

**NORTHWEST TERRITORIES HUMAN
RIGHTS ADJUDICATION PANEL**

**IN THE MATTER OF the Northwest Territories
*Human Rights Act, S.N.W.T. 2002, c. 18***

BETWEEN:

William Dalton

Complainant

-and-

Hay River Health and Social Services Authority

Respondent

Reasons for Decision

Before: Adrian C. Wright, Adjudicator

Place of Hearing: Yellowknife, NT

Appearing:

William Dalton, Complainant, Self-represented

Glenn Tait, Counsel for the Respondent

Sections of the *Human Rights Act* considered:

Sections 44 (1)(d), 53 (3) (b) and 62(5).

Other Legislation considered:

Canada Labour Code, section 60 (1)(a.1)

Introduction

[1] This is an appeal from the decision of the Director of Human Rights dated 12 April 2011. The decision was made under section 44 (1) (d) and was to dismiss the complaint.

[2] The complainant, William Dalton alleged the respondent Hay River Health and Social Services Authority (HRHSSA) discriminated against him on the basis of disability. The discrimination related to

- terms and conditions of employment contrary to section 7;
- harassment in relation to employment contrary to section 14; and
- retaliation for filing the complaint contrary to section 15.

[3] Mr. Dalton filed six grievances with HRHSSA. These grievances were resolved by arbitration. The Director found these grievances addressed the same issues as the complaint. Amongst other reasons, the Director said the arbitration process was both procedurally fair and addressed established human rights principles. As a result, the Director dismissed the complaint under section 44(1)(d) of the Act.

[4] In a pre-hearing conference on 8 September 2011 the parties agreed to argue this appeal by written submissions. They agreed oral argument was not required. I considered their written submissions and the record before the Director in reaching this decision.

Preliminary matters

[4] The Director indicated she did not wish to participate even though section 53 (3)(b) makes her a party. As a result, the parties are Mr Dalton and HRHSSA.

Facts

[5] From 2002 to 2008, Mr Dalton was employed by HRHSSA as a licenced practical nurse at Woodland Manor Long Term Care Facility in Hay River. In 2007 and 2008 he suffered from a chronic condition causing pain in his right leg below the knee. This prevented him from standing or weight-bearing for prolonged periods. He requested HRHSSA to accommodate him by allowing him to work night shift. When Mr Dalton worked night shift he rested more frequently. He also received fewer demands from the residents of Woodland Manor. As a result, Mr Dalton felt he experienced reduced pain when he worked night shift.

[6] HRHSSA assigned Mr Dalton to night shifts for a period of time. From April 2007 to about June 2008, HRHSSA asked Mr Dalton to obtain answers to a series of questions from a physician. HRHSSA intended the questions to tell it why Mr Dalton's disability made it better for him to work night shift. Mr Dalton did not get a physician to answer these questions. Instead, physicians only expressed the opinion it was better for Mr Dalton to work night shift.

[7] Effective June 2008, HRHSSA indicated it would put Mr Dalton on day shift but accommodate the work to address some issues identified by Mr Dalton. Mr Dalton was away from work for most of July and August 2008. When he returned HRHSSA directed him not to come to Woodland Manor in his off-duty time unless he had the approval of an employee of HRHSSA it named. He was directed to attend a disciplinary meeting with the employer on 3 September 2008. At the meeting, Mr Dalton's employment was terminated.

[8] Mr. Dalton filed six grievances under the collective agreement on the following matters:

Grievance number	Date filed grievance (in 2008)	Description of grievance
01-08-144	8 February	Denial of accommodation on night shift. Also requested diagnostic and treatment information from physicians to stop
01-08-149	22 May	Mr Dalton told accommodation would stop on 30 May unless medical support (for accommodation continuing) received
01-08-155	27 June	Mr Dalton put on day shift effective 30 June
01-08-157	18 July	Mr Dalton directed to undergo independent medical examination and functional capacity evaluation or be subject to discipline
01-08-161	27 August	Mr Dalton barred from workplace
01-08-163	4 September	Mr Dalton employment terminated

[9] On 31 March 2008 Mr Dalton filed a complaint with the Human Rights Commission. Mr Dalton provided “additional details” of his complaint on 9 June 2008 and 28 September 2008. I call the 31 March 2008 complaint as supplemented by the additional details on 9 June 2008 and 28 September 2008 “the human rights complaint” in these reasons.

[10] By reasons dated 16 February 2009, the Director of Human Rights deferred consideration of the human rights complaint under section 43 of the *Act* pending the outcome of the grievance arbitration.

