YHRPA File: 2023-03 Vincent (Zsohar)

Before the Yukon Human Rights Board of Adjudication

In the matter of the Yukon *Human Rights Act*

and the matter of

Journey Zsohar (formerly Vincent)("Complainant")

&

Yukon Human Rights Commission ("Commission")

v.

Romi Dhillon ("Respondent")

BOARD DECISION

Before: Chief Adjudicator Judith Hartling
Adjudicator Vincent Larochelle
Adjudicator Carol Geddes

Appearances

Vida Nelson and	
Alexander Dezan for	Commission
Journey Zsohar	Complainant
Romi Dhillon	Respondent

Heard: Whitehorse, Yukon, January 3 and 4, 2024

Closing Submissions: January 11, 2024; February 22 and February 27, 2024

Written Reasons by:
Adjudicator Vincent Larochelle

Concurred by:
Adjudicator Carol Geddes

Dissenting Written Reasons by:
Chief Adjudicator Judith Hartling (Pages 34 to 41)

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Overview

1. The Complainant Journey Zsohar (hereafter the "**Complainant**") and her wife Vikki Zsohar (hereafter "**Ms. Zsohar**") both identify as bisexual and transgender.

2. Sometime in the fall of 2020, Ms. Zsohar approached the Respondent, Romi Dhillon (hereafter the "**Respondent**"), at the Whitehorse General Hospital, where they both worked. Ms. Zsohar was aware that the Respondent is a landlord, and inquired whether he had an apartment to rent in Whitehorse.

3. In due course, the Respondent signed a one-year lease with both the Complainant and her wife, for a 3rd floor apartment on 4th Avenue, in Whitehorse (the "**Apartment**"), beginning on January 1, 2021 (the "**Tenancy**").

4. On April 7, 2021, the Respondent served the Complainant and Ms. Zsohar with a three-month, without-cause notice to end the Tenancy, with the result that the Complainant and her wife were eventually evicted from the Apartment in August 2021 (hereafter the "**Termination**").

5. The Complainant alleges that a protected characteristic — sexual orientation and gender identity or expression — contributed to the termination of her tenancy by the Respondent, and therefore that the Termination constitutes discrimination contrary to ss. 7(f.01), 7(g), and 9(d) of the *Human Rights Act,* R.S.Y. 2002, c. 116 (hereafter the "**Act**").

6. The matter was brought before the panel for hearing on January 3 and 4, 2024. The Commission was a party to the hearing and supported the Complainant's position.

7. After careful consideration of the evidence presented at the hearing of this matter, I have come to the conclusion that the Commission and the Complainant have not proven, on a balance of probabilities, that a protected characteristic was a factor in the Termination.

8. Accordingly, I find that the complaint before me is not made out.

9. What follows are my reasons for reaching this conclusion.

Applicable Legal Frameworks

Discrimination as a two-step inquiry

10. The legal framework applicable to claims of discrimination involves a well-established two-step inquiry. First, a complainant must establish a *prima facie* case of discrimination. Where a *price facie* case of discrimination is made out, the burden then shifts to the Respondent to raise a legal justification for the *prima facie* discriminatory conduct or practice.[1]

11. In order to establish a *prima facie* case of discrimination, a complainant must show, on a balance of probabilities, that:

i. They have a characteristic which is protected from discrimination under the *Act;*
ii. They experienced an adverse impact with respect to an area protected from discrimination under the *Act;*
iii. The protected characteristic was a factor in the adverse impact.

12. It is important to note that, in the human rights context, the term "*prima facie* discrimination", in its various iterations, must not be confused with the relatively low *prima facie* standard of proof. A complainant must establish a *prima facie* case of discrimination on the civil balance of probabilities standard of proof.

[1] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, para. 64. **[Bombardier, para. 64]**

13. The expression *prima facie* discrimination in the human rights context merely denotes the first step in the two-step analytical framework used to determine whether claims of discrimination are made out.[2]

14. When considering whether a protected characteristic was a factor in the adverse impact, it is not necessary to show that the protected characteristic played a significant or major role in the adverse impact, much less that it was the sole reason or factor for the adverse treatment. It is also preferable to avoid expressions or terms connected to the lexical field of "causality", as they detract from the effect-centered nature of the inquiry that must be undertaken.

15. To establish *prima facie* discrimination, it is sufficient for a complainant to show that a protected characteristic was **one** of many factors in the adverse treatment — that it contributed to the adverse treatment.[3]

16. Moreover, because human rights legislation is aimed at correcting and eradicating discrimination as a systemic phenomenon, the complainant need not prove that the respondent had an intention to discriminate.[4] Again, it is sufficient to show that the effect of a measure, decision, or conduct is discriminatory.

17. A complainant, however, may certainly try to prove that a respondent's actions or practices were intentionally discriminatory.

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[2] Bombardier, para. 59.
[3] Bombardier, para. 56.
[4] Bombardier, para. 41.

Circumstantial evidence and inferences

18. I am cognizant of the fact that it will often be nearly impossible for a complainant to show direct evidence of discrimination. Some forms of discrimination rarely manifest themselves overtly; rather they occur subtly or even unconsciously.

19. Accordingly, it is recognized that circumstantial evidence and inferential reasoning both have an important role to play in cases of discrimination.

20. It is open to this panel to infer that a course of conduct is discriminatory if the evidence presented makes such an inference more probable than other possible inferences.

21. Even in the process of drawing inferences, however, the standard of proof must remain that of proof on a balance of probabilities. It is important never to lose sight of the standard of proof on a balance of probabilities, even when a complainant relies on **both** direct and circumstantial evidence in support of their claim.

