

2016 BCHRT 163
British Columbia Human Rights Tribunal

Ferguson v. Vancouver Skycap

2016 CarswellBC 2925, 2016 BCHRT 163

**IN THE MATTER OF THE HUMAN RIGHTS
CODE R.S.B.C. 1996, c. 210 (as amended)**

IN THE MATTER of a complaint before the British Columbia Human Rights Tribunal

Leah Ferguson (Complainant) and Vancouver Skycap Ltd. (Respondent)

Barbara Korenkiewicz Member

Judgment: October 19, 2016

Docket: 14941

Counsel: Chris Siver, for Complainant

Andrew Breen, for Respondent

Subject: Constitutional; Employment; Human Rights

Barbara Korenkiewicz Member:

I INTRODUCTION

1 On February 5, 2016, Leah Ferguson filed a complaint against Vancouver Skycap Ltd. in which she alleges discrimination in a service on the basis of physical disability contrary to s. 8 of the *Human Rights Code*.

2 Since the complaint may have been filed outside the six-month time limit stated in s. 22 of the *Code*, the Tribunal sought submissions on the timeliness of the complaint.

3 I have considered all of the information filed by the parties. Of the information considered, I only recite that which is necessary to come to my decision. This decision deals solely with the timeliness of the complaint. I make no findings of fact.

II BACKGROUND

1. Events Underlying the Complaint

4 On April 7, 2014, Leah Ferguson arrived at Vancouver International Airport on an Alaska Airlines flight. Ms. Ferguson has physical disabilities and thus had arranged for wheelchair service from Alaska Airlines to assist her upon arrival in Vancouver.

5 A wheelchair attendant met Ms. Ferguson at the aircraft and pushed her up the walkway into the terminal. Once inside, she transferred to a mobilized cart and was driven a short distance to meet up with an attendant who has since been identified as a porter from Vancouver Skycap Ltd. ("Skycap"). Before leaving the mobilized cart, Ms. Ferguson told the driver that she needed help throughout her journey through the airport. The driver said the porter would help her. He then put her purse and bag on the porter's handcart.

6 Ms. Ferguson alleges that the porter failed to provide her with the wheelchair service that she required and left her to walk through the airport on her limited power while he transported her purse and luggage. She explains that, in addition to having her things transported, she herself also needed to be transported through the airport.

7 Ms. Ferguson states that, when she and the porter arrived at an escalator, she told him that her disabilities made it very difficult for her to use an escalator and she asked that they find an elevator instead. She says that the porter ignored her request and continued onto the escalator with her things.

8 Ms. Ferguson says that she asked the porter to place her things on the seat next to where she would sit and wait for her friend to pick her up. She says the porter ignored her request and put her things on a personal push cart instead. She says the cart was left out of her reach and she explains that this was problematic because she was physically unable to retrieve her purse from the cart or to push the cart closer to where she was seated.

9 Ms. Ferguson says that the porter failed to accommodate her disability. Ms. Ferguson says that the porter knew or ought to have known that she required accommodation. In addition to the specific requests that she made, Ms. Ferguson also says that her disabilities are readily apparent and that the porter saw her riding in the mobilized cart before he began assisting her.

10 Skycap provides porter services at Vancouver International Airport under a license granted by the Vancouver International Airport Authority. Skycap's porters are equipped with handcarts that they use to transport customers' luggage within the airport on a "user-pays" basis. Skycap was incorporated in British Columbia and is a provincially registered company.

2. Procedural History of the Complaint

11 On April 10, 2014, Ms. Ferguson filed a human rights complaint (Complaint 12581) against Alaska Airlines and Vancouver International Airport.

12 By letter dated April 11, 2014, the Tribunal advised Ms. Ferguson that the respondents she named in her complaint may be under federal jurisdiction and not within the Tribunal's jurisdiction. The letter provided contact information for the Canadian Human Rights Commission ("CHRC"),

13 By further letter dated May 7, 2014, the Tribunal confirmed the respondents named in Ms. Ferguson's complaint were indeed under federal jurisdiction and that her complaint was not within the jurisdiction of the Tribunal and, therefore, not accepted for filing. She was again provided with the CHRC's contact information.

14 By July 2014, Ms. Ferguson had retained legal counsel to represent her.

15 By email dated July 17, 2014, Ms. Ferguson wrote to the Vancouver International Airport Authority (the "Airport Authority") regarding the events of April 7, 2014.

16 By email dated July 30, 2014, the Airport Authority informed Ms. Ferguson that the porter service at Vancouver International Airport is conducted by Skycap pursuant to a license agreement granted by the Airport Authority.

17 By email dated October 7, 2014, Ms. Ferguson asked the Airport Authority to provide Skycap's contact information.

18 By email dated October 17, 2014, the Airport Authority told Ms. Ferguson that it does not release such details and suggested that a corporate search might provide the information sought.