[11] Arbitrator Andrew Sims heard Mr Dalton’s grievances between 27 and 31 July 2009. He issued an award on 23 February 2010 and a supplementary award on 29 November 2010. I call these “the arbitration awards” in these reasons.

[12] The Director of Human Rights dismissed Mr Dalton’s complaint in a decision dated 12 April 2011. In her decision, the Director organized the issues in these complaints based on how Mr Dalton alleged HRHSSA had violated the *Human Rights Act*. She put them into four groups:

- Refusal to accommodate Mr Dalton’s disability from April 2007 until termination of employment on 3 September 2008 – grievances 01-08-144 and 01-08-149.
- Harassment of Mr Dalton by requesting medical information and requiring him to have an independent medical examination and functional capacity evaluation – grievances 01-08-149, 01-08-155 and 01-08-157.
- Retaliation by continuing to refuse to accommodate him, barring him from the workplace and terminating his employment – grievances 01-08-157, 01-08-161 and 01-08-163.
- Terminating his employment - grievance 01-08-163.

[13] The Director of Human Rights found

- The arbitration awards consider each incident in the human rights complaint. The arbitration awards do this in the context of the human rights principles concerning the duty to accommodate disability in the workplace;
- the arbitration awards resulted from a procedurally fair process;
- the human rights complaints were fairly and fully put before the arbitrator
- Mr Dalton and his union (the Union of Northern Workers/Public Service Alliance of Canada) had the opportunity to present evidence, make arguments on the evidence and cross-examine witnesses.
- Mr Dalton was represented by legal counsel provided by his union;
- the arbitration awards found facts and used those findings to determine remedies. The remedies considered are consistent with the remedies available in the *Human Rights Act*.

- Mr Dalton and his union "... chose not to pursue the avenues available to appeal ..." ¹ the arbitration awards.

[14] As a result, the Director found the "matter [raised in the complaint] was appropriately dealt with in another proceeding" – that is the arbitration awards. The Director dismissed the complaint under section 44 (1)(d) of the *Human Rights Act*.

Positions of the Parties

[15] Complainant:

- Mr Dalton was treated differently than other employees at HRHSSA. The reason for the differential treatment was his disability. One example was Mr Dalton's not being present at a meeting between the HRHSSA Manager of Human Resources and a co-worker on 6 August 2008. Mr Dalton's disability and its effect on the workplace were discussed at this meeting. Another is his being prevented from attending Woodland Manor without restriction while he was on a leave of absence approved by his employer.
- Contrary to HRHSSA's submission to the Director on 21 October 2008, Mr Dalton did complain about systemic discrimination.
- The executive director of HRHSSA was insensitive to Mr Dalton's depression
- The executive director at HRHSSA wanted to end Mr Dalton's accommodation – the executive director had no real interest in obtaining either an independent medical examination or a functional capacity evaluation.
- Arbitrator Sims erred in finding
 - o the employment relationship had been problematic for a number of years; and
 - o similar issues arising from Mr Dalton's accommodation human rights principles dealing with accommodation would likely arise again. Examples are potential layoff, undue hardship on HRHSSA or Mr Dalton being unable to perform his job.

[16] Respondent:

- Mr Dalton's complaint was appropriately dealt with in the arbitration awards. Mr Dalton did not challenge those awards.
- Issue estoppel should apply. The three principles established by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies* ² are satisfied in this case.
- It would be an abuse of process to allow Mr Dalton's human rights complaint to proceed. The issues in the complaint were decided by Arbitrator Sims.

¹ Director's decision 12 April 2011 at page 8

² 2001 SCC 44

- The principles established by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*³ should be applied. As a result, the Director's decision should be upheld.

Issue

Has the substance of the human rights complaint been appropriately dealt with in the arbitration awards?

Decision

[17] My authority comes from sections 45 and 62 (5) of the Act. Section 62 (5) says I may affirm, reverse, or modify the Director's dismissal of the complaint. I also may provide any directions I consider necessary.

[18] The standard of review I must apply to the Director's decision is reasonableness⁴: I must look at whether the Director's decision is justified, transparent and intelligible:

- Is the decision consistent with the relevant legal principles?
- Can one discern the reasons and logic from the decision?
- Can one understand the decision – does it make sense?

[19] There may be a number of possible outcomes of this case. I must decide whether the Director's decision is a possible or acceptable outcome. I need not decide if it is "correct"⁵.

[20] The Director dismissed the human rights complaint under section 44 (1) (d) of the *Act*. This requires her to be satisfied the substance of the complaint has been appropriately dealt with in another proceeding. This is essentially the same as the language in section 27 (1)(f) of the *British Columbia Human Rights Code* considered by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*⁶.