22. In some circumstances, a trier of fact can draw an adverse inference against a party who fails to elicit or produce evidence, an issue to which I now turn as the Commission asked that I make such a finding in this case.

Adverse inference

23. An adverse inference is, quite simply, the process of drawing an inference against a party based on a failure to produce or call evidence. In my opinion, the use of adverse inferences in the fact-finding process must be circumscribed by the following principles:

i. An adverse inference, like any inference, must be grounded in the evidentiary record, and not be the product of speculation or conjecture by the trier of fact.[5]

ii. Owing to its nature, however, an adverse inference may also be partly grounded in the procedural record or pre-hearing discussions between parties. A factual record of such issues may be required if they involve contentious facts;[6]

iii. An adverse inference is, broadly speaking, a finding of fact that evidence has not been adduced or produced by a party on the basis that such evidence would be unfavorable to that party;[7]

iv. Adverse inferences must not result in a shifting of the burden or standard of proof[8], however they may serve to recognize an unequal ability to access or produce evidence on a particular issue by the parties; and

v. Adverse inferences, if improperly or liberally used, have the potential to negatively affect trial fairness and efficiency. Thus, caution is warranted in the drawing of adverse inferences.[9]

24. A mere failure by a party to produce or adduce potentially relevant evidence to its case is insufficient in and of itself to ground an adverse inference.[10] This would represent an impermissible shifting of the burden of proof, affect trial fairness, and unnecessarily lengthen hearings by encouraging parties to conservatively adduce evidence.

25. Some form of evidentiary record or circumstances – beyond the mere failure to produce evidence — are required if the trier of fact is to be satisfied that evidence is not being called or produced by a party because it is unfavorable to that party.

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[5] *S.L.H. v. A.W.H.*, 2019 YKSC 43, para. 44.
[6] *Buksh v. Miles*, 2008 BCCA 318, para. 35
[7] *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509
[8] *Cobalt Construction Inc. v. Kluane First Nation, 2013 YKSC 124*, paras. 25-26.
[9] 2008 BC;
[10] *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509

26. Moreover, a party seeking an adverse inference to be drawn against another party must make this intention known, as the other party must have an opportunity to provide an explanation for the failure to produce evidence.

27. There is some controversy over the circumstances where it is appropriate to draw an adverse inference against a party who fails to call a witness. Some cases suggest that such inferences can only be drawn against a party "when that party alone could bring the witness before the court."[11]

28. Other cases suggest that the inference may be drawn where a party fails to produce a witness which "it would be natural for it to produce", or where such witness is "reasonably assumed to be favourably disposed to that party."[12]

29. The Commission brought the panel's attention to the case of *Town of Faro v. Carpenter*, where Justice Kent held as follows in relation to this panel's powers:

> *[28] Fundamental to this complaint is an issue of credibility. The statements were either made or not made. A board of adjudication is the best way to determine that question. That board could, pursuant to its powers, compel the protection of documents if the board determined that they were necessary to decide the question. The hearing would allow both sides to call as witnesses those people who each thought was relevant to decide the issues. A failure by either side to call certain witnesses would likely allow the board of adjudication to draw adverse inferences.*[13]

[11] *Lambert v. Quinn*, 1994 CanLII 978 (ON CA); *Robb Estate v. Canadian Red Cross Society*, 152 O.A.C. 60 (C.A.), para. 161; *Bishop-Gittens v Lim*, 2015 ONSC 3971, para. 24.
[12] *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509; *R. v. Ellis*, 2013 ONCA 9, para. 46.
[13] *Town of Faro v. Carpenter,* 2008 YKSC 25 (emphasis added).

30. I find that Justice Kent's dicta in *Town of Faro* are *obiter*, but more importantly they do not assist in determining the circumstances in which an adverse inference should be made by the panel.

31. The Commission also brought our attention to the B.C. Human Rights Tribunal decision in *Mann v. JACE Holdings*[14] to support its position on the drawing of adverse inferences. That case contains little helpful guidance on the applicable legal principles, but rather a factual example of where it was appropriate to draw an adverse inference.

32. In my opinion, black and white rules such as the two approaches described in *Lambert* and *Ma,* above, are not helpful. The former is too restrictive, and the latter is too broad.

33. Rather, the drawing of an adverse inference must be seen as part of the fact-finding process. Accordingly, it is discretionary in nature and highly dependant on the evidentiary record and entirety of the circumstances before the trier of fact.

34. It is therefore useless to attempt to draw here an exhaustive list of what facts and circumstances could be relevant to this inference-drawing process. For the sake of example, and, again, bearing in mind that a party may always justify a failure to produce evidence, some relevant considerations could be:

i. Whether one party was the sole party capable of shedding light on an issue;[15]

[14] *Mann v. JACE Holdings,* 2012 BCHRT 234.
[15] *Heynen v. YTG*, 2007 YKSC 49, para. 36.

ii. Whether one party possesses some degree of control over or special relationship with a potential witness or piece of evidence;

iii. Whether one party raised an issue in an untimely fashion, and failed to provide the best evidence on this issue;

iv. Whether one party failed to assist or obstructed another party's attempt to identify or communicate with a potential witness prior to the hearing;

v. The extent, if any, to which have been impractical for one party to ascertain the existence of, obtain or produce the evidence; and

vi. Whether one party failed to produce evidence after advising that it would do so.

35. Furthermore, the nature of the hearing, the procedure involved both before and during the hearing, and discussions between the parties, may all be relevant considerations in the decision to draw an adverse inference or not.

36. Ultimately, however, it is for a trier of fact to consider all relevant evidence and circumstances to determine whether the inference can be drawn or not.

Hearsay Evidence

37. At the outset of the hearing of this matter, given that the Respondent was self-represented, I raised an issue concerning hearsay evidence and its admissibility at the hearing.

