Collective Agreement.

#### **6. April 16, 1986**

Tweedie received a registered letter from the head office of the Respondent advising him of a meeting on this date with a WCB Rehabilitation Officer.

Those present at this meeting were:

George C. Hendrie - Director of Operations

Cecil Cooper - CBRT Shop Steward

Tom Singer - CBRT Shop Steward

Brian Tweedie

A WCB Rehabilitation Officer

This meeting was for the purpose of discussing the terms upon which Tweedie could return to work. It was agreed that he would require a medical certificate of fitness to do the job.

Evidence indicates that there was confusion on Tweedie's part as to how this was to be obtained. He thought he was to be called to see the company doctor. The company officials expected him to see a WCB doctor.

7. On an unspecified later date, Tweedie expressed his frustration with the delays in conversation with a Mr. Tilley, the Business Agent for CBRT. He indicated he was going to see a lawyer.

8. Tweedie went to a legal clinic, the North End Legal Services, and spoke to a lawyer named Debbie Kehlar. By way of a letter to the Respondent dated September 15, 1986, his lawyer communicated his desire to return to work.

There is no evidence of any response although George C. Hendrie recalls someone calling indicating Tweedie wanted to return to work.

**9. December 24, 1986**

At some point in time before December 24, 1986 Tweedie's lawyer advised him to go to the Ontario Human Rights Commission (OHRC) in St-Catherines. This he did on December 24, 1986 and made his complaint known.

**10. March 19, 1987**

Almost three months later Tweedie was advised the formal Complaint forms were ready for signature and they were signed on March 19, 1987.

**11. June 5, 1987**

The Respondent filed a reply to the Complaint indicating the Respondent was federally regulated.

**12. August 20, 1987**

The Complainant Tweedie was advised that he was before the wrong Commission by the OHRC and on August 20, 1987 the Complaint was formally withdrawn. He was advised then that his file would be transferred to the Canadian Human Rights Commission (CHRC) office in Toronto.

**13. March 5, 1988**

On this date, the formal CHRC complaint was ready for signature after an unexplained delay of over six months.

**14. September, 1988**

The Respondent filed submissions with the CHRC, submitting the Commission should refuse to entertain the Complaint because the act complained of occurred more than one year before the filing of the Complaint.

**15. September 20, 1988**

On this date, George C. Hendrie made a notation in his file that Guy (Joubert) couldn't find the file on Tweedie.

**16. December 9, 1988**

CHRC advised the Respondent that it had decided to deal with the complaint.



#### **17. 1989**

During this year on an unspecified date, Guy Joubert, Tweedie's former supervisor, was dismissed.

#### **18. September, 1990**

The investigation was commenced by the CHRC during this month. The Respondent's representatives were contacted by the investigating officer on September 27, 1990, more than two years and six months after the Complaint was filed with the CHRC and more than three years after the complaint files were to be transferred by OHRC. Three employees, or former employees, were interviewed - Geo. C. Hendrie, former Director of Operations; Steven Nash, now Financial Officer; Donald Appleyard, driver and local grievance chairman for CBRT.

#### **19. November 1, 1990**

The investigation report was completed.

#### **20. April 1991**

The Canadian Human Rights Commission passed a resolution to appoint a Conciliation Officer to attempt to settle the matter.

21. At some point there was a proposed settlement communicated by letter but it was unacceptable to the Respondent.

**22. January 18, 1993**

Michael G. Horan, counsel for the Respondent objected to the CHRC on the grounds of delay.

**23. May 5, 1993.**

The CHRC advised the Respondent of its decision to request the appointment of a Tribunal.

DECISION:

In its argument seeking a stay of the proceedings on the grounds of delay the respondent relied primarily on the decisions Motorways Direct Transport Ltd. v. Canadian Human Rights Commission, a decision of Federal Court Trial Division, 1991, 16 C.H.R.R.D./459 (Motorways) and Kodellas v. Saskatchewan (Human Rights Commission) (1989) 5 W.W.R. 1 a decision of Saskatchewan Court of Appeal (Kodellas).

Criteria for determining whether or not a delay was an unreasonable delay were set out in Kodellas v. Saskatchewan Human Rights Commission (1989) 10 C.H.R.R. D/6305:

It is my opinion that for the purposes of determining an "unreasonable delay" in the context of s.7 of the Charter in relation to a remedial proceeding under the Code, the factors to consider and weigh are: (1) Whether the delay complained of is prima facie unreasonable, having regard to the

time requirements inherent in such a remedial proceeding; (2) the reason or responsibility for the delay, having regard to the conduct of the complainants (at whose instance the proceedings were initiated) the conduct of the Commission (who by the provisions of the Code has carriage of the proceedings), including the inadequacy of or limitation to its institutional resources, and the conduct of the alleged discriminator, including whether he failed to object or waive any time period; and (3) the prejudice or impairment caused to the alleged discriminator by the delay.

