

BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION
IN THE MATTER OF THE *YUKON HUMAN RIGHTS ACT*
AND IN THE MATTER OF
Donna McBee (Molloy) and
Government of Yukon
BOARD DECISION

Appearances:

Donna McBee (Molloy)
Dan Shier
Peter Csiszar

Complainant
For the Commission
For the Respondents

Panel Members

Barbara Evans, Chief Adjudicator
Darcy Tkachuk, Adjudicator
Donna Mercier, Adjudicator

Heard: March 3-7
and August 21, 22 and 25-28, 2008
Whitehorse, Yukon

Decision Issued: December 10, 2008

IN THE MATTER OF THE ***YUKON HUMAN RIGHTS ACT***

AND IN THE MATTER OF

Donna McBee (Molloy) and Government of Yukon

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I. Introduction

This is a Human Rights Complaint by Donna McBee, formerly an employee of the Yukon Government. She alleges that she was discriminated against on the basis of her marital status arising out of her employment.

Ms. McBee advised the Panel and the parties at the hearing of this matter in March 2008 that she had changed her name from “Donna McBee” to “Donna Molloy”. Although no motion has been brought to formally change the name of the party in these proceedings, to improve consistency, lessen confusion, and as a matter of deference, the Panel will hereafter refer to Ms. McBee as Ms. Molloy.

Relevant to this Complaint is the identity of her common-law spouse, Thomas Molloy. Ms. Molloy and Thomas Molloy began their common-law relationship in August 2003. Over the ensuing months, Ms. Molloy developed a relationship with Thomas Molloy that by her own admission to her supervisor, Cheryl Van Blaricom, became abusive.

Thomas Molloy was an independent contractor seeking to establish himself in the Yukon as a facilitator specializing in team-building. In pursuing work, Thomas Molloy met initially with Public Service Commissioner Patricia Daws who referred him to Ms. Van Blaricom. Ms. Van Blaricom advised Thomas Molloy that it was unlikely the Public Service Commission would have need for his services.

After several months of unsuccessfully pursuing government contracts, Thomas Molloy met with Ms. Van Blaricom at his request, at which time she confirmed that he was not a suitable facilitator for the purposes of Government of Yukon (“GY”) employee training. Ms. Van Blaricom required her employee, Ms. Molloy (Thomas Molloy’s spouse) to attend that meeting, for unspecified reasons.

As part of her job duties, Ms. Molloy was to develop a Customer Service training program for employees in the Department of Highways and Public Works under Steven Gasser. Flowing from that assignment, Yukon Tourism Education Council (“YTEC”) agreed to enter into a MOU with the Department of Highways and Public Works to deliver their “Service Best” program. In November 2004, YTEC contracted Thomas Molloy to facilitate a Service Best program to GY employees. Ms. Molloy suggested Thomas Molloy to YTEC as an available facilitator.

As a result of fears expressed by a number of female employees scheduled to participate in the training program facilitated by Thomas Molloy, the program was abruptly cancelled within 24 hours of receiving complaints from those employees on or about December 2, 2004.

Arising from the complaints regarding Thomas Molloy, an investigation by the Staff Development Branch was conducted over the following several days with regard to Ms. Molloy’s involvement with the contract between YTEC and Thomas Molloy. A scripted meeting between Ms. Molloy, Ms. Van Blaricom and Rosemary Tait was

held on December 17, 2004, specifically related to the involvement of Ms. Molloy in the contracting of Thomas Molloy by YTEC.

On January 12, 2005, Government of Yukon terminated the employment of Ms. Molloy, alleging breach of Conflict of Interest Policy, insubordination and breach of trust.

II. What is this Complaint about?

The Human Rights Board of Adjudication must decide whether the Public Service Commission — Staff Development Branch discriminated against Ms. Molloy (the “Complainant”), on the basis of her marital status, relationship with Thomas Molloy, including Thomas Molloy’s criminal record or charges when it terminated her employment.

The sections of the Yukon *Human Rights Act* relevant to this matter are:

7. *It is discrimination to treat any individual or group unfavourably on any of the following grounds*
 - ...
 - (i) *criminal charges or criminal record;*
 - (k) *marital or family status;*
 - ...
 - (m) *actual or perceived association with other individuals or groups whose identity or membership is determined by any of the grounds listed in paragraphs (a) to (l);*
 - ...
- 9 *No person shall discriminate*
 - ...
 - (b) *in connection with any aspect of employment;*

III. Who are the Parties?

The Complainant against whom the discrimination was alleged to have occurred is Donna Molloy. At all times material to this hearing, Ms. Molloy was an employee of the Government of Yukon. She participated for part of the hearing and was unrepresented by counsel.