38. As the Commission pointed out, Reg. 11(1) of the *Human Rights Regulations,* Y.O.I.C. 1988/170 relaxes the rules of procedure and standards of proof in our hearings:

> *Regulation 11(1)*
> *In addition to receiving evidence in accordance with the Evidence Act, the board of adjudication may receive or view any relevant evidence whether*

> *under oath or otherwise and irrespective of whether that evidence would be admissible in proceedings in court, and the board may act according to its view of the reliability and import of the evidence.*

39. I agree that hearsay may be admitted at a hearing of the panel. As the Supreme Court of Canada noted in *Bombardier* in a similar context:

> *[67] In essence, the purpose of this section is to relax the rules governing the admissibility and presentation of evidence, not to lower the usual civil standard of proof. In practice, this means that the Tribunal may accept any means of proof — writings, presumptions, testimony, admissions or the production of real evidence. Since it is not bound by the specific rules of evidence applicable in civil matters, it could, for example, admit hearsay evidence on certain conditions. That being said, the Tribunal must nevertheless, after hearing all the evidence, be satisfied on a balance of probabilities that the plaintiff has been discriminated against before it can decide in the plaintiff's favour.*[16]

40. To the extent that the Commission suggested that hearsay evidence is generally or presumptively admissible in proceedings before the panel, I disagree. The operative word of Reg. 11(1) is "may", which provides the panel with a discretion to admit evidence that would not normally be admissible in court proceedings.

41. The panel may refuse to admit hearsay evidence where such evidence raises concerns of reliability, fairness, or relevance, to give but some examples.

42. Where parties intend to adduce evidence that would not normally be admissible in court proceedings, they should come to a hearing prepared to speak to and defend the admissibility of the evidence. It would also be best practice to raise this issue in the course of case management conferences with the Chief Adjudicator to ensure a smooth hearing.

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[16] Bombardier, para. 67.

43. Fortunately, in this matter, the Respondent did not object to the hearsay evidence tendered by the Commission. Accordingly, I have considered the hearsay evidence adduced by the Commission.

44. As will be seen from my analysis below, however, I found such evidence not to be particularly material to the Complainant's case.

Misgendering at trial

45. At various times during the hearing, the Respondent used incorrect pronouns in referring to the Complainant's wife. The Respondent was corrected by the Chief Adjudicator several times.

46. The Commission asked the Panel to take this misgendering into consideration when drawing conclusions of fact and assessing the credibility of the Respondent.

47. Given that this occurred both during the Respondent's testimony and while making submissions to the panel, I need not decide the thorny issue of what to make of the misgendering had it occurred solely outside of the Respondent's testimony.

48. Accordingly, I will deal with this misgendering as a form of circumstantial or demeanour evidence when considering the Respondent's testimony.

Highlights of the evidence presented at hearing

49. The Commission called three witnesses:

i. Journey Zsohar (the Complainant)
ii. Vikki Zsohar (the Complainant's wife); and
iii. Romi Upkar Singh Dhillon.

50. The Commission also adduced several audio and documentary exhibits.

51. The Complainant called no evidence.

52. The Respondent testified a second time, during the presentation of his case in response to the Commission.

Complainant

53. The Complainant was the first witness called by the Commission. The Complainant's wife was excluded from the hearing during this testimony.

54. The Complainant identifies as transgender and bisexual. Her pronouns are she/they. During the hearing, she invited the board to use the pronoun she.

55. The Complainant's wife is Vikki Zsohar; her pronouns are she/her.

56. The Complainant established a broad timeline that led to the Tenancy and eventually to the Termination.

57. The Complainant explained that she had a discussion with her wife and the Respondent prior to signing the lease in the fall of 2020. During this meeting, which the Respondent thinks was by phone, the Respondent asked about employment.

58. At that time, according to the Complainant, Ms. Zsohar advised the Respondent that she was employed as a taxi driver. She had ended her employment as a nurse in the spring of 2020 and had begun working as a taxi driver prior to signing the lease. The Complainant advised that she was employed by the Yukon government as a nursing home attendant.

59. The Complainant testified that she had an in-person meeting with the Respondent's wife and Ms. Zsohar in order to sign the lease, giving rise to the Tenancy, sometime in October 2020.

60. Relevant terms of the lease included a one-year fixed term beginning on January 1, 2021, and a monthly rent of $1,500.

61. The Complainant and her wife moved into the Apartment on January 1, 2021.

62. The Complainant described the building in which the Apartment is found as follows:

i. There are eight units in the building, with a staircase in the middle;
ii. The Apartment was on the top floor of the building, and has no shared walls with any other apartment in the building;
iii. There is another apartment on the top floor of the building, across a hallway;
iv. There is another apartment directly below the Apartment.

63. The Complainant testified that she could hear tenants when they were walking up the stairs, and that other tenants probably heard her when she was walking up the stairs.

64. She was never approached by any other tenant in the building about noise issues.

65. The Complainant testified that her wife's work shifts as a taxi driver would typically begin after 6 a.m. and end by midnight.

66. The Complainant does not recall ever receiving a phone call from the Respondent to discuss noise issues in February 2021.

67. On April 7, 2021, the Complainant received a letter containing a three-month notice to end the Tenancy without cause. The letter did not state any reason for the termination. The letter indicated June 30, 2021, as the last day of the Tenancy.

68. After receiving this letter, the Complainant and her wife had two phone conversations with the Respondent on April 7 and on April 11, 2021, respectively.

