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Lee v. Strata Plan 4082 Strata Corp.

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

Vincent Lee, Complainant and Owners and Strata Council Members of Strata Plan 4082 Strata Corp. and Betty Hsia, Ching Weng, Maggie Su, Steven Lin, Wai Ling Ho, Respondents

British Columbia Human Rights Tribunal

Bernd Walter Chair

Heard: November 14-15, 2011

Judgment: January 12, 2012

Docket: 8369

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Counsel: Vincent Lee, for himself

Karla Mukai, for Respondents

Subject: Constitutional

Human rights.

***Bernd Walter Chair:***

## **Introduction**

1 Vincent Lee filed a complaint against Betty Hsia, Ching Weng, Maggie Su, Steven Lin and Wai Ling Ho, and owners and strata Council members of Strata Plan LMS 4082 ("Empire"), (collectively the "Respondents" or "Council").

2 Empire is a shopping centre or mall. Mr. Lee was the mall manager. The Respondents are members

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of Empire's strata Council as well as individual unit owners.

3 Mr. Lee alleges that he disclosed a physical disability to the Respondents on December 29, 2009. On December 31, 2009, the Respondents terminated Mr. Lee's employment.

4 Mr. Lee's complaint alleges that he was terminated on the grounds of physical disability and age and was therefore discriminated against, contrary to s. 13 of the *Human Rights Code*.

5 The Respondents, who are five of Empire's seven Council members, deny any discrimination and say Mr. Lee was terminated because of his conduct and work performance.

6 The complaint was heard on November 14 and 15, 2011.

7 Mr. Lee was self-represented and gave evidence on his own behalf.

8 The Respondents were represented by Karla Mukai. Only two of the Respondents testified at the hearing.

9 The Respondent Betty Hsia's family owns seventeen strata units at Empire Centre and operates the Shaing Garden Restaurant, where she is the executive assistant. Ms. Hsia has been a member of Empire's strata Council since 2007 and serves as vice-president. She said that the Council manages the property and looks after the interests of the tenants and unit owners.

10 The Respondent Hsiang Chin Weng is represented in the complaint as Council secretary but he described himself as finance officer.

11 In the course of his closing submissions, Mr. Lee withdrew that part of his complaint relating to age discrimination. Therefore this decision deals solely with Mr. Lee's allegations of discrimination in relation to physical disability.

### **Assessing the Evidence**

12 Clearly, the parties are divided on the central issue in this complaint: the reason for Mr. Lee's dismissal. I have considered all of the evidence presented and the submissions of the parties, though I set out only the evidence I consider necessary and relevant to my decision. I have assessed the evidence in accordance with the principles in *Faryna v. Chorny*, [1951] 2 D.L.R. 354.

13 I have also remained mindful throughout of the fact that the evidence at this hearing was complicated by the language barriers of, and amongst the parties, which at times, required the use of two interpreters simultaneously.

14 I generally accepted Mr. Lee's evidence though it was, at times, disorganized and not always linear in its presentation. I attributed some of this to the fact that he was selfrepresented. I also found him to some

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extent minimizing of problems in his relationships with some Council members and tenants of Empire.

15 I found the evidence of the Respondents who testified duplicative, vague and generalized. Their evidence was also internally inconsistent. I also discerned a degree of personal antipathy toward Mr. Lee from Ms. Hsia, though not from Mr. Weng. I believe this clouded her evidence. I was therefore somewhat cautious of Ms. Hsia's evidence and the weight I accord it.

## **Evidence at Hearing**

### **Background: Mr. Lee's Employment with Empire**

16 Mr. Lee is sixty-three years old. His wife owns and operates a bakery in the Empire Mall. Before he was employed, Mr. Lee said he served as a volunteer at Empire. He also operated his own computer equipment company called Raytek Computers ("Raytek").

17 Empire Mall consists of 138 units including stores, a Chinese restaurant owned and operated by the Respondent Betty Hsia and her family, a food court and offices.

18 On November 19, 2007, Mr. Lee was hired as Empire's "mall officer" for an initial three month probationary period. Mr. Lee said that, at the time of his hiring, he had sixteen years of experience in the property management field. His starting salary was \$2,500.00 per month. On December 13, 2007, his title was changed and he was referred to as "mall manager". (Ex. 14, Tab 22) In his position, Mr. Lee was responsible for general maintenance of the building and premises as well as for its business administration. His duties included looking after and monitoring HVAC, plumbing, elevator, fire safety and water systems; overseeing and supervising renovations and hiring and directing contractors; mall safety and security; janitorial services (and the tradespersons hired to perform these); arranging notices to tenants; collecting strata fees, and managing Empire's office and administrative staff, including an accountant/bookkeeper. Mr. Lee was also required to monitor and respond to emergencies at the mall. The importance of that responsibility, in the context of this complaint, is discussed below. Mr. Lee was also the recipient of, and responded to, complaints from Empire's tenants on the Council's behalf.

19 As mall manager, Mr. Lee attended strata Council meetings to report on finances, on his activities and to receive the directions and instructions of Council. He said he had no direct supervisor. He was given no written job description. He said he created his own job description. He learned his duties from his previous jobs. Mr. Lee took a commercial property management course at Langara College in 2008, of which he only completed the "mall component", though he did not achieve a passing grade. He never received any written or other performance evaluations from Council during his employment.

20 Mr. Lee took considerable pride in his accounting practices, which he testified had saved Empire money after his first year on the job. He said that in October 2009, the close of Empire's fiscal year, his efforts had retired a historic, ongoing debt and the efficiencies he implemented had saved Empire \$32,613.61.

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21 By March 1, 2008, Mr. Lee's salary was increased to \$3,000.00 per month, along with some overtime and a stipend of \$100 per "emergency call". There was testimony that the previous mall manager had received just \$50.00 per "emergency call". (Ex. 14, Tab 24)

22 Mr. Lee testified that it was up to the Council to determine salary increases but he would make requests for a raise at Empire's fiscal year-end on the basis of his good performance.

23 On November 4, 2008, Mr. Lee asked for and received a 10% increase, to \$3,300.00 per month, because, he said, he had saved Empire a lot of money. Ms. Hsia testified that Mr. Lee threatened to quit if he did not get the raise he wanted.