The Respondent, as represented by Peter Csiszar, is the Public Service Commission, Government of Yukon.

The Yukon Human Rights Commission, as represented by Dan Shier, is charged with carriage of this Complaint before the Board of Adjudication.

IV. What are the circumstances giving rise to the Complaint?

Ms. Molloy was employed by the Government of Canada prior to devolution of that department to Government of Yukon, where she became employed by the Public Service Commission – Staff Development Branch under the supervision of Ms. Van Blaricom. Ms. Molloy began her employment as a training officer, based on her expressed desire for a position related to health and safety. As a training officer, her responsibility involved assisting in the development of training opportunities for GY employees.

Ms. Molloy's employment with GY began February 2003 and terminated January 12, 2005. During her employment, she accepted a number of temporary positions in other departments, two of which were concluded earlier than anticipated because of incidents involving her common-law spouse, Thomas Molloy. Ms. Molloy returned to her substantive position as a training officer with the Public Service Commission following both instances.

Ms. Molloy's employment was terminated by GY on the grounds that she had breached her employer's trust and more particularly, the GY Conflict of Interest Policy, insofar as she had advised, or by some counts, recommended to a contractor (YTEC) that her spouse, Thomas Molloy, was a suitable facilitator for the Service Best program. Ms. Molloy did not disclose the referral/recommendation to her supervisor, Ms. Van Blaricom.

Immediately following the first day of delivery of the two-day program, and after the first day of the second delivery of the program, government employees called the Victoria Faulkner Women's Centre to question the suitability of Thomas Molloy as facilitator. News of this complaint reached the Minister's office, and was communicated back to the Director of the department, Ms. Van Blaricom. She immediately reacted to the call from the Minister's office by saying words to the effect that "no one in her department would hire Thomas Molloy for government employee training". Immediately following that discussion she initiated an investigation that led her to believe that Ms. Molloy had actually referred her spouse, Thomas Molloy, to YTEC and in doing so, committed a serious breach of the GY Conflict of Interest Policy.

For clarity, YTEC was an independent entity that was part of a joint signatory, with the GY Department of Highways and Public Works, to a MOU for the Service Best training. YTEC contracted Thomas Molloy to facilitate the training. GY cancelled its MOU with YTEC upon determining they had no alternative facilitator.

V. The Parties' Positions

Position of the Yukon Human Rights Commission

Discrimination arises under the Yukon *Human Rights Act* when an individual is treated unfavourably on the grounds of one of the prohibited grounds listed in section 7 of the Act. These grounds include marital status, association (real or perceived), criminal charges or criminal record. Section 9(b) prohibits discrimination in connection with any aspect of employment or application for employment.

In its initial investigation of this Complaint, the Human Rights Commission determined that the Respondent terminated the Complainant's employment at least in part on the basis of her marital status arising from her common-law relationship with Thomas Molloy, and on the basis of the Respondent's safety concerns about him. In its argument before the Board of Adjudication, the Commission submitted that the Board must decide only whether or not a prohibited ground of discrimination was more likely than not a contributing factor in the termination of the Complainant's employment. In support of its position, the Commission submitted the following authorities: *Holloway v. Clair MacDonald and Clairco Foods* (B.C. Human Rights Tribunal), *Holland v. Prince George Taxi Association* (B.C. Human Rights Tribunal) and *Shopland v. Watson Lake Bus Lines* (Yukon Human Rights Board of Adjudication).

The Commission also quoted the decision of the Supreme Court of Canada in *B. v. Ontario* that confirmed marital status is not limited to membership in a class or group of persons, but includes the identity of the spouse:

... it is clear that these terms encompass discrimination claims based on the particular identity of a complainant's child or spouse ...

Arising from this leading case, the *Canadian Human Rights Reporter* (Vol. 44 at C/1) states:

Women are often ... penalized, not just for being married, but for the identities of the men they are married to. They are treated as having an identity essentially connected to, and inextricable from, their husbands.

