

Case No.: CS-001372

At the British Columbia Human Rights Tribunal

Between:

**BRITISH COLUMBIA TEACHERS FEDERATION
OBO CHILLIWACK TEACHERS ASSOCIATION**

Complainant

and

BARRY NEUFELD

Respondent

APPLICATION PARTICULARS

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Counsel for the Respondent

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Counsel for the Complainant

FACTS

1. Barry Neufeld is the Respondent to a complaint filed by the British Columbia Teachers Federation obo the Chilliwack Teachers Association. The hearing of the complaint has been set down for October 21-November 1, 2024.
2. The case is both factually dense and legally complex. Over 500 documents and 100 hours of video footage have been disclosed by the complainant. The issues span multiple areas including publication, employment and retaliation. A *Charter* analysis will be necessary. Some dozen witnesses are expected to be called, including at least one expert witness.
3. Mr. Neufeld has been unrepresented by legal counsel for seven months. While Mr. Neufeld had been represented by David Bell and Shauna Gersbach of Guild Yule LLP, in February 2024 his professional liability insurer discontinued funding his legal representation, and Mr. Bell and Ms. Gersbach withdrew. Mr. Bell and Ms. Gersbach required a \$150,000 retainer to continue Mr. Neufeld's representation, which was untenable.
4. Mr. Neufeld set about trying to find alternative counsel, which proved nearly impossible, given his limited means in combination with either lack of interest in his case or lack of availability to provide representation. Mr. Neufeld approached the Justice Centre for Constitutional Freedoms, Freedoms Advocate, the Democracy Fund, and Paul Jaffe—all of whom declined.
5. Mr. Neufeld retained James SM Kitchen, a sole practitioner from Alberta, after close of business on September 18, 2024 (10:17 PM PST, to be precise). The next day, Mr. Kitchen worked quickly to contact opposing counsel to inform her he was on the file and would be requesting an adjournment, and to seek her client's consent to an adjournment.
6. While Mr. Kitchen is willing and able to assist Mr. Neufeld, he operates a busy litigation practice, currently without the aid of his legal assistant, who is on maternity leave. Mr.

Kitchen's associate, a 2-year call, has almost no availability to assist him until December, given she is completing coursework toward a mediation designation and has deadlines on her own files and impending hearings. Mr. Kitchen has many open files with their attendant deadlines and hearings between now and October 21.

LAW

Tribunal Rules

7. Rule 30 of the BC Human Rights Tribunal [Rules of Practice and Procedure](#) provides that an application for an order adjourning a hearing must be filed at least two full business days before the date set for the hearing; must state why the request is reasonable; and must state why granting the request will not unduly prejudice the other participants.

Tribunal Precedents

8. Factors influencing adjournment decisions include the circumstances surrounding the transfer between counsel; the amount of time since counsel was retained; the sufficiency of the time remaining to prepare; whether counsel is in fact changing or simply being added; the complexity of the case; the volume of materials; whether counsel is a sole practitioner; whether counsel sought adjournment in a timely fashion; whether counsel sought the consent of the opposing party; the degree of control counsel had over setting the existing hearing dates; the age of the matter; factors limiting the client's representation options, such as finances and difficulty finding counsel; the motivation for the adjournment; whether the loss of counsel was voluntary; whether any prejudice claimed by the objecting party is real or merely speculative; and which party would be more prejudiced as between granting or not granting the adjournment.
9. Where adjournments have been denied, such factors have militated against the reasonableness of granting adjournment. For example, in *Hussey v Ministry of Transportation*, [2003 BCHRT 15](#), "the Tribunal did not grant the adjournment because:

there was an internal transfer of files between Ministry counsel; the hearing was some two and [a] half months away; [and] the first instance of discrimination alleged by the complainant was almost eight years before” (*Wakelin v White Oaks Futures Ltd (cob Ellwood Animal Hospital)*, [2004 BCHRT 405](#) [*Wakelin*] at para 20).

10. The adjournment in *Weisner v BCO*, [2003 BCHRT 18](#) was denied because counsel had been retained 14 months prior to the scheduled hearing and the file was not being transferred to new counsel, rather co-counsel was joining the matter (*Wakelin* at para 21).
11. The adjournment in *Yates v Ross*, [2004 BCHRT 83](#) was denied because counsel took the file knowing he would be on paternity leave during the hearing and his organization had been involved in setting those hearing dates in the first place.
12. On the other hand, in *Wakelin*, a case wherein an adjournment was granted, the respondents had difficulty retaining counsel for want of resources; the Law Centre withdrew from the case against the wishes of the respondents; the change of counsel was not motivated by a desire to delay; proceeding with the scheduled dates would have unduly prejudiced the respondents; and short of losing witnesses or negatively impacting the merits of their case, the complainants faced mere inconvenience and not undue prejudice (at paras 24-5). Having “already booked time off work to attend the hearing” and “summonsed witnesses to attend”, as well as desiring the complaint to proceed in an expeditious manner do not constitute undue prejudice (*Wakelin* at para 17).
13. In *Doratty v Fording Coal Ltd*, [2004 BCHRT 82](#) [*Doratty*], an adjournment was granted on the following bases: the plaintiff’s representation options were limited (at para 14); counsel acted in a timely fashion, seeking consent from the respondents’ counsel within three weeks of being retained (at para 16); and the prejudice identified by the respondents—namely that “witness memory and availability” would be impacted by a six-month delay—was found to be speculative. The Tribunal stated that the delay, while “of some significance”, would not unduly prejudice the respondents (*Doratty* at para 18). The Tribunal characterized the prejudice to the plaintiff, however, as “grave” should her

adjournment be denied, owing to the complexity of her case, which the Tribunal described as “factually involved and legally complicated” (*Doratty* at para 19). The Tribunal stated that “expediency cannot be at the expense of the overall fairness of the process or at such a significant cost to one of the parties” (*Doratty* at para 19). In *Clarke v Lou’s Rent-All Service Ltd*, [\[1994\] BCCHRD No 5](#), the Tribunal found that the length of the adjournment to permit new counsel to prepare depended on the complexity of the case (at paras 5, 8).