24 Mr. Weng testified that he was a member of Council when Mr. Lee requested a 10% pay increase in 2008. He said Mr. Lee pounded the table and said he would quit "today". He said the Council met privately and gave Mr. Lee his raise. Mr. Weng testified that, by the time of this request, there had already been complaints about Mr. Lee's attitude and Council was concerned about him. He said that they discussed his anger with Mr. Lee's wife. The meeting minutes reflect no discord with respect to Mr. Lee's request or the Council's decision concerning his salary. (Ex. 14, Tab 32, para. 23)

25 Ms. Mukai asked Mr. Lee, and he twice denied, that he had intended to quit his job if he was not granted his raise. Mr. Lee testified that Ms. Hsia told him he would get a raise but would no longer receive his emergency call-out stipend, but he also stated she said that there would be no raise. Mr. Lee said that, in the end, he received his raise and was permitted to continue his \$100.00 charge per "emergency call".

#### **Council Meeting: November 16, 2009**

26 Mr. Lee tendered, as evidence, minutes of Empire's strata Council meeting of Monday, November 16, 2009. (Ex. 4; Ex. 14, Tab 41)

27 The minutes reflect Empire's financial status. They also contain several directions to Mr. Lee (who is throughout, referred to as "VL"), in relation to mall security services, video surveillance equipment, infiltration of water, and business to be undertaken at Empire's (upcoming) 2010 annual general meeting. Of particular relevance is paragraph 4 of the minutes, in which Council accepted a quotation from Raytek Computers (*sic*) for the replacement of eight defective security cameras and software. Council also invited quotations for the installation of an additional twelve security cameras.

28 Significant also for the purposes of this complaint, paragraph E. 9, of the minutes of November 16, 2009, reads:

Upon voting, the Council approved to renew the caretaking contract with VL. The Council showed appreciation to VL for his effort in the management of the mall in the past year. (Ex. 4; Ex. 14, Tab 41)

29 Mr. Lee testified that, at the November 16, 2009 Council meeting, he again asked for a 10% pay increase for himself and staff of his office. Mr. Lee said that he was asked to leave the meeting room for

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fifteen to twenty minutes. When he rejoined the meeting, he said the Council rejected any increase in his compensation "due to the economy", but voted to give him a \$500 bonus. Mr. Lee said that his bookkeeper received a 10% salary increase.

30 Ms. Hsia testified that the discussion about Mr. Lee's raise occurred after the person who recorded the minutes had left the November 16, 2009 Council meeting. She said Mr. Lee had asked for a 10% increase and the Council discussed his performance in private.

31 Ms. Hsia testified that "no decision was reached" on Mr. Lee's request for a salary increase, though evidently there was a decision to decline the request. Ms. Hsia provided no further information about the content of Council's private discussion. I note that, in contrast with previous minutes, Mr. Lee's request and the Council's decision on the issue are not recorded in the minutes of this meeting. (Ex. 14, Tab 41)

32 Mr. Lee testified that he accepted the Council's decision. He then set to work on the arrangements for the Council's annual general meeting, including the development of the upcoming fiscal year's operating budget.

#### **Annual General Meeting: December 18, 2009**

33 The Council's annual general meeting and dinner party were held at the Respondent Betty Hsia's restaurant on December 18, 2009. Mr. Lee was responsible for making all arrangements in relation to the event. The only reference to Mr. Lee in the minutes of the annual general meeting is in relation to his elaborating on some "major expenses incurred during the year". (Ex. 14, Tab 41, Para. 6).

#### **Council Meeting: December 29, 2009**

34 Empire's next Council meeting was held on December 29, 2009. The minutes of the November 16, 2009 meeting and the financial statements were approved. The minutes of this meeting make reference to a procedure governing the approval of certain expenditures or "work orders". Specifically, it was decided that:

Two Council members' signatures are required for any work order less than \$3,000;

Three Council members' signatures are required for any work order from \$3,000 to \$5,000;

Four Council members' signatures are required for any work order above \$5,000; and

In the case of emergency, the mall manager may override the above requirements to issue work orders. (Ex. 14, Tab 43, Para. 3)

35 Paragraph 3 of the minutes also instruct Mr. Lee to review surveillance video records to determine if vandalism was the cause of a recent fire alarm and resulting repair costs.

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36 The minutes of December 29, 2009 contain no other reference to Mr. Lee.

### **Mr. Lee's Spending Authority**

37 Mr. Lee was cross-examined at some length in relation to his purchasing or expenditure authorities as mall manager. He testified that purchases or work orders of a value under \$1,000.00 were previously within his discretion; purchases under \$3,000.00 would require three Council members' signatures; expenditures over \$3,000.00 would require four signatures (Ex. 14, Tab 30, Para. 3). Mr. Lee testified that he always operated within these rules and that he would obtain competing quotes and bids on purchases and prospective work, which Council would then approve. Mr. Lee adamantly denied having been made aware of any questions or concerns about any excessive or unauthorized expenditures on his part. He said he had never exceeded his (previously) authorized spending limits, which appear to have been more stringent than those adopted on December 29, 2009. (para. 34, supra)

38 Ms. Hsia testified that Mr. Lee had authority to make purchases of up to \$1,000.00. Though she serves as Council's vice-president, Ms. Hsia was unable to remember the various expenditure limits or how many Council signatures were required to authorize which amounts.

### **Emergency Cell Phone Duties: December 29, 2009**

39 Mr. Lee explained that it was another aspect of his duties as mall manager, to carry and monitor a cell phone, for security purposes, and to act as an initial, or first responder, in emergencies. In emergency situations such as fire, flooding or sprinkler problems, electrical problems or in cases of break-ins or burglary, Mr. Lee would respond personally or contact appropriate repair services, such as a plumber or an electrician. Mr. Lee gave, as a specific example, a December 2008 nighttime water problem which originated in a particular shop and progressed to the point of flooding adjacent units. He said he personally responded and had to climb a ladder in order to shut off a main valve. He described how he got thoroughly soaked by cold water during this incident.

40 Mr. Lee said he would always attend personally in the event of a fire alarm. He said he remembers attending three times in one night, in response to fire alarms, during November of 2009. Mr. Lee testified that the frequency of such emergency calls tended to increase during winter months. He said in some months there would be no calls; in other months there would be several. Mr. Lee was reimbursed in the amount of \$100 if a call required his actual attendance at the mall. If a call did not require his attendance, Mr. Lee said he would charge at his hourly wage rate.

