**IN THE MATTER OF:** ***The Law Enforcement Review Act.***
**LERA Complaint No: 5328**

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|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| **R.J.M.** | ) | **R.J.M.** |
| | ) | **representing herself** |
| **Complainant,** | ) | |
| **-and-** | ) | |
| | ) | |
| **CONSTABLE P. and** | ) | **Mr. Josh Weinstein** |
| **CONSTABLE T.** | ) | **for the Respondents** |
| | ) | |
| **Respondents.** | ) | |
| | ) | **Mr. Denis Guenette** |
| | ) | **for the** |
| | ) | **Commissioner** |
| | ) | |
| | ) | |
| | ) | **Decision delivered** |
| | ) | **the 10th day of** |
| | ) | **February, 2004** |

## DECISION ON THE PRELIMINARY APPLICATION BY THE RESPONDENT OFFICERS

**L. GIESBRECHT P. J.**

## INTRODUCTION

[1] The complainant, RJM made a complaint to the Law Enforcement Review Commissioner on July 6, 2000 alleging that the two respondent officers had committed certain disciplinary defaults affecting her during their involvement with her on May 9, 2000. The Commissioner has referred the matter to a Provincial Judge for a hearing to determine the merits of the complaint. The hearing in this matter has been set for February 10 and 11, 2004.

[2] The respondent officers have filed a preliminary application asking for a finding that the Commissioner acted without jurisdiction or in the alternative lost jurisdiction, in connection with all disciplinary defaults that are alleged to arise from the complaint made by Ms M. The respondents

take the position that the Commissioner lost jurisdiction to refer the complaint for a hearing before a Provincial Judge, and that a Provincial Judge has no jurisdiction to conduct a hearing to determine the merits of the complaint.

[3] The respondents' application is based on the limitation period that is set out in ***The Law Enforcement Review Act*** (the Act) requiring complaints to be filed not later than 30 days after the date of the alleged disciplinary default. The Commissioner has a limited discretion under the Act to extend the time for the filing of a complaint. The respondents take the position that the Commissioner ought not to have exercised his discretion to extend the time to file the complaint in the circumstances of this case.

[4] The Commissioner has been added as a party to these proceedings for the limited purpose of addressing the jurisdictional issue raised by the respondents. Argument on this preliminary application was heard on November 26, 2003. Although she was present at that time Ms M. made no submission on this application. The respondent officers and the Commissioner of the Law Enforcement Review Agency were represented by counsel who filed written briefs and made oral submissions.

## JURISDICTION TO HEAR THE PRELIMINARY APPLICATION

[5] Counsel for the respondents and the Commissioner agree that I have the jurisdiction to hear and determine the respondent's challenge to the Commissioner's exercise of discretion when he extended the time for the filing of the Ms M.'s complaint. They rely on two cases: *Kennedy v. Manitoba (LERA),* [1999] M. J. No. 111(Man. Q. B.) and *Turnbull v. Canadian Institute of Actuaries* (1995), 129 D.L.R. (4th) 42 (Man. C.A.)

[6] In the *Kennedy* case one of a number of procedural irregularities that the applicants complained of was that the complaint was filed more than 30 days after the alleged disciplinary default occurred. Beard J. held that this was the kind of procedural irregularity, which "may be able to be remedied by a provincial judge in the course of an application to determine whether he has jurisdiction to proceed." (at para. 17) She went on to say:

> "If he or she found that one or more of the procedural irregularities complained of resulted in a breach of the rules of natural justice and that there had been prejudice to the applicants, he or she may also find on the

> facts that the breach could be remedied at the hearing stage by ordering disclosure, an adjournment or other such relief at that stage, and he or she could make such an order.
>
> On the other hand, if he or she found that there was no remedy which would resolve the prejudice to the applicants, then he or she would have to find that he or she was without jurisdiction to proceed with a hearing and refuse to hold a hearing. … A provincial judge is in as good a position to deal with these procedural irregularities as is the Court of Queen's Bench." (at paras. 17 - 19)

[7] In the *Turnbull* case Scott C.J.M. writing for the Court and relying on the decision of the Supreme Court of Canada in *Canadian Pacific Limited v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 concluded that an administrative tribunal is an appropriate body to deal with questions of its own jurisdiction.