19 By letter dated November 20, 2014, Ms. Ferguson contacted Skycap regarding the events of April 7, 2014.

20 On February 27, 2015, Ms. Ferguson filed a human rights complaint against Skycap with CHRC.

21 By letter dated March 30, 2015, CHRC informed Ms. Ferguson that it would be preparing a report to help it decide whether to deal with the complaint because it appeared that Skycap may fall under provincial jurisdiction. CHRC invited submissions from Ms. Ferguson and Skycap on the jurisdiction issue.

22 By letter dated May 1, 2015, Ms. Ferguson provided CHRC her submissions in which she took the position that Skycap is within the federal jurisdiction.

23 By letter dated June 1, 2015, Skycap provided CHRC its submissions in which it took the position that Skycap is within the provincial jurisdiction.

24 By letter dated December 23, 2015, CHRC informed the parties that it had concluded its report and recommended that it not deal with Ms. Ferguson's complaint because Skycap was not within the federal jurisdiction.

25 On February 5, 2016, Ms. Ferguson filed this complaint.

III ANALYSIS AND DECISION

26 Section 22 of the *Code* provides:

(1) A complaint must be filed within 6 months of the alleged contravention.

(2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.

(3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that:

(a) it is in the public interest to accept the complaint, and

(b) no substantial prejudice will result to any person because of the delay.

27 The time limit set out in s. 22 of the *Code* is a substantive provision which is intended to ensure that complainants pursue their human rights remedies with diligence and to allow respondents the comfort of not having to defend stale-dated complaints: *Chartier v. School District No. 62*, 2003 BCHRT 39.

1. Time Limit

28 Here, the alleged discrimination occurred on April 7, 2014. To comply with the time limit in s. 22(1) of the *Code*, the complaint must have been filed by October 7, 2014. The complaint was not filed until February 5, 2016, roughly 16 months after the six-month time limit expired. Ms. Ferguson acknowledges that her complaint was filed out of time.

2. Discretion to Accept a Late-Filed Complaint

29 The Tribunal has discretion to accept late-filed complaints under s. 22(3) of the *Code*. The onus is on the complainant to persuade the Tribunal, both, that it is in the public interest to accept the late-filed complaint and that no substantial prejudice would result to any person because of the delay in filing: *Chartier* at para. 12.

30 Whether it is in the public interest to accept a complaint filed outside the six-month time limit is a multi-faceted consideration, which is governed by the purposes of the *Code*, and done on a case-by-case basis. Factors that may be important considerations in determining whether it is in the public interest to accept a late-filed complaint include the reasons for the delay, the length of the delay, the significance of the issue raised in the complaint and fairness in all the circumstances. The list of factors that the Tribunal may consider is non-exhaustive: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220, *Hoang v. Warnaco and Johns*, 2007 BCHRT 24.

Length of Delay

31 In this case, the length of delay is nearly 16 months, which is substantial and weighs against acceptance of the complaint.

Novelty of Complaint

32 In determining whether acceptance of a late-filed complaint is in the public interest, the Tribunal has considered whether there is anything particularly unique, novel, or unusual about the complaint that has not been addressed in other complaints. Where a complaint raises a novel issue on behalf of a vulnerable group, for example, that is a factor that may be considered in weighing the public interest in accepting the complaint: *Mzite*, paras. 65-66.

33 Ms. Ferguson says that her complaint raises a novel issue because she suffered grievous harm due to the porter's discriminatory act. She says that educating the public that a seemingly small interaction can lead to grievous harm fulfills the purposes of the *Code*. I am not persuaded by the argument that the novelty of this human rights complaint is strong enough to tip the balance in favour of accepting the late-filed complaint in the public interest. The Tribunal has frequently addressed complaints of discrimination on the basis of physical disability with respect to an accommodation, service or facility: *Segal v. Active Fire & Safety Services Ltd.*, 2014 BCHRT 252 at para. 24.

Reasons for Delay

34 Ms. Ferguson says that she filed her initial complaint on April 10, 2014 and that she has been diligently pursuing that complaint ever since. She relied on the information provided by the Tribunal and believed that her complaint belonged in the federal forum. She explains that, since she had one year to file her complaint with CHRC, she used the extra time and tried to resolve the matter informally by directly contacting Vancouver International Airport and then Vancouver Skycap Ltd., to no avail. When it became apparent that the matter could not be resolved, she ultimately filed a timely complaint with CHRC.

35 Ms. Ferguson says that she believed that Vancouver International Airport, including its porter service, was federally regulated. She says she formed this belief based on the Tribunal's communications in response to her original human rights complaint. She believed that the service assisting airport travellers within the physical boundary of the airport fell under the same human rights jurisdiction as the airport itself. Ms. Ferguson submits that it would be unfair if she was unable to seek redress for Skycap's discriminatory conduct because she relied on information provided by the Tribunal.

