

# **ANTI-DISCRIMINATION COMMISSION NORTHERN TERRITORY**

**LOCATION: DARWIN**

**TRIBUNAL: TONY FITZGERALD  
HEARING COMMISSIONER**

**DATE OF HEARING: 13 APRIL 2004**

**HEARING NO: 1 of 2004**

**BETWEEN: CHRIS BLACKHAM-DAVISON  
First Complainant**

**TONI DAVISON  
Second Complainant**

**and**

**KENNETH JOILS  
Respondent**

**DATE OF DECISION: Oral Decision given on 13 April 2004.**

**Written Decision given on 16 April 2004.**

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***Legislation: Anti-Discrimination Act 1992 (NT), ss 4(1), 19(1)(j) and (r), 20, 21, 28, 88 and 90.***

## **REASONS FOR DECISION**

### **1. Background**

- 1.1 The Complainants allege that they were subject to unlawful discrimination by the Respondent at Darwin Airport at about 1.00am on 6 October 2003 in breach of the provisions of the Anti-Discrimination Act 1992 (NT) (“the Act”).
- 1.2 Chris Blackham-Davison (“Complainant 1”) has permanent severe-to- profound hearing loss. He requires the assistance of a “hearing” dog (included in the definition of “guide dog” under section 4 of the Act). It was not contested by the Respondent that Complainant 1 has an impairment and/or required the assistance of a hearing dog for the purposes of the Act. The dog, a Kelpie/Staffordshire Terrier cross named “Ivy”, was present at the hearing.
- 1.3 The allegations arise out of the refusal by the Respondent, a taxi driver, to allow Complainant 1 to travel in his taxi because Complainant 1 was accompanied by Ivy. Complainant 1 alleges discrimination on the ground of his impairment and on the ground that he was accompanied by a guide dog. Toni Davison (“Complainant 2”) alleges discrimination on the basis that her “association” (for the purposes of section 19 of the Act) with Complainant 1 at the time of “the incident” at the airport meant that she too was unable to travel in the taxi.
- 1.4 One attempt at conciliation was made but was unsuccessful.
- 1.5 On 18 November 2003 the Respondent was issued with an Infringement Notice by the Inspector of Commercial Passenger Vehicles (“the Inspector”) for alleged infringement of the Commercial Passenger (Miscellaneous) Regulations, in that on 6 October 2003 he was a taxi driver who “refused a hiring involving a hearing dog”. During the course of his investigation the Inspector obtained statutory declarations in November 2003 from both Complainants, the Respondent and a witness (another taxi driver) to ‘the incident’ at the airport. The statutory declarations contained detailed accounts of the incident.

## **2. Statutory Provisions**

The complaint involves sections 4(1), 19(1)(j) and (r), 20, 21, 28, 88 and 90 of the Act. These sections are set out below.

### **S.4 Interpretation**

(1) In this Act, unless the contrary intention appears -

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“guide dog” means a dog that is trained to provide assistance to a person who has a visual, hearing or mobility impairment;

“impairment” includes –

- (a) the total or partial loss of a bodily function;
- (b) the presence in the body of an organism which has caused or is capable of causing disease;
- (c) the presence in the body of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease;
- (d) total or partial loss of a part of the body;
- (e) the malfunction or dysfunction of a part of the body;
- (f) the malformation or disfigurement of a part of the body;
- (g) reliance on a guide dog, wheelchair or other remedial device;
- (h) physical or intellectual disability;
- (j) psychiatric or psychological disease or disorder, whether permanent or temporary; and
- (k) a condition, malfunction or dysfunction which results in a person learning more slowly than another person without that condition, malfunction or dysfunction;

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## **19. Prohibition of discrimination**

- (1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
  - (a) race;
  - (b) sex;
  - (c) sexuality;
  - (d) age;
  - (e) marital status;
  - (f) pregnancy;
  - (g) parenthood;
  - (h) breastfeeding;
  - (j) impairment;**
  - (k) trade union or employer association activity;
  - (m) religious belief or activity;
  - (n) political opinion, affiliation or activity;
  - (p) irrelevant medical record;
  - (q) irrelevant criminal record;
  - (r) association with a person who has, or is believed to have, an attribute referred to in this section.**
- (2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.

## **20. Discrimination**

- (1) For the purposes of this Act, discrimination includes –
  - (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
  - (b) harassment on the basis of an attribute,in an area of activity referred to in Part 4.

- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –
  - (a) an attribute;
  - (b) a characteristic imputed to appertain to an attribute; or
  - (c) a characteristic imputed to appertain generally to persons with an attribute,  
  
less favourably than a person who has not, or is believed not to have, such an attribute.
- (3) For discrimination to take place, it is not necessary that –
  - (a) the attribute is the sole or dominant ground for the less favourable treatment; or
  - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

**21. Discrimination by refusing to allow guide dog, &c.**

- (1) For the purposes of this Act, a person discriminates on the ground of impairment against a person with a visual, hearing or mobility impairment if the person treats the person with the impairment less favourably because the person has a guide dog.
  - (2) Subsection (1) applies notwithstanding that it is the practice of the person to treat less favourably other persons who have dogs.
  - (3) Nothing in this section shall limit the operation of section 20 in relation to discrimination on the ground of impairment.
  - (4) This section does not affect the liability of a person with a guide dog for any damage caused by the guide dog.
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## **28. Areas of activities**

This Act applies to prohibited conduct in the areas of –

- (a) education;
- (b) work;
- (c) accommodation;
- (d) goods, services and facilities;
- (e) clubs; and
- (f) insurance and superannuation.

## **88. Orders after hearing**

(1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:

- (a) an order requiring the respondent not to repeat or continue the prohibited conduct;
- (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;
- (c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;
- (d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.

(2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

- (a) employing, reinstating or re-employing a person;
- (b) promoting a person;
- (c) moving a person to a specified position within a specified time.

- (3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.
- (4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint.

### **90. Conduct of proceedings**

- (1) In the conduct of proceedings under this Act, the Commissioner –
  - (a) is not bound by the rules of evidence and the Commissioner may obtain information on any matter as the Commissioner considers appropriate;
  - (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms;
  - (c) may give directions relating to procedure that, in the Commissioner's opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties;
  - (d) may draw conclusions of fact from any proceeding before a court or tribunal;
  - (e) may adopt any findings or decisions of a court or tribunal that may be relevant to the proceedings; and
  - (f) may conduct proceedings in the absence of a party who was given reasonable notice to attend but failed to do so without reasonable excuse.

### **3. The Evidence**

3.1 At the outset the Respondent announced that he did not wish to contest the Complainants' allegations or give evidence on oath. The evidence at hearing was accordingly limited to the following:

- contents of the statutory declarations described in paragraph 1.5. Under s.90 of the Act the Commissioner may obtain information as the Commissioner considers appropriate;

- the Complainants' evidence on oath that the contents of their said statutory declarations were true and correct;
- the evidence of the Complainants as to damage;
- the Respondent's cross-examination of both Complainants;
- the concession by the Respondent that he had paid without dispute the penalty of \$110 stipulated in the Infringement Notice described in paragraph 1.5.

3.2 In view of the Respondent's attitude the Complainants elected not to call their witnesses.

3.3 There was no dispute on the facts, but some disagreement between the parties on their respective demeanours during the incident at the airport. This slight variation in the evidence had no effect on the final determination of the complaint.

3.4 In summary, as described in section 1 above, Complainant 1 has an impairment, requires the assistance of a hearing dog, and was refused transport by the Respondent taxi driver because he had a hearing dog. At the time of the refusal:

- Complainant 1 was accompanied by Ivy and his elderly mother Toni Davison (Complainant 2);
- Complainant 2 was walking with the aid of crutches after a recent operation on a broken leg;
- Complainant 2 was also refused transport by the Respondent because of her association with Complainant 1;
- the Complainants had waited in the taxi queue for 10-15 minutes for their taxi, and when their turn came in excess of 20 people remained in the queue;
- Complainant 1 showed Ivy's written certification to the Respondent and explained that it was unlawful to refuse transport to a person accompanied by a "hearing dog";
- the Respondent refused to transport the Complainants and Ivy, and described Ivy as "a mongrel";



- the Respondent did not radio his “base” to seek advice, and steadfastly refused to recognise the entitlements of the Complainants;
- the next taxi driver in the queue was willing to transport the Complainants and Ivy, and the next member of the public in the taxi queue refused to travel with the Respondent until it was ascertained that the Complainants and their dog had successfully secured transport in the next taxi.

3.5 Under cross-examination by the Respondent the Complainants agreed that they had made several allegations of discrimination in the past. However, rather than lending support to the Respondent’s contention that the Complainants were “gold diggers” motivated by greed rather than principle, in my view this evidence tended to support an entitlement to compensation for aggravation of loss or damage in that it demonstrated that the Complainants were yet again forced to suffer unfavourable treatment – and in this instance in the presence of so many members of the public.

3.6 The Complainants maintained that, at least initially, they were only interested in receiving an apology from the Respondent, and that the “apology” offered by the latter at conciliation was qualified and unacceptable.

3.7 On the question of damage Complainant 1 alleged that at the time of the incident he was publicly humiliated, embarrassed and inconvenienced. Subsequent to the incident he claimed to suffer from stress, sleeping difficulties and a reluctance to travel in taxis – preferring instead public transport or a private minibus. Complainant 1 did not provide any medical evidence to support his claim. Complainant 2 confirmed her son’s embarrassment, sleeping difficulties, and fear of rejection by taxi drivers, and also stated that delay caused by the incident inconvenienced her and resulted in pain and suffering (because of her broken leg).

