

Date Issued: August 18, 2009
File: 5160

Indexed as: Gordon v. AWM-Alliance and another (No. 2), 2009 BCHRT 279

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

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

B E T W E E N:

Ervin Gordon

COMPLAINANT

A N D:

AWM-Alliance Real Estate Group Ltd. and The Owners, Strata Plan BCS
1461

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Lindsay M. Lyster
Counsel for the Complainant:	Don P. Hall
Counsel for the Respondents:	Veronica P. Franco
Dates of Hearing:	August 10 and 11, 2009

I INTRODUCTION

[1] In December 2006, Ervin Gordon started work as a part-time relief care-taker at The Arcadia, a condominium in Burnaby, British Columbia. After five months, his employment was terminated. Mr. Gordon alleges that the strata corporation which owns the building, named as “The Owners, Strata Plan BCS 1461”, and the property management company responsible for it, AWM-Alliance Real Estate Group Ltd., discriminated against him on the basis of race, colour, ancestry, place of origin and age in terminating his employment, contrary to s. 13 of the *Human Rights Code*. Mr. Gordon was born in Barbados of East Indian ancestry, and was 63 years of age at the time his employment was terminated.

[2] The respondents deny discrimination on any prohibited ground. They say that they received a number of complaints about Mr. Gordon’s work performance, starting in January 2007. They say that the Strata Council President, Jeff Watts; the property manager, Paul Kral; and the full-time care-taker, James Wee, all spoke to Mr. Gordon about the concerns with his job performance, but it did not improve sufficiently. Mr. Kral wrote Mr. Gordon a letter, dated April 20, 2007, in which he warned Mr. Gordon that, if his performance did not improve, his employment would be terminated. Mr. Gordon’s performance did not improve, and in a letter dated April 30, 2007, Mr. Kral informed him that his employment was terminated, effective May 31, 2007.

[3] The primary issue before me is whether Mr. Gordon has established, on a balance of probabilities, that the termination of his employment was based, in whole or in part, on his race, colour, ancestry, place of origin and/or age. If he has, then his complaint will be justified. If he has not, then his complaint will be dismissed.

II DECISION

[4] For the reasons that follow, I have decided to dismiss Mr. Gordon’s complaint.

III FACTS

1. General comments on the evidence

[5] Mr. Gordon testified on his own behalf. Mr. Watts, Mr. Kral and Mr. Wee testified for the respondents. In addition, a number of documents were entered into evidence.

[6] It is notable that some other people were not called as witnesses. In particular, no one called Yuen Wah Lee, an owner in The Arcadia. In his complaint, as amended, Mr. Gordon alleged that Mrs. Lee made discriminatory remarks about him to Al Englund, the Strata Council Vice President. Mr. Gordon originally named Mrs. Lee as a respondent, but withdrew the complaint as against her after his application to add the present respondents was granted: *Gordon v. AWM-Alliance and others*, 2008 BCHRT 447. Nor was Mr. Englund called as a witness. Aside from allegedly hearing Mrs. Lee's remarks, Mr. Englund was also involved in both hiring and terminating Mr. Gordon.

[7] There are some disputes in the evidence, and in what follows, I assess the reliability of the evidence before me as necessary to make my findings of fact. In all cases, I do so by considering whether the evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), p. 357.

[8] All of the witnesses had difficulty remembering and recounting the chronology of the events about which they testified, and in general, while there were also some problems with some of the documentary evidence, I rely on it wherever possible to establish the chronology.

[9] None of the witnesses' evidence was entirely reliable.

[10] Mr. Kral's evidence lacked specificity at times, as for example in recalling who complained to him and the number of complaints he received about Mr. Gordon's work. However, Mr. Kral was willing to acknowledge the limits of his knowledge and recall, as, for example, in being unable to explain why a particular letter bore two dates. He also acknowledged that he had learned from this experience how to deal better with

complaints about employees. I generally found Mr. Kral's evidence to be the most internally consistent of the witnesses, and have relied on it more than the others'.

