

IN THE MATTER OF an appeal of
a decision of the Director of Human Rights
pursuant to section 45 of the *Human Rights Act*,
S.N.W.T. 2002, c. 18 as amended

AND IN THE MATTER OF a complaint filed by Jenny Belyea
against the Government of the Northwest Territories

REASONS FOR DECISION

INTRODUCTION

This is an appeal by Jenny Belyea (hereinafter referred to as the “Appellant”) of a decision of the Director of Human Rights (hereinafter referred to as the “Director”) made on November 9, 2006, wherein a complaint against the Government of the Northwest Territories (hereinafter the “Respondent”) under sections 5 and 7 of the *Human Rights Act* (the “Act”) was dismissed.

The specific issue before me at this time is a preliminary application by the Respondent to have the appeal dismissed on the basis of a lack of jurisdiction on the part of the Human Rights Adjudication Panel to hear this appeal.

The Appellant is not represented by counsel in the proceedings. The Respondent is represented by counsel. The Director did participate in a conference call in this case on February 23, 2007, but decided not to be further involved in the appeal proceedings, including this particular application.

THE RECORD

A list of the documents and writings reviewed by the adjudicator is contained in Appendix “A” to these Reasons for Decision. The record results from an agreement reached among the Parties at a prehearing conference that took place on February 23, 2007.

BACKGROUND

The Complaint

In her complaint, the Appellant outlines her history. She is a non-aboriginal person who was born in Toronto, Ontario, but has spent most of the past 25 years in the Northwest Territories. In summary, the Appellant’s position is that the application of the GNWT

Affirmative Action Policy discriminates against her and others, on the basis of race, by giving preference to certain classes of persons set out in that policy. It is also her position that the GNWT Affirmative Action Policy has outlived its usefulness, and that it now acts as a systemic barrier to the hiring of non-aboriginal employees.

The Director's Decision

By letter dated November 9, 2006, the Director dismissed the Appellant's complaint on the basis that she did not have jurisdiction to accept the complaint. In her decision, the Director stated:

“As you are aware, Section 7 of the NWT *Human Rights Act* prohibits discrimination in employment, including a refusal to employ, on the basis of race, colour, ancestry, ethnic origin, and place of origin, and age. I have enclosed a copy of the *Act* for your reference.

One exception to Section 7 of the *Act* is found in Section 67, which reads:

67.(1) Nothing in this Act precludes any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 5(1).

(2) Any program designed to promote the welfare of any class of individuals that was approved under section 9 of the Fair Practices Act, R.S.N.W.T. 1988, c.F-2, is deemed, for the purposes of subsection (1), to be a program that has as its object the amelioration of conditions of disadvantaged individuals or groups. (emphasis added).

Section 67 of the *Act* makes it clear that any program that was approved under Section 9 of the *FPA* is deemed to be a program that better the conditions of a disadvantaged group, *regardless of which class of individuals* the program is designed to promote, or whether the group is actually disadvantaged.

Section 67 of the *Act* exempts the AA Policy even if effective arguments can be made that the Policy has outlived its usefulness, or that it discriminates on the basis of age. Section 67 deems that the AA Policy is considered a policy that better the conditions of disadvantaged individuals or groups.

Section 67 precludes the Director from accepting complaints against the AA Policy by providing an interpretation of how the *Act* applies to it. Specifically, the AA Policy is deemed to be a program for the purposes of 67(1). Given this, the Director has no jurisdiction to proceed with your complaint. Programs that have not been approved under section 9 of the *FPA* would be scrutinized at a hearing to ensure that the program targets a disadvantaged group and that the program serves to better the conditions of that group. Programs that have been approved under Section 9, on the other hand, are already deemed to better the conditions of a disadvantaged group.

I have therefore dismissed this complaint further to Section 44(1)(a) of the *Act*, which authorizes the Director to dismiss complaints where there is no jurisdiction to proceed.”

Summary of the Respondent's Position on the Preliminary Application

In its preliminary application, the Respondent seeks that this appeal be dismissed for lack of jurisdiction. In particular, the Respondent's position is that the GNWT Affirmative Action Policy is an exemption under the Act, and as such, neither the Director or the Human Rights Adjudication Panel has jurisdiction to hear this matter. More specifically, the lawyer for the Respondent argues that the GNWT Affirmative Action Policy is an exception to section 7 of the Act, being a program that is intended to ameliorate the conditions of a disadvantaged group or individual, and is covered by section 67 (1) and (2) of the Act.