[8] Accordingly, I am satisfied that I have the necessary jurisdiction to determine the respondent's preliminary application.

## THE PROVISIONS OF *THE LAW ENFORCEMENT REVIEW ACT*

**[**9**]** The provisions of the Act, which are relevant to the present application, provide as follows:

> 6(1) Every person who feels aggrieved by a disciplinary default allegedly committed by any member of a police department may file a complaint under this Act.
>
> 6(3) Every complaint shall be in writing signed by the complainant setting out the particulars of the complaint, and shall be submitted to
>
> (a) the Commissioner; or
> (b) the Chief of Police of the department involved in the complaint; or
> (c) any member of the department involved in the complaint;
>
> not later than 30 days after the date of the alleged disciplinary default.
>
> 6(4) Every member who receives a verbal complaint concerning conduct which may constitute a disciplinary default shall forthwith inform the person making the verbal complaint that a complaint under this Act must be made in writing and shall forthwith inform the person of the relevant time limits set out in this section.

> 6(6) Where the complainant has **no reasonable opportunity** to file a complaint within the time period set out in subsection (3), **the Commissioner may extend the time for filing the complaint** to a date not later than six months after the date of the alleged disciplinary default. (Emphasis added).

[10] It is the Commissioner's discretion under section 6(6) of the Act, which is being challenged, in the present application. Essentially the determination of this application comes down to the question of what is meant by the phrase 'no reasonable opportunity.'

## THE FACTUAL BACKGROUND

[11] On May 9, 2000 it is alleged that the respondent officers searched the home of the complainant R.J.M. and later arrested her and took her to the Public Safety Building to be interviewed about an alleged theft. It is during this encounter that the complainant alleges that the two officers committed various disciplinary defaults. Ms M. filed her complaint with the Commissioner in this regard on July 6, 2000, some 58 days after the occurrence. On July 13, 2000 the Commissioner reviewed the file and extended the time for filing the complaint pursuant to section 6(6) of the Act. The following note appears on the LERA file in the Commissioner's handwriting:

> "File reviewed. Time for filing extended consistent with section 6(6) L.E.R. Act. It is in the public interest to have this matter investigated, as well as factors noted in the complainant's statement."

[12] In the statement taken from the complainant by a LERA investigator the following question and answer were recorded:

> "Q. Why did you report this to L.E.R.A. after the 30 days?
>
> A. I was out of town and I was discouraged by friends who told me that's how the police are and that's just the way it is and I should forget about it but I can't forget about it. I didn’t know about the 30 days."

[13] In a written statement provided to the LERA investigator by a witness to the incident the following statement is made:

> "R.J.M. returned. Upset. Crying. Scared. I phoned the non-emergency police to obtain their names or badge numbers. Which they refused to

> give me. When I asked for the information they ignored my question I repeated 3x."

## POSITION OF THE RESPONDENT OFFICERS

[14] The respondents take the position that the language in section 6(3) of the Act is mandatory and that the Commissioner's discretionary jurisdiction to extend the time limit past the 30-day limitation period for the filing of a complaint is very narrow. They submit that a failure to comply with the time limits in the Act results in a loss of jurisdiction for the Commissioner to accept a complaint and refer it to a Provincial Judge to conduct a hearing on the merits.

[15] The respondents argue that there is nothing in the Commissioner's file on this matter that indicates that the complainant did not have a reasonable opportunity to file her complaint within the 30-day time limit. They submit that the complainant's statement does not provide an adequate reason for not being able to file the complaint within the appropriate time. They note that 'being out of town' without specifying how long she was away or where she was is not sufficient to amount to a lack of 'reasonable opportunity' to make a complaint. Moreover, they argue that being discouraged by friends from making a complaint or ignorance of the 30-day limitation period is also not an adequate reason under the Act for failing to make the complaint within the time limit. They rely on the maxim that 'ignorance of the law is no excuse'. The respondents point out that the information as to the 30-day limitation is available to the public on the LERA web site and could have been obtained by means of a simple phone call. They also argue that one of the Commissioner's stated reasons for extending the time period in this case, namely, that it is in 'the public interest' is not the appropriate test under section 6(6).