[11] There were more significant difficulties with Mr. Gordon's evidence, including internal inconsistencies and inconsistencies between it and other, more reliable, evidence. For example, he testified in direct that he received a letter after the conclusion of his probationary period confirming his permanent employment, but admitted in cross-examination that no such letter existed. I found Mr. Gordon's denials of ever receiving any complaints about his work, with the exception of those from Mrs. Lee, to lack credibility in the face of the consistent evidence from the other witnesses that they talked to him about problems with his work. I found Mr. Gordon's evidence about the handwriting on an Owners Survey entered into evidence by him to be self-serving and to fly in the face of the document itself. I have been cautious in relying on Mr. Gordon's evidence.

[12] There were also substantial difficulties with Mr. Watts' evidence. I accept that Mr. Watts attempted to tell the truth to the best of his ability, as demonstrated in his frank description of Mrs. Lee's behaviour during the incident in which he observed her giving Mr. Gordon a bad time about mopping and during her attendance at a Strata Council meeting. But his evidence was often both internally inconsistent and inconsistent with contemporaneous documents, as, for example, with respect to the sequence of events around the termination of Mr. Gordon's employment, and who was involved in that decision. While Mr. Watts candidly admitted he had made a mistake on one occasion, his evidence was often confused. I have been cautious in relying on Mr. Watts' evidence.

[13] Mr. Wee's evidence was more limited in scope, and while it lacked specificity at times, perhaps due in part to challenges communicating in English, I have relied on it as far as it goes.

2. Mr. Gordon is hired to work at The Arcadia

[14] Mr. Gordon began work as the relief care-taker at The Arcadia in late December 2006. The Arcadia is a fairly large building, with 187 suites on 29 floors. Mr. Gordon worked eight hours a week, on Thursday and Saturday afternoons. In general, his duties

consisted of cleaning various common areas, including the lobby windows and floors, elevators, and the garbage area, picking up litter inside and outside the building, and assisting with moves as required. Mr. Gordon was paid \$500.00 per month for his work at the Arcadia.

[15] While the evidence on the point was not as clear as it might have been, it appears that the strata corporation was Mr. Gordon's employer, and that AWM, and Mr. Kral in particular, acted as its agent in dealing with Mr. Gordon. The respondents submit that, in the circumstances, only the strata corporation would be liable for any discrimination. In light of my finding that there was no discrimination, I need not consider this issue further.

[16] Mr. Gordon obtained the relief care-taker position on the recommendation of Mr. Englund, the Strata Council Vice President, with whom he had worked in the past at an alarm company. This was one of a number of capacities in which Mr. Gordon had worked over his career, including as a machinist and as a part-time care-taker at another apartment building in the Lower Mainland. Mr. Watts interviewed Mr. Gordon in person, and thought that Mr. Gordon's previous experience as a care-taker, and the fact that he lived near The Arcadia, would be assets. Mr. Kral spoke with Mr. Gordon over the telephone, Mr. Watts and Mr. Kral spoke, and the decision was made to hire Mr. Gordon.

[17] While no written contract or other documentation was introduced to substantiate it, Mr. Gordon testified, and I accept, that his employment was subject to an initial three month probationary period. His employment continued after the conclusion of the probationary period.

3. Complaints about Mr. Gordon's work performance

[18] The parties disagreed about whether there were complaints about Mr. Gordon's work during his employment at The Arcadia.

[19] Mr. Gordon testified that he performed all his duties appropriately, and with one exception, never received any complaints. More specifically, Mr. Gordon testified that Mr. Wee never had any complaints about his work, and that Mr. Wee told him he did a very good job and wanted him to stay on. He accepted that Mr. Wee told him he should do things the way he (Mr. Wee) wanted, which Mr. Gordon testified he did. Mr. Gordon

denied that he was ever late for work, or that Mr. Watts ever talked to him about being late. Mr. Gordon also denied that Mr. Kral called him to complain about how he was performing his duties.

[20] The only complaint Mr. Gordon testified he received was from Mrs. Lee. Mr. Gordon testified that, on one occasion, he was mopping, and Mrs. Lee took the mop from him and tried to show him how to use it. Mr. Gordon testified that he had no idea why Mrs. Lee did this or complained about him to others on other occasions. According to Mr. Gordon, this was the only complaint he received prior to the April 20, 2007 warning letter. He also testified that he asked Mr. Wee if anyone else complained about him, and that Mr. Wee told him he could not think of anybody else.

