

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

- and -

TRACY THORSON

Respondent

MEMORANDUM OF JUDGMENT

1. This is an appeal pursuant to s. 66 of the *Human Rights Act*, S.N.W.T. 2002, c. 18. The Appellant (“GNWT”) submits that two provisions of an order made by an Adjudicator should be quashed.
2. This appeal proceeded in a somewhat unusual fashion. Initially, counsel presented an *ex parte* application with a consent order for the relief sought by the GNWT. I asked them to make submissions on the issues and that was done in chambers on November 27, 2013. I now provide these brief reasons for my decision allowing the appeal.
3. The Respondent, Ms. Thorson, was an employee of the GNWT from 2004 to 2007, when her employment was terminated. In 2008, she filed a complaint with the Northwest Territories Human Rights Commission (“NWT HRC”), in which she alleged that she had been discriminated against by her employer, in that the GNWT had failed to accommodate her disability. A hearing into her complaint was held over a period of many days between May 2010 and July 2012. In March 2013 the Adjudicator before whom the hearing was held delivered his decision, in which he

found that there was discrimination and he made some orders specific to the Respondent. He also ordered the GNWT to cease discrimination against its employees by failing to afford accommodation to those who suffer from a disability. He further ordered (i) that the GNWT ensure that all employees and others who have supervisory duties receive training, within specified time frames, relating to the employer's duty to accommodate persons with disabilities; and (ii) that the GNWT provide a copy of its Accommodation Policy, including all instructions or directives about how it is to be applied in practice, to the NWTHRC for its information, comment and advice (together, the "Orders"). It is the latter two Orders, which may be described as "public interest orders" that are the subject of this appeal.

4. Although the Adjudicator's jurisdiction to make the Orders was one of the grounds of appeal, counsel agreed not to pursue that issue and so I will make no further comment about it, nor are these reasons or the order resulting from them to be construed as determining that the Adjudicator had jurisdiction to make the Orders.

5. Instead, the sole issue argued before me and on which I was asked to grant the appeal is whether the Adjudicator erred by failing to provide an opportunity to the Appellant to make submissions and lead evidence as to its current practices, policies and approach to the duty to accommodate employees with disabilities.

6. Although the NWTHRC was not a party to the hearing before the Adjudicator, it was added as a party to the appeal pursuant to a consent order granted May 10, 2013. By way of another consent order granted October 28, 2013, the Union of Northern Workers was also added as a party.

7. The Appellant, the Respondent and the Union of Northern Workers made what amounts to a joint submission about error by the Adjudicator. Although the NWTHRC took no position on the allegation of error, its counsel indicated that it would not stand in the way of the relief sought by the other parties.

8. The allegation of error rests on the following. At the conclusion of the hearing before the Adjudicator, counsel for the Respondent suggested that the Adjudicator should require the GNWT to review its policy on accommodation of employees with disabilities. It was pointed out to the Adjudicator that the evidence indicated that at the time of the events that were the subject of the complaint, the GNWT had no formal policy. Counsel who appeared for the GNWT at the hearing stated that since the events had occurred, the GNWT had developed a formal Duty to Accommodate

policy, had hired a Duty to Accommodate Advisor and had funding to hire more such advisors. Counsel for the GNWT requested that if the Adjudicator was going to consider making an order directed at the GNWT's policy or steps the GNWT should take, the GNWT be permitted to present evidence about what it had done since the Respondent's employment was terminated. Counsel suggested that the Adjudicator might be satisfied with the steps that had already been taken.

9. Counsel for the Respondent essentially agreed with the position taken by the GNWT and suggested that hearing evidence and further submissions might assist the Adjudicator in determining whether an order relating to policy or steps to be taken was necessary at all, or, if deemed necessary, how extensive it should be.

10. At the hearing, the Adjudicator did not commit to hearing further submissions or evidence, but he did allude to the possibility of having further communications with counsel on some of the issues. In the end, however, the Adjudicator did not provide an opportunity for further submissions on the GNWT's policy or any other steps taken by the GNWT to address accommodation issues.

