

HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: A Complaint by Wendy Kilbride against A+ Financial Services Ltd. alleging a breach of s. 19 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended.

Panel: Peter Sim, adjudicator

Appearances:

Wendy Kilbride, in person

For the respondent: Mr. Sidney Soronow

For the Commission: Ms. Isha Khan

Interim Decision

[1] This is a complaint by Wendy Kilbride, who alleges that she was subject to sexual harassment by the Wayne McConnell, the president of the Respondent.

[2] The following is an interim decision deals with a request for an adjournment by the Respondent and two preliminary requests by the Commission.

Request for Adjournment

[3] The Respondent has requested an adjournment of the hearing on the grounds that Mr. McConnell is not medically fit to participate in the hearing at this time. The Commission opposes the adjournment on the grounds that there has already been undue delay in setting the hearing date.

[4] I was designated as an adjudicator in this matter on May 31, 2012. In July, I was contacted by Isha Khan, counsel for the commission, to discuss the setting of a hearing date. I indicated that I would be available in September and asked that she contact

Sidney Soronow, who was then acting for the Respondent, to confirm his availability for the hearing dates.

[5] Mr. Soronow advised that he would not be representing the Respondent at the hearing and requested that I postpone setting the hearing date so that the Respondent could seek other counsel. In August, the Respondent consulted one lawyer, who declined to act, and then, in September, retained a second lawyer. This lawyer advised the Commission and myself that he intended to bring an application for judicial review of the decision of the Commission to appoint an adjudicator. I deferred setting a hearing date for several weeks to allow time for this application to be brought. No application for judicial review was brought and in October, 2012, this second lawyer advised he was no longer acting. I then set a hearing date to commence on December 11, 2012.

[6] On December 6, 2012 Mr. Soronow, who acts as corporate counsel to the respondent, sent me an e-mail requesting an adjournment of the hearing on the grounds that Mr. McConnell was not medically fit to appear and represent the Respondent. I asked Ms. Khan for her response, and she advised that the Commission was not prepared to consent to an adjournment. After a number of email exchanges between Ms. Khan, Mr. Soronow and myself, I concluded that the request for the adjournment was contentious and would have to be dealt with at the public hearing.

[7] Mr. Soronow has produced a report from Dr. Jeremy Gordon, the psychiatrist who is treating Mr. McConnell to myself and Ms. Khan. Out of consideration for Mr. McConnell's privacy, I agreed that the report did not have to be entered as an exhibit and I will simply summarize enough of it to explain the basis for this decision.

[8] Dr. Gordon states that Mr. McConnell has been under treatment for a chronic mental health disorder since 2006. Since September of 2012, Dr. Gordon notes that Mr. McConnell has experienced a marked deterioration in his condition. Dr. Gordon conducted a clinical assessment of Mr. McConnell on December 6, 2012 and noted symptoms of moderately severe levels of anxiety and depression. It was Dr. Gordon's

opinion that Mr. McConnell was unfit to participate adequately in the human rights commission proceedings.

[9] Ms. Khan raised an objection that the report of Dr. Gordon was not tendered in accordance with Section 50 of *The Evidence Act* of Manitoba which requires that medical reports be served at least 14 days before the date of a hearing. I give no weight to this objection. Section 39(2) of *The Human Rights Code* provides that an adjudicator may receive evidence that the adjudicator considers relevant and appropriate without regard to the rules of evidence that would apply in court.

[10] Mr. Soronow argued that it would be unjust to proceed with the hearing at a time when Mr. McConnell was operating under diminished capacity and was not able to instruction counsel, let alone have carriage of the proceedings. He said that a hearing under *The Human Rights Code* required the appearance and reality of justice and this meant that the Respondent must be able to challenge the evidence of the applicant and present its own case.

[11] He explained that it was consistent with the impact of Mr. McConnell's disability that it prevented him from realizing that he had a problem, and therefore he did not raise the issue at an earlier date. He also argued that a person suffering from a mental disability is entitled to the same consideration as a person suffering from a physical illness.

[12] Ms. Kahn did not take issue with the substance of Dr. Gordon's report but she did point out that Dr. Gordon refers to the ability of Mr. McConnell to represent the Respondent at the hearing without the benefit of counsel. The report does not specifically address whether he is able to give evidence as a witness.

[13] She also argued that there has been substantial delay in setting a hearing date for the case. The Complainant will be prejudiced by an adjournment as she is in the process of moving away from Manitoba and will have to return for a new hearing.