[21] Mr. Watts also testified about the mop incident, which he said he observed, and intervened in because Mrs. Lee was giving Mr. Gordon such a bad time. He attempted to calm them both down.

[22] It is clear that Mrs. Lee was unhappy with Mr. Gordon's work. It is also clear that English is her second language, in which she is not proficient, which likely affected the manner in which she communicated her concerns. In addition to the mop incident, Mrs. Lee attended a Strata Council meeting sometime early in 2007. According to both Mr. Kral and Mr. Watts, Mrs. Lee was quite agitated on this occasion. Her husband calmed her down and interpreted for her, communicating her complaints about Mr. Gordon's cleaning. Mr. Kral also spoke with Mrs. Lee on one occasion in the lobby of The Arcadia, at which time she pointed out to him problems with the cleanliness of the windows, floor, elevator and parkade, and told him about what others had said to her on the subject.

[23] In a letter to Strata Council and AWM, dated March 12, 2007, Mrs. Lee reported deficiencies she had observed in Mr. Gordon's cleaning, in particular on March 3. A number of other owners' signatures and suite numbers are included on the letter.

[24] In a letter to Mrs. Lee, dated March 14, 2007, Mr. Kral stated that he had been directed by the Strata Council to advise her that the Strata Council had authorized her to establish a Care-taker Relief Committee. This letter also has a handwritten date on it of

“April”. No explanation of this was provided, although Mr. Kral admitted that the letter could have been misdated.

[25] In any event, in this letter Mrs. Lee was asked to submit a proposal as to how to deal with the care-taker relief situation, including submitting resumes for a new relief care-taker, before May 4, 2007. Mr. Kral testified that Mrs. Lee was unable to form a Care-taker Relief Committee, and that the only feedback he ever received as a result of this letter was Mrs. Lee referring a person to him for consideration as a relief care-taker. The person referred was seeking full-time work, and therefore not an appropriate candidate. Mr. Watts confirmed that the Committee never got off the ground.

[26] The respondents’ evidence was that Mrs. Lee was not the only person to complain about Mr. Gordon’s work.

[27] Mr. Kral testified that, starting in January 2007, he received a number of phone calls and e-mails from owners complaining about the quality of Mr. Gordon’s cleaning and about him being late on a few occasions. He also testified that Mr. Wee called him to tell him that owners were complaining to him about Mr. Gordon not cleaning properly. Mr. Kral said that he did not receive any complaints in February, but did again in March, and that he discussed the matter with the Strata Council. In addition to complaints about his cleaning, Mr. Kral testified that he also received complaints about Mr. Gordon being late arriving for work or difficult to locate on site. It was clear, however, that Mr. Kral placed comparatively little weight on the latter complaints. The main thing, as far as he was concerned, were the complaints about Mr. Gordon’s cleaning.

[28] Mr. Kral also testified that on his periodic visits to The Arcadia he observed problems with the cleanliness of the premises after Mr. Gordon had finished his shifts. Mr. Kral testified that he even conducted a couple of “tests” in which he left litter in an obvious location to see if Mr. Gordon would pick it up; he did not.

[29] Mr. Kral testified that he spoke to Mr. Gordon about his concerns on several occasions over the telephone, but agreed that he never talked to him in person. According to Mr. Kral, Mr. Gordon said he would try to address the concerns and do the work as it was supposed to be done.

[30] Mr. Watts testified that he observed deficiencies in Mr. Gordon's work a couple of times, as well as him being late a few times, and on a few occasions spoke to Mr. Gordon about these concerns. Mr. Watts said that, on the couple of occasions when he spoke to Mr. Gordon about problems with window cleaning and garbage in the gardens and on the walkway, Mr. Gordon cleaned it up right away. Mr. Watts said that, while there was some improvement, Mr. Gordon continued to not perform his work satisfactorily.