[21] In *Figliola*, the Review Committee of the B.C. Workers' Compensation Board dismissed applications by some workers to not limit chronic pain disability pensions to 2.5%. This limitation was set out in Workers' Compensation Board policy. The workers had argued the policy discriminated on the basis of disability. The workers then filed complaints to the B.C. Human Rights Tribunal again arguing the policy discriminated on the basis of disability. The question before the Human Rights Tribunal (and on appeal to the Supreme Court of Canada) was whether "the substance of the complaint had been appropriately dealt with in another proceeding". If it had, section 27(1)(f) of the B.C. *Human Rights Code* allowed the Human Rights Tribunal to dismiss the complaint without a hearing.

³ 2011 SCC 52

⁴ *Aurora College v. Niziol* 2007 NWTSC 34 at paragraph 36

⁵ *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraph 47

⁶ Citation in footnote 2

[22] Although the issue rises in a different context in this case, the issue is the same – has the substance of Mr Dalton’s complaint been dealt appropriately dealt with in the arbitration awards?

[23] The majority of the Supreme Court indicated⁷ the adjudicator should not be concerned with whether the case falls within the rules governing issue estoppel, abuse of process, collateral attack, *res judicata* or other similar legal doctrines. Instead the adjudicator should

- encourage finality in decision-making; and,
- avoid litigation again about issues already decided by a decision-maker with the authority to decide them.

[24] As a result, the Court said the adjudicator should ask itself,

- Did the other tribunal (here Arbitrator Sims) have concurrent jurisdiction with the adjudicator to decide the issues in the complaint?
- Were the issues decided by the other tribunal essentially the same as those before the adjudicator?
- Did the complainant have the opportunity to know the case he had to meet and have an opportunity to meet it?

[25] I will answer these questions in order. Before doing so, I note the reasons in *Figliola* were released on 16 March 2011 about one month before the Director’s decision. *Figliola* was not addressed by either party in argument before the Director – it was released after the parties made argument before the Director. In any event, the Director did not mention *Figliola* in her decision. Clearly, *Figliola* is now the leading authority on section 44 (1)(d) of the Act and must be applied. I will analyze the Director’s reasons and the circumstances in this case using the approach set out in *Figliola*.

1. Did Arbitrator Sims have concurrent jurisdiction with an adjudicator under the Human Rights Act to decide the issues in the complaint?

[26] The majority of the Supreme Court said in *Figliola*⁸ all administrative tribunals have the authority to apply human rights legislation. This authority exists along with (or “concurrent with”) the authority or jurisdiction given tribunals by statute. Tribunals may apply human rights legislation so long as there is no express language saying they cannot.

[27] Arbitrator Sims’s jurisdiction comes from the collective agreement between HRHSSA and the Public Service Alliance of Canada. A grievance arbitrator under this collective agreement would be an “administrative tribunal” as mentioned in *Figliola*. The collective agreement says nothing about interpreting the law. Paragraph 3.02 does say there shall be no discrimination by reason of disability except as permitted by law.

⁷ *Figliola*, citation in footnote 2 at paragraphs 36 and 37)

⁸ *Figliola*, citation in footnote 2 at paragraph 45

[28] Furthermore, section 60 (1)(a.1) of the *Canada Labour Code* gives the grievance arbitrator the authority to apply statutes relating to employment matters. The *Human Rights Act* deals with employment matters. As a result, an arbitrator acting under this collective agreement has concurrent jurisdiction with an adjudicator under the *Human Rights Act* to decide the issues in the complaint.

[29] This does not mean Arbitrator Sims could have decided the complaint. Arbitrator Sims could decide the issues in the complaint only if those issues were (as they were) validly before him as a duly appointed arbitrator deciding a grievance under the collective agreement.

[30] Although the Director did not address this factor, in my view it is satisfied in this case.

2. Are the legal issues in the arbitration awards the same as those in the human rights complaints?

[31] The Director concluded Arbitrator Sims considered every incident raised in Mr Dalton's complaint. The Director went through the grievances and reconciled them with the issues in the complaints. One can follow her analysis and it is logical. Her reasoning makes sense. The Director also concluded Arbitrator Sims looked at the incidents using the human rights principles dealing with the duty to accommodate disability in the workplace.