The Commission further argued that:

"one thread throughout [the testimony of Ms. Van Blaricom and Ms. Daws] was their focus on staff safety. It was clear that when the decision was made to terminate the Complainant's employment it was done within the context of what they perceived to be an emergency situation caused by Thomas Molloy delivering a training program to YG employees..."; "... thus the investigation [of Ms. Molloy's involvement] was not conducted because of a breach of the policy but because Mr. Molloy was the spouse of the Complainant and there were fears about him specifically ... his criminal record and the criminal proceedings against him."

Position of the Respondent

The Respondent argued that the Commission had failed to show a prima facie case of discrimination, or in the alternative, that there is no basis on the evidence to conclude that the termination of the Complainant was based on any prohibited ground in the Yukon *Human Rights Act*.

The test, the Respondent submitted, is found in *Dumais v. TCG International*, [2004] B.C. Human Rights Tribunal No. 40 (Tab 1, Respondent's Brief of Authorities) which provides: "... it is reasonable to infer from the evidence ..." that a discriminatory ground was a factor in the Respondent's decision, in this case, to terminate.

The Respondent argued that the termination of the Complainant was based only on the Complainant's conduct related to breach of the Conflict of Interest Policy, insubordination, undermining the reputation and integrity of the Public Service Commission, dishonesty and irreparable breach of trust.

The Respondent challenged the Commission's characterization of the investigation of the Complainant's conduct, arguing that the Respondent's investigation arose upon discovering that Thomas Molly was the trainer, and that led the Respondent to discover the role of the Complainant, and the subsequent investigation of her conduct.

The Respondent submitted that there "is not even an iota of evidence to support the Commission's claim that a prohibited ground was a factor in the Complainant's termination. We further submit that there is no evidence from which an inference let alone a reasonable inference can be drawn that a prohibited ground was a factor in the Complainant's termination."

VI. What are the Issues to be determined?

If the matter to be considered by the Board of Adjudication was wrongful termination, a substantial amount of the evidence presented would require analysis.

Evidence was led that Ms. Molloy knew and understood the Conflict or Interest Policy, having actually taught it to new employees. Evidence shows that Ms. Molloy was tasked with organizing a program for the department of Highways and Public Works related to Customer Service and Team-Building. Her involvement with YTEC and the Service Best program was to be her first "solo" program organization. YTEC's only barrier to taking on the Service Best training contract was the apparent unavailability of a suitable facilitator.

Ms. Molloy recommended, or according to her testimony, provided, Thomas Molloy's name to YTEC while disclosing that he was her spouse. Knowing that her supervisor was not amenable to using the services of Thomas Molloy, she did not disclose that information to her supervisor. When Ms. Molloy's promotion of Thomas Molloy was discovered through the subsequent employee complaints and ensuing political involvement, Ms. Molloy was terminated for breach of trust and the breach of the GY Conflict of Interest policy.

The Board of Adjudication does not have jurisdiction to make a determination on wrongful termination. The question before the Panel, within its role as a Human Rights Board of Adjudication is whether or not, on the balance of probabilities, discrimination as defined in the Yukon *Human Rights Act* was present in the workplace arising from the marital status of Ms. Molloy and her ongoing affiliation with her spouse, who had a well-known criminal record for abuse or if discrimination was a factor that impacted the decision to terminate Ms. Molloy.

The Majority of the Panel identified the issues to be decided in this case as:

- A. Did the Respondent discriminate against Ms. Molloy because of her marital status, and more specifically, her relationship to her common-law spouse, Thomas Molloy, who has a well-known criminal record?**
- B. Was discrimination a factor in determining whether or not to terminate Ms. Molloy's employment?**

VII. Finding of Discrimination

The Commission has the initial burden of establishing a prima facie case that there is credible evidence to support Ms. Molloy's claim of discrimination. It is then the responsibility of the Respondent to reasonably explain that its conduct was not discriminatory within the meaning of the Yukon *Human Rights Act* and that it acted within its rights and responsibilities as her employer.

- A. Did the Respondent discriminate against Ms. Molloy because of her marital status, and more specifically, her relationship to her common-law spouse, Thomas Molloy, who has a well-known criminal record?**

Relying primarily on the evidence of Ms. Van Blaricom, Ms. Molloy's relationships within her workplace changed shortly after she became involved with Thomas Molloy in August 2003. Ms. Van Blaricom became involved with Ms. Molloy's personal life on a number of occasions, such as:

- Asking whether Ms. Molloy was aware of Thomas Molloy's reputation of abusiveness with women;
- Ms. Van Blaricom recommending that Ms. Molloy leave Thomas Molloy, or at least prepare an emergency escape bag;
- Discussing a number of specific "abuses" by Thomas Molloy related to Ms. Molloy; and
- Ms. Van Blaricom expressing serious concern for Ms. Molloy's health and well-being because of Thomas Molloy.