[31] Mr. Wee testified that he also observed some problems with Mr. Gordon's work, such as litter in the lobby, smudges on the windows, and streaks on the floor, and that some owners, including but not limited to Mrs. Lee, also complained to him about Mr. Gordon's work. Mr. Wee testified that he spoke to Mr. Gordon on a few occasions about those problems and complaints. He testified, for example, that he told Mr. Gordon to vacuum before he mopped. Mr. Wee also testified that he told Mr. Kral about the problems he observed and the complaints he received about Mr. Gordon's work.

[32] Strata Council meeting minutes for March 12, April 10 and May 14, 2007 were entered into evidence.

[33] The March 12 minutes indicate that the Council received a letter regarding the relief care-taker, and discussed complaints from several residents about him, and that the property manager would arrange for a meeting with Mr. Gordon. It is reasonable to infer that the letter mentioned is the March 12 letter from Mrs. Lee. Mr. Kral testified that Mr. Englund was supposed to meet with Mr. Gordon after this meeting, but that that meeting never occurred.

[34] Mr. Kral testified, however, that he spoke to Mr. Gordon on the phone some time after the March 12 Strata Council meeting, and told him about the issues with his work.

[35] While Mr. Gordon placed it later, after he received the April 20 warning letter, this is likely the same conversation in which Mr. Gordon testified that Mr. Kral told him that he was under extreme pressure from Mrs. Lee to have him removed, that the only complaint he had was from Mrs. Lee, and that he had other buildings he managed in which he could place him. Mr. Kral denied telling Mr. Gordon that he was under pressure from Mrs. Lee, saying that he did not feel pressured because he was used to

some owners acting as she did. Mr. Kral testified that he did tell Mr. Gordon about Mrs. Lee complaining, in particular that she was talking about forming a Committee. Mr. Kral denied making any promises that he would try to help Mr. Gordon get another job.

[36] I find that Mr. Kral told Mr. Gordon there were complaints, in particular from Mrs. Lee, but did not tell Mr. Gordon that he was under extreme pressure from Mrs. Lee or make any representations or promises, either in this or any other conversation, that he could place Mr. Gordon in another building.

[37] The April 10 Strata Council minutes indicate that a letter had been received regarding the weekend relief care-taker, and that the Council would establish a Care-taker Relief Committee, which would report to the Council. It is not clear which letter the minutes refer to.

[38] The number and precise nature of the complaints, and the owners involved, was not clearly established, but I find, on the whole of the evidence, that a number of owners expressed concerns about Mr. Gordon's performance of his duties. While Mrs. Lee was the most strident in the expression of her concerns, she was not alone.

[39] I also find that Mr. Kral and Mr. Watts honestly and reasonably believed, both as a result of their own observations and through receiving complaints from others, that there were problems with Mr. Gordon's work. As this is not a wrongful dismissal case in which just cause is alleged or must be proven, I need not determine if all of the complaints about Mr. Gordon were accurate or whether they would justify his dismissal for cause.

[40] The respondents did not advise Mr. Gordon of all the complaints they received. It is possible that Mr. Kral, Mr. Watts and Mr. Wee were not as clear with Mr. Gordon as they might have been about the problems they and others observed in his work performance. Nonetheless, I find that Mr. Kral, Mr. Watts and Mr. Wee all spoke to Mr. Gordon about problems they and others observed, and that he was thereby given the opportunity to improve his performance. While some improvement was noted immediately after Mr. Gordon was spoken to, it was not sustained or sufficient to satisfy the respondents' concerns.

4. Owners Survey

[41] Some time in April, Mr. Kral and Mr. Watts decided to circulate an Owners Survey to all owners in The Arcadia. Owners were asked to state whether they believed the Strata Council should hire a new weekend relief care-taker. They were also asked to provide any comments they might have. By May 3, 2007, the completed surveys were to be either dropped in the Council mailbox in the lobby or faxed to Mr. Kral.

[42] Mr. Kral testified that about 50% of the owners responded, the majority of them within two or three weeks, with perhaps two or three coming in after the May 3 deadline. Of those responding, about 90% indicated that they thought a new weekend relief care-taker should be hired. Mr. Kral also testified that they focussed on the owners' responses to that question, rather than any comments they might have made. He noted that some of the comments were in Chinese and he could not read them in any event.