41 Ms. Mukai questioned Mr. Lee with respect to his payroll and attendance records. (Ex. 14, Tab 3) Mr. Lee agreed that these records reflect a total of twenty-three (23) emergency calls over a period of two years. Mr. Lee agreed he was paid at a rate of \$100 dollars per attendance and \$50.00 per call if he did not actually attend at Empire to deal with the matter. He said that there were actually many more than twenty-three such calls. He said that the idea of additional compensation for responding to emergency calls came from the previous Council president. Mr. Lee denied that, during November or December 2009, he requested extra compensation for carrying the emergency cell phone. Council minutes do not reflect such

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a discussion.

42 Ms. Hsia was shown Mr. Lee's payroll and time sheets. She confirmed he had been paid \$2,300.00 for twenty-three emergency calls since November 2007. In 2008, there were only four emergency calls recorded for which Mr. Lee was reimbursed \$400.00. (Ex. 14, Tab 1)

### **Hypertension**

43 Mr. Lee said he was first diagnosed with hypertension in March 2008. He testified that being responsible to carry the telephone and to respond to emergency calls required him to remain alert and vigilant. He said this prevented him from getting a good night's sleep. He said this aggravated or worsened his hypertension. Mr. Lee introduced a report from his physician, Dr. Peter Chang, dated August 3, 2011. Dr. Chang confirms that Mr. Lee has been under his care since 2008, and that he suffers from hypertension, for which he has been prescribed anti-hypertensive medication since March 2008. Dr. Chang also confirms that "stress, including work pressure can aggravate hypertension". (Ex. 5)

44 Mr. Lee testified that he is prescribed medication for his hypertension, of which he consumes 1.25 mg. daily, in the morning. He also uses diabetes medication at night. In terms of managing his hypertension, Mr. Lee said his doctor advised him to get a good sleep and to exercise. He said he went swimming for about a month, after January 2010, but found it too tiring. As to diet, he said he was already eating mostly vegetables.

### **Disclosure: December 29, 2010**

45 Mr. Lee testified that after the December 29, 2009 Council meeting, he disclosed his medical condition to the Council members. He said he either asked for help or requested that someone else be assigned responsibility to carry and monitor the emergency phone. Mr. Lee said that he asked Michael Fung, Council president, if it was necessary for the mall manager to carry the phone. He said that even before he was employed by Empire in November 2007, he took care of the phone on a volunteer basis. He said that, previously, the emergency phone had been the responsibility of the Council president. Under an earlier regime, when a property management firm was running the mall, responsibilities for the emergency phone were shared. He also testified that in other, similar workplaces, someone other than the mall manager carries the emergency phone.

46 Mr. Lee testified that he was told the Council would consider his request and his disclosure.

47 Mr. Lee also said he told Mr. Fung that he would provide a doctor's certificate but he was not given the opportunity.

### **Termination: December 31, 2009**

48 Two days later, on December 31, 2009, Mr. Lee received a letter of termination, effective immediately. (Ex. 6)

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49 Mr. Lee introduced another note from his physician, Dr. Peter Chang. The note is dated January 2, 2010 and it reads:

To confirm that this patient suffers from hypertension. Stress will adversely affect his health. (Ex. 16)

50 Mr. Lee said he tried to obtain this note on December 31, so he could show it to Council, but his doctor's office was closed until January 4, 2010, and he was therefore unable to obtain the note sooner.

51 Ms. Hsia was asked why Council decided to fire Mr. Lee. She listed his attitude; complaints from tenants; his request for a raise; the cost of paying him for overtime and responding to emergency calls and an allegation with respect to the "splitting" of Raytek invoices. She said they had lost faith in him. Ms. Hsia said Mr. Lee had never mentioned any health problems and she did not know his age.

52 Ms. Hsia testified that Mr. Lee's firing had nothing to do with his age or his blood pressure. She indicated it had more to do with Raytek camera invoices, and his response to being questioned about them. She testified that it was not until October or November that Council knew Mr. Lee owned, or had any relationship with, Raytek.

53 Ms. Hsia testified she had started to interview or meet with potential new mall manager candidates at her restaurant around the end of November 2009 along with Michael Fung and the other respondents. She said she kept no notes of these meetings. She said there had been a "preliminary meeting" with P.K. who was a retired former pilot. She did not have names of any other candidates she met with. She testified these meetings occurred before Mr. Lee disclosed his hypertension. She also said they were not really job interviews.

54 When asked why Mr. Lee was not told about his termination at the December 29, 2009 meeting, Mr. Weng said that Mr. Lee brought up the raise issue after the meeting, around the same time he disclosed his health issue and his request with regard to the emergency phone. Mr. Weng said Mr. Lee's request for a raise in pay was one factor in Council's decision. Mr. Weng did not say that tenant complaints were a factor.

55 Mr. Weng's evidence was that Council decided to dismiss Mr. Lee in "November or December 2009" when he again asked for a raise in pay. Mr. Weng testified that he may not remember the exact dates of the various conversations referred to in the evidence.

56 Both Ms. Hsia and Mr. Weng testified that the issue of Mr. Lee's pay raise was in fact dealt with at the November 16, 2009 Council meeting.

**Severance Package: January 2, 2010**

57 Mr. Lee testified that on January 2, 2010, Michael Fung, Council president, along with a caretaker, attended at his wife's bakery and presented him with two options. Option "A" included a severance offer of

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three weeks' salary or \$2,284.62. Option "B" offered four weeks of severance pay or \$3,300.00. Mr. Lee testified that he was asked to sign a form entitled "Acceptance and Release", in essence waiving or relinquishing any further claims against Empire arising from his termination (or any other reason), including any claims under the "British Columbia's Charter of Human Rights and Freedoms" (*sic*). (Ex. 7)

58 Mr. Lee said he was told that if he signed the Release, he would receive the higher severance amount included in Option "B". If he refused to sign the Release, he would receive the lower severance amount in Option "A". Mr. Lee did not sign the release document. He testified that on or about January 5, 2010, he nevertheless received a cheque in the higher amount included under Option "B".

59 He also received a Record of Employment, ("ROE") (undated), which gives the reason for Mr. Lee's dismissal as: "re-organization, no more mall manager is required". (Ex. 14, Tab 8). No Council minutes reflect any discussion of re-organization. Moreover, this explanation is starkly incompatible with the minutes referenced at paragraph 26 above, where, just a month earlier, Council had voted to renew Mr. Lee's contract.