A number of issues arose as a result of Thomas Molloy's presence in Ms. Molloy's workplace, such as:

- The Staff Development Branch had an open policy that allowed family and spouses of employees in their office. Thomas Molloy often frequented Ms. Molloy's workplace and office;

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- Employees alleged that Thomas Molloy was stealing food from the refrigerator;
- People ignored Thomas Molloy when he came into the office;
- Ms. Molloy's co-workers complained that he spent much time in Ms. Molloy's office with the door closed; and
- Local newspaper articles made the staff aware of Thomas Molloy's charges involving violence and abuse. Evidence indicated that both Ms. Daws and Ms. Van Blaricom were monitoring the court proceedings involving Thomas Molloy's criminal charges.

Within her role as Director, Ms. Van Blaricom responded to potential impacts on the workplace environment by having a silent warning system installed; however, Ms. Van Blaricom did little to address the personal safety or performance issues of Ms. Molloy. Evidence at the hearing demonstrated the following points:

- Ms. Van Blaricom asked Ms. Molloy to sit in on a meeting where Thomas Molloy was specifically told that he would not be hired by the GY as a facilitator;
- Neither during that meeting, nor after that meeting did Ms. Van Blaricom clarify with Ms. Molly the departmental policy and concern in regard to the risk of breaching the Conflict of Interest Policy as it related to Thomas Molloy and his pursuit of GY contracts, and Ms. Molloy's position;
- Performance evaluations for Ms. Molloy were not conducted, despite Ms. Molloy's requests;
- Ms. Molloy took a temporary assignment with the Department Environment. Her office was located at Burns Road building. While on secondment to the Department of Environment, an incident arose in which it is alleged that Thomas Molloy assaulted Ms. Molloy.
- In the course of her temporary assignment with the Department of Environment, Ms. Molloy traveled to Haines Junction to deliver flowers for an upcoming conference. Thomas Molloy followed her to Haines Junction and appears to have actively sought her out.
- Arising from the Haines Junction incident, Thomas Molloy was charged with and pled guilty to a number of charges related to spousal abuse. This was widely published in the local newspapers and common knowledge within GY.

Based on the sum of the evidence, the majority of the Panel believes that Ms. Molloy was subject to discrimination in her workplace because of her marital status. Thomas Molloy's attendance at the workplace raised serious safety concerns on the part of Ms. Molloy's co-workers and, as expressed by Ms. Van Blaricom, for the safety of Ms. Molloy herself while in the workplace. In considering the evidence of Ms. Van Blaricom and the testimony of Ms. Molloy, the

majority of the Panel accepts that Ms. Molloy more likely than not was ostracized by her co-workers because of her common-law spouse.

Looking at the evolving situational facts leading up to the termination of Ms. Molloy's employment, the majority of the Panel believes that the situation should not have come as such a surprise to Ms. Van Blaricom. Ms. Van Blaricom was cognizant that Ms. Molloy was entranced by Thomas Molloy, that Thomas Molloy was seeking contracts from GY, and that Ms. Molloy's job was to arrange training and assist to the point of arranging facilitators for training. Yet, Ms. Van Blaricom, in the opinion of the majority, did not address the risk of succumbing to pressure from Thomas Molloy faced by Ms. Molloy.

B. Was discrimination a factor in determining whether or not to terminate Ms. Molloy's employment?

In its submissions, the Respondent stated that, "the evidence reveals that there is a full and complete non-discriminatory explanation for the termination of the Complainant". Yet, in one of its authorities (*Bains v. Metro College Inc.*, [2003] B.C. Human Rights Tribunal No. 64 [Tab 3, Respondents' Brief of Authorities], the B.C. Human Rights Tribunal stated (at Para 76): "An employer is, for the purposes of the Human Rights Code, legally entitled to be wrong in its reasons for terminating an employee, so long as those reasons are not discriminatory..."

The majority of the panel finds that while the Respondent provided substantial justification for terminating Ms. Molloy, we are not satisfied that it was not, in part, motivated by discrimination based on her marital status, including the identity of her common-law spouse and his criminal record.

Thomas Molloy's criminal record and public reputation were focal points of a number of complaints by employees regarding their participation in the Service Best training. These complaints were relayed to the Victoria Faulkner Women's Centre and into the office of the Minister. From there, questions were forwarded through the Public Service Commissioner to the Director of the Staff Development Branch.