11. In his reasons for decision, the Adjudicator made the following comments before making the Orders complained of:

[GNWT] says that it now has an Accommodation Policy in place. Having a policy is an excellent idea. However I am also concerned about how the policy is and will be applied. ... (at paragraph 150)

This case hilites (*sic*) the terrible consequences of having supervisory staff and management who are unfamiliar with their obligations toward employees who have a disability. ... (at paragraph 152)

12. The Adjudicator then went on to make the two Orders that are the subject of this appeal. What they require the GNWT to do are exactly the sort of things that the GNWT had wanted to present further evidence about.

13. Although none of the parties oppose the GNWT's request that the Orders be quashed, it is still incumbent on the Court to determine whether there is merit to the appeal. The first issue to be addressed is the standard of review.

14. The GNWT submits, and no one suggested otherwise, that the standard of review to be applied to human rights matters has already been determined by this

Court. It has held that although there should be some deference shown to an adjudicator on procedural issues, that deference is owed only so long as the procedural choices comply with the duty of fairness: *Aurora College v. Niziol*, 2007 NWTSC 34; *Aurora College v. Niziol*, 2010 NWTSC 87. I agree that this amounts to a standard of correctness.

15. For purposes of this appeal, the GNWT referred to, without objection from the other parties, an affidavit in which the deponent outlines various initiatives undertaken by the GNWT to educate employees about the importance of sensitivity to persons with disabilities, enhance awareness of disabilities and provide for the accommodation of same. The initiatives were developed over the time period 2009 to 2012 and they include two key policies, the “Harassment Free & Respectful Workplace Policy and Guidelines” and the “Duty to Accommodate Injury and Disability Policy”, as well as the establishment of the position of “Duty to Accommodate Advisor”. The affidavit also describes workshops delivered to a number of GNWT employees on the duty to accommodate.

16. Having reviewed the affidavit, I concur with the submission by the GNWT that the information contained therein would have been helpful to the Adjudicator and would likely have had an impact on his view of the need for an order that the GNWT review its policy and that its employees receive training. It would almost certainly have had an impact on the time periods specified for the delivery of that training. It would also likely have had an impact on the Adjudicator’s view of the need for an order that the GNWT deliver its policy to the NWTBRC for its review.

17. In the circumstances I find that there was a breach of procedural fairness arising from the Adjudicator’s failure to provide the opportunity that counsel requested to present evidence and submissions on this aspect of the remedy.

18. At the beginning of these reasons I referred to the two Orders as public interest orders. Counsel made submissions about whether the public interest concerns that gave rise to the Orders will be served if they are reversed. I am persuaded by the submission that the affidavit that sets out the steps that have been taken by the GNWT now provides the Respondent, the Union of Northern Workers and the NWTBRC with adequate information about what the GNWT is doing to ensure that the rights of employees with disabilities are respected. It is also worth noting that under s. 29(4) of the *Human Rights Act*, the NWTBRC itself can initiate a complaint if it sees fit. Further, now that the NWTBRC has a copy of the GNWT’s policies

and information about training, it is at liberty to provide the GNWT with comments. And finally, the GNWT is still subject to the Adjudicator's order that it cease failing to afford accommodation to employees with disabilities. The public interest is served by all of these circumstances and the Orders under appeal are not required.

19. The final question is what order I should make and whether this matter should be remitted back to the Adjudicator. As counsel pointed out, this Court sitting on an appeal under s. 66(2) of the *Human Rights Act* may make an order that affirms, reverses or modifies the order of an adjudicator. Given that none of the parties asked that the matter be remitted to the Adjudicator in this case and given that all parties are satisfied with the information now provided by the GNWT about its initiatives to accommodate employees who have disabilities, I see no merit in prolonging this matter, which has already taken several years since the events at issue occurred. Accordingly, I allow the appeal and order that the two Orders referred to above are reversed (or quashed, which amounts to the same thing). The draft consent order that was originally provided by counsel will issue, to be dated the same date as this Memorandum of Judgment.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
10th day of January 2014

Counsel for the Appellant: Sarah A.E. Kay

Counsel for the Respondent and for the
Union of Northern Workers: J. Robert W. Blair

Counsel for the Northwest Territories
Human Rights Commission: Ayla K. Akgungor

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