### **New Mall Officer: January 8, 2010**

60 Mr. Lee testified that as of January 8, 2010, Empire hired P.K. as its new caretaker or "mall officer", for an initial three-month probationary period, starting January 18, 2010. Minutes of the Council meeting of January 8, 2010, contain the following recording under paragraph B.1:

#### **1. Mall Manager**

It was unanimously decided by Council to terminate the management service provided by Mr. Vincent Lee with effect from January 1, 2010. Termination notice had been delivered to Mr. Lee prior to the meeting. Mr. P.K. was recruited by the Council as caretaker. Mr. K. was given three months' probationary period starting from January 18, 2010... (Ex. 9; Ex. 14, Tab 44)

61 A year later, on January 14, 2011, Mr. K. was released from his position due to "errors", being "non-proficient in English" and "incapable of handling certain routine tasks during his employment". The Council minutes also note that Council "was ignorant of his incompetence in English when hiring him". (Ex. 10, para. 7.3.2)

62 Ms. Hsia said when P.K. was hired to replace Mr. Lee, he was given different duties than those Mr. Lee had performed and was not considered a manager. She said Mr. K. was not permitted to own another business and was delegated no spending authority. All buying was to be discussed by Council. He was also paid a lower salary than Mr. Lee. Ms. Hsia said Mr. K. was eventually let go because of his inadequate performance, knowledge and lack of proficiency in English.

### **Raytek**

63 Mr. Lee was cross-examined at length regarding his relationship with an electronics/technology

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company called Raytek Computer Technology. Mr. Lee acknowledged that he was sole owner and employee of Raytek.

64 Ms. Mukai introduced into evidence approximately thirty-eight invoices from Raytek to Empire, dating from November 2007 until November 2009. The total amount of those invoices is between \$27,600 and \$28,000. The purchases include office supplies, such as toner, ink jet cartridges and paper; accounting software; equipment such as printers and cables; video surveillance cameras and associated equipment, and website design. (Ex. 14 Tabs 6, 7; Ex. 17)

65 In her cross-examination of Mr. Lee, Ms. Mukai attempted to establish that Mr. Lee's ownership of Raytek and its extensive sales to Empire represented an inappropriate conflict of interest in relation to his role as mall manager. Her questions to Mr. Lee appeared intended to elicit his acknowledgement that the Respondents were unaware of his ownership of Raytek, or that they were purchasing all of Empire's office and technological equipment from him. When directly confronted by Ms. Mukai, (see Ex. 14, Tab 39, para. 4), Mr. Lee insisted that he had, at the outset, told Council that he owned Raytek. He reiterated that any purchases of less than \$1,000.00 were within the spending authority delegated to him by Council. He also testified Raytek's prices were cheaper than those of competitors. He said no one had objected to this practice in two years. Ms. Hsia testified that Council did not know Mr. Lee owned Raytek until October or November, 2009.

66 Ms. Mukai directed Mr. Lee's attention specifically to an invoice (#381004) from Raytek dated October 28, 2009, in the amount of \$5,600.00, in relation to video security equipment and software. Mr. Lee testified that he had been instructed to replace the previous non-functioning security system. This instruction is specifically confirmed in the November 16, 2009 minutes. He testified that no questions or concerns were raised by Council about the number of purchases from Raytek. (Ex. 14, Tab 7; Ex. 14, Tab 41)

67 Ms. Hsia testified that before the November 16, 2009 Council meeting, Maggie Su had called her about a "problem" with a Raytek invoice of October 28, 2009 (Ex. 14, Tab 7). The invoice in question (#381004) was for video equipment in the amount of \$5,600.00, inclusive of GST and PST. Ms. Su was concerned that Mr. Lee had been instructed to negotiate the price and had quoted a price of \$5,000.00, inclusive of taxes. Ms. Hsia suggested the matter be discussed at the meeting where Mr. Lee could provide an explanation. Ms. Hsia said that Mr. Lee was asked and said that the quote had been for \$5,000.00 plus taxes. Ms. Hsia testified that Ms. Su raised the issue and Council refused to sign a cheque for the invoice.

68 Ms. Hsia made an accusation that Mr. Lee had "split" the invoice in question into two and asked for two cheques of lesser amounts, the implication being that he was trying to avoid scrutiny or to circumvent the expenditure oversight or cheque-signing process. I note that under the expenditure oversight scheme in place at the time, either three or four Council signatures would still be required to authorize payment of these amounts. Again, this was actually a more stringent requirement than the scheme that was implemented on December 29, 2009. (See para. 32, 35 supra)

69 Mr. Lee was cross-examined about "splitting" invoice #381004 into two invoices so that the sep-

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arate amounts would be lower, thereby implicitly reducing the Council's oversight. Mr. Lee denied both the allegation as well as any concern on Council's part.

70 Ms. Mukai tendered Exhibit 18, a list of the previously-mentioned Raytek invoices she had introduced individually at Ex. 14, Tab 7. The list shows the same payment of \$5,600.00 discussed above paid for with two cheques of \$3,000.00 and \$2,662.72 respectively and dated December 9, 2009. The latter amount also includes \$62.72 for toner. No invoices for these amounts, beyond the single invoice of October 28, 2009, were tendered in evidence. Absolutely no "split invoices" are reflected in the records or in Exhibit 18.

71 Ms. Hsia said that when Ms. Su questioned Mr. Lee about this matter at the Council meeting, he "lost his temper", said [she] knew nothing, and struck the table angrily. Ms. Hsia said Mr. Lee also spoke to her in a belittling manner and made a reference to "diapers, because of her youth". Despite this alleged exchange, the invoice was paid in full on December 9, 2009. The Respondent Maggie Su was not called and did not provide direct supporting evidence of the event. The minutes simply reflect that eight cameras were found to be out of order and that Council accepted a price quote from Raytek Computers Technology (*sic*) for replacing the equipment and software. The minutes also record that Council sought quotes for an additional twelve cameras. (Ex. 14, Tab 41, para D4) (See also para. 27, *supra*)

72 Mr. Lee said he was patient with Council's questions and he denied any inappropriate behaviour on his part. He denied the meeting or discussion was heated and said these were usually harmonious. He denied ever intimidating Council members.

73 The November 16, 2009 minutes contain no upper-limit quote nor any discussion about an invoice from Raytek. They surprisingly make no mention of a pending expenditure totalling \$5,662.72. I note that the Raytek invoice #381004 at Ex. 14, Tab 7, is dated October 28, 2009, about three weeks before the Council meeting, and is actually for the purchase of sixteen cameras. Under the circumstances, I find Ms. Hsia's testimony about these matters disorganized, illogical and of little probative value. Specifically, there is nothing in the documentary record to suggest any threat to Mr. Lee's employment; to the contrary, Mr. Lee's employment for a further year was explicitly endorsed.