[43] Only one owner's response to the Owners Survey was entered into evidence. In light of the nature of the evidence about his Owners Survey and the fact he was not called as a witness, I will refer to the owner in question as "J.W.". Two copies of this response were introduced, one by Mr. Gordon and one by the respondents. The copies were identical, with the exception of a single phrase which appeared only on the copy introduced by Mr. Gordon. Mr. Gordon relied upon this document as evidence of his allegation that he was discriminated against on the basis of race, colour, ancestry, place of origin and/or age.

[44] On his Owners Survey, J.W. indicated that he believed the Strata Council should hire a new weekend relief care-taker. On both copies of J.W.'s form, the following is handwritten in the comments section:

Strata Council should hire new weekend (part time) caretaker. and make sure he is doing his job.

The one we have now ^ slow. dirty. stink. not even performances

close to be a caretaker at all.

[45] While difficult to convey in typed form, the word “performances” appears to be inserted into the line which would otherwise read “The one we have now slow. dirty. stink. not even close to be a caretaker at all”.

[46] Appearing only on the copy introduced by Mr. Gordon is an additional handwritten comment, underneath “not even close to be a caretaker at all”, that reads “too old 70 year”.

[47] The copies of this document introduced by both parties are photocopies. Despite my directions after the first day of hearing to search their premises, neither party was able to produce an original of this document. On the copy introduced by Mr. Gordon, the “too old 70 year” comment is lighter than the other handwriting, suggesting it was written in different ink. It also appears to be in different handwriting than the remainder of the document.

[48] The evidence from both parties about how this document came to be in their hands, in the form presented, was less than satisfactory.

[49] Mr. Watts testified that he had seen both versions before making the decision to terminate Mr. Gordon, that he faxed the document to Mr. Kral’s office, and later gave him the original. Mr. Watts’ evidence on this and a number of points was confused and internally inconsistent and I am unable to rely on it.

[50] Mr. Kral testified that he only ever had a faxed copy, and that it lacked the “too old 70 year” comment. He was unable to locate an original of this document, or any copy of this document with that comment on it. He also testified that he thought he would have remembered if they had two different versions of the same Survey.

[51] Mr. Gordon testified that he got his copy of the document from Mr. Wee or from the manager’s suite at The Arcadia, and that the only copy he ever saw or had in his possession (other than through pre-hearing document production from the respondents) had the “too old 70 year” comment written on it.

[52] A number of questions arise in relation to the authenticity of the copies of this document entered into evidence. But as neither party pursued this matter in final argument, I will not address it further.

[53] I return to the Owners Surveys more generally below in dealing with the termination of Mr. Gordon's employment.

5. Mr. Gordon's employment is terminated

[54] The respondents did not wait until the deadline for return of the Owner Surveys before taking further action in relation to Mr. Gordon's employment.

[55] According to Mr. Kral, there were numerous ongoing discussions in this period between him and Mr. Watts about what to do. Mr. Kral testified that he asked Mr. Watts for direction. In response, on April 17, 2007, Mr. Watts wrote an e-mail to Mr. Kral and other members of the Strata Council. In it, he stated that "because of on-going issues/work performance with our caretaker relief, I have discussed with other members and we agreed to mail a warning letter to Edwin [*sic*] that he will be terminated if no improvement regarding cleanliness. We will further discuss at council meeting."

[56] Mr. Kral replied by e-mail, saying he would send a warning letter to Mr. Gordon, which he did on April 20. Mr. Kral wrote that the Strata Council had directed him to write "in regards to complaints received regarding your services". Mr. Kral stated that the Council had "received complaints from numerous owners that they are not happy with the level of service which you have provided which include cleaning, sweeping, mopping of floors and litter pick-up." Mr. Kral requested Mr. Gordon to "complete your tasks properly". Mr. Gordon was warned that "should there be no improvement, the Council will terminate your services". Mr. Kral closed by stating that he looked forward to Mr. Gordon's cooperation, and providing his contact information should he have any questions.