When asked by the Minister's office whether it was true that Thomas Molloy was the facilitator, Ms. Van Blaricom vehemently denied that anyone in her department would hire him.

The Service Best training program was cancelled because of employees' reactions to Thomas Molloy and YTEC's inability to find an alternative facilitator.

Early in the relationship between Ms. Molloy and Thomas Molloy, Ms. Van Blaricom had advised Ms. Molloy that if she wished to disseminate information involving her spouse, that information must be turned over to a co-worker for dissemination to avoid the perception of conflict of interest.

Ms. Van Blaricom informed Thomas Molloy, in the presence of Ms. Molloy, that Staff Development Branch was not interested in contracting his services.

Simplistically, The MOU for the Service Best training program was between YTEC and the Department of Public Works; YTEC directly contracted with

Thomas Molloy to provide service as facilitator. Staff Development Branch did not contract Thomas Molloy. YTEC presumed Staff Development Branch endorsement of Thomas Molloy, even though Ms. Molloy specifically advised YTEC that she knew he was available because he was her common-law spouse.

While it may seem a moot point, the majority of the Panel recognizes the attempts Ms. Molloy made to prevent direct conflict of interest. On paper, there appears to be no breach of conflict of interest by Ms. Molloy.

It is the circumstances following the first offering of the Service Best program facilitated by Thomas Molloy that brought the issue of possible conflict of interest to the attention of the Respondent. The complaints about Thomas Molloy, based on the public knowledge of his criminal record and abusiveness toward women were raised at the ministerial level. Once these concerns were brought to the Public Service Branch, an investigation was conducted and Ms. Molloy was terminated.

Ms. Molloy, since her relationship with Thomas Molloy, had been involved in a number of situations which proved difficult for the Respondent. With this political pressure coming to bear on the reputation of the department, Ms. Molloy's termination could be justified. All the problems linked to Thomas Molloy would go away upon her termination.

The majority of the Panel finds that the marital status of Ms. Molloy was, at least in part, a factor in the termination of Ms. Molloy's employment.

VIII. The majority of the Panel of Adjudicators' conclusion regarding the Complaint

It has been the Panel's experience that matters come before it because of the subtle nature of a possible discrimination based on the prohibited grounds set out in the *Human Rights Act*. What may initially appear to be a clear case on hearing opening statements often evolves into a jigsaw puzzle of facts, testified to as truth by multiple witnesses, each of which often has their own perceptual beliefs.

As previously noted, the Panel does not have jurisdiction to determine a wrongful dismissal; that is a labour issue. Therefore, it must follow the more subtle track of evidence, determine what reasonably motivated the parties' actions, and then, fitting the puzzle together, recognize the most likely picture.

From the time that Ms. Molloy became involved with Thomas Molloy, her supervisor and co-workers, not only in her substantive position, but also at her temporary assignments, were involved in situations where the marital status, and more specifically, the identity of her spouse created workplace issues.

Fear and apprehension drove a number of actions which led to the public knowledge of Thomas Molloy's criminal record and, in the opinion of the majority of the Panel, the Complainant's inevitable breach of the GY Conflict of Interest Policy and, ultimately, the Respondent's need to terminate the Complainant's employment.

The Majority of the Panel finds discrimination was a factor in the termination of Ms. Molloy's employment.

IX. Remedy

The impact of spousal abuse on an employee at the workplace is a situation that cannot be ignored by the employer. The Panel orders that the Government of Yukon investigate its role and ability to ensure that no employee is put at risk of personal safety, co-worker safety and the potential for further spousal abuse arising from an employment situation. The findings of this investigation and the planned prevention strategy shall be reviewed by the Yukon Human Rights Commission within six months of the date of this decision.

The Panel awards Costs to the Yukon Human Rights Commission from the Respondent.

Ms. Molloy did not fully cooperate in the adjudication of her Complaint and refused to return to complete her cross-examination by the Respondent. Ms. Molloy advised the Panel that she was employed in Alberta and was unwilling to return to the Yukon for the remainder of the hearing. Ms. Molloy was not represented at the hearing. The Panel makes no award to the Complainant.