74 Ms. Hsia was asked about and testified that there was a rule about conflict of interest, including with respect to purchasing items from an owned company. She said those rules are recorded in Council minutes. Having carefully reviewed all of the Respondents' documentary evidence, I have found no record of any such rule or policy respecting either Council members or staff of Empire.

75 After the termination of his employment, Mr. Lee was asked to provide warranty documents for the video equipment he had supplied. He said these had already been handed over. He indicated he had also provided security pass codes for the equipment.

76 Mr. Lee was questioned about replacing or adding employee punch clocks. He testified that these were not purchased from Raytek and that the overall cost was under \$1,000.00 and therefore within his delegated spending authority.

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### **Tenant Complaints**

77 Mr. Lee was asked about tenant complaints and his response to them. Mr. Lee said he only remembered one complaint involving a broken water pipe which caused flooding. He said he personally attended the premises on a very cold night and shut off the water. (See para. 39, supra)

### **Superior Seafood Complaint**

78 On February 25, 2009, a tenant, Superior Seafood, wrote a letter of complaint to the strata Council about Mr. Lee. The letter states that during the first half of 2008, Superior had contacted Mr. Lee asking to be notified if the main water supply was ever to be shut down to avoid causing Superior's icemaker to shut off, which would damage its seafood product. Superior said that on November 14, 2008, despite Mr. Lee's reassurances, the water supply was shut off, for cleaning purposes, without notification from Mr. Lee.

79 In its letter, Superior said that, by next morning, its frozen products had thawed. Superior said Mr. Lee admitted he had forgotten to notify it, that he accepted responsibility and apologized. Superior said that due to this incident, its business was closed for two days. Superior sought reimbursement of \$500.00, the amount of its insurance deductible from Council. Superior said Mr. Lee later disputed any responsibility because it had not made its request for prior notification in writing. (Ex. 14, Tab 13)

80 In cross-examination, Ms. Mukai proposed to Mr. Lee that he knew that the water supply would be shut off for maintenance purposes. She was unable, in my estimation, to elicit any meaningful admissions.

### **Altercation**

81 Ms. Mukai questioned Mr. Lee about a physical altercation with a tenant. Mr. Lee indicated that when tenants asked him to nullify their parking violation tickets because their permits had expired, he refused to do so. In this particular case, the tenant had pushed Mr. Lee and he claims he injured his back.

82 Ms. Hsia testified a physical altercation occurred in January 2009, between Mr. Lee and the owner of a bookstore. She said she did not know the reason for the dispute but said the matter had been the subject of a police report.

83 Mr. Lee said that he and the other person are now on friendly terms.

### **Bulletin Board Complaint**

84 Ms. Mukai asked Mr. Lee about an argument with the Respondent Maggie Su about a bulletin board placed near her premises. Mr. Lee said that Ms. Su was using more than her allotted advertising space. He denied losing his temper or that Ms. Su was fearful of him after this incident. Again, Ms. Su did not provide direct evidence at this hearing.

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85 Mr. Lee said that it was his job to enforce strata by-laws whether or not the offender was a Council member.

### **Shaing Garden Complaint**

86 Ms. Mukai showed Mr. Lee a collage of six photos apparently identifying various infractions committed by Ms. Hsia's business, the Shaing Garden Restaurant. The photos purport to depict various items of furniture and equipment, left in common areas, including under a staircase and in the parkade, near a fire extinguisher. Mr. Lee said he verbally raised these concerns with Ms. Hsia but the infractions persist to date.

### **Unit 138**

87 Ms. Mukai questioned Mr. Lee about an undated complaint from the owner of strata unit 138, brought to the Council in October 2009, regarding an obstruction of their storefront. (Ex. 14, Tab 40, Para. E. 5)

88 The complaint said that Mr. Lee had left a mechanical lift in front of the store. The owner wrote a strongly-worded letter of complaint about Mr. Lee's "extremely poor" attitude toward tenants. It also alleges lack of diligence, abuse of power and threatening of female tenants. It asks that he be replaced. (Ex. 20)

89 Ms. Mukai introduced Exhibit 19, an undated petition in Chinese, signed by more than twenty tenants, purportedly initiated by the owner of Unit 138, complaining about the manager's attitude and intimidating manner. It also includes additional complaints concerning third-party liability insurance, a suggestion box and inadequately cleaned and equipped toilets and suggests switching cleaning services.

90 Ms. Hsia testified that Mr. Lee's unfriendly attitude and complaints that he yelled at tenants and owners, were of concern. She was directed to the petition "around the end of 2009". (Ex. 19)

91 The petition, which initially started as an e-mail letter, was actually presented at the Council's October 8, 2009 meeting. Ms. Hsia said the Council hoped Mr. Lee's conduct would change but the complaint made him angry and he struck the table.

92 Mr. Lee denied ever swearing at the occupant of Unit 138. He said the matter was brought to Council who explained matters to the tenant. He also testified this tenant was behind on her strata fees. This is verified at para. 3 of the November 16, 2009 council minutes. (Ex. 14, Tab 41)

93 Mr. Lee found the letter offensive and the Council minutes of October 8, 2009, reflect that Mr. Lee "reserved the right to sue the owner for libel". (Ex. 14, Tab 40)

94 Mr. Lee acknowledged that his response to complaints may, at times, have been too direct. He said he had never received a letter of warning or reprimand. He admitted that Mr. Weng had told him, in late

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2007 or early 2008, he should get along with customers in a more harmonious manner or get Council to intervene.

95 In cross-examination, Mr. Lee asked Ms. Hsia how many times he had lost his temper. She answered "too many". She said he had shown lots of anger and emotion over minor matters and had many conflicts. She could not be specific about what kinds of matters would cause Mr. Lee to lose his temper. She testified she was not unhappy with him but afraid of him. She reiterated the "diaper" comment and said even her parents had never yelled at her like that. As to Mr. Lee's management of Empire's funds, she said there had always been a surplus whether or not Mr. Lee had been the manager.

None of the other Respondents testified.