[16] The respondents suggest that in order for the Commissioner to validly extend the time for filing a complaint he is obliged to investigate and validate any reasons offered by the complainant for the late filing. They argue that the Commissioner should not simply accept at face value what the complainant says in this regard. If the complainant's position is not validated, they say the Commissioner should not extend the time for filing a complaint. The respondents refer to the witness statement, which indicates that a phone call was allegedly made to the police and information was sought about the names, and badge numbers of the officers involved in the

incident. In this regard the respondents argue that if this was a reason for extending the time for filing the complaint, that allegation ought to have been investigated further by the Commissioner. They say that there was an inadequate inquiry in the present case and that the Act contemplates some kind of inquiry before the time is extended. They argue that in this case the Commissioner did no investigation to determine whether the complainant lacked a reasonable opportunity to make the complaint within the time limit and that this is not acceptable.

[17] The respondents cite the case of *Simpson v. Black's Harbour (Village)*, [1995] N.B.J. No. 56 (N.B.C.A.) in support of the importance of time limitations in the context of police disciplinary cases.

[18] The respondents submit that there was not even a basic investigation as to why the complaint was filed past the 30-day time limit. The Commissioner ought not to have exercised his discretion under section 6(6) of the Act to extend the time limit in the present case. Accordingly the respondents argue that the complaint was made outside the time limitations imposed by the Act and the matter should not proceed to a hearing on the merits. They take the position that this is a strict issue of jurisdiction and that if jurisdiction is lost there is no need to consider the question of any possible prejudice to the respondents. The respondents concede that they are not able to demonstrate much if any prejudice in the present case.

## POSITION OF THE COMMISSIONER

[19] Counsel for the Commissioner submits that the Commissioner's discretion to extend the time for filing the complaint was exercised properly in this case. He argues that there is no onus on the Commissioner to conduct any detailed investigation before making the decision to extend the time for filing a complaint. Moreover he submits that the onus is on the respondents to establish that the Commissioner had no grounds to exercise his discretion to extend the time for the filing of the complaint in this case. He suggests that if the onus were reversed it would mean that the Commissioner would be compelled to justify the exercise of his discretion under section 6(6) in any case where the time to file has been extended.

[20] Counsel for the Commissioner points out that there are no formal requirements set out in the Act that must be followed by the Commissioner when he exercises the discretion under section 6(6). There is for example no

express requirement that the decision must be made in writing or that reasons must be given for the decision. He notes that there are some attempts made to provide some level of written record that will provide a basis (but not necessarily a complete record) of the decision. He argues that the written record in this case consists of the Commissioner's file, and that this discloses that there were proper grounds for extending the time to file the complaint in this case.

[21] The Commissioner also takes the position that there is a public interest aspect to the Act and that this should be taken into account in the interpretation of the section. A liberal interpretation of the Act is urged in light of its purpose. Counsel points out that the meaning of the words 'no reasonable opportunity' as they are used in this Act has never been judiciously considered. However, he relies on the interpretation of those words in another statute by the court in the case of *Northwest Territories (Commissioner) v. Simpson Air* (1981) Ltd. (1994), 27 C.B.R. (3d) 190 (N.W.T.S.C.). He argues that the determination of what is a 'reasonable opportunity' can only be made on the basis of an analysis of the facts and circumstances of each individual case.

## ANALYSIS

[22] It is common ground that but for section 6(6) of the Act Ms M. would not have been able to file a complaint in this case. Section 6(3) clearly provides that every complaint shall be in writing and shall be submitted not later than 30 days after the date of the alleged disciplinary default. MacInnes J. in *Apostle v. Robinson* [1996] M.J. No. 543 (Man. Q.B.) notes that limitation periods of the kind set out in section 6(3) of the Act are mandatory and that "compliance is a necessary statutory prerequisite to jurisdiction".