[14] She also pointed out that the medical report refers to an exacerbation of Mr. McConnell's symptoms around the time the hearing was scheduled. If this happens

every time a hearing is scheduled, she argued, it will never be possible to proceed with the case.

[15] There are two competing principles here. Subsection 39(1) of *The Human Rights Code* requires that an adjudicator convene and complete the hearing without undue delay. On the other hand Subsection 39(4) requires that the adjudicator give every party attending the hearing a full opportunity to present evidence and make submissions.

[16] In this case, I have concluded that the prejudice to the Respondent in requiring the hearing to proceed at a time when Mr. McConnell is clearly unable to participate outweighs any prejudice to the Complainant from adjournment. Mental illness can be as disabling as physical illness and a person who suffers from mental illness is entitled to reasonable accommodation for his condition.

[17] However, there are a number of differences between mental and physical illness which are relevant in this matter.

[18] One is that a mental illness may prevent a person from realizing how the illness is affecting his behaviour or from taking action to deal with the problems created by the illness until a crisis point is reached. I accept Mr. Soronow's submission that this is the reason that Mr. McConnell has not been able to respond adequately to requests to move forward with the adjudication.

[19] On the other hand, there is often a large gray area between the symptoms of clinical anxiety and depression and the ordinary response to stressful circumstances, such as involvement in legal proceeding. I share Ms. Khan's concern that the next time a hearing date is set Mr. McConnell will experience worsening symptoms of anxiety and depression and will seek a further adjournment.

[20] The answer to these competing concerns is that Mr. McConnell has now reached a crisis point and he needs to find a way to move past it. Mr. McConnell is now aware of his mental condition and the impact it has had on his ability to prepare for this hearing. He should also be aware that this hearing will eventually proceed even if he is

not prepared to take part. Mr. Soronow, Dr. Gordon and other trusted employees of the Respondent are also aware of the problem and available to offer support. As the next hearing date approaches, I expect that Mr. McConnell will take appropriate steps to prepare himself mentally for the hearing.

[21] One of the steps he should take is retaining counsel to represent the Respondent. This would be in the interests of both parties. In a case involving allegations of sexual harassment it is highly undesirable that the party alleged to have committed the harassment cross-examine the complainant. I have been very generous in allowing the Respondent time to retain counsel in an effort to avoid this situation.

[22] I do not have the jurisdiction to order the Respondent to retain counsel. However, I can state that if the Respondent does not retain counsel, I will not be prepared to grant further adjournments on the grounds that Mr. McConnell is not mentally fit to represent the Respondent.

[23] Ms. Khan suggested that the hearing be divided, with the Commission presenting its evidence now and the Respondent at some time in future. This is not a reasonable suggestion. The right to a full and fair hearing includes the right to cross-examine adverse witnesses. Mr. McConnell is not fit to conduct the cross-examination himself. Mr. Soronow indicated that he is not litigation counsel and that his retainer is limited to this adjournment application. Furthermore, he has not had a reasonable opportunity to prepare for a cross-examination.

[24] I therefore order that the hearing be adjourned to March 11 12, 13, 14 and 15, 2013 to at a time and place to be determined.

[25] There are two additional preliminary matters before me.

Request to add Wayne McConnell as a Party

[26] The first is a motion by the Commission and Ms. Kilbride to add Mr. McConnell, in his personal capacity, as a respondent. This motion was first made, in writing on October 18, 2012, which was just after the Respondent dismissed its lawyer. I will deal

with this motion at the start of the hearing. There is no urgency to this motion and Mr. McConnell's medical condition has prevented him from responding to it. However, I will indicate that if I do grant the motion to add Mr. McConnell as a party, I will then proceed immediately to the main hearing. Mr. McConnell has had adequate notice that he should prepare for the hearing bearing in mind the possibility that he may be added in his personal capacity.

Order for Production of Documents

[27] The other preliminary issue is an order for production of documents which I made under Section 38 of the code. The order was made on the request of the Commission and the order states that if the Respondent had any objections to the order it could raise them with in in writing and I would deal with them at the start of the hearing.

[28] Mr. Soronow, on behalf of the respondent, raised certain objections to the production order and Ms. Khan responded. The arguments raise questions which will require further consideration. It is not necessary to decide this issue today, but it should be resolved before the continuation of the hearing in March, 2013.

[29] I have therefore directed that the Respondent may submit a written argument on this issue on or before January 31, 2013. The Commission and the Complainant may submit arguments in reply within two weeks after receiving the Respondent's submission. I will deliver a written decision on this point well in advance of the continuation date for the hearing.

Date

Peter Sim
Barrister and Solicitor
Board of Adjudication
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