In the present case, the first consideration set out by Chief Justice Bayda in *Kodellas* is straightforward. We do not find as a fact that it is the incident of October 25, 1985 which gives rise to the complaint. It may indeed be that the complainant, Mr. Brian Tweedie, had uncertain status with the respondent company for a lengthy period after that date. It may be that the specific incident which could give rise to a complaint occurred in April 1986 or as late as September 1986. The length of time even from the last date however until the scheduled date for hearing is seven years and two months. This period of delay is *prima facie* unreasonable having regard to the time requirements inherent in such a remedial proceeding and is one of the factors to be weighed in determining whether or not the delay is unreasonable.

For the second consideration, the period of the delay may be broken down for scrutiny into the periods before and after Mr. Tweedie's complaint was filed with the Canadian Human Rights Commission on March 5, 1988.

Mr. Tweedie originally submitted his complaint to the attention of the Ontario Human Rights Commission on December 24, 1986. For some unexplained reason, complaint forms were not available for his signature until March 19, 1987. Prior to filing that claim, Mr. Tweedie attended a meeting with the respondent company to explore returning to work, communicated with his union, and attended a Worker's Compensation Board retraining program. He could not be said to have delayed the pursuit of his claim up to this point.

Certainly Mr. Tweedie erred in filing with the Ontario Commission. It took the Ontario Commission two months after the respondent's submission respecting federal regulation to advise Mr. Tweedie that his file would be transferred and there was then a further unexplained delay of six months until March 1988. We are agreed that because the company was aware by March 1987 that it would be answering a human rights claim that Mr. Tweedie's error and the bureaucratic delays which flowed from that error are not significant to the position of the company. We find as a result that the Canadian Commission did not fail to observe procedural fairness by deciding to deal with the complaint even though the complaint was based on incidents which occurred more than one year before receipt of the complaint.

In the period between March 1988 and the present there was no evidence to suggest that Mr. Tweedie caused any delay.

Hendrie and Company Limited objected to the Commission proceeding in a letter to the Commission dated January 18, 1993. Between September 1988 and January 1993 the company did not pursue the issue of delay with the Commission or take other action concerning the delay. Although we do not find that the company waived any time periods or acquiesced to any proceeding by the Commission we do note that the company was not diligent in objecting to delays after March 1988.

The primary responsibility for the delay of five years however must rest with the Commission.

It was submitted by the Commission that the institutional delay of five years was not unusual given its workload. Further we noted that it was not as if nothing had been going on during the five year delay. To the contrary, the Commission investigated the complaint, appointed a conciliation officer, and communicated a settlement proposal to the company. Except for the year 1989 when it appeared that not much if anything was being done, it seems that the Commission was in constant contact with the respondent but followed its procedures methodically and slowly.

Hendrie and Company Limited pointed to the following in regard to prejudice resulting from the delay:

- 1) some of the documentation concerning the complainant and the incidents is unavailable to the company;
- 2) a potential witness for the company has died;
- 3) some witnesses are difficult to locate and there would be resulting costs to the company in locating them;

4) the witnesses who are available are experiencing fading memory.

In regard to the unavailability of documentation we heard that the Niagara terminal of the company, where Mr. Tweedie worked, closed in 1989 and many of the files containing information about activity at the terminal were placed in a storage trailer. According to the company no one has made any effort in the past four years to look in the trailer to establish whether files pertaining to this case are available. In addition, there is evidence that a law firm was retained in 1987 to represent the company in regard to the complaint to the Ontario Human Rights Commission as well as evidence that the consulting firm of L.A. Liversidge and Associates was hired by the company to review the files and prepare a report concerning the Tweedie matter. There is no evidence that the company pursued avenues open to it to attempt to locate documentation pertinent to its response. The unavailability of documentation is not the result of the delay.