[23] While the time limitations under the Act are certainly mandatory, the *Simpson v. Blacks Harbour (Village)* case relied on by the respondents is not particularly helpful in the present case because in the New Brunswick Act there was no power or discretion to extend the time for the filing of the complaint. Thus in that case when the complaint was filed beyond the 30-day time limit it was held that there was no jurisdiction to embark on the hearing.

[24] Section 6(6) of the Act allows the Commissioner to extend the time for filing a complaint to a date not later than six months after the date of the alleged disciplinary default. This discretion may only be exercised if the complainant had 'no reasonable opportunity' to file a complaint within the time period set out in section 6(3) of the Act.

[25] When it is alleged that the Commissioner did not have jurisdiction under section 6(6) of the Act to extend the time for filing a complaint, I am satisfied that the onus rests on the respondents to show that the Commissioner did not have the necessary grounds to exercise his discretion. This is the only conclusion that makes sense. Otherwise, as counsel for the Commissioner points out, at the outset of every hearing dealing with a complaint where the time for filing has been extended, the Commissioner would be required to appear before the judge to justify the exercise of his discretion. I agree that this is not how the Act is intended to operate.

## THE MEANING OF 'NO REASONABLE OPPORTUNITY'

[26] The determination of the respondent's preliminary application depends entirely on the meaning of the words 'no reasonable opportunity to file a complaint' as used in section 6(6) of the Act. It is only where there is no reasonable opportunity to file a complaint within the 30-day time period that the Commissioner has grounds to extend the time for the filing of the complaint.

[27] The proper approach to statutory interpretation has been referred to repeatedly by the Supreme Court of Canada. This is the approach that is endorsed by Elmer Driedger in *Construction of Statutes* (2nd ed. 1983). Iacobucci J. for the Court in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 for example, refers to Driedger's text and states as follows at paragraph 21:

> "He [Driedger] recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.' "

[28] This approach was recently applied by the Supreme Court of Canada in the case of *Parry Sound (District) Social Services Administrative Board v. Ontario Public Service Employees' Union, Local 324*, [2003] S.C.J. No. 42. The Court in that case first considered the plain and ordinary meaning of the words, then the scheme of the legislation and policy considerations.

[29] I also rely on section 6 of *The Interpretation Act*, C.C.S.M. c. 180 that provides as follows:

> "Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."

[30] In the *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd.* case the court considered a provision of the *Bankruptcy and Insolvency Act* which required that a trustee be given a 'reasonable opportunity' to inspect the property and exercise his right of redemption. Vertes J. states in this regard at paragraph 26:

> "What is meant by 'reasonable opportunity' is not explained. In my opinion this concept is similar to that of 'reasonable time' to be given a debtor to satisfy a demand for payment. **The question of what is 'reasonable' must be looked at in the light of all of the facts and circumstances in the individual case**: per Estey J. in *Ronald Elvin Lister Ltd. v. Dunlop Canada Ltd.* (1982), 135 D.L.R. (3d) 1 (S.C.C.) at p. 16." (Emphasis added.)

## PUBLIC INTEREST PURPOSE OF THE ACT

[31] I agree with counsel for the Commissioner that the *Law Enforcement Review Act* fulfills a broad public interest and that this purpose must be kept in mind when interpreting section 6(6) of the Act. This public interest purpose was recognized by the court in *Blair v. Soltys*, [1999] M.J. No. 470 (Man. Q.B.). In that case the respondent police officer argued that there was no jurisdiction to conduct a hearing because he had resigned and was no longer a member of the police force. It was his position that the Act was exclusively disciplinary in nature. Mykle J. on appeal adopts the reasons of the hearing judge, Giesbrecht A.C.J. who had concluded that the scope and purpose of the Act was much wider than being simply a disciplinary vehicle. Giesbrecht A.C.J. stated:

> "…lawmakers have wrestled for years with the problem of trying to find a balance between an open and fair system for responding to complaints from citizens about possible police abuses on the one hand, while at the same time not hampering the vital work the police do….The complainant, the police officer, the police service and the province all have an interest. From the individual police officer's perspective, the Act may appear to be purely disciplinary in nature, **but it has a much broader public purpose as well. It is designed to promote both respect for the police and respect for the individual.**" (Emphasis added.)

