

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

- and -

TRACY THORSON

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] Tracy Thorson filed a human rights complaint with Northwest Territories Human Rights Commission in which she alleged that she had been discriminated against by her employer, the Government of the Northwest Territories (“GNWT”). Ms. Thorson claimed that she suffered from a disability during her employment as a Project Officer with the GNWT Department of Public Works and Services and that her employer discriminated against her which ultimately led to her termination. The GNWT conceded that Ms. Thorson had established a *prima facie* case of discrimination but claimed that her termination was because of “innocent absenteeism” which occurred after making efforts to accommodate her to the point of undue hardship.

[2] After a hearing, an adjudicator found that the GNWT had discriminated against Ms. Thorson and that the GNWT had not made sufficient efforts to accommodate her. The adjudicator ordered, along with other remedies, that the GNWT:

[E]nsure all employees, contractors and appointees having supervisory duties and functions receive training relating to the employer’s duty to accommodate persons with disabilities. Implementation of this Order for incumbent supervisors is to

take place within 90 days of this decision; new supervisors are to receive the training within 90 days of their appointment to the public service.

[3] The decision was made on March 8, 2013. The GNWT filed an Originating Notice of Appeal on April 5, 2013. On May 24, 2013, in regular chambers, the GNWT sought a stay of the part of the adjudicator's order relating to the training ordered above.

[4] Ms. Thorson and the Northwest Territories Human Rights Commission took no position on the GNWT's application for a stay.

ANALYSIS

[5] Pursuant to Rule 600(1) of the *Rules of the Supreme Court of the Northwest Territories*, this Court has the authority to make any interim order that is necessary for the purpose of preserving the position of the applicant that is not otherwise provided for or prohibited by an Act.

[6] An interim stay is not provided for or prohibited under the *Human Rights Act*, S.N.W.T. 2002, c. 18 (the "*Act*").

[7] I am not aware of any case where this Court has considered what test should be applicable in determining whether an interim order is necessary to preserve the position of the applicant. Counsel for the GNWT provided a number of cases from other jurisdictions which have considered the appropriate test to be applied in considering whether an order or part of an order from a human rights tribunal should be stayed on an interim basis.

[8] In *Pankiw v. Canada (Canadian Human Rights Commission)*, 2006 FC 601 at para. 7, the Federal Court held that the granting of a stay is discretionary and must be applied in a flexible fashion. The test is a three part one that considers whether (at para. 9):

- a) There is a serious issue of fact and/or law to be tried;
- b) Irreparable harm would result if the stay is not granted; and
- c) The balance of convenience favours granting a stay.

[9] This test has also been applied by the British Columbia Human Rights Tribunal: *Armstrong v. B.C. (Min. of Health)*, 2009 BCHRT 341 at para. 31; *J.J. v. School District No. 43*, 2012 BCHRT 371 at para. 7; *A. v. The University and others (No. 3)*, 2013 BCHRT 45 at para. 10. In *Armstrong, supra* at para. 43, the

tribunal held that a global approach should be taken in which the questions of irreparable harm and the balance of convenience are decided together. In considering these factors, considerations such as “conserving individual and institutional resources, and the avoidance of hearing and deciding a matter when the legal analysis to be used is in question, all form part of the contextual matrix.” *Armstrong, supra* at para. 43; *A., supra* at para. 11.

[10] In considering what constitutes irreparable harm, it has been determined to be “harm which either cannot be quantified in monetary terms or is uncollectible” and “refers to the nature of the harm rather than its magnitude.” *Armstrong, supra* at para. 31-32.

[11] In *Pankiw, supra* at para. 14, the court held that irreparable harm can be found:

[O]nce it is established that, unless the stay of proceedings is granted, irreparable harm of a nature such that it could not be remedied by an award in monetary damages, or otherwise adequately treated if the applicant ultimately succeeded on the underlying application for judicial review.

[12] In applying these principles to the case before the Court, the Appellant claims that there is a serious issue to be tried which is whether the adjudicator had the authority to make an order of this nature. I agree that this is a serious issue to be decided on the appeal.