[57] Mr. Gordon testified that he was surprised to get this letter, which he said he picked up when he went to work one day. The letter is addressed to his home; it is likely it was mailed there.

[58] On April 29, 2007, Mr. Watts sent Mr. Kral and members of the Strata Council another e-mail. He stated that "we inspected the building after Ervin left; I have discussed with other members and we agreed to terminate our caretaker relief. We will

further discuss at May meeting”. Mr. Kral replied, indicating the letter would go out the next day.

[59] Accordingly, on April 30, 2009, Mr. Kral wrote Mr. Gordon the termination letter. Mr. Kral wrote that the Strata Council had received further complaints, of the same nature as those referred to in the April 20 letter. He stated that, as there had been no improvement since the April 20 letter, the Council had unanimously agreed to terminate Mr. Gordon’s services, as of May 31, 2007.

[60] There was no explanation as to why the decision to terminate was made prior to the May 3 deadline for the return of the Owners Surveys.

[61] The evidence was inconsistent as to who was involved in the decision to terminate and the information taken into account by them. Mr. Watts testified that he and Mr. Englund made the decision together after inspecting the premises, without consulting the remainder of the members of the Strata Council. But Mr. Watts’ April 29 e-mail and Mr. Kral’s April 30, 2007 letter both indicate that other Strata Council members were involved in the decision. Later in his evidence, Mr. Watts testified that, after all the Owners Surveys were in, they had a meeting and took a vote resulting in Mr. Gordon’s termination.

[62] I found Mr. Watts’ oral evidence on this point confused and unreliable. I think it more probable that, as indicated in the April 29, 2007 e-mail, other Council members were consulted and participated in the decision to terminate. Whether, as stated in Mr. Kral’s letter, the decision was unanimous, I do not know. Clearly, this occurred prior to the deadline for the submission of the Owners Surveys. Equally clearly, the Strata Council did not have a formal meeting and take a vote before that e-mail was sent, as this did not occur until May 14, 2007.

[63] The evidence was inconsistent as to whether the members of Strata Council who participated in the decision to terminate considered the Owners Surveys which had come in to that point, and in particular J.W.’s response (whichever version), in making their decision.

[64] Mr. Watts testified that he and Mr. Kral decided between them to circulate the Owners Survey and to keep the results quiet and just between them until they had received all the forms back. Mr. Watts testified that they did not share the Owners Surveys with the other members of Council, including Mr. Englund, until after the decision to terminate was made. This was despite the fact that Mr. Watts said he faxed the completed surveys to Mr. Kral from Mr. Englund's home. Mr. Watts said that, once the deadline for submission of the Surveys had passed, Mr. Kral did a count of how many owners wanted to hire a new relief care-taker. Later, Mr. Watts testified that the other members of Strata Council never saw the Owners Surveys. Mr. Watts appeared to think that Mr. Kral's count, and its communication to the other members of Strata Council, occurred before the decision to terminate was made. He was mistaken in this, as the decision to terminate was made on April 29, before the May 3 deadline. When this was pointed out to Mr. Watts, he admitted he had made a mistake, but he was never able to recall accurately the relevant sequence of events.

[65] For his part, Mr. Kral testified that he and Mr. Watts went through the Owners Surveys received, and that they made the decision to terminate based on them. Mr. Kral also testified that the Owners Surveys were provided to the Strata Council and discussed at a meeting. It was not clear at which meeting this occurred.

[66] I am unable to rely on Mr. Watts' evidence on this point. It is in my view unlikely that, when consulting with other Council members about whether to terminate Mr. Gordon's employment, Mr. Watts would not have shared with them at least the substance of whatever Owners Surveys had been received by that point. Certainly there was nothing in Mr. Kral's evidence which would tend to support that he and Mr. Watts were keeping the Owners Surveys quiet.

[67] Whether the Owners Surveys considered by the members of Strata Council would have included J.W.'s survey is unclear on the evidence. I assume, for the purposes of this decision, that J.W.'s survey was one of the pieces of information considered by members of Strata Council in deciding to terminate Mr. Gordon's employment.