#### **4. The Law**

4.1 In the conduct of proceedings, section 90 of the Act suspends the rules of evidence and entitles me to inform myself on any matters I consider appropriate. In this way I am able to take notice of the prosecution file of the Inspector of Commercial Passenger Vehicles and rely on the affidavits of the parties on their witnesses (see paragraph 1.5).

4.2 Section 19 of the Act prohibits discrimination against a person on the ground of a number of attributes including impairment (s.19(1)(j)) and association with a person who has an attribute (s.19(1)(r)). The Respondent did not contest, and I formally find, that he discriminated against Complainant 1 on the basis of his attribute of impairment and Complainant 2 on the basis of her attribute of association with Complainant 1.

4.3 Section 20 states inter alia that discrimination takes place where a person with an attribute is treated less favourably than a person without that attribute. Section 21 states that for the purposes of the Act discrimination on the ground of impairment includes treating a person with an impairment less favourably because the person requires a guide dog (defined in section 4(1) of the Act).

I find that the Respondent, in refusing to transport the Complainants, treated them less favourably on the ground of their said attributes than he would treat persons who do not possess such attributes.

4.4 Section 28 restricts the Act to prohibited conduct in specified “areas of activities” including ‘goods, services and facilities’ (s.28(d)). I find that the Respondent, at the time of the prohibited conduct, was clearly refusing to provide the “service” of transport by taxi and accordingly, his refusal is within an area of activity contemplated by the Act.

## **5. Compensation for Loss or Damage**

Having found the actions of the Respondent to be prohibited conduct under the Act and having found the allegations in the complaints to be substantiated, I would normally assess the impact of the conduct on the Complainants in order to determine the extent of damages.

However, at the conclusion of the evidence I indicated to the parties that I proposed to make findings in favour of the Complainants. (For the record, I found the evidence of the Complainants on the question of damage to be credible.) Rather than assessing damages myself, I then offered them the opportunity to resolve the question of damages for themselves through conciliation. In taking this course I was conscious, and I reminded the parties, of the prominent status of conciliation in the resolution of complaints under the Act. I informed the parties that if conciliation was unsuccessful then I would assess damages.

The parties accepted my invitation to conciliate and were provided with a Conciliator from the Commission. Prior to hearing, the parties had already been provided with several recent decisions on point from

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HREOC and the Federal Magistrates Court – so they had a fairly good grasp of a range of relevant damages awards.

## **6. Determination**

In the event, and after conciliation, the parties were able to agree on damages and I formally made the following findings, and the following formal orders by consent –

### **6.1 Findings**

1. I find the prohibited conduct alleged by the First Complainant, Chris Blackham-Davison, to be substantiated on the basis that he has been discriminated against in contravention of ss.19 and 20 of the Anti-Discrimination Act (“the Act”) – which relate to discrimination based on an attribute, in this case impairment. Also I find that he has been discriminated against in contravention of s.21 of the Act which deals specifically with discrimination where the Complainant has a guide dog.
2. I find the prohibited conduct alleged by the Second Complainant, Toni Davison, to be substantiated on the basis that she has been discriminated against as an associate of Mr Blackham-Davison in contravention of ss.19 and 20 of the Act.
3. I find that the prohibited conduct engaged in by the Respondent, Kenneth Joils, to be in the area of the provision of goods, services and facilities which is an area contemplated by s.28 of the Act.

### **6.2 Orders**

1. The Respondent is not to repeat or continue the prohibited conduct.
2. The Respondent is to pay to the Complainant Chris Blackham-Davison the sum of Seven Hundred and Fifty Dollars (\$750.00) as compensation for the inconvenience, embarrassment and humiliation caused by the prohibited conduct. Payment is to be made to the Anti-Discrimination Commission (“ADC”) for payment out to the First Complainant on the following basis:
  - \$250 within one week of the date hereof.

- \$30 per month commencing 1 May 2004 and continuing on the first of each month thereafter until the balance of \$500 is paid in full.
3. The Respondent is to pay to the Complainant Toni Davison the sum of Seven Hundred and Fifty Dollars (\$750.00) as compensation for the inconvenience, pain and suffering caused by the prohibited conduct. Payment is to be made to the ADC for payment out to the Second Complainant on the following basis:
- \$250 within one week of the date hereof.
  - \$30 per month commencing 1 May 2004 and continuing on the first of each month thereafter until the balance of \$500 is paid in full.

Dated this 16<sup>th</sup> day of April 2004.

TONY FITZGERALD  
COMMISSIONER