[32] Mr Dalton says systemic discrimination "is part of his allegation". He says the person deciding this matter should look at the practices of HRHSSA to see if there is a pattern. Mr Dalton did not raise systemic discrimination in his complaint. He addressed systemic discrimination only in response to HRHSSA's application to defer consideration of his complaint until the conclusion of the grievance arbitration. In letters dated 2 May 2008 and 21 October 2008, HRHSSA argued the public interest did not weigh against deferring the complaint – systemic discrimination was not raised in the complaint. In a letter dated 8 August 2008, Mr Dalton responded – there may have been other complaints by other employees of HRHSSA. He asked the Human Rights Commission to examine its files relating to other human rights complaints related to disability and involving HRHSSA. According to Mr Dalton in this letter, this possibility of other complaints gives rise to a systemic issue.

[33] The Director, in her decision to defer the complaint (16 February 2009) said human rights are confidential until they are heard by an adjudicator. Settlements are usually also confidential. As a result, information from one complaint cannot be used in another.

[34] I also refer to *Aurora College v. Nizioł*⁹. In that case, Schuler J. stated¹⁰ a human rights adjudication is an adversarial proceeding. The parties to the complaint decide on the evidence to be called and the arguments to be made. The complainant must establish discrimination on a balance of probabilities.

⁹ 2010 NWS 87

¹⁰ Citation at footnote 9 at paragraph 23

[35] As a result, Mr Dalton must have evidence of systemic discrimination. Neither the Human Rights Commission nor the adjudicator will find it for him.

[36] Mr Dalton raised the possibility of systemic discrimination in this exchange of letters in 2008 only to stop the Director from deferring his complaint. He argues it now only to contend Arbitrator Sims did not address all the legal issues in the human rights complaints. He provides no concrete allegations based either on his own knowledge or the evidence to suggest there was systemic discrimination affecting the employees of HRHSSA. I have seen no reference to systemic discrimination in any other aspect of this matter. Indeed, Mr Dalton did not raise the issue in his argument before the Director on the application to dismiss his complaint under section 44 (1) (d) of the Act.

[37] Furthermore, Mr Dalton had the opportunity to raise arguments of systemic discrimination in the grievance arbitration but did not.

[38] For all these reasons I cannot allow this complaint to proceed only to allow Mr Dalton to pursue systemic discrimination. I am satisfied if I did so, I would not be promoting the goals of finality in decision-making and avoiding litigation on matters already decided.

[39] The Director's analysis is a possible outcome on this point. It is reasonable. As a result, I cannot overturn it.

3. Did Mr Dalton have the opportunity to know the case he had to meet and have the chance to meet it?

[40] The Director found the process used by Arbitrator Sims "was procedurally fair in the context of a process that has procedural safeguards". The Director also said Mr Dalton had the opportunity to cross-examine witnesses. The Director did not fully address whether Mr Dalton had the opportunity to know the case he had to meet and have the chance to meet it.

[41] The grievances were all filed by Mr Dalton (not HRHSSA) as was the human rights complaint. Mr Dalton knew the facts giving rise to all of them. It appears from the arbitration awards the evidence was known to both parties. Arbitrator Sims indicated the parties agreed on a substantial set of facts and related exhibits. The agreement on facts included a chronology of events which Arbitrator Sims relied on liberally in his reasons. It appears no issue was raised before Arbitrator Sims concerning any surprise issue or non-disclosure of evidence. The procedure of agreeing to facts and exhibits suggests there was full disclosure of evidence between the parties. No issue was raised before either the Director or me that either party did not know the case it had to meet. As a result, Mr Dalton knew the case he had to meet.

[42] Neither party argued the rules of procedural fairness were not observed in the arbitration hearing. As a result, I assume Mr Dalton had the opportunity to call evidence, cross-examine witnesses and make submissions. Mr Dalton complained to the Director a particular witness was not cross-examined. The Director correctly concluded the process was fair so long as Mr Dalton had the opportunity to cross-examine a witness – even if he (or his counsel) chose not to exercise that opportunity. As a result, Mr Dalton had an opportunity to meet the case against him.

[43] For all these reasons, in my view, this third element of the *Figliola* test is satisfied.

[44] So, although the Director did not fully examine this issue, I find the circumstances of this case satisfy the third element of the *Figliola* criteria.

[45] To conclude, I find Mr Dalton has not made out the first or third of the *Figeola* factors; the Director's decision on the second is reasonable.

Conclusion

[46] For all these reasons, I exercise my authority under 62 (5) of the Act to affirm the dismissal of Mr Dalton's complaint.

DATED at the City of Yellowknife in the Northwest Territories this 31st day of August 2012.

Adrian Wright



Adjudicator

Human Rights Adjudication Panel