[68] Mr. Gordon testified that he thought he picked the termination letter up from the manager's office at The Arcadia. This again seems unlikely as it is addressed to his

home. Mr. Gordon testified that he was surprised to receive the letter, had his doubts about it, and wished that he had had a chance to meet with the Strata Council or Mr. Kral, whom he referred to as his employer, to see all of the complaints and to clarify matters.

[69] The May 14, 2007 Strata Council's minutes state that the Council considered complaints from several residents about the relief care-taker. They also state that the Property Manager re-circulated a questionnaire about the relief care-taker's performance. Mr. Kral testified, and I accept, that the minutes, which he drafted, should have said "circulated". The minutes go on to state that Council unanimously agreed "to cancel" the current part-time relief care-taker as of May 31, 2007. In fact, what the Council actually did was confirm the decision which had already been made on April 29 and communicated on April 30 to terminate Mr. Gordon's employment. As Mr. Kral testified, proceeding in this fashion, with consultation and a decision prior to a formal meeting where the matter is reviewed and confirmed, is not unusual.

[70] Mr. Gordon worked out the notice period set out in the April 30 termination letter. The respondents also paid him the equivalent of an additional two weeks pay in lieu of notice, or \$250.00.

[71] As indicated, Mr. Gordon testified that Mr. Kral, at some point in this process, promised to find him work at another building managed by him. Mr. Kral denied having made such a promise, saying that he would not have done so in light of the complaints received about Mr. Gordon's work. I prefer Mr. Kral's evidence on this point.

[72] Mr. Gordon testified that he depended on his income from The Arcadia to subsidize his pension income. Mr. Gordon has not looked for other work, nor has he worked for any other employer, since being terminated by the respondents. He describes himself as being "on pension".

IV ANALYSIS

[73] In order to succeed in his complaint, Mr. Gordon must establish, on a balance of probabilities, that he was subject to adverse treatment, and that that treatment was related, in whole or in part, to his race, colour, ancestry, place of origin and/or age.

[74] I note that, while Mr. Gordon alleged age discrimination in his original complaint, he subsequently filed an amendment form which appeared, on its face, to delete that ground, and the Tribunal accepted the complaint only on the first four grounds. However, Mr. Gordon's complaint, as amended, and fairly read, does include an allegation of discrimination on the basis of age, and both parties proceeded on this basis at hearing. I do the same.

[75] It is clear that Mr. Gordon experienced adverse treatment in that his employment was terminated. The question is whether the termination was related, in whole or in part, to any of the grounds relied upon.

[76] In his complaint, as amended, Mr. Gordon alleged that Mrs. Lee had made statements to Mr. Englund, which, if proven, would have been some evidence that she, at least, harboured discriminatory attitudes towards Mr. Gordon on all of the grounds alleged. However, no evidence was introduced at the hearing of Mrs. Lee ever making such statements, whether to Mr. Gordon, Mr. Englund, or anyone else.

[77] Counsel for Mr. Gordon submitted that I could infer from the totality of the evidence that Mrs. Lee was biased against Mr. Gordon, and that that bias was based on discriminatory attitudes. I accept that the totality of the evidence supports the inference that Mrs. Lee strongly believed that Mr. Gordon did not do his job properly and should not have been the relief care-taker. The evidence before me does not support the inference, however, that Mrs. Lee's beliefs or actions were related to Mr. Gordon's race, colour, ancestry, place of origin and/or age.

[78] The only evidence which might reasonably support the inference that Mr. Gordon's race, colour, ancestry, place of origin and/or age played any role in the respondents' decision to terminate his employment is J.W.'s Owner Survey.

[79] It is not clear on the evidence whether J.W.'s Owners Survey was considered by the members of the Strata Council who made the decision to terminate Mr. Gordon's employment. It is also not clear whether the "too old 70 years" comment, which would be some evidence of discrimination on the basis of age, was written by J.W. on the Owners Survey or appeared on any copy of it considered by the members of Strata Council. Finally, J.W.'s Owners Survey is open to interpretation as to whether he was

saying that Mr. Gordon was slow, dirty and stinky, or whether his performance was slow, dirty and stinky.