69. The Complainant described the phone call of April 7, 2021, as follows (this is not intended as a sequential description):

i. The Complainant and her wife asked the Respondent why their tenancy was terminated;
ii. The Respondent said it was because of their lifestyle;
iii. The Respondent mentioned noise as an issue;
iv. The Respondent did not mention Vikki Zsohar's employment;
v. The Respondent also said that the building was not "LGBT friendly";
vi. The Respondent offered to rent another apartment to the Complainant and her wife, but it was for a rent of approximately $2,000.

70. When asked in her examination in chief how she interpreted the word "lifestyle" used by the Respondent during this first phone call, the Complainant answered that she felt he meant their gender identity, but she didn't want to assume, and that's why she called him back and asked him to explain what he meant by "lifestyle".

71. On April 11, 2021, the Complainant and her wife called the Respondent and recorded the conversation. An audio file and transcript of the call were filed as exhibits during the hearing.

72. As a consequence of the termination notice and the two phone conversations, the Complainant testified that she felt considerable emotional and psychological distress. She became anxious. She felt unsafe and unwelcome in the building and wanted to get out.

73. After receiving the notice to terminate, the Complainant contacted the Residential Tenancy Office to dispute the notice. According to the Complainant, the RTO granted an extension until August 15, 2021.

Vikki Zsohar

74. Ms. Vikki Zsohar is the Complainant's wife. Her pronouns are she/her.

75. Ms. Zsohar began employment as a nurse at the Whitehorse General Hospital in 2012. The Respondent was already working at the hospital at that time.

76. When Ms. Zsohar began working at the hospital, she identified as a man. The Respondent met and became acquainted with Ms. Zsohar during this period, prior to her transition.

77. Ms. Zsohar began her transition in 2017 and had gender reassignment surgery in 2019.

78. Ms. Zsohar acknowledged that the Respondent would have been aware of her transition prior to renting out the Apartment, as they probably had discussions about

pronouns and her transition while they both worked at the hospital. Ms. Zsohar also acknowledged, in cross-examination, that the Respondent would have noticed that she started wearing a woman's nursing gown sometime before the discussion of a rental came up.

79. At some point during work hours, Ms. Zsohar approached the Respondent to ask for a rental unit for herself and the Complainant. The response was positive, and no reference check was required by the Respondent.

80. Ms. Zsohar met with the Respondent's wife and the Complainant in order to sign the lease, at a Tim Hortons. Ms. Zsohar was familiar with the Respondent's wife; their kids went to the same school.

81. Ms. Zsohar generally confirmed the layout of the Apartment and building as described by the Complainant. Ms. Zsohar also testified that the building in which the Apartment is found is small and compact, and that noise travels easily from the staircase and hallway to the units.

82. Ms. Zsohar explained that she was employed as a hospital nurse until November 2020 when she resigned, following a leave from work. She struggled to find employment and eventually returned to taxi driving in mid-January 2021.

83. She worked as many days as she could, and her shifts would typically consist of 12-hour shifts beginning or ending sometime between 4 and 6 a.m.

84. Ms. Zsohar indicated that the Respondent probably told her to walk more quietly when going up the stairs, and that this would probably have occurred prior to receiving the notice to end tenancy in April.

85. On February 6, the Respondent sent Ms. Zsohar a text message asking her to call him. Ms. Zsohar does not have a good recollection of whether she called him or not, nor the reason why this text message was sent.

86. Ms. Zsohar received the formal notice to end the tenancy on April 7, 2021. Through discussions with the Respondent, she ended up moving out of the Apartment in mid-August 2021 rather than the initial date set for July 2021.

87. Ms. Zsohar and her wife called the Respondent on April 7th after receiving the notice. Ms. Zsohar described the phone call as follows:

i. The first thing the Respondent said was that the building was not LGBT friendly, Ms. Zsohar became extremely distressed;
ii. The Respondent also said that their lifestyle was in issue;
iii. Ms. Zsohar interpreted “lifestyle” as referring to them being a transgender gay couple;
iv. The Respondent offered another property, which he owns, to them, but it was much more expensive.

88. Ms. Zsohar and the Complainant called the Respondent again on April 11th and recorded the conversation.

89. Sometime later, the Respondent provided a positive reference letter that helped Ms. Zsohar obtain another tenancy.

90. In cross-examination, Ms. Zsohar indicated she was not confused about the Respondent's use of the term "lifestyle" during their conversation of April 7, as this term was used when the Respondent also said the building was not LGBT friendly, and therefore was upsetting and hurtful.

91. Finally, Ms. Zsohar also acknowledged, in cross-examination, that she used an extension cord to plug in her car across the sidewalk during the winter of 2020.

Respondent

92. The Respondent was called by the Commission, but also testified during his case in response.

93. Around 2020-2021, the Respondent owned about 50 rental units. His wife would take care of administrative and office-type duties, while the Respondent would take care of maintenance, repairs, and other tenant requests.

94. The Respondent generally confirmed the timeline of events leading to the signing of the lease.

95. The Respondent testified that he was aware of Ms. Zsohar's transition which occurred while they both worked at the hospital. The Respondent noticed that Ms. Zsohar had changed clothes, was wearing makeup, and putting on jewelry.

96. The Respondent added that he met the Complainant when he showed the Apartment in person to Ms. Zsohar and the Complainant.

97. The Respondent was also told by Ms. Zsohar that the Complainant was transgender prior to signing the lease, and that they were in a relationship together.

98. The Respondent testified that he terminated the Complainant's lease because of noise complainants received from other tenants, and because of the safety issue posed by the car being plugged in using an extension cord over the sidewalk.

99. With respect to noise complaints, the Respondent indicated that tenants from three of the other five units in the building, on the second and third floors, all of whom had been living in the building for longer periods of time, had complained about the noise caused by the Complainant and her wife's use of the door and staircase.

100. One of the tenants had also complained that the Complainant was plugging her car in using an extension cord over the sidewalk.