Tom Singer was a union steward for the Niagara terminal at the time of the complainant's employment. Mr. Singer has since died. The company describes Mr. Singer as a witness for the company due to the fact that he was present at the meeting of April 16, 1986 and at other relevant times. According to the company, Mr. Tweedie agreed at this meeting to do something which he then failed to do. The details of what occurred at this meeting may indeed be critical evidence at the hearing of this case but we heard that along with Mr. Singer, there were three other people present including Cecil Cooper. Mr. Cooper was the second steward at the terminal and Mr. Cooper continues to be employed by the company. Mr. Cooper was not called by the company to testify. There was no indication as to what Tom Singer might have said and he was considered by the company to be an important witness because he was a union representative present at crucial meetings. As there was another union representative present at the meetings and Cecil Cooper is still employed by the respondent company, we find that there is not sufficient evidence to support the contention that Mr. Singer's permanent unavailability as a witness is prejudicial to the company.

There is one potential witness whose whereabouts are unknown to the company. He is the representative from the Worker's Compensation Board who was present at the April 1986 meeting. The company does not appear to have made serious efforts to locate this person nor is there evidence that his testimony will be favorable to the company. There is no evidence that the cost of locating him is somehow greater now than it would have been earlier.

In regard to the fading memory of the witnesses who are available we are agreed that memory of events seven years ago will be at best imperfect. Fading memory in and of itself however is not a sufficient factor. There are certainly human beings who experience fading memory after very short periods and the fact of fading memory is a disadvantage to every party concerned.

We find that there was insufficient evidence on any of the points raised by the company to hold that the company's ability to present its case was impaired by the delay.

It was accepted that the complainant has no other possible remedy available to him other than such remedy as might be the outcome of this hearing. Dismissing his complaint prior to considering his complaint, would be harsh and obviously prejudicial to the complainant.

As set out in Kodellas, supra, there would be a possible prejudice to society to dismiss this claim prior to an inquiry:

Another class of persons likely to be affected by an order preventing the inquiry is the community at large. Although not as direct as the complainant's interest, the community's interest is none the less real and strong. There are two aspects to it. The first pertains to the community's interest in the recognition of the inherent dignity of the members of the human family and the furtherance of public policy to discourage and eliminate discrimination.

In accordance with Motorways, supra, the appointment of a tribunal and the hearing of a complaint, must not occur in breach of the duty of fairness. In weighing the factors to be considered in determining whether the prima facie delay was unreasonable we find that the respondent company has failed to show that the other factors to be considered, are significant. The fact of prima facie delay is not in and of itself significant enough to severely prejudice a complainant and possibly prejudice society by the resulting preliminary dismissal of an inquiry.

The delay in this case might result in there being insufficient evidence for a determination of the case on its merits. Further, during the course of the hearing it may appear on further evidence that the complaint should be dismissed because the respondent is suffering significant prejudice in the presentation of its defence.

In the Motorways decision a complaint was filed by the complainant with the Canadian Human Rights Commission in February of 1987 as a result of a termination of employment which took place in December of 1984. A further complaint was filed in July of 1988. On June 13th, 1990, the Commission's investigation was commenced.

At the time that the motion seeking the stay of the proceeding was brought before the Federal Court the matter had yet not been referred to a tribunal.

The application seeking the stay of proceeding in the Motorways proceeding was brought by the respondent prior to the matter having been referred to a tribunal whereas in this instance the respondent waited until the matter had been referred to a tribunal.

In the instant case counsel for the respondent wrote to the Commission in September of 1988 submitting that the Commission should refuse to entertain the complaint as the circumstances giving rise to the complaint had occurred more than one year before the filing of the complaint. It would appear that no argument was raised at that time respecting prejudice to the respondent by reason of delay.

No further objection was received from the respondent until January of 1993 when in correspondence from its solicitors prejudice by reason of the delay was alleged. Counsel for Motorways had objected to the delay in commencing the investigation by letter to the Commission in July 1989.

In our view, the Motorways decision can be distinguished from the instant case on its facts. In the Motorways decision at the date of the motion the investigation had not been completed and no decision had yet been made to initiate an inquiry. In the present case the matter has proceeded to a tribunal.

The consequences in Motorways were considerably more pronounced. In concluding that the respondent would suffer severe prejudice in the event that the matter proceeded, the Court in Motorways refers to complaints going back some twenty years and further indicates that eight different terminal managers supervised the complainant. At the time of the motion only one of the managers could be located by Motorways. In the matter before us it appeared that, although one of the witnesses, Tom Singer, a union steward at the material time, had died, most of the individuals who were involved in the meetings and discussions relevant to the matter in issue would be available to give testimony at the hearing. Moreover, a second union steward, Cecil Cooper, who was present at the material times continued to be in the employ of the company and accordingly would appear to be available to testify. Although we were advised that one of the union stewards had died, we were not advised as to the evidence that such individual would provide nor was there any indication that such evidence would likely have assisted Hendrie and in accordance with the finding of R.v. David A., (1992) 10 O.R. 3rd, 241 C.A. there must be an "air of reality that the missing evidence would in fact and in a material way assist the accused in order to justify a stay of proceedings."