X. Dissent of Adjudicator Tkachuk

With the greatest of respect, I do not agree with my fellow Panel Members Evans and Mercier and find that the Respondent Government of Yukon, Public Service Commission — Staff Development Branch did not contravene the Yukon *Human Rights Act* (the "Act"), and specifically did not discriminate against Ms. Molloy when it dismissed her from her position as staff development consultant for the Staff Development Branch. I accept the Respondent's position that it terminated Ms. Molloy's employment because of a breach of trust arising from a conflict of interest arising in her employment relationship, and in doing so, I find that her marital status, her relationship with Thomas Molloy, and his criminal charges or record were not factors in its decision to terminate.

a) Issue

The key issue in this proceeding is whether Ms. Molloy's marital status or her relationship with Thomas Molloy, or his criminal charges or record was a factor in the Respondent's decision to terminate her employment.

The Complainant alleges that sections 7(i), (k), (m) and 9(b) of the Yukon *Human Rights Act* were contravened by the Respondent:

7. *It is discrimination to treat any individual or group unfavourably on any of the following grounds*

...

(i) *criminal charges or criminal record;*

(k) *marital or family status;*

...

(m) *actual or perceived association with other individuals or groups whose identity or membership is determined by any of the grounds listed in paragraphs (a) to (l);*

...

9 *No person shall discriminate*

...

(b) *in connection with any aspect of employment;*

and argued that Ms. Molloy was terminated, at least in part because of her marital status, or relationship with her common-law spouse Thomas Molloy, or because of his criminal charges or record.

b) Evidence at Hearing

Evidence was led at the hearing of this matter suggesting that the Respondent *could* have discriminated against Ms. Molloy when it terminated her.

Evidence was led, for example, about concern within the Staff Development Branch and the Department of Environment about safety and possible violence in relation to Thomas Molloy. These safety concerns were known by most, if not all employees in the Staff Development Branch, including Ms. Molloy's immediate supervisor, the Director of Staff Development for the Public Service Commission, Ms. Van Blaricom and Public Service Commissioner Patricia Daws, both senior managers in Ms. Molloy's department. These concerns about safety even led to the installation of a security warning system. At one point, the RCMP was consulted for advice regarding what measures were appropriate in the event of a disruption in the workplace because Thomas Molloy had attended Ms. Molloy's workplace on a number of occasions.

The Panel also heard evidence that shortly after Ms. Molloy forwarded an e-mail on April 21, 2004, promoting Thomas Molloy's consulting services, Ms. Van Blaricom met with Ms. Molloy and provided specific instructions that she was not to be involved with hiring or promoting Thomas Molloy as a contractor.

Perhaps the most alarming piece of evidence arose in the testimony of Leonard Briemon, during which he quoted a female employee at the Department of Environment as having said, "it's kind of like the dog bringing the bear back to the campsite," in reference to Ms. Molloy's assignment to that department. Although this statement is clearly hearsay, Mr. Briemon's credibility in giving evidence and the vast amount of corroboration supporting the widespread fear of Thomas Molloy among many Government of Yukon employees leaves me with little doubt as to its veracity.

It was argued that Ms. Daws' and Ms. Van Blaricom's decision to terminate Ms. Molloy without a series of warnings and in spite of a good formal employment

record also demonstrates that the termination arose not by Ms. Molloy's conduct, but by other factors — namely her relationship with Thomas Molloy.

Evidence that Thomas Molloy's facilitating a training course for the Yukon Tourism Educational Council ("YTEC") was brought to the Minister's attention and resulted both in discussion on the floor of the Legislature and discussions between the Minister's office and Ms. Daws *could* also be construed to suggest that Ms. Molloy's termination arose because of the embarrassment to the Minister and the Department's senior managers caused by Thomas Molloy's role in the course.

There is also circumstantial evidence suggesting that following Ms. Molloy's termination on January 12, 2005, Ms. Van Blaricom may have attempted to build or at least gather evidence supporting the case for dismissal. In Exhibit 9, an e-mail dated June 8, 2008, from Ms. Van Blaricom to Penelope Gawn and Michael McBride contains an attachment summarizing information obtained from a post-termination review of the contents of Ms. Molloy's work computer. The attachment begins, "I understand the following to be the legal grounds that we need to demonstrate the dismissal of Donna McBee..." and goes on to describe examples of materials found on the computer demonstrating Ms. Molloy's use of the government computer for personal purposes and conduct incompatible with duties, including stored e-mails from Thomas Molloy and e-mails involving her attempts to secure consulting work for Thomas Molloy with other employers. But just as this attachment describes e-mails involving Thomas Molloy, it also lists personal e-mails involving legal custody and access issues involving her son as well as correspondence involving rental properties — issues that do not appear to involve Thomas Molloy.

