

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

BETWEEN:

Elizabeth Portman

Complainant

-and-

City of Yellowknife

Respondent

Reasons for Decision

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife NT

Date of Hearing: 5 January 2017

Elizabeth Portman, for herself

Michelle Thèriault, Counsel for the Respondent

Authorities considered:

***Human Rights Act*, S.N.W.T. 2002, c. 18, as amended:**

Sections 22, 31, 33, 34, 43, 44, 45, 46, 52, 53, 55, 57, 58, 60, 62, 63 and 66

Background

[1] This decision results from my decision (“the first decision”) dated 22 September 2016 concerning this complaint. In the first decision I found the Respondent discriminated against the Complainant by not making monthly passes available for her use of the disabled persons transit system (DTS) operated by the Respondent. I also determined the Respondent would not be subject to undue hardship if it provided the Complainant monthly passes for the DTS.

[2] I ordered the Respondent to:

- i. cease using a fare structure for public transit discriminating against persons using public transit on the basis of disability and social condition;
- ii. refrain in the future from using a fare structure discriminating against persons using public transit on the basis of disability and social condition; and,
- iii. pay the Complainant \$8,518.50 within thirty days of the date of the order.

[3] I also remained seized of the complaint to resolve any disputes arising from the order.

[4] Since the first decision the Respondent continued to charge higher single-trip and punch pass fares to users of the DTS than to those using its regular system. This continued until 2 January 2017. On that date the Respondent commenced charging the same single-trip and punch pass fares to all users of the DTS. The Complainant contends the differential fares are contrary to the first decision. The Complainant requests me to order the Respondent to compensate those paying higher single-trip fares or using punch passes to ride DTS between 22 September 2016 and 2 January 2017.

Issues

1. Am I seized with the following issue raised by the Complainant?
2. Does the Respondent discriminate on the basis of disability, social condition or both by charging different per-ride and punch pass fares to the Complainant for her use of the disabled transit system than to other users of the public transit system?
3. Would charging the same per-ride and punch-pass fares to the Complainant as other users of the public transit system cause undue hardship to the Respondent?
4. What if any compensation should flow to the Complainant and other persons with disabilities who used the DTS between 22 September 2016 and 2 January 2017 and paid the fares then charged by the Respondent for use of DTS?

Positions of the parties

Complainant:

[5] I ordered the Respondent to both cease and refrain from using a discriminatory fare structure. I also remain seized of disputes arising from the order. All transit fares were addressed in the complaint, in issue at the hearing and covered by my order. I should order the Respondent to compensate those who rode DTS during the above period and paid higher fares than users of the regular system. The Complainant should be compensated for the resulting upset and impact on her of having to ensure the Respondent observes both the law and my order.

Respondent:

[6] I am not seized with the issues raised by the Complainant. The complaint dealt only with bus passes as did my decision. The order is broad and cannot be enforced. I am *functus officio*. As a result I cannot revisit this matter because it is already decided. Finally even if I am seized I have no statutory authority to deal with any breaches of the order other than those affecting the Complainant. I cannot deal with issues affecting those who were not parties at the hearing.

Analysis

Issue 1: *Am I seized with the issues raised by the Complainant?*

[7] The complaint addresses all aspects of fares:

- before DTS she could only use cabs. These cost at least \$5 per trip.
- when DTS was first available the Complainant purchased a monthly pass and then discovered she could not use it on DTS
- DTS had its own “punch card” system. These cost \$2.50 per ride or \$5.00 per round trip. This meant she paid more to use DTS than those using regular transit.

[8] Although the Complainant did request monthly passes be available to DTS users she was also concerned about the other fares. I recognized this in my description of the complaint in the first decision:

Until December 1, 2015 users of the Respondent’s disabled persons transit system (DTS) who could not travel on the regular buses were required to pay more to use DTS than either users of DTS who could use the regular bus system, or users of the regular bus system. This discriminated on the grounds of both disability and social condition.

[9] At the hearing I received evidence of all fares and the City’s explanation for arriving at the different types. The decision focussed on monthly passes but also dealt with the other fares. The monetary payment to the Complainant resulted from the single-trip fares paid by the Complainant less what she would have paid for monthly passes. Single-trip fares therefore

entered into my decision. The order to cease and refrain from a discriminatory fare structure covers all three types of fare.