## **Remedy**

### **Loss of Earnings**

96 Mr. Lee was earning \$3,300.00 per month at the time of his dismissal by Empire. He was also receiving \$100.00 per emergency call-out. Mr. Lee said his job as mall manager was his primary source of income. As of March 2010, he collected employment insurance of \$1,300 per month ending in mid-January 2011. Mr. Lee's 2010 T1 General Income Tax Return shows he received \$19,512.00 in E.I. Benefits. (Ex. 15)

97 Mr. Lee says that while unemployed, he attended one or two days of job-search training provided by a non-profit agency. He also attended a two-week government program to be trained as a security guard in May 2010 and obtained his license.

98 Mr. Lee attended one day of first-aid training provided by St. John Ambulance in April 2010. He also taught computer skills at a non-profit agency on a volunteer basis.

99 Mr. Lee testified that he scanned job websites, responded to newspaper ads, and sent out resumes, applying for more than thirty (30) positions in the maintenance, security or property management fields. He said he was only invited to one interview but was not offered a position. Mr. Lee submitted a number of postings he says he applied for. (Ex. 7) These were reviewed by Ms. Mukai and received in evidence without objection. Mr. Lee testified that he made calls to some computer companies from the yellow pages and also made some cold calls but had no interviews. Mr. Lee was not licensed to work specifically in such areas as elevator or HVAC, but he said he mentioned his experience in his resumes. (Ex. 13)

100 Mr. Lee testified that he continued to sell products from Raytek, which was dissolved as of June 2010. He continues to supply toner to a few customers under his wife's company name. Mr. Lee testified that he earned perhaps \$2,000.00 from this in 2010 and even less in 2011.

101 Mr. Lee testified that, after two years, he continues to look for work. Subject to any set-off in relation to his employment insurance benefits, Mr. Lee seeks compensation for wage loss dating from his

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dismissal on January 1, 2010 until the date of this hearing.

### **Injury to Dignity**

102 As to compensation for injury to his dignity, feelings and self-respect, Mr. Lee said he has not slept well in two years. He said he has difficulty focusing. He said he experiences what he termed "silly impulses". He provided as an example, that his wife has to pull him back to prevent him from walking into traffic.

103 Mr. Lee asserted that he was a hard worker, did a good job and was never fired from a job in his life. He said that the fact that Empire's strata fees have been stable and have not increased is a testament to his sound management. He feels he was treated unfairly.

104 At the time of the hearing, Mr. Lee said he helps out at his wife's bakery two or three days per week, performing bookkeeping and accounting chores, as well as cleaning. He said that he helped her in his off hours even while he was mall manager. He was asked about a cheque he had signed in satisfaction of the bakery's strata fees. He denied being a co-owner of the bakery. He said that his wife does not write cheques in English or do paper work. Mr. Lee indicated that until he started his job in 2007, his wife had been a Council member but then resigned in compliance with strata by-laws. He said that the previous strata president said he could not work for the Council while his wife was a Council member.

105 He denies he ever received any criticism about his performance and had no record or complaints of absenteeism. He did not specify the specific amount he seeks in respect of injury to dignity.

### **Analysis and Decision**

106 Mr. Lee's complaint is brought pursuant to s. 13 of the *Code* which provides:

(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

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(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

107 Mr. Lee has the legal burden to prove, on a balance of probabilities, that the Respondents discriminated against him on the basis of his physical disability.

108 Mr. Lee must first establish a *prima facie* case of discrimination:

"...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the Respondent employer": *Ontario Human Rights Council and O'Malley v. Simpson-Sears Ltd.*, [\[1985\] 2 S.C.R. 536](#).

109 In order to establish a *prima facie* case, Mr. Lee must demonstrate that:

(i) he was disabled;

(ii) he suffered adverse treatment; and

(iii) his disability was a factor in the adverse treatment: *Armstrong v. British Columbia (Ministry of Health)*, [2010 B.C.C.A. 56](#); *Wu v. Ellery Manufacturing*, [2000 BCHRT 53](#).

110 It is not necessary that Mr. Lee's physical disability was the sole or even the primary factor in his termination, just that it was a factor: *O'Connor v. Tower Taxi*, [2000 BCHRT 9](#); *Cook v. Vancouver Island Aids Society* (1999), [35 C.H.R.R. D/56](#).

111 If Mr. Lee is able to establish a *prima facie* case, then the burden shifts to the Respondents to provide evidence that Mr. Lee's physical disability was not a factor in his termination.

112 The Respondents did not lead evidence or argue that there existed a *bona fide* occupational requirement in regard to Mr. Lee's disability or with respect to his capacity to manage the emergency telephone.

### **Did Mr. Lee Have a Physical Disability?**

113 Mr. Lee is a sixty-three year old man. He has submitted a single-page medical certificate from his personal physician, Dr. Chang, as evidence of his disability. The note is dated August 3, 2011, suggesting

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that it was obviously obtained in contemplation of the Tribunal's hearing of Mr. Lee's complaint. The report purports to confirm that Dr. Chang has treated Mr. Lee for hypertension by the administration of antihypertensive medication. Dr. Chang says he has cared for Mr. Lee since March 2008, after Mr. Lee was in his position with Empire for five months. Dr. Chang further confirms that stress may aggravate hypertension: Ex. 5.

114 Mr. Lee alleges that he became increasingly concerned about the loss of sleep occasioned by his responsibility to carry the emergency cell phone and the expectation to respond, in effect, on a twenty-four-hour basis. His concern prompted him to approach his employers following the December 29, 2009 Council meeting, disclose his medical condition and try to persuade Council to relieve him of this aspect of his responsibilities.

115 Although Mr. Lee was prepared, and made the effort, to obtain medical evidence in support of his request, he was unable to provide this until after the decision to terminate him had been made and communicated to him. The Respondents evidently determined to dismiss Mr. Lee within two days of his disclosure. There is no evidence of any meaningful effort to accommodate him or any consideration of additional medical information. The aforementioned report is dated January 2, 2010 and, in the context of this complaint, is actually the first piece of medical evidence. It simply confirms that Mr. Lee suffers from hypertension and stress will adversely affect his health: Ex. 16.

116 In this case, the combined effect of the two medical certificates, albeit written more than a year and a half apart, persuades me that Mr. Lee did suffer from, and received treatment for, hypertension. I am also, absent expert evidence to the contrary, prepared to accept that hypertension can be negatively affected by stress.

117 To the extent that Mr. Lee's responsibility to respond to the emergency calls, on an unpredictable basis, could be expected to generate stress, and to the extent that stress could affect or interfere with his sleep, I am prepared to find that his responsibilities could exacerbate his hypertension. The question to be answered then, is whether hypertension can, for the purposes of this complaint, be considered a physical disability.