[32] A consideration of all these factors in my view supports a liberal interpretation of the phrase 'reasonable opportunity'. All the surrounding facts and circumstances of a particular case must be considered to determine whether the evidentiary record establishes that the prerequisite in section 6(6) was met.

## PLAIN AND ORDINARY MEANING

[33] The plain and ordinary meaning of the words 'no reasonable opportunity' does not suggest that a narrow interpretation of section 6(6) is appropriate. What is deemed to be reasonable will always depend on all the surrounding facts and circumstances and even on the nature of the person involved in a particular situation. What is reasonable cannot be determined in isolation. That determination can only be made in the context of the facts of each individual case.

[34] Webster defines 'opportunity' as:

> "Fit or convenient time or occasion; a time favorable for the purpose; a suitable time, combined with other favorable circumstances".

The word 'reasonable' is defined as

> "Having the faculty of reason; rational; governed by reason; not given to extravagant notions or expectations; conformable or agreeable to reason; not extravagant, excessive, or immoderate; fair; equitable; … moderate; tolerable".

Black's Law Dictionary defines 'reasonable' as

> "Just; proper. Ordinary or usual. Fit and appropriate to the end in view…Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason….Thinking, speaking, or acting according to the dictates of reason; not immoderate or excessive, being synonymous with rational; honest; equitable; fair; suitable; moderate; tolerable." (Citations omitted.)

These definitions support a fairly liberal interpretation of the phrase 'no reasonable opportunity' as used in section 6(6) of the Act.

[35] There are a number of different circumstances in which a complainant might be said not to have a 'reasonable opportunity' to file a complaint within the time period prescribed in the Act. For example, a complainant might be physically unable to do so by reason of illness or being out of the country from the time of the alleged disciplinary default until after the expiration of 30 days.

[36] However, in my view, lack of a reasonable opportunity should not be interpreted as being the equivalent of a physical impossibility. There will be circumstances where it would have been physically possible for the complaint to have been filed within 30 days, but there may be other legitimate reasons why that was not done. One such situation might arise where a complainant fears repercussions if a complaint is made. Or a complainant might be mentally or otherwise disadvantaged and not aware of the opportunity or the procedure for making a complaint. A complainant might be so emotionally affected by the incident that he or she is unable to file a complaint within the time prescribed. These are merely some examples of circumstances where one could say that there was not a reasonable opportunity to file a complaint within 30 days. All the facts must be looked at to determine what was reasonable for that particular complainant in those particular circumstances.

## APPLICATION TO THE PRESENT CASE

[37] In the present case there are a number of reasons advanced as to why the complaint was not filed on time. Ms M. told the L.E.R.A. investigator that she did not make the complaint within 30 days as she was 'out of town'. There is no evidence as to where she was, how far away from Winnipeg this was or how long she was away from the city. It is certainly not clear from

the evidentiary record that she did not have the physical ability to make her complaint within the time limit set out in the Act. Having regard to modern communication devices, E-mail and fax machines, clearly it would be possible to file a written complaint from almost anywhere in the world. Accordingly, a simple statement that a complainant was 'out of town' would ordinarily require some further inquiry before the time to file a complaint is extended on that basis alone. Being 'out of town' would not in all cases be sufficient to satisfy the requirement that there was 'no reasonable opportunity' to make the complaint within 30 days.

[38] Ms M. also indicated in her statement that her friends discouraged her from making a complaint telling her essentially that she should just forget about what had happened and accept that this is 'how the police are'. She was not able to forget about it as she was advised to do and eventually filed her complaint 58 days after the occurrence. In my view having regard to all the circumstances in this case this factor does provide a reasonable basis for extending the time to file the complaint.

