IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and -

IN THE MATTER OF: Board File No. 51000-30-H06-0266

BETWEEN:

Roger LeFrense
(Complainant)

- and -

IBM Canada Ltd. and Mark Gallant
(Respondents)

- and -

The Nova Scotia Human Rights Commission
(NSHRC)

Board of Inquiry: J. Walter Thompson, Q.C.

Heard: August 13, 2013

Counsel: Derek Vallis, for the Complainant

Brian Johnston, Q.C. and Michelle Black, for the Respondents

Lisa Teryl, for the NS Human Rights Commission

Opinion on Preliminary Motion

On October 20, 2006, the complainant, Roger LeFrense, filed an allegation that his employer, IBM Canada Ltd., and his superior at IBM, Mark Gallant, had discriminated against him as an employee because of his physical disability contrary to the *Human Rights Act*, Stats. N.S. 1989, c. 214 as amended. IBM and Mr. Gallant have applied to me as the Board of Inquiry appointed under the Act for a stay of proceedings due to the time that has passed since the

complaint was filed and the prejudice that the delay causes to the proper preparation and presentation of their response.

I shall, in this opinion, refer to IBM and Mr. Gallant collectively as IBM, except where I think it important to make specific reference to Mr. Gallant. I shall refer to The Nova Scotia Human Rights Commission as the Commission.

Ms. Teryl at the hearing of IBM's application acknowledged there had been a long delay and there was really no reasons for it. She apologized to IBM and Mr. Gallant on behalf of the Commission and explained that the Commission's procedures had been reformed.

Thus, I accept that the delay was inordinate and undue. Over six years passed from the time of the complaint until my appointment late in the fall of 2012. Most seriously, IBM, having promptly delivered a comprehensive reply to the complaint, and received Mr. LeFrense's rebuttal in December, 2006, heard nothing further of substance from the Commission until March 31, 2011.

I accept that IBM responded promptly and comprehensively to inquiries of the Commission, and fault for the delay lies with the Commission.

There is no evidence that Mr. LeFrense contributed significantly to the delay, except perhaps with his retention of his own counsel when first attempts were made to set the matter down for a hearing early this year. That delay would not compound the prejudice.

The Supreme Court of Canada has ruled on the standard to be applied in considering a stay because of delay. *Blencoe v. British Columbia (Human Rights Commission*), [2000] SCC 44. Our own appeal court in *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission,* 2006 NSCA 63 has formulated the result in *Blencoe* this way;

> [54] However, as the Court noted, delay in an of itself will not be a sufficient basis to strike a proceeding. In order for an administrative hearing to be quashed on the basis of administrative delay, there must be either real and significant prejudice arising out of the inordinate delay, or, proof that the delay and its

> attendant circumstances are such as would bring the human rights scheme into disrepute, thereby constituting an abuse of process...
>
> [55] Therefore, the test to be applied is whether the delay compromised the fairness of the proceedings, and if not, whether the delay was serous enough to amount to an abuse of process. In this case the appellants raise the both branches of the test...

Whether there was "an abuse of process" or "real and significant prejudice" "compromising the fairness of the proceeding" will, in my view, depend on the allegations of fact and the applicable law facing IBM.

The Complaint

Mr. LeFrense alleges that he has been discriminated against on the basis of disability. A disability is defined:

> (1) "physical disability or mental disability" means an actual or perceived
>
> (i) loss or abnormality of psychological, physiological or anatomical structure or function,
>
> (ii) restriction or lack of ability to perform an activity,
>
> (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,
>
> (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (v) condition of being mentally impaired,

(vi) mental disorder, or

(vii) dependency on drugs or alcohol;

The Act goes on to prohibit discrimination in respect for employment because of a physical disability.