In spite of this tenuously correlated evidence, I am not persuaded on the balance of probabilities that the *operating mind* of the Staff Development Branch that decided to terminate Ms. Molloy's employment, namely Ms. Daws and Ms. Van Blaricom, considered the relationship, family status or marriage between Ms. Molloy and Thomas Molloy in making its decision, nor were Thomas Molloy's criminal record or charges a factor.

There is no doubt that Ms. Daws and Ms. Van Blaricom were aware of and concerned about Thomas Molloy and had an interest in preventing disruption or agitation among employees that could arise from his involvement in their department's affairs — but Ms. Molloy's termination, as and when it occurred, could have little or no impact on that issue. Ms. Molloy was terminated on January 12, 2005, following an investigation of her involvement in Thomas Molloy's hiring as a facilitator by YTEC, yet Thomas Molloy's involvement in the YTEC training session had ended over a month earlier, on December 2, 2004. After Thomas Molloy's training contract had been terminated by YTEC, he had no further involvement with the Staff Development Branch and the subsequent termination of Ms. Molloy would not change that.

Certainly employees were concerned, and Ms. Van Blaricom expressed concern about Thomas Molloy's involvement and presence at the workplace. It is arguable that terminating Ms. Molloy would put an end to Thomas Molloy's presence at the

Staff Development Branch. This argument is questionable because neither Ms. Daws or Ms. Van Blaricom, nor the management of the Department of Environment had taken any prior steps to terminate Ms. Molloy before she put Thomas Molloy's name forward as a facilitator for the YTEC training course, and took few steps to lessen Thomas Molloy's presence at the workplace — in spite of incidents and employee concerns about Thomas Molloy at both departments. If these managers had wanted to rid themselves of Thomas Molloy's workplace presence by terminating Ms. Molloy, they could and presumably would have done so earlier, or would have at least begun building a case for termination by documenting Ms. Molloy's highly visible involvement with Thomas Molloy at the workplace in her employment file. They did not do so after Ms. Van Blaricom learned of Thomas Molloy's use of departmental videos for the marketing of his consulting firm, which Ms. Molloy had borrowed for him. They did not do so when Ms. Molloy sent out an e-mail promoting Thomas Molloy on April 21, 2004. They did not do so when Thomas Molloy's presence was repeatedly noted in Ms. Molloy's office during working hours. Indeed, the only time when Thomas Molloy was in any way connected with Ms. Molloy's employment record arose when the Respondent learned that she had recommended Thomas Molloy (or in Ms. Molloy's view, put his name forward) to facilitate the YTEC training course — the incident that resulted in her termination. Until that time, despite many opportunities, management had taken no steps to impugn Ms. Molloy's employment in spite of her relationship with Thomas Molloy. In fact, evidence of both Ms. Van Blaricom and to some extent Ms. Molloy, indicated that until the incident that led to termination, Ms. Van Blaricom was actually supportive and tried to accommodate Ms. Molloy in light of the safety issues and abusive relationship involving Thomas Molloy.

For similar reasons, I also cannot accept the Commission's argument that the decision to terminate Ms. Molloy was made within the context of what they perceived to be an emergency situation caused by Thomas Molloy delivering a training program to GY employees. Ms. Molloy's termination, and indeed the investigations of her involvement, took place only after any such "emergency" had passed and Thomas Molloy was no longer facilitating the program. If any incident that could be characterized as an "emergency situation" involving Thomas Molloy arose in evidence, it actually occurred several months earlier in June 2004 when he followed Ms. Molloy to Haines Junction where she appeared agitated, and personnel were sufficiently tense and concerned that the RCMP became involved. No attempt was made to terminate Ms. Molloy following that incident, and management did not begin building a case at that time to support her termination.

Ms. Daws and Ms. Van Blaricom would have certainly wanted to avoid any further embarrassment arising from negative publicity and attention from the Minister's office, but here too, Ms. Molloy's termination took place *after* the public and ministerial fallout had occurred, and would have no effect upon what had already taken place. If anything, Ms. Molloy's termination several weeks after the incident raised some risk of renewed attention to the embarrassing issue.