101. After a formal human rights complaint was filed in this matter, the Respondent contacted one of the tenants, Benjamin Lambert, to provide an e-mail concerning the noise issues. This e-mail was put into the record.

102. The Respondent explained that he uses his judgment when dealing with noise complaints. In this case he explained that since three long-term tenants had complained about another tenant that just moved in, he didn't need the headache or to waste his time. He therefore decided to give a without-cause eviction notice, which the law allowed him to do at the time.

103. Asked if he had spoken to the Complainant or her wife about noise issues, he indicated that he wasn't sure, he had a great deal of units to deal with at the time, but that he had no reason to doubt Ms. Zsohar's account that this happened.

104. The Respondent indicated that he offered a basement suite to the Complainant for a cheaper rent of $1,400 during the phone call on April 7, 2021, which would fit her lifestyle as a taxi driver, in particular the comings and goings at night.

105. The Respondent denied saying that the building was not LGBT friendly on April 7th, however he agreed that he told the Complainant that he had another apartment that would fit her lifestyle as a taxi driver.

106. The Respondent testified that, during the phone call of April 11th, the Complainant brought up the issue of LGBT. He got scared. He felt that the Complainant was going in a totally different direction. He wasn't sure what it meant exactly but he remembered it being used in his training when he worked for the City of Whitehorse. He indicated that inside his heart he knew what it meant and that it would be a mean thing to say.

107. The Respondent indicated that he provided a positive reference letter to the Complainant's prospective landlady, but that he did mention the noise issues in the letter.

108. The Respondent testified that he brought his children to a birthday party at Ms. Zsohar's residence. It was not clear when this happened.

109. At various times during his testimony and when asking questions to witnesses, the Respondent was unable to refer to the term "LGBT". He would confuse the acronym, use wrong letters or an incorrect number of letters to refer to the acronym.

110. It was also readily apparent that the Respondent struggled with his spoken English. He required assistance at times and struggled with words and basic grammar.

111. The Respondent, during his testimony and at other moments, referred to Ms. Zsohar by using the pronouns he or him. When warned by the Chief Adjudicator, the Respondent corrected himself. Later in the hearing, however, he continued to misgender Ms. Zsohar, sometimes using both the pronouns he and she within the same sentence or in answer to a question asked of him.

Documents and audio call

112. The Commission filed a number of exhibits, the most relevant of which I find to be:

i. An audio recording of the phone call which occurred on April 11, 2021;
ii. Text messages exchanged between Ms. Zsohar and the Respondent, in particular one message sent by the Respondent on February 6, 2021, asking Ms. Zsohar to call him back;
iii. An e-mail sent by Benjamin Lambert to the Respondent on June 8th, 2021; and
iv. The three-month notice to end tenancy that was served on the Complainant on April 7, 2021.

Analysis and conclusions

113. I find that the Complainant has established on a balance of probabilities that she possessed two protected characteristics under the *Act*: she identified as transgender and was bisexual.

114. I also find that the Complainant has established on a balance of probabilities that she suffered an adverse treatment which is covered by the *Act:* her lease of the Apartment was terminated. I find that termination of a lease falls within the scope of s.9(d) of the *Act.*

115. However, I find that the Complainant has not established on a balance of probabilities that a protected characteristic contributed to or was a factor in this adverse treatment.

116. When considering all of the evidence, on balance I have reached the conclusion that the reason for the Termination was indeed because of noise issues. I do not conclude that the car plug had much to do with this decision, but I do conclude it was brought to the Respondent's attention by another tenant prior to April 5, 2021.

117. Furthermore, and most importantly, I have reached the conclusion that neither the Complainant's sexual orientation nor her gender identity or expression were a factor in the termination of the tenancy.

118. All of the witnesses testified in a straightforward manner. I do not believe that anybody was attempting to mislead the panel. All witnesses understandably did not have a precise recollection of events that had transpired years ago.

119. I did note some difficulties with the Complainant's evidence and the evidence of her wife Ms. Zsohar.

120. The Complainant indicated that Ms. Zsohar advised the Respondent that she was a taxi driver prior to signing the lease in October 2020, however Ms. Zsohar indicated that she was employed as a nurse until November 2020 and did not begin her work as a taxi

driver until mid-January 2021. I also note that Ms. Zsohar approached the Respondent at their mutual place of employment, namely the hospital.

121. The Complainant indicated that Ms. Zsohar would work from 6 a.m. to midnight, however Ms. Zsohar indicated that she often began or ended work as early as 4 a.m.

122. I find these two inconsistencies of some moment as they relate to when and how noise would have been made in the building, and weigh on the legitimacy of the Respondent's explanation for terminating the lease.

123. The Complainant testified that she was unsure what the Respondent meant by "lifestyle" in the phone call of April 7, that she felt he meant gender identity but gave him the benefit of the doubt and called him back to ascertain what he meant. I find this difficult to understand if the Respondent also said that the building was not LGBT friendly. Indeed, Ms. Zsohar's evidence was that the use of the word "lifestyle" in close proximity to a comment that the building was not LGBT friendly raised no confusion in her mind about what lifestyle meant.

124. I pause here to note that the complaint did not allege, and the panel was not asked to consider, whether the termination of a tenancy on the basis of a person's "lifestyle", if such a word refers to a person's employment, was prohibited under the *Act*, for example under s. 7(l) of the *Act*. Accordingly, I will not consider this issue.

125. I attach a significant amount of weight to the fact that the Respondent was aware of both the Complainant and Ms. Zsohar's protected characteristics when he chose to

rent the Apartment to them without asking for references, in a market which allowed the Respondent to choose his tenant.