> Prohibition of discrimination
>
> 5 (1) No person shall in respect of
>
> (d) employment; ...
>
> discriminate against an individual or class of individuals on account of ....
>
> (o) physical disability or mental disability;

There are exceptions which IBM may qualify for:

> Exceptions
>
> 6 Subsection (1) of Section 5 does not apply ....
>
> (c) in respect of employment, ...
>
> (e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;
>
> (f) where a denial, refusal or other form of alleged discrimination is
>
> (i) based upon a bona fide qualification,
>
> (ia) based upon a bona fide occupational requirement; or
>
> (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

Mr. LeFrense worked Monday to Friday 9:00 to 5:00 with an on-call shift one night every second week and every eighth weekend. He would be on

call for 24 hours and would be responsible to cover a territory from Truro to Yarmouth. He says he suffered from sleep apnea. His biggest concern was falling asleep while driving. He sought an accommodation from IBM significantly reducing or eliminating his on-call responsibilities. IBM accommodated him by placing him in another position with regular hours, but at a lower rate of pay. This end of IBM's business was later taken over by another firm and Mr. LeFresne left IBM.

IBM, within the month following Mr. LeFrense's complaint in October, 2006, filed a comprehensive reply saying, succinctly in its own words from later correspondence, "The Complainant suffered from medical conditions that posed ongoing permanent medical restrictions that prevented him from performing the role of a Band 4 SSR."

On March 31, 2011, the Human Rights Officer then working the file wrote IBM asking:

> What examination was done by the respondent in evaluating how the complainant's duties in his position prior to his leave (Band 4 SSR) could or could not be adjusted to accommodate his medical requirements? Please provide any internal memos or correspondence on this study.

In his submission to the actual Commission on the issue of whether Mr. LeFrense's complaint should be sent forward for a hearing, the Officer wrote:

> Despite these assertions, and the assertion that all reasonable efforts were made, the Respondent has provided no evidence to suggest that such is the case. No study of possible alternative scheduling has been produced, no discussion with the Complainant of how he might be able to complete his assigned work with the available time was held. There is no doubt that an alternate schedule for the Complainant would place a hardship upon the Respondent. Simple hardship is not sufficient - the Supreme Court of Canada's decision is clear - the fact that it must be accommodation to the point of "undue hardship" acknowledges there will be

some hardship.

I take it then, that the Commission's expectation is that IBM should explain why it could not adapt its employee schedules to accommodate Mr. LeFrense.

IBM's Response

While I am not sure I fully understand what IBM's defence is, and indeed I acknowledge that it may evolve even through the hearing, I understand that IBM contests whether Mr. LeFrense suffered from a disability within the meaning of the *Human Rights Act.* The *Act* has a comprehensive definition, and for the purposes of this opinion, I think it is sufficient to say that the issue will be whether Mr. LeFrense's claimed disability fits within the definition.

I take it that IBM will also argue that Mr. LeFrense's disability, if established, "reasonably precludes performance" of the job, or its decision that Mr. LeFrense could not fulfill the job's responsibilities is "based upon a bona fide qualification, or a bona fide occupational requirement" within the meaning of the law. This will entail, as I understand it, an analysis of a three step test stipulated by the Supreme Court of Canada in *British Columbia (Public Service Employment Relations Commission) v. BCGSEU* 1999 CanLII 652 (SCC) (aka "Meiorin"):

> 1. that the employer adopted the standard for a purpose rationally connected to performance of the job
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of the that legitimate work-related purpose.

Then, an employer has a duty to "take reasonable measures short of undue hardship" to accommodate a disability. (*Central Okanagan School District No.23 v. Renaud* 1992 CanLii 81 (SCC). I take it too, that IBM will argue that it did accommodate Mr. LeFrense through an extended disability period

and then by finding a position for him which he could work notwithstanding his disability and that to do more would have caused "undue hardship."

A proceeding may be stayed because of delay for two reasons; the delay compromised the fairness of the proceedings or the delay constituted an abuse of process.

Delay as Abuse of Process

Justice Bastarache described the grounds for a stay for abuse of process as follows:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances where the fairness of the hearing has not been compromised. Where inordinate delay has caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing: there may be cases of abuse of process for other than evidentiary reasons brought about by delay.