In our view, Hendrie has not demonstrated that it has suffered severe prejudice by reason of the delay.

In the Kodellas decision the Saskatchewan Court of Appeal upheld an Order of the Court of Queen's Bench staying proceedings on the complaints of two individuals against the individual respondent. The complaints proceeded against the corporate respondent and we would submit that this alone is significant in distinguishing this case from the instant case. Although prejudice was found to have been occasioned to the individual respondent by reason of the delay and in particular that his rights to life, liberty and security of the person pursuant to Section 7 of the Charter had been contravened such rights were not applicable to a corporate respondent. Accordingly the complainants were not deprived of their right to have the matter heard.

With respect to the other authorities relied upon by the respondent we find that they too can be distinguished from the instant case. The decision John Douglas and Jonlee Holdings Ltd. v. Saskatchewan Human Rights Commission, Brenda Marcotte and Terrance G. Hymers, unreported decision dated October 25, 1989 (Saskatchewan Queen's Bench) is similar to Kodellas in that the matter was dismissed against the individual respondent, however, the complaint proceeded against the corporate respondent thereby preserving the complainant's rights. In Commercial Union Insurance and Ontario Human Rights Commission (1988) 9 C.H.R.R. D/5140 delay was caused by the reconsideration by the Human Rights Commission of an earlier decision. Such delay led to prejudice to the respondent. In addition, a material witness



had died and it appeared that no other witness would be able to provide testimony and information available from the deceased witness. Again this can be distinguished from the instant case where a number of individuals were involved in the meetings and situations in issue.

The decision of Canadian Airlines International Ltd. v. Canadian Human Rights Commission 93 CLLC 16037 (Federal Court of Canada, Trial Division) considered the Human Rights Commission's failure to advise the complainant of an offer of settlement available from the corporate respondent. Again this is clearly distinguished from the instant case.

In Nisbett v. Manitoba Human Rights Commission 92 CLLC 16376 (Manitoba Court of Queen's Bench) the subject matter of the complaint had already given rise to a criminal proceeding which had proceeded to trial and accordingly the complaint had in some sense been adjudicated.

The intention of the Canadian Human Rights Act is remedial. Its purpose is not to punish wrongdoing or find fault but to prevent and eliminate discrimination. It is accordingly distinct from penal and quasi-penal proceedings. As stated in C.N. v. Canada (Human Rights Commission) (1987 IS.C.R. 1114-1134) "the words of the act (Canadian Human Rights Act) must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact."

We are mindful of the comments of Chairman McCamus in Hyman v. Sutherland Murray Printing et al. (1982), 3 C.H.R.R. D/617 at D/621, "having been assigned, by Order of the Minister of Labour, a statutorily defined task of undertaking an inquiry to ascertain certain facts, the Board of Inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made the fulfilment of its task impossible."

In our view, the respondent has not demonstrated that the task of the Tribunal has been made impossible by reason of the passage of time since the filing of the complaint.

It must be remembered that the complainant, Mr. Tweedie, did not in any manner contribute to the delay in bringing this matter before the Tribunal and as such he should not be deprived of the opportunity to present his case without strong and convincing evidence that the respondent would suffer severe prejudice if this matter proceeds.

In our view, the respondent has not shown severe prejudice. Although the length of time may affect the memory of the respondent's witnesses, a similar effect may be suffered by the witnesses testifying on behalf of the Commission and the complainant. The respondent has been aware of the complaint filed by the complainant since 1988 and by their own evidence indicated their awareness that they were unable to find certain files as early as September 1988. Knowing of the existence of the complaint since that time the respondent has had ample opportunity to search for its files and locate and maintain contact with the various individuals involved. It would appear that certain of the individuals who may have testimony pertinent to this matter remain in the employ of the respondent and accordingly could be available for hearing.

Accordingly, the respondent has not shown prejudice by reason of delay to the extent necessary to justify a stay of the proceedings and its motion is dismissed.

Dated this day of September, 1993.

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Keith C. Norton

Chairman

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Janet Ellis

Member

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Jane Armstrong

Member