118 A physical disability involves a physiological state which to some degree impairs an individual's ability to carry out the normal functions of life. The Tribunal has tended not to define the concept of a disability narrowly:

...in assessing whether an individual has a physical or mental disability within the meaning of s. 13 of the *Code*, the Tribunal must consider the individual's physical or mental impairment, if any; the functional limitations, if any, which result from that impairment; and the social, legislative or other response to that impairment and/or limitations. The focus is on this third aspect, which is to be assessed in light of the concepts of human dignity, respect and the right to equality: [Morris v. BC Rail, 2003 BCHRT 14](#).

119 In *McKinney v. B.C. Tel*, the Supreme Court of Canada considered the question and agreed that:

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Hypertension has been considered a disability in human rights jurisprudence (see *Horton v. Niagara (Regional Municipality)* (1987), 9 C.H.R.R. D/461 (Ont. BD.), and *Wamboldt v. Department of National Defence* (1983), 4. C.H.R.R. D/1479 (Can. Trib), and that it constituted a disability at law (at paras. 82, 89).

120 Under the circumstances, I find that Mr. Lee suffers from a physical disability.

121 The Respondents did not challenge Mr. Lee's evidence of his diagnosis, treatment, or the alleged negative effects of his emergency responsibilities on his condition.

122 Moreover, the Respondents did not dispute Mr. Lee's disclosure of his condition, his request to be relieved of his emergency duties, or the timing of this event.

123 Therefore, I find the Respondents were aware of Mr. Lee's disability and his request for accommodation on the date of his termination, December 31, 2007.

#### **Did Mr. Lee Suffer Adverse Treatment?**

124 There is no disagreement among the parties that after two years as mall officer/manager, Mr. Lee was, on December 31, 2009, terminated in writing and offered one month's salary in lieu of notice. The letter of termination was signed by six Council members including the Respondents. (Ex. 6, Tab 9)

125 I conclude that Mr. Lee suffered adverse treatment in the form of his termination on December 31, 2009 and the loss of income he experienced as a result.

#### **Was Mr. Lee's Disability a Factor in His Adverse Treatment?**

126 It is this element of the *prima facie* test that is contested.

127 The parties disagree on the reason(s) for Mr. Lee's termination. Mr. Lee alleges he was terminated because he sought accommodation in relation to his emergency responsibilities on account of his disability.

128 The Respondents argue that Mr. Lee was dismissed because of his work performance; his conduct toward, and relationships with, the Council and mall tenants; because of the complaints he engendered, and because of his alleged conduct with respect to his company, Raytek's, dealings with Empire.

129 The Respondents did not contest that Mr. Lee disclosed his disability and made his request to be accommodated with respect to the emergency call phone on December 29, 2009.

130 Ms. Hsia and Mr. Weng testified that Council had concerns about Mr. Lee's dealings with, and his response to, complaints from tenants of Empire. Ms. Hsia testified this issue was one factor in Mr. Lee's

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termination.

131 I have carefully examined all of the Council minutes filed by the Respondents at Exhibit 14. I conclude that complaints from occupants, about a wide variety of issues and concerns, were a routine and consistent part of Council's business.

132 I am prepared to accept that Mr. Lee's approach or response to concerns may, at times, have been abrupt or even challenging. Mr. Lee himself acknowledged that he may have been "too direct" in his responses and he admitted that Mr. Weng had talked to him about this in late 2007 or early 2008, which I note was within a few months or so of his hiring.

133 It would seem logical, if this issue was of sufficient concern, that Mr. Lee would have been spoken to directly by Council or even received written reprimands or warnings. The minutes tendered make no mention of any concerns about Mr. Lee's demeanour.

134 Mr. Lee testified about, and the minutes to some extent reflect, requests for and discussions in relation to pay issues.

135 Ms. Hsia testified that these discussions were somewhat acrimonious, including table pounding, threats of resignation and flashes of temper. Again, none of this is reflected in Council minutes. Mr. Weng's testimony in this regard does not illuminate Ms. Hsia's comments. In any event, Mr. Lee's November 16, 2009 request for a raise was denied. He did not resign. Business carried on as usual. Mr. Lee set about arrangements for Empire's annual general meeting.

136 Mr. Weng's testimony was of little assistance on this issue. He was unclear as to the date of Mr. Lee's request. He did say that Council decided to dismiss Mr. Lee in November or December when he again asked for a raise in pay. The minutes reflect that the matter was disposed of in November.

137 I have previously noted that the November 16, 2009 minutes specifically reflect a vote to retain Mr. Lee and extend Council's appreciation for his efforts in managing the mall. I reject the Respondents' contention that Mr. Lee's request for a pay raise on November 16, was the reason for his termination on December 31, 2009. In any event, Mr. Weng's evidence specifically indicated that Mr. Lee's request for additional pay was but one factor in Council's decision to terminate him.

138 As well, there is simply no evidence, except for Ms. Hsia's statement to the effect, that Mr. Lee's payments for responding to emergencies had any impact on his termination, especially as the Respondents' documents suggest that there were only four such calls, costing a total of just \$400.00, in all of 2009.

139 I have more difficulty assessing the evidence with respect to Mr. Lee's ownership of Raytek and its dealings with Empire.

140 Ms. Hsia's evidence that Council had a "rule" about conflict of interest in terms of Empire's financial dealings with an owned company, is not reflected or supported by any documentary evidence

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filed. Her evidence, moreover, does not clarify whether such a rule applied to Council members or also extended to employees, which is what Mr. Lee was.

141 Mr. Lee testified that Council knew about his interest in Raytek. Ms. Hsia testified Council did not know of the connection until "October or November" of 2009.

142 I note Raytek is mentioned as a vendor as early as August 2009, and its invoices to Empire date from 2007. I observe that the alleged so called "split invoice" (#381004) is dated October 29, 2009.

143 Again, the Council minutes of November 16, 2009 reflect none of the alleged controversial discussion or any problem raised by Ms. Su, who, though a named Respondent, was not called to give evidence. No confrontation of Mr. Lee or any refusal to pay an invoice is noted in the minutes. Indeed, the minutes instruct Mr. Lee to provide an estimate for the purchase of an additional 12 security cameras.