This was echoed in our Court of Appeal's opinion in *Construction Safety,* as quoted above;

> ....or, proof that the delay and its attendant circumstances are such as would bring the human rights scheme into disrepute, thereby constituting an abuse of process...

There is no evidence that the Commission acted in bad faith by its delay of proceedings. The Commission delayed, and that is truly unfortunate, but these kinds of delays have not been uncommon either here or, it appears from the number of decisions, elsewhere.

The parties now disagree on the very nature of what discrimination is under the Act and about whether IBM, short of undue hardship, have or should

have altered Mr. LeFrense's work schedule to accommodate him. No one wants, of course, to have it found that they discriminated, but I see any risk to the reputation of IBM or of Mr. Gallant to be relatively small. IBM's discrimination, if it exists, would be, insofar as I see the materials presented, relative to an allegation of race or sexual orientation for example, marginal. There is nothing to suggest or indeed any allegation, so far, that Mr. Gallant had any axe to grind in dealing with Mr. LeFrense or acted maliciously. I cannot conclude that the Commission has acted in such a way or that IBM has suffered through the delay, or that the delay is such as to bring the process into disrepute. I do not find an abuse of process.

Fairness of the Proceedings

This second issue is more complicated. Did the delay, notwithstanding that it was not abusive, create a real and significant prejudice in IBM's ability to show, eight years later, that it had addressed the "three steps" and that it would have inflicted an undue hardship upon it to adapt Mr. LeFrense's work schedule.

There seems to me to be two aspects to the impact of delay. One aspect is the nature of Mr. LeFrense's disability itself and IBM's accommodation of it. The other is the ability of IBM to properly respond to the allegation that it should have been able to alter employee schedules to enable Mr. LeFresne to reduce or eliminate week end and night time work.

Mr. LeFrense sought accommodation in June, 2004 due to his sleep apnea. He went on disability, had back surgery, and then sought to return in June, 2005. In June 2006, after extended negotiations about his return, IBM offered a position with lower pay, but without IBM's on-call and weekend stipulations of his former job. I believe I am safe in assuming that there will be extensive documentation of his sleep apnea and IBM's accommodation of him within IBM or accessible through the disability insurer, Manulife. Each of them are large, sophisticated corporations. The assessment and processing of disability claims will be a routine function of the employees of both.

I have the benefit of the letters, although not their attachments, of November 20, 2006 and May 6, 2011 to the Commission from IBM's Corporate Counsel. If I might say so, I think IBM's argument is

compromised by her competence. Even without the benefit of the attachments to these letters, they seem to me to provide a comprehensive and persuasive account of IBM's position on the disability and IBM's accommodation of it. I do not see in the letter dependence, for an argument, on the recollections or even the oral evidence of those people who are listed by IBM as potential witnesses and in any event it appears to me likely that Corporate Counsel, in preparing the responses, will have spoken to and noted the evidence of those engaged in the file.

Counsel, in her response of November 20, 2006 takes each of the allegations in the complaint and successively responds to them and incorporates 19 attachments. I see little disagreement on facts in the complaint and response.
More generally, I see little sign of potential for conflict in the oral evidence of witnesses. The facts, as I see them now, are well documented and not seriously contested. Mr. LeFrense has a well diagnosed illness. The submissions to IBM about this illness are in writing and the administration of his submission, his admission to short and long term disability will be well documented by the disability insurer, Manulife. The work requirements of the position are well understood; if not well documented they are well expressed by Counsel. I cannot see that IBM's capacity to establish the "three steps" have been significantly impacted by the delay.

The only item of evidentiary contention seems to be the possible evidence of Lewis Smith. No one has said that Mr. Smith is not available. The point of his evidence, I suppose, is that IBM accommodated him and so cannot now say it could not accommodate Mr. LeFrense.