36 Skycap argues that it would not be in the public interest to accept Ms. Ferguson's complaint because she has not adequately explained her very significant delay in filing. It says that, by July 30, 2014, Ms. Ferguson knew or ought to have known that the porter in question worked for Skycap. It says that she could have filed her complaint with the Tribunal at any time from that point onward and that she chose not to. In essence, Skycap argues that Ms. Ferguson's failure to file her complaint at the Tribunal while her complaint with CHRC ran its course was at her own peril.

37 Skycap argues that pursuing other avenues for resolution does not provide an excuse for filing a complaint outside of the six-month time limit and cites the Tribunal's decision in *Ryan v. West Vancouver Police Department*, 2015 BCHRT 104, in support of its argument. I distinguish *Ryan* on its facts as that case did not involve a late-filed complaint that had been previously filed in the federal jurisdiction.

38 Skycap also says that Ms. Ferguson's argument regarding her reliance on the Tribunal's advice that her complaint was under federal jurisdiction is untenable given Skycap's understanding that the Tribunal never took a position on whether a complaint against Vancouver Skycap Ltd. was within its jurisdiction. I agree that the first time Ms. Ferguson filed a complaint against Skycap at the Tribunal was on February 5, 2016. However, the analysis in this case is rendered more complex by Ms. Ferguson's reliance on her understanding of the information that she received from the Tribunal.

39 In my view, on the basis of the materials filed, and considering the particular circumstances of this case, Ms. Ferguson's belief, that the porter service within the physical boundary of the airport fell under the same human rights jurisdiction as the airport itself, is not unreasonable.

40 Further, in my view, the material provided supports Ms. Ferguson's assertion that she, throughout, pursued her complaint diligently. She filed her initial complaint against Alaska Airlines and Vancouver International Airport with the Tribunal three days after the April 7, 2014 incident. Within a month, the Tribunal informed her that it had determined her complaint was federal in nature and, therefore, not accepted for filing.

41 Ms. Ferguson did not immediately file her complaint with CHRC, however, she did file her complaint within the one-year time limit provided for in the federal statute. During CHRC's process, it became clear that Ms. Ferguson's complaint against Skycap fell under provincial jurisdiction. Rather than waiting for CHRC's ultimate decision on the jurisdictional issue, Ms. Ferguson contacted the Tribunal in February 2016 and sought to amend her initial complaint to name Vancouver Skycap Ltd. at that time. After the Tribunal informed Ms. Ferguson that her initial complaint had been closed and could not be amended, she filed the current complaint.

42 While I acknowledge the significant passage of time in this case, I note that s. 3(e) of the *Code* provides that one of the purposes of the *Code* is to provide a means of redress for individuals who allege that they have been discriminated against under the *Code*. I find that the fulfilment of this purpose, in the particular circumstances of this case, renders it in the public interest to accept Ms. Ferguson's complaint for filing.

Substantial Prejudice

43 While it is true that Ms. Ferguson bears the burden of establishing both elements under s. 22(3) of the *Code*, the circumstances which could give rise to substantial prejudice are far more likely to be within the respondent's knowledge. Skycap says that it will suffer substantial prejudice if the Tribunal exercises its discretion to accept the complaint for filing at this late stage because the identity of the porter who assisted Ms. Ferguson is unknown to it and the events in question occurred more than two years ago.

44 Again, I acknowledge that a significant amount of time has passed. However, Skycap has been aware of Ms. Ferguson's allegations since November 20, 2014 and has been fully involved with CHRC's investigation of the jurisdiction issue in the time since. Skycap has offered no evidence to substantiate its submission that it will suffer substantial prejudice. It has not described any steps taken to try and identify the porter in question, such as when or if it interviewed each of the porters who worked on April 7, 2014. In the absence of this type of specific information, I am not persuaded that Skycap would suffer substantial prejudice because of the delay.

45 I find that Skycap would not incur substantial prejudice as a result of the acceptance of the late-filed complaint in these particular circumstances.

IV CONCLUSION

46 For all of these reasons, Ms. Ferguson's complaint is accepted for filing.

47 I encourage the parties to take advantage of the Tribunal's mediation services and to contact the case manager to arrange for this service.

48 As a final comment, I underscore that s. 25 of the *Code* allows the Tribunal to defer a human rights complaint pending the outcome of another proceeding. Therefore, when CHRC first informed Ms. Ferguson that it appeared that Vancouver Skycap Ltd. may fall under provincial jurisdiction, the more prudent course of action would have been for her to file a complaint with this Tribunal and request that the complaint be deferred under s. 25 of the *Code* pending CHRC's decision on the jurisdiction issue.

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