[39] The broad public interest purpose of the Act requires that the public have confidence in the police and in the process established to deal with complaints about police conduct. When a complainant is persuaded (albeit by friends) that she should not file a complaint because the conduct complained of is to be expected from the police, the public interest in my view in most cases would justify an extension of the time to file the complaint. I note that the delay in this case was not excessive and that this delay in filing the complaint has not caused any prejudice to the respondent officers, which should also be factors to be considered.

[40] Aside from the public interest, it is my view that the interests of the respondents as well as of other police officers is not well served by the perception in any part of the community that abusive conduct by the police is the norm and that nothing else can be expected of them. When such a perception contributes to the delay in filing a complaint the Commissioner may be justified in extending the time to file a complaint having regard to all the circumstances and the other factors I have noted above.

[41] The complainant also indicated in her statement that she was not aware of the 30-day limitation period. Counsel for the respondents, points out that information about the procedure for filing a complaint under the Act is readily available to the public and suggests that 'ignorance of the law is no

excuse'. I am of the view that lack of knowledge about the 30-day time limit is another factor that the Commissioner is entitled to consider in determining whether there was a reasonable opportunity to file the complaint within 30 days. In the absence of any other explanation for the delay in filing a complaint, ignorance of the limitation period alone would likely not be sufficient to justify an extension of time to file in most cases. However, once again this factor would have to be considered in the context of all the circumstances having regard to the particular complainant.

[42] The evidentiary record reveals that a witness who was interviewed by the L.E.R.A. investigator in this case indicated that she called the police service non-emergency telephone number to ascertain the names and badge numbers of the officers who were involved in this incident. This call was placed when the complainant returned home after her release by police. The witness was denied this information. I agree with counsel for the Commissioner that this is perhaps the most compelling factor in the present case for justifying an extension of time to file the complaint.

[43] Police officers who receive a verbal complaint have a duty to inform complainants of the requirements of the Act, particularly in terms of the need to make a written complaint and the time limits that apply. Section 6(4) of the Act provides that every member who receives a verbal complaint about the conduct of a police officer, which may constitute a disciplinary default,

> "shall forthwith inform the person making the verbal complaint that a complaint under this Act must be made in writing and shall forthwith inform the person of the relevant time limits set out in this section."

[44] This section of the Act is designed to ensure that persons will be made aware of the availability of the process to address their complaints and will be informed of the time limitations that apply. In the present case the evidentiary record suggests that there was a failure to comply with the mandatory requirements of section 6(4) of the Act. This may well have contributed to the complainant's ignorance of the 30-day time limit for filing a complaint.

[45] Counsel for the respondents submits that this information from the witness about being refused the names and badge numbers of the officers involved with Ms M. should have been further investigated by the

Commissioner if that was to be a basis for extending the time to file the complaint. He argues that there was no investigation of this allegation and that the Act contemplates some kind of further inquiry before the time is extended.

[46] I agree that it would have been preferable for this particular allegation to be investigated further, as it might itself be the basis of a separate complaint. However, I do not agree that the absence of such an investigation means that the Commissioner was not entitled to consider this information in determining whether to extend the time for filing the complaint. Once again all the circumstances must be considered. In my view it is not necessary for the Commissioner to further investigate every factor which is considered by him in determining that a complainant did not have a reasonable opportunity to file the complaint within the time period set out in the Act.

[47] Having regard to the need for a fair, large and liberal interpretation of the Act, and in light of all of the facts and circumstances in this case, I am satisfied that the Commissioner was in a position to properly exercise his discretion under section 6(6) of the Act. The respondents have not established that the Commissioner was without jurisdiction when he extended the time for the complainant to file her complaint in this case. The evidentiary record supports his conclusion that the complainant did not have a 'reasonable opportunity' to file her complaint within the 30-day limit.

[48] I conclude that the Commissioner had the jurisdiction to refer this complaint for a hearing before a Provincial Judge and that I have jurisdiction to conduct a hearing to determine the merits of the complaint. The respondents' application is accordingly dismissed.

Dated at Winnipeg, Manitoba, this 10th day of February, 2004.

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Linda Giesbrecht P.J.