14. In *Petterson v Gorcak*, [2008 BCHRT 260](#), the Tribunal granted an adjournment on the bases that while “parties to a complaint are not required to have counsel...if they wish to be represented, that is their right” (at para 19); the only counsel the complainants were able to retain could not represent them absent an adjournment (at para 19); and the ability of witnesses to participate if the hearing were postponed would not unduly prejudice the respondent (at para 21).
15. *Sinclair v Blackmore*, [2004 BCHRT 433](#) found the Tribunal granting an adjournment premised on counsel for the respondent’s status as a sole practitioner who could not reconcile the hearing dates with his schedule, as well as the fact that he had sought the complainant’s consent to the adjournment more than one month in advance of the scheduled hearing dates (at para 5).
16. The Tribunal granted an adjournment in *RR v Vancouver Aboriginal Child and Family Services Society*, [2022 BCHRT 116](#) for the express purpose of affording new counsel “the opportunity to get up to speed” (at para 433), given the volume of materials he was obliged to review (at para 435).
17. In *Stentafor v Westfair Foods Ltd.*, [2004 BCHRT 81](#), wherein counsel “notified the respondent immediately after being retained that it was not available for the hearing dates and requested an adjournment”, the adjournment was granted despite the opposing party’s concerns regarding prejudice because they were found to be “speculative”: “the respondent had not...identified any individuals about whom this concern applied. As a

result, the Tribunal concluded that the respondent would not be prejudiced by a short adjournment” (*Wakelin* at para 22).

18. Even where legitimate prejudice existed, i.e. out-of-town witnesses who had already paid airfare and accommodation expenses, “undue” prejudice did not issue and the adjournment was granted (*Soriano v VTech Telecommunications Canada Ltd*, [2007 BCHRT 244](#) at paras 12, 14). Delay alone did not amount to undue prejudice (*Kennedy v Design Sportswear Ltd*, [2001 BCHRT 42](#) at para 35); the prejudice to a party in having to proceed to a hearing without counsel outweighed the prejudice to the opposing party by reason of the adjournment (*Cook v Citizens Research Institute*, [2000 BCHRT 28](#) at para 27); and where new counsel stepped in and needed time to prepare and the adjournment did not add significantly to the delay in processing the complaint, the adjournment was granted (*Aimers v Spirit West Construction Ltd*, [2005 BCHRT 385](#) at paras 3-5).

ARGUMENT

Reasonableness of Adjournment

19. Mr. Kitchen is new counsel from a new firm, as distinct from substitute counsel from an already retained organization or additional co-counsel. Mr. Kitchen came on the scene 2 business days before this adjournment application has been submitted, sought consent for this adjournment as his first priority, and when unsuccessful, proceeded to prepare this application with all haste, including over the weekend of September 21-22. Mr. Kitchen will be acting in his sole capacity, which is to say, largely without staff, until near the end of the year. Neither Mr. Kitchen nor his firm had any control over anything that occurred in this case prior to now, let alone fixing the hearing dates.

20. The complexity and volume of this case, encompassing issues of publication, employment, retaliation and *Charter* freedoms, as well as lengthy witness lists, thousands of pages of documents, and dozens of hours of video recordings, combined with the preceding considerations regarding counsel’s circumstances and the successive

considerations regarding Mr. Neufeld's circumstances weigh heavily in favour of granting an adjournment to permit adequate time to prepare and ensure fairness to a party who has already been prejudiced by lack of counsel these many months.

21. Mr. Neufeld has no improper motive for seeking adjournment. Parting with his former counsel was not Mr. Neufeld's choice, and he had a great deal of trouble finding new counsel both whom he could afford and who would be willing to provide representation on a matter of this magnitude. Not only will the respondent suffer no undue prejudice—the month-long notice of this adjournment constituting sufficient time to make scheduling adjustments and the short delay constituting insufficient time to significantly impact the overall resolution of the complaint; Mr. Neufeld stands to suffer grave prejudice should his new counsel be barred from preparing adequately such that Mr. Neufeld is able to meet the case against him.

22. On the foregoing bases, not only is Mr. Neufeld's request for adjournment reasonable; an adjournment short in duration is the only reasonable course of action given the particular circumstances of Mr. Neufeld, Mr. Kitchen, and this matter generally.

No Undue Prejudice to the Complainant

23. The hearing being online, the parties having ample time to modify scheduling, the requested adjournment being of short duration, no individuals who might be prejudiced having been identified, the adjournment in no way negatively impacting the merits of the complainant's case, the general dearth of practical implications resulting from the delay, and fairness being no slave to expediency in any event, no undue prejudice will accrue to the complainant by the granting of this adjournment.

REMEDY

24. Mr. Neufeld seeks a short adjournment of a minimum of 6 weeks to permit his newly retained counsel to prepare for what will be a complex and lengthy hearing. His counsel

will make all efforts to be available for any proposed dates that are amenable both to the Tribunal and counsel for the Complainant.

25. In the alternative, should an adjournment not be granted, Mr. Neufeld seeks an extension to October 9, 2024 to submit his witness list.

September 22, 2024