Similarly, Ms. Daws' and Ms. Van Blaricom's decision to terminate appears abrupt, given the relative absence of formal warnings or reprimands. But this does not support a conclusion of discrimination for two reasons. First, Ms. Van Blaricom *did* discuss and warn Ms. Molloy about concerns regarding an actual or perceived conflict or interest that arose on April 21, 2004, when Ms. Molloy forwarded an e-mail to other employees promoting an event involving Thomas Molloy's services. Although this warning did not appear on Ms. Molloy's formal employment record, it certainly occurred.

Second, the Panel is not charged with the responsibility of determining whether the employer's termination procedures were over-reactive, fair, or lawful — its role is to determine whether or not discrimination, as described in the *Human Rights Act*, has occurred. The Respondent's managers may or may not have used questionable judgment, overreacted, or failed to adhere to accepted employment law principles in terminating Ms. Molloy, but evidence was not specifically led to prove or disprove that issue and the Panel is not being asked nor does it have jurisdiction to make such findings.

Similarly, the Panel is not required to scrutinize the legality of the possible reasons advanced by the Respondent as to why Ms. Molloy was terminated — for example, whether or not there was just cause for termination, or whether internal policies were followed properly. The Panel must be satisfied only that reasons advanced for dismissal are plausible in light of the evidence and that the *actual factors considered in deciding to terminate* were not discriminatory. The reasons for termination advanced by the Respondent in argument include:

- a) failing to recognize a significant conflict of interest despite clear direction from her Director;
- b) being insubordinate by acting contrary to that direction;
- c) undermining the reputation and integrity of the Public Service Commission;
- d) failing to disclose responsibility for her conduct;
- e) failing to acknowledge responsibility for her actions;
- f) being dishonest about her conduct when asked; and
- g) irreparably breaching the trust placed in her.

These factors are consistent and follow logically from the evidence, particularly the evidence of both Ms. Daws and Ms. Van Blaricom. Ms. Van Blaricom's evidence in particular, even under extensive cross-examination, demonstrated consistently that she did not terminate Ms. Molloy because of her relationship with Thomas Molloy or because of his criminal record, but because of the breach of trust that arose from Ms. Molloy's involvement in promoting (or in Ms. Molloy's words, putting forward the name of) Thomas Molloy — particularly after the warning about conflicts of interest that had been provided by Ms. Van Blaricom earlier, and Ms. Molloy's denial of having recommended her spouse. I believe the evidence of Ms. Daws and Ms. Van Blaricom on this point. Ms. Van Blaricom's testimony made it clear that she was troubled, frustrated and even emotionally upset by Ms. Molloy's actions and these were likely factors in the termination decision — but I believe that neither her reaction nor her decision were caused by

Thomas Molloy, they were caused by Ms. Molloy's actions, namely her failure to follow directions regarding conflict of interest, her breach of trust, and her denial.

In the circumstances, it is easily understandable how Ms. Molloy could honestly and reasonably draw the conclusion (and could continue to nurture the belief) that she was terminated because of her relationship with Thomas Molloy — numerous workplace discussions and a pervasive concern with Thomas Molloy and safety would convey that much of her workplace communications were focused on Thomas Molloy rather than her own performance and work issues. This is particularly regrettable in light of how this Complaint evolved; however, on considering all the evidence, Ms. Molloy's perspective does not in itself prove that her relationship to Thomas Molloy, his criminal charges or record was an actual factor in her termination.

c) *Dissenting Conclusion*

Although evidence involving a number of communications and circumstances was led in this hearing that suggest the Respondent *could* have discriminated against Ms. Molloy when it terminated her, I am not satisfied that tenuously related evidence that is consistent with, but does not establish discrimination can lead to such a finding, particularly in the absence of credible evidence that the *operating mind* of the Respondent made its decision to terminate while considering a factor that was discriminatory.

Had evidence been led — perhaps an overheard comment, a meeting note, a revealing comment on cross-examination, a memorandum or e-mail involving a key manager involved with the termination decision demonstrating or even suggesting that Ms. Molloy's marriage or relationship with Thomas Molloy or his criminal charges or record was a factor considered in the decision to terminate or that an effort by the Staff Development Branch to distance itself from Thomas Molloy was a factor, I could conclude that discrimination had occurred. In the absence of such evidence that would demonstrate such a nexus, and the compelling evidence to the contrary, I am not satisfied on the balance of probabilities that a discriminatory ground was a factor in the termination of Ms. Molloy's employment.

Decided this 5th day of December 2008 at the city of Whitehorse, Yukon



Barbara A. Evans, Chief Adjudicator