[80] I think it more probable than not that any version of J.W.'s Owners Survey considered by the members of Council did not include the "too old 70 years" comment, as it appears to have been written in different ink (it is lighter than the remainder of the handwriting) and to be in different handwriting. It is, however, impossible to be certain of this on the basis of the photocopies entered into evidence.

[81] For the purposes of what follows, I assume, without deciding, both that J.W.'s Owners Survey was one of the documents considered by the Strata Council, and that the "too old 70 years" comment was written on the document considered. These are the assumptions most favourable to Mr. Gordon's case.

[82] It is reasonable to infer on the entirety of J.W.'s Owners Survey that English is not his first language. It is impossible to be certain, in the absence of testimony from J.W., whether he meant to communicate that Mr. Gordon, or his performance, was slow, dirty and stinky. The language and punctuation used are open to both interpretations. An assertion that Mr. Gordon was himself slow, dirty and stinky could be a discriminatory comment based on his race, colour, ancestry, place of origin and/or age, while an assertion that his work was slow, dirty and stinky is unlikely to reflect discrimination.

[83] Proceeding on this basis, I find that Mr. Gordon has not established that the Strata Council, who I find made the decision to terminate his employment, did so on a basis related, in whole or in part, to his race, colour, ancestry, place of origin and/or age. Assuming that J.W.'s Owners Survey is evidence that J.W. took some or all of those factors into account in reaching his belief that the weekend care-taker should be replaced, that is not sufficient to establish that the Strata Council took some or all of those factors into account in deciding to terminate Mr. Gordon's employment.

[84] Strata corporations are intended to operate in a democratic fashion. Members of strata councils are elected by their fellow owners to run the affairs of the strata corporation. It was appropriate for Mr. Kral and Mr. Watts to seek the owners' views about whether Mr. Gordon should be replaced. It was equally appropriate for the members of the Strata Council charged with making the decision to consider the views

expressed by their fellow owners. The fact, if fact it be, that one of the owners may have expressed discriminatory views in the Survey is not a basis upon which I am prepared to infer that the decision of the Strata Council as a whole, of which J.W. was not a member, was tainted by those views. To reach that conclusion would be to render it impossible for strata councils to seek the input of owners for fear that an individual owner might make an arguably discriminatory remark. This would be contrary to the democratic basis upon which strata corporations are supposed to be run.

[85] Further, one must consider J.W.'s Owners Survey in light of the totality of the evidence. The evidence as a whole shows that there were a number of owners, as well as Mr. Wee and Mr. Kral, who had and expressed concerns about Mr. Gordon's work performance. Sufficient complaints had been received from a sufficient number of persons for Mr. Kral and the Strata Council to consider it appropriate to take action.

[86] This is not a case in which one or two people, based on discriminatory motivations, were able, through influence or power, to obtain a discriminatory result. There is no evidence that anyone, with the possible exception of J.W., whose only involvement in the matter was to be one of some 26 owners to sign Mrs. Lee's March 12, 2007 letter, and to submit his Owners Survey, had or expressed any arguably discriminatory views about Mr. Gordon.

[87] Indeed, the evidence is to the contrary. Mr. Gordon's race, colour, ancestry, place of origin and age would have been, at least in general terms, apparent to Mr. Watts and Mr. Englund when they decided to hire him in December 2006. If those factors were not of concern then, it is difficult to see how they would have become of concern in the five months that passed before the decision was made to terminate Mr. Gordon's employment. Further, both Mr. Kral and Mr. Watts denied that Mr. Gordon's race, colour, ancestry, place of origin or age were discussed or taken into account at any point in the process leading to the termination of his employment. While it is true that respondents seldom admit to discriminatory motivation, Mr. Kral's and Mr. Watts' evidence on this point is entitled to be taken into account, especially in the absence of any persuasive evidence to the contrary.

[88] Considering the matter as a whole, Mr. Gordon has not established, on a balance of probabilities, that the termination of his employment was related, in whole or in part, to his race, colour, ancestry, place of origin and/or age. I therefore dismiss his complaint under s. 37(1) of the *Code*.

Lindsay M. Lyster, Tribunal Member