In essence, the Respondent's position is that it supports the decision of the Director to dismiss the complaint.

Summary of the Complainant's Position on the Preliminary Application

On the preliminary application, the Complainant maintains that the GNWT Affirmative Action Policy prevents non-aboriginal employees from obtaining employment with the GNWT. She concedes that the adjudicator may not have any jurisdiction to hear her complaint, as the GNWT Affirmative Action Policy may be exempt from the provisions of the Act. On the other hand, she hopes that an adjudicator will find that the GNWT Affirmative Action Policy should be open to scrutiny under the Act, and find that someone such as herself is discriminated against by the GNWT Affirmative Action Policy.

ANALYSIS

The Director dismissed the Appellant's complaint on the basis of a lack of jurisdiction. In particular, the Director found that the GNWT Affirmative Action Policy was exempt from the provisions of the *Act*. Respondent's counsel agrees with this conclusion, and cites two cases in support.

In the case of *Braithwaite vs. Ontario (Chief Coroner)* [2005] O.H.R.T.D. No. 31, the Ontario Human Rights Tribunal held that there was no tenable cause of action outlined in the materials that would allow the Tribunal to proceed with the complainant's case. The Tribunal found that it was "plain and obvious" that the complainant would not succeed at hearing.

In the case of *Weyerhaeuser Co. (c.o.b. Trus Joist) v. Ontario (Human Rights Commission)* [2007] O.J. No. 640, the Ontario Superior Court of Justice applied the "plain and obvious" test.

Respondent's counsel urges me to find that it is "plain and obvious" that the Appellant cannot succeed on appeal because the GNWT Affirmative Action Policy is exempt from the operation of the *Act*. On this point, I disagree. Nowhere in section 67 of the Act does it state that affirmative action type policies are exempt from the operation of the Act. Rather, it states that such programs are allowable and deemed to ameliorate the conditions of a disadvantaged group, without further evidence on this point. However, such policies would still be reviewable where a person who is part of the class of individuals that the policy is intended to benefit believes that the policy is discriminatory against him or her. This is exactly what happened in the case of *Ontario (Human Rights Commission) v. Ontario* (1994), 19 O.R. (3d) 387. In that case, a person who was legally blind claimed that the ADP program, a program for those with long-term disabilities operated by the Ontario Ministry of Health, discriminated against him on the basis of age. Although the court found that the policy was allowable as a special program, the policy was reviewable in certain cases. Weiler, J.A. stated:

"Where a person whom a special program is designed to assist is discriminated against on an enumerated ground prohibited by the Code, section 14(1) is considered to be an interpretive aid aimed at promoting substantive equality. Programs aimed at promoting substantive equality are reviewable depending on the context in which the challenge is brought...

In this case, the Board of Inquiry and the Divisional Court erred in law in finding that the inquiry ends when a "special program" status is proven. The inquiry should have considered: (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to benefit, and (2) whether the provision or limitation is reasonably related to the scheme of the special program."

In the case at hand, the Appellant is not claiming to be part of the group that the GNWT Affirmative Action Policy is designed to aid. In fact, the Appellant is clear that she is not part of that group. Further, there is no evidence before me that the policy itself is discriminatory as against anyone in the group that the policy is intended to assist. For these reasons, the Affirmative Action Policy is not reviewable in this case, and therefore, it is plain and obvious that the appeal will not succeed.

DISPOSITION

In this application, I was only asked to consider whether or not I have jurisdiction to hear this appeal.

For reasons I have already outlined, I have determined that I do not have jurisdiction to hear this appeal. As such, the Respondent's application to dismiss the appeal is granted.

Dated this _____ day of _____, 2007.

Shannon R. W. Gullberg
Human Rights Adjudication Panel Member

APPENDIX A - The Record

1. Complaint Information Form and Complaint Details, dated April 25, 2006.
2. Deputy Director Deborah McLeod's letter dated August 14, 2006.
3. Complainant's response to McLeod's letter, dated September 15, 2006.
4. Letter dismissing the complaint, with attachments, dated November 9, 2006.
5. Notice of Appeal to the Adjudication Panel, dated December 3, 2006.
6. Submissions of the Respondent, dated March 14, 2007.
7. Complainant's submissions, dated April 10, 2007.
8. Respondent's reply to the Complainant's submissions, dated April 16, 2007.