[13] The authority of the adjudicator upon finding that a complaint has merit is set out in section 62(3) of the *Act*. Section 62(3) of the *Act* permits the adjudicator to make a number of orders, many of which are specific to the individual complainant. The question of whether the adjudicator had the authority to make a more broad order has not been previously decided in this jurisdiction and, at first glance, it is not clear that the adjudicator did have this authority. However, that is the issue to be determined on the appeal after a review of the record and submissions by the parties. At this stage, it is sufficient that the Appellant has raised a serious issue to be decided on the appeal.

[14] The Appellant makes two arguments with respect to whether irreparable harm will result if the adjudicator’s decision is not stayed. The first is that if the Appellant is required to complete the training that was ordered within the 90 days allotted by the adjudicator, that is the main issue on appeal: whether the adjudicator had the authority to require the Appellant to conduct this training. If the stay is not granted, much of the meaning of the appeal will be lost. The

Appellant, if successful, will have done what the adjudicator did not have the authority to order. In order to preserve the position of the Appellant, it is necessary to grant the stay.

[15] The second aspect is that the scope of the order is such that the Appellant is not practically able to complete what is required within the time allotted by the adjudicator. The Affidavit of Sheila Bassi-Kellett, Deputy Minister of Human Resources for the GNWT, states that there are 1246 employees who have supervisory duties and functions. Of those 1246 employees, 629 are located outside of Yellowknife. There are an additional unknown number of persons who are contractors and/or appointees who would have supervisory duties and functions. As of April 12, 2013, 372 employees had participated in “Creating and Maintaining Respectful Workplaces” workshops. As well, 260 managers and supervisors had received training on the duty to accommodate.

[16] Ms. Bassi-Kellett deposes that, in order to provide training to those with supervisory duties and functions, as contemplated in the adjudicator’s order, it would take the Department of Human Resources 10 weeks working on a full-time basis. This would cause significant hardship to the department as other human resources initiatives and programs would have to be put on hold pending the delivery of the training.

[17] The Appellant claims that if successful on an appeal, this is not something than an appellate court could address in damages and that costs are unlikely.

[18] With respect to the balance of convenience, the Appellant points to the contextual matrix referred to in *Pankiw*. The appeal itself is about the authority of the adjudicator to make this type of order. The adjudicator’s decision found that Ms. Thorson had been discriminated against and made other orders with respect to Ms. Thorson which the Appellant has not appealed. Therefore, Ms. Thorson is not prejudiced by the granting of a stay with respect to the finding of discrimination and the relief which was granted on the basis of that finding.

[19] In addition, the Appellant notes, based on Ms. Bassi-Kellett’s affidavit, that the GNWT does have a training program on the duty to accommodate and that training will still occur while the appeal is pending. What will be different is that the Appellant will not have to have all 1246 supervisory employees trained within a 90 day period.

[20] I agree with the arguments of the Appellant on the issues of irreparable harm and the balance of convenience. If the Appellant is successful on appeal but has

conducted the training of 1246 employees in the meantime, the Appellant cannot be compensated for the effort that the Department of Human Resources will have expended with damages or costs. The impracticality of completing this training within the required time period also militates for the granting of a stay. Given that this issue does not relate specifically to Ms. Thorson, her interests will not be prejudiced as the adjudicator's decision on the finding of discrimination and the relief she was granted is not in issue. Overall, I am satisfied that it is necessary to grant the stay in order to preserve the position of the Appellant on the appeal.

[21] In conclusion, there will be an Order staying the adjudicator's decision that the Appellant must provide training to all supervisory staff and management on the duty to accommodate within 90 days of the decision. The stay will be in effect until October 31, 2013 or until the appeal has been decided, whichever occurs first.

[22] If the parties wish to make submissions on costs, they should contact the Registry within 14 days of these reasons being filed and make arrangements to do so. Otherwise, costs will be in the cause.

S.H. Smallwood
J.S.C.

Dated in Yellowknife, NT this
11 day of June, 2013

Counsel for the Appellant:	Sarah Kay
Counsel for the Respondent:	Robert Blaire
Counsel for Human Rights Commissions:	Leah Anaka

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

GOVERNMENT OF THE NORTHWEST
TERRITORIES

Appellant

- and -

TRACY THORSON

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