126. In fact, the Respondent clearly defended himself in this way during the phone call of April 11, 2021, which was recorded without his knowledge. The only conclusion I can draw from this is that the Respondent wasn't influenced at all by these protected characteristics when he decided to rent the Apartment to the Complainant.

127. Accepting this, it is difficult to understand why those protected characteristics, only months later, would influence the Respondent in his decision to terminate the Tenancy in any way.

128. I conclude that the Respondent did not tell the Complainant that the building was not "LGBT friendly". I prefer the Respondent's testimony on this point. I also note that the Respondent was unable to correctly say this acronym during the hearing on multiple occasions, including during the phone call of April 11. The difficultly was genuine.

129. In addition, the Complainant's testimony concerning giving the Respondent the benefit of the doubt about the lifestyle comment is inconsistent with the Respondent saying the building was not LGBT friendly.

130. I found the Respondent to be particularly credible around the issue of noise complaints and in relation to his testimony that he does not judge the Complainant or Ms. Zsohar in any way for their sexual orientation and gender identity or expression.

131. The Complainant and Ms. Zsohar themselves acknowledged that noise travelled easily in the building. This fact, combined with the comings and goings at 4 a.m., lends support to the proposition that noise was an issue for the other tenants.

132. An e-mail sent by Mr. Lambert to the Respondent was entered as an exhibit by the Commission. It is not clear whether the e-mail was entered as hearsay evidence, or rather as evidence that a noise complaint had been made by this tenant, in which case it may not be considered hearsay. The parties did not address this issue. The e-mail is most relevant in relation to the adverse inference I am asked to draw, to which I will come shortly.

133. I also note that none of the witnesses suggested that the other tenants themselves were the source of the discrimination, i.e. that the Complainant's protected characteristics were a factor in the noise complainants made to the Respondent. Such a conclusion would therefore be speculative.

134. Asked if he had spoken to the Complainant about noise issues prior to giving notice, the Respondent candidly admitted that he did not remember, despite his awareness that Ms. Zsohar testified to this effect. I find that the issue of noise was brought up prior to the notice, most likely this conversation occurred in response to the text message of February 6, 2021, although none of the witnesses could provide an exact timeline.

135. One significant issue regarding the Respondent's evidence was his denial, during the phone call of April 11, 2021, that he used the term "lifestyle" when speaking to the Complainant on April 7, 2021. At the hearing, he admitted to having used that term.

136. It is unfortunate that the Respondent was not cross-examined by the Commission or the Complainant on this inconsistency. The Commission had an opportunity to do this when the Respondent testified in his own case, or during its own examination-in-chief of the Respondent.

137. The lack of cross-examination raises some issues of fairness, in this context referred to as *Browne v. Dunn* issues. It is particularly concerning here that no cross-examination occurred given that the inconsistency related to an important issue, which was manifest at a very early stage in this matter, even before an investigation by the Commission occurred.

138. In my opinion, the failure of a party to cross-examine a witness on an inconsistency is not necessarily fatal. It will always be a question of what weight can be put on the inconsistency in the absence of cross-examination.

139. In the future, however, given the relatively informal and relaxed rules of procedure in our hearings, I believe we should not get bogged down in the weeds of procedure. The panel has a broad discretion to allow a witness to be recalled, and I expect this discretion would be favorably exercised when a *Browne v. Dunn* issue has been identified by a party or the panel, especially when the witness is present at the hearing and the rules of natural justice do not dictate otherwise.

140. In this case, fortunately, I find an explanation for the inconsistency in the Respondent's testimony despite the failure to cross-examine. During the conversation, he felt scared, and understood the Complainant to be taking the termination in a bad direction. He wasn't sure what LGBT meant but he knew in his heart that it was bad. It

can also be heard in the recording that the Respondent became defensive. I find that the denial was made because the Respondent was scared about the direction in which the Complainant was taking the conversation, and he became defensive.

141. While this inconsistency and defensiveness have a bearing on his credibility in general, it does not prevent me from preferring his version of events to those of the Complainant and Ms. Zsohar.

142. On balance, therefore, I prefer the Respondent's testimony and version of events over those of the Complainant and her wife. I believe the Respondent when he testifies that, in his heart, he had nothing but respect for Vikki Zsohar, and wanted to help her find a place to stay even after serving the notice on April 7, 2021.

143. I have also considered the misgendering issue, and the adverse inference which the Commission has asked the panel to draw. I am not prepared to go down those paths.

144. On the misgendering, having observed the Respondent closely during his testimony on this specific issue, I am satisfied that it was not intentional, let alone ill-intentioned. I conclude that he was genuinely confused and struggling to use the correct pronoun. It bears remembering that the Respondent met Ms. Zsohar when she still identified as a male. It is therefore understandable that some confusion could arise in using the correct pronouns, especially in a language which he struggles to speak.

145. To be clear, I am not condoning or justifying the Respondent's failure to use the correct pronouns for Ms. Zsohar during the hearing. I am simply not prepared to conclude, in the context of the evidence of a whole, that this misgendering reflects some form of

disapproval or judgment for Ms. Zsohar's gender identity and expression, or that it is otherwise helpful in supporting the notion that a protected characteristic played a role in the Termination.

146. I turn, finally, to the adverse inference that the Commission has asked me to draw. The Commission submitted that the failure of the Respondent to call any of the tenants who complained about the noise issue should lead the panel to infer that they would not have supported this claim, in other words they would have testified that they didn't complain about noise issues.

147. I am not prepared to draw this inference.

148. The Respondent identified noise as being the justification for the Termination early on in this process, including in his Form 2. That form also indicated that tenants had been complaining about the noise. The Commission was therefore aware of this justification and potential evidence. Indeed, the Respondent provided an e-mail from Benjamin Lambert, one of the tenants who complained about the noise, which was eventually provided to the Commission prior to the hearing although no evidence was adduced concerning when this happened.