IBM argues delay and its effect on witnesses, but Mr. Smith would not, I should think, be a witness for IBM but rather for Mr. LeFrense. I note too that Mr. Smith seems reluctant to be involved. No doubt he would respond to a subpoena, and testify honestly, but I should not think that Mr. LeFrense has reason to expect that Mr. Smith's evidence will necessarily be of assistance to him. Furthermore, the question of the relevancy of his evidence, which was raised by IBM Corporate Counsel, has yet to be determined, but I should think any Board might be reluctant to involve itself in a question of whether Mr. Smith was "accommodated". That might consume more time and effort than any probative effect might be worth. In sum, the effect of delay on Mr. Smith's evidence should be of less concern to

IBM.

IBM's position, as repeatedly and well articulated by Corporate Counsel over the whole of this long time has, succinctly been that "The Complainant suffered from medical conditions that posed ongoing permanent medical restrictions that prevented him from performing the role of a Band 4 SSR."

I appreciate that IBM and Mr. Gallant may now have to shift their defence in light of the Commission's insistence that the issue is whether Mr. LeFrense's schedule, without undue hardship, "could not be adjusted to accommodate his medical requirements." IBM, having been called upon over four years later, may have been prejudiced in being able to round up the evidence necessary for a proper response. IBM may, over four years later, have been left to scramble to find the evidence of scheduling in order to properly present its case.

IBM, in its brief, addresses the problem this way:

> Further, the information that was available when the Respondents made their decisions with respect to Mr. Lefrense's (sic) situation is no longer available. Specifically, IBM had to take into consideration such things as the volume of business on Saturdays, the amount of overtime a person in Mr. Lefrense's old position could expect to work on a regular basis, the particular reasons why that overtime would be required, which clients required the overtime, how often and for how long, the rotation schedules in place at the time, the job postings at the time, etc.

As I review the list of potential IBM witnesses, however, I see few who would have been involved in the day to day scheduling of employees anyway. The witnesses, by and large, are people who were involved in the processing of Mr. LeFrense's disability application and the negotiation of his return to work which, as I say, I am satisfied will have been well documented.

Mr. Gallant, who is a party, and who is still employed by IBM, is a person most likely to have knowledge of scheduling. I acknowledge that his own

memories of the scheduling difficulties IBM faced from time to time maybe impaired, and this may cause prejudice to IBM's case, but I am not satisfied, in the context of the case as a whole, that the prejudice to his evidence would be real and significant.

IBM's Corporate Counsel did not address the matter of scheduling. Commission staff suggested that IBM claimed solicitor-client privilege over the material. I do not interpret Counsel as having said that at all, but I do think it significant that Counsel, in her response to the question about details of scheduling, stuck by her guns and did not address the challenge to IBM's scheduling. I take it that she must have found the question fundamentally irrelevant to IBM's position as she had articulated it.

Over two years, IBM took the position that it cannot accommodate Mr. LeFrense's request to work a normal week in the position he held. I conclude, at least for the purposes of the current application, that IBM's stipulation was ongoing and not temporary. In other words, the requirement is structural and less dependent upon the circumstances of a particular time. The evidence in support of their argument relates to the demands of the work and that is not a transitory matter nor dependent upon evidence from the particular people involved in Mr. LeFrense's case or their recollections of it. It is not a case where IBM has to justify itself on the basis of evidence from managers, during the relevant time, about day to day staffing levels or the temporary lack of replacements.

In summary, I am not satisfied that IBM will be embarrassed in its presentation, even on the question of day to day scheduling. In any event, I am empowered by the Act to receive evidence in various forms and outside of the strictures of a traditional court proceeding. I anticipate that I should use that latitude in the power to admit evidence to minimize any prejudice arising from delay.

Mr. LeFrense is the complainant. One must also remain mindful that he has the right to be heard.

I dismiss the application and look forward to hearing the evidence in the New Year.

Dated at Halifax, Nova Scotia the 17th day of September, 2013.

J. Walter Thompson, Q.C.
Board Chair