[10] The matters the complainant asks I decide fall within the jurisdiction I reserved in the first decision – disputes arising from my order. The principle *functus officio* prevents me from revisiting matters already decided¹. It does not prevent me from dealing with matters over which I have reserved jurisdiction. I may do this to ensure the remedies I order are forthcoming to the parties.² Furthermore I should consider whether it would “frustrate the mandate of the legislation” to require the Complainant to either enforce my order in the Supreme Court or to file a new complaint in order to obtain the full remedy I ordered.³

[11] Whether higher single-trip and punch pass fares for DTS users amounts to discrimination flows directly from my decision and the resulting order. My decision determines all differential fares for the use of DTS are discriminatory; and charging the same fares to all transit riders does not cause undue hardship to the Respondent. I ordered the Respondent to cease and refrain in the future from “...using a fare structure discriminating against persons using public transit on the basis of disability and social condition.” Requiring the Complainant and others to commence another complaint (or other complaints) would be contrary to the goals of the *Human Rights Act*. One of these is to obtain quick and inexpensive determinations of human rights disputes.

[12] As a result I am seized with the issues raised by the Complainant.

Issue 2: Does the Respondent discriminate on the basis of disability, social condition or both by charging different per-ride and punch pass fares to the Complainant for her use of disabled transit system than to other users of the public transit system?

[13] The Respondent’s charging higher single-trip and punch pass fares to DTS users than regular users is discrimination. As indicated in my discussion on seizure this flows from the first decision.

Issue 3: Would charging the same per-ride and punch-pass fares to the Complainant as other users of the public transit system cause undue hardship to the Respondent?

[14] The Respondent suffers no undue hardship from charging the same fares to all who use the transit system. This again flows from the first decision.

¹ *Robertson v. Goertzen* 2010 NWTSC 81 at paragraph 19

² *Grover v. Canadian Human Rights Commission* 1994 CanLII 189 (CHRT) at pages 12 and 13; *Barberi v. Canadian Human Rights Commission* 2011 CHRT 23 (CanLII) at paragraph 13

³ *Grover* [FC decision] at paragraph 33

Issue 4: *What if any compensation should flow to the Complainant and other persons with disabilities who used DTS between 22 September 2016 and 2 January 2017 and paid the fares then charged by the Respondent for use of DTS?*

[15] There is no real dispute - the Complainant should be compensated for the cost to her arising from the City charging more for single-trip and punch pass fares since my decision. I address this below in the remedy portion of these reasons.

[16] The real dispute is whether I can require the Respondent to compensate other users of the DTS for the discriminatory fares they paid since the date of the first decision. My relevant remedial authority comes from section 62 (3)(a)(viii) of the *Human Rights Act*. This provision states:

“If the adjudicator finds ... a complaint has merit in whole or in part, the adjudicator may order a party against whom the finding was made to do one or more of the following:

(viii) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this *Act* in the position the person would have been in but for the contravention of this *Act*”.

[17] The question is the meaning of the phrase “any party dealt with contrary to this *Act*”. Does this only apply to individuals or entities appearing at the hearing? Or does it apply more broadly to any entity dealt with contrary to the *Act*?

[18] I rely on the modern approach to statutory interpretation⁴:

“...the words [must 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”.

Grammatical and ordinary sense

[19] I look at the ordinary meaning of the phrase “any party dealt with contrary to this *Act*” and in particular the term “party”. I do not – contrary to the position taken by counsel for the Respondent – look at any legal meaning of the term. As a result I do not look at Black’s Law Dictionary or any similar source. Instead I refer to the Shorter Oxford English Dictionary. This says for the purpose of this decision “party” has two possible meanings:

⁴ *R. v. Borowiec* 2016 SCC 11 at paragraph 18

- a person or group of people forming one side in a contract, dispute, law case etc
- a person who takes part or is implicated in a specified deed, event, or matter.

[20] The latter is a broader definition. It describes an individual or entity who takes part in something. It is not limited to those who are actually or specifically named in a proceeding or made a party in (for example) a complaint or a court action.

[21] I also note “person” is defined in the *Act*⁵ as including “an employment agency, employees’ organization, employers’ organization and occupational association...”. Since it is an inclusive definition it does not take precedence over the definition of “persons” in the *Interpretation Act*⁶ which includes corporations.

Entire context

[22] “Party” appears in 17 sections of the *Act*.⁷ A close reading reveals the term is used in various stages of the human rights process and for different purposes. It is not just the entities mentioned in the complaint. One example is “interested parties”⁸ who object to disclosure of documents, records or things. These must include anyone with possible evidence and not just those participating in the complaint or appeal. Entities not part of the complaint or not at the hearing must be able to object to the production of potential evidence.