149. I also note that the Commission has investigative powers under the *Act* and its regulations. This includes the ability to contact potential witnesses and the Respondent. Relatedly, the e-mail provided by the Respondent contains contact information for Mr. Lambert.

150. Had the Commission adduced evidence that, prior to the hearing, the Respondent never mentioned noise complaints by the other tenants or had refused to provide contact details and names for these tenants, or that the tenants were ignoring its attempts to contact them, I may very well have considered drawing an adverse inference against the Respondent. This was not done.

151. In fact, no evidence was adduced — or circumstances brought to the panel's attention — to suggest that it was impossible or impractical or difficult for the Commission to establish contact with or call these potential witnesses at the hearing, let alone that the Commission, during its investigation, attempted to contact these witnesses. It is also unclear whether these potential witnesses remained tenants of the Respondent at the date of the hearing or during the Commission's investigation.

152. In the result, I find the inference speculative more than anything else. There is no evidentiary record or circumstances brought to the panel's attention by the Complainant or the Commission to justify it.

153. I also note that non-government respondents in complaints under the *Act* are often self-represented and unfamiliar with the process of a hearing. The Commission, by contrast, has significant resources at its disposal, investigative powers, and is familiar with this process.

154. The Commission's invitation for the panel to draw an adverse inference in the particular circumstances of this case, if accepted, would fail to acknowledge the important role and duty which it is itself called to play under the *Act:* to investigate and get to the bottom of human rights complaints.

Conclusion

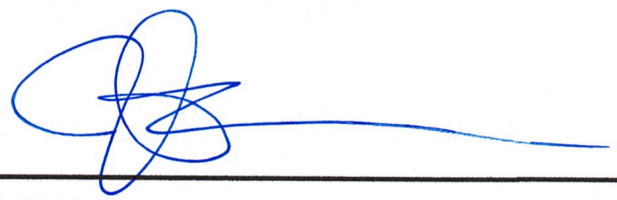
155. The Commission and the Complainant have not proven, on a balance of probabilities, that a protected characteristic was a factor in the Termination.

156. Accordingly, I find that they have not made out a *prima facie* case for discrimination, contrary to ss. 7(f.01), 7(g) and 9(d) of the *Act.*

157. It is therefore unnecessary for me to consider the question of what remedy would have been appropriate, and I decline to do so.

158. I conclude that the complaint before me is not made out.

Whitehorse, Yukon, April 19, 2024



Adjudicator Vincent Larochelle

I agree:
"Adjudicator Carol Geddes"

Dissenting Written Reasons

159. **This is not the decision** / judgement. It is a dissenting opinion.

160. The decision has been provided by board members Vincent Larochelle and Carol Geddes.

Finding of Facts

161. The Complainant and her partner (VZ) both identify as bisexual and transgender.

162. The Respondent and VZ worked together at the Whitehorse General Hospital. VZ inquired with the Respondent if he had rentals available.

163. The Respondent knew of VZ's gender identity.

164. The Respondent, the landlord, rented an apartment to them, commencing January 1, 2021.

165. The Complainant worked 12-hour shifts, 4 days a week, at the hospital. VZ worked part time shifts as a taxi driver.

166. VZ's two children stayed with them on occasion.

167. The Respondent issued a Notice of Eviction, without cause, to the Complainant and VZ on March 31, 2021.

168. The Complainant and VZ called the Respondent and asked why they were being evicted.

169. Both the Complainant and VZ were on the phone.

170. The Respondent advised it was because of noise, walking up and down the stairs, closing the door when going to work, and their lifestyle.

171. The Respondent gave evidence that he was the first to use the word “lifestyle”.

172. The Complainant and VZ placed a second call to the Respondent asking what the Respondent meant by “lifestyle”. The Complainant and VZ both gave evidence the Respondent said the building was not LGBT friendly. The Respondent denies saying the building was not LGBT friendly.

173. The Respondent had not warned the Complainant and VZ of noise complaints before giving the Notice. The Complainant and VS had not received complaints of noise from other tenants. The Respondent did not rescind the Notice when The Complainant and her partner reduced the noise when on the stairs and when closing the outside door.

174. He offered to rent them another apartment.

175. The Complainant and her partner moved from the building.

176. The mental health of the Complainant and her partner were severely affected by the eviction as they suffered depression, anxiety, and strain on their relationship. They were compelled to seek and find other accommodation.

The Law as it Relates to the Yukon *Residential Landlord and Tenant Act,* and the Yukon *Human Rights Act*

177. The Respondent argued he did not have to provide a reason for eviction as if the legislation permitted an eviction for gender identity.

178. S.39 of the *Human Rights Act*, Yukon states:

> *This Act supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act.*

179. The Yukon *Residential Landlord and Tenant Act* does not contain an exception to the *Human Rights Act*.

180. As such, during the time period of the tenancy in this case, a landlord could give Notice to Evict without cause, however, a landlord still could not do so if the eviction was a discriminatory practise under the *Human Rights Act*, Yukon. In the case at hand, the Respondent landlord could not evict the complainant because of gender identity or gender expression, 7(f.01), sexual orientation, 7(g), and prohibited discrimination in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public, 9(d).

181. Part 2 of the Respondent's submission is not accepted.

Has the Complainant established a prima facie case of discrimination on a balance of probabilities?

182. Cases under the Human Rights Act are civil cases where the standard of proof is a balance of probabilities. It is not the same standard as in a criminal case of proof beyond a doubt. I stress this as we are faced with credible evidence of both parties (the Respondent falling short in credibility when giving evidence concerning noise in the building and evidence about the "first" phone call).

Balance of Probabilities

183. McIver v. Power (1998) P.E.I.J. No.4 Prince Edward Island Court-Trial Division

> *In any civil case the plaintiff must prove their case on a balance of probabilities if they are to succeed. This means that the plaintiff must prove that his facts tip the scale in his favour even if it is only a 51% probability that he is correct.*

184. Saying that something is proven on a balance of probabilities means that it is more likely than not to have occurred. It means that it is probable (i.e. the probability that some event happened is more than 50 percent). Envisioning the scales of justice evenly balanced, but if one side then has the weight of a feather added to it, causing it to go down and the other side up, the side with the feather wins. Proof greater than that is not required.

185. It is more probable that the Respondent, in using the term “lifestyle” during the phone call, was referring to gender identity, than not.

186. He did not use the word “work” when referring to the noise even though his evidence was that noise complaints were about the complainant and VZ using the stairs and closing the door when going to work.

187. The Respondent said he used the word “lifestyle” first.

188. It is not plausible that the eviction was based on noise.

Adverse Inference

189. The Respondent advised that they were being evicted because of noise, but the only evidence of noise was the respondent’s evidence that he received noise complaints from tenants. He couldn’t provide dates, names, or what the specific complaints were.

190. He provided an email from a tenant in the apartment, but the email holds little weight as it was written after the Complainant's complaint was lodged.

191. The Respondent did not offer any information as to why tenants who complained of noise weren't called as witnesses.

192. As such, the Respondent's evidence about noise is of little weight.

193. There is an adverse inference drawn when a party fails to produce important witnesses or fails to provide a reason as to why those witnesses are not attending and giving evidence.

194. *Mann v JACE Holdings*, 2012 BCHRT 234, 9, 10:

> 9*. When a party, without a satisfactory explanation, to call a witness who is likely to have relevant evidence, it is open to a trier of fact to infer their evidence would not have favoured that party's position on the facts about which they could have testified.*
>
> *10. …..From Thrifty's failure, without explanation, to call those witnesses. I draw an adverse inference.*

Direct evidence of discrimination

195. That the Respondent knew of the transgender identity and didn't appear that he himself was concerned about it is not the point. His evidence was credible that he would rent to transgender or bisexual person. What is at issue is whether the act of eviction he performed was because of gender.

Credibility/ Plausibility

196. The reason of noise is not plausible. The only noise the Respondent gave evidence of is that tenants complained of noise when the Complainant and VZ were coming and

going to work. It was footsteps and the closing of a door in an apartment building that the Complainant gave evidence that you could hear a cat meow on occasion.

197. No tenants complained to the Complainant or VZ about noise.

198. No complaint was made by the Respondent to the Complainant about the noise prior to the eviction.

199. The Complainant and VZ gave evidence that, after receiving the Notice of the Eviction, they decreased the noise.

200. The Respondent didn't subsequently cancel the Notice even though it appears the problem might have been solved.

201. Interestingly, there were no complaints of any noise from two children staying with the Complainant.

202. On a balance of probabilities, noise was not the reason for evicting.

203. It appears that the Respondent himself, as an individual, was not discriminatory, but the act of eviction which he performed was.

Adverse Effect on the Complainant and her Partner

204. The Complainant gave evidence of the negative psychological effect that the eviction had on her and her partner. Further, having to find new accommodation and move is an adverse effect in itself.

Did the Respondent Justify the Discrimination?

205. The Respondent felt he was justified to evict without cause as that is what he understood he could do under the *Residential Landlord and Tenant Act*, Yukon.

206. Unfortunately for him, his lack of knowledge of the law and that the *Human Rights Act* superseded the *Residential Landlord and Tenant Act*, is not a defence.

207. The Respondent still cannot evict on discrimination.

Intent to Discriminate

208. The Complainant is not required to prove the Respondent intended to discriminate against her.

209. See: *Commission v. Bombardier Inc. v Javed Latif* 2015, SCC 39, para 40.

> 40. *Before we consider the three elements of discrimination, we believe it will be helpful to point out that under both Canadian law and Quebec law, the plaintiff is not required to prove the defendant intended to discriminate against him or her: to... hold intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create... injustice and discrimination by equal treatment of those who are unequal... (Citation omitted; O'Malley, at p 549)*

Sole Reason

210. It is not necessary for the prohibited ground being relied upon to be the sole cause of the prohibited act.

211. Ibid: para 44

> *In the case at bar, the Tribunal held it is not necessary for the prohibited ground relied on by the plaintiff to be the sole cause of impugned act, as*

that act may be explained by a variety of reasons. The Tribunal found that as long as any one of those reasons is connected with a prohibited ground, it can be concluded that discrimination within the meaning of s.10 has occurred.

Finding

212. I find that the Respondent did discriminate against the Complainant and VZ pursuant to the *Human Rights Act*, Yukon s. 7(f.01), 7(g) and 9(d).

213. I find the Respondent, as an individual, was accepting of the gender identity of the Complainant and VZ as he knew of their gender prior to renting to them and he offered rental accommodations to them after the eviction.

214. However, he did perform an act of discrimination by evicting them. It is not plausible he would evict tenants based on the limited noise complaints he gave evidence of or that he would not have warned them of noise complaints.

215. He used the word "lifestyle" rather than "work" when speaking with the Complainant and VZ on the telephone discussing the reason for eviction.

216. He did not rescind the Notice when the Complainant and VZ reduced the noise.

217. An adverse inference is made as he did not call witnesses to give evidence of the noise or give reasons why he did not call witnesses.

Whitehorse, Yukon, April 19, 2024

Chief Adjudicator Judith Hartling
Yukon Human Rights Panel of Adjudicators