Scheme of the Act

[23] The broad meaning of “party” is consistent with the scheme of the *Act*. The legislation establishes three agencies – the Commission, Director and adjudicator. These carry out different functions:

- The Commission oversees education, research, and policy development. It is also responsible to the Legislative Assembly for the administration of the *Act*.
- The Director administers the Act, supervises staff in doing this, investigates complaints, defers and dismisses complaints and refers complaints to adjudication.
- Adjudicators decide both complaints referred for decision and appeals from Director’s dismissals.

[24] Since “party” is used in connection with all three agencies, in different contexts and with various modifying phrases (“parties to the complaint”, “parties to the settlement”, “interested parties”, or “any party dealt with contrary to this Act”) it must have a broad meaning. In

⁵ Section 1

⁶ Section 18

⁷ Sections 22, 31, 33, 34, 43, 44, 45, 46, 52, 53, 55, 57, 58, 60, 62, 63 and 66

⁸ Section 60

particular these modifying phrases narrow the term's application as necessary. As a result when "party" is used on its own it must have a broad meaning.

Object of the Act

[25] The object of the Act is as outlined in the preamble – the promotion of respect for and observance of human rights in the Northwest Territories. This suggests and is consistent with the general principle human rights legislation – and "party" - should be given a broad and liberal interpretation.

Intention of the legislature

[26] All of the above discussion is consistent with the Legislature intending "party" be given a broad and liberal interpretation. The term appears throughout the Act in a variety of contexts and with various modifying phrases. Restricting this term to the parties to the complaint or the parties at the hearing would not allow this broad and liberal interpretation to be given effect. Where the Legislature intended to narrow the application of the term ("parties to the complaint", "parties to the appeal", or "parties to the settlement agreement") it used modifying phrases. This demonstrates the Legislature wanted the unmodified term to have a broad and unrestrained meaning.

Conclusion

[27] "Person who takes part or is implicated in a specified deed, event or matter" from the Oxford Dictionary most closely reflects the Legislature's intended meaning for "party". The phrase "any party dealt with contrary to this Act" in section 62 (3) (a) (viii) must mean all persons who are adversely affected by the contravention of the Act. It cannot just apply to the persons who were parties to the complaint or who participated at the hearing.

[28] As a result section 62 (3) (a) (viii) authorizes me to place those adversely affected by the discriminatory fares where they would have been if the Act had not been contravened. These persons should not have to commence complaints to obtain redress. This would be contrary to the purpose of the human rights legislation. There should be a quick and inexpensive determination of this issue.

Remedy

[29] The Respondent will compensate all authorized DTS users who paid single-trip fares or used punch passes to ride the DTS between 22 September 2016 and 2 January 2017. I expect many will be unable to prove when they rode DTS or what they spent. It appears from the

evidence presented at the hearing the Respondent has detailed records of each individual's use of the DTS. The Respondent will use these records to determine the amount it overcharged each user between 22 September and 2 January 2017. It will pay the amount it calculates to each user. If it does not have these records it will accept each user's reasonable estimate as set out in a statutory declaration.

[30] I remain seized of this complaint to resolve any dispute arising from this order. In particular the Respondent says it will create a new fare policy to come into effect in March or April 2017. It indicates this policy will address social condition.

[31] The Complainant requests compensation for having to come back before me to enforce the first decision. I understand the Complainant's frustration with having to do this. I am not satisfied compensation to the Complainant results from the dispute arising from the order in the first decision. I do not order compensation to her other than that flowing to her from the higher single-fare and punch pass fares she paid since the first decision.

Order

[32] I order the Respondent to:

1. Pay each authorized user the difference between
 - a. The total of all fares paid by the authorized user for using the DTS between 22 September 2016 and 2 January 2017 and
 - b. The fares a user of the regular transit system would pay for the same number of trips using the type of fare used by the authorized user.
2. Use its records of authorized use of the DTS between 22 September 2016 and 2 January 2017 to determine the amount to be paid each authorized user.
3. In the event the Respondent has no record of the use made by any authorized user of the DTS between 22 September 2016 and 2 January 2017 pay that authorized user's reasonable estimate of use as set out in the authorized user's statutory declaration.

[33] In the above order

- a. "Authorized user" is an authorized user of the disabled persons transit system operated by the Respondent;
- b. "DTS" is the disabled persons transit system operated by the Respondent; and
- c. "Type of fare" is either
 - i. the fare paid for a single trip;
 - ii. the fare paid using a punch pass; or,
 - iii. a monthly pass.

[34] As indicated above I remain seized of this complaint to resolve any dispute arising from either this order or the order in the first decision.



Adrian Wright
Adjudicator
Human Rights Adjudication Panel
10 January 2017