144 A close examination of Respondents' Exhibits 17 and 18 confirms that, in fact, only one invoice, in the captioned amount, dated October 28, 2009, was ever tendered. Exhibit 18 shows that the invoice was paid on December 9, 2009 in the form of two cheques of \$3,000.00 and \$2,662.72, totalling \$5,662.72 (including \$62.72 for toner).

145 Even though these payments precede the expenditure authorization procedures approved in the December 29, 2009 minutes, they would in fact require more signatures under the process identified by Mr. Lee and in effect at the operative time. (Para. 34)

146 I find that Mr. Lee, in fact, did not render two split invoices. Raytek submitted a single invoice which was satisfied in the form of two cheques, issued on the same date, without any diminished Council oversight.

147 Ms. Hsia was the Respondents' primary witness but her evidence was overall diminished by her evident negative feelings toward Mr. Lee; by the fact that much of her evidence did not appear to accord with uncontested documentary evidence filed and the disconnect between her assertion that a decision to terminate Mr. Lee had been made when he had in fact been renewed by Council. In addition, I find Ms. Hsia's testimony in respect of the entire Raytek issue of no probative value in relation to, or as an underlying ground for, Mr. Lee's termination.

148 The Respondents assert that Council had determined in November to dismiss Mr. Lee, and that Ms. Hsia and the Respondents had proceeded to interview replacements, including Mr. K., in December. I find this assertion to be entirely inconsistent with the laudatory comments about Mr. Lee and the decision to continue his employment reflected in the November 16 minutes. I note that, in the end, Ms. Hsia testified her meeting with Mr. K. was "not really a job interview". Furthermore, and absent any discussion or notation whatsoever in Council minutes, I find the comments about mall reorganization contained in Mr. Lee's ROE, under the circumstances, more likely than not, pretextual.

149 Finally, I refer to Mr. Weng's testimony with respect to Mr. Lee's disclosure to Council on De-

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ember 29, 2009, as the last word on the matter. Mr. Weng said that, after the meeting, Mr. Lee again brought up the issue of a pay raise and his health issue. Mr. Weng testified that M. Lee's request for a raise was one factor in Council's decision.

150 I conclude that Mr. Lee's disability and its relationship to his emergency response duties was at least a factor in his termination just two days later.

151 Mr. Lee has therefore established a *prima facie* case of discrimination on the basis of his physical disability. Therefore, the burden shifts to the Respondents to establish a defence.

152 Employers are required to use information about employees' medical conditions and restrictions to explore accommodation options: *Senyk v. WFG Agency Network (No. 2)*, [2008 BCHRT 376](#).

153 The Respondents did not lead evidence or advance any arguments that they had made any attempt or effort to accommodate Mr. Lee or that he was terminated on the basis of a *bona fide* occupational requirement: [British Columbia \(Public Service Employee Relations Commission\) v. British Columbia Government and Service Employees' Union \(B.C.G.S.E.U.\), \[1999\] 3 S.C.R. 3 \("Meiorin"\)](#). I find the Respondents have not established a defence and the complaint is justified.

154 Having determined that the Respondents have breached s. 13 of the *Code*, I turn to the matter of remedy under s. 37.

## **Remedy**

### ***Cease Contravention***

155 As I have found Mr. Lee's complaint is justified I must, under s. 37(2)(a), order the Respondents to cease contravening the *Code* and to refrain from any similar contravention in future. I so order.

### ***Injury to Dignity, Feelings and Self-Respect***

156 The evidence shows Mr. Lee took considerable pride in, and ownership of, his work as mall manager.

157 I find that Mr. Lee's job loss would have exacerbated his stress and, at least initially, have had a negative impact on his sleep and in turn on his hypertension. He testified the impact on his sleep is ongoing.

158 Mr. Lee has found himself distracted or ruminative on occasion but he did not introduce evidence that he has had to seek or receive additional treatment.

159 Mr. Lee was described as, and his demeanour suggested, that he can be a somewhat emotional individual. I conclude that his termination affected him emotionally and in terms of his sense of self-worth

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and self-esteem.

160 I take into account that, however keen his motivation, Mr. Lee's age may present a barrier to employment. This factor also renders him more vulnerable to the impact of his termination.

161 I also consider the circumstances under which the Respondents terminated Mr. Lee. This happened just a month and a half after they commended his performance and voted to continue his employment.

162 Any concerns with respect to Mr. Lee's performance or attitude were never honestly or openly shared with him. He was given no expectations and offered no opportunities with respect to ameliorating such concerns. He had no reason to suspect that his job was in jeopardy.

163 Instead, the Respondents dismissed Mr. Lee within two days of his informing them of his health concerns and requesting some reasonable accommodation with, what was, in effect, a relatively minor aspect of his job. I consider the manner in which Mr. Lee was terminated especially hurtful to him.

164 All in all, the Respondents' conduct was high-handed, disingenuous and ultimately pretextual. While a financial award is not automatic, I am persuaded that an award of \$6,500.00 for injury to dignity, feelings and self-respect is appropriate under the circumstances.

### **Loss of Earnings**

165 At the time of his termination, Mr. Lee had been working for Empire for approximately twenty-six and one-half months. He was earning \$3,300.00 per month as well as overtime and \$100.00 per emergency attendance.

166 I calculate Mr. Lee's annual earnings as follows (see Ex. 14, Tab 1):

• Salary @ \$3,300.00 per month	\$39,600.00	per annum
• Overtime (in 2009) \$2,245.19	\$ 2,245.19	
• Emergency response compensation (averaged over 26 months)	\$ 1,061.54	
• Vacation pay	\$ 1,731.72	
Total average annual earnings (based on 2009 actuals)	\$44,638.45	

167 I find Mr. Lee could have expected to earn roughly this amount in 2010.

168 Mr. Lee claims compensation at this level from his dismissal on January 1, 2010, until the time of his hearing, or approximately one year and eleven and one-half months, less any emergency compensation, or a total of \$87,153.82.

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169 Once unemployed, Mr. Lee said he attended various employment-related and training programs for approximately fourteen days in total.

170 Mr. Lee provided evidence of his efforts to find work. I consider that, for a period of time at least, he made diligent efforts to gain employment and to reasonably mitigate his loss of income. He also began to spend more time assisting in his wife's bakery business.

171 Under s. 37(2)(d)(ii) of the *Code*, the amount of any compensation for wage loss is within my discretion. The purpose of such an award is to put the complainant in the position he would have been but for the Respondents' discrimination. A wage loss award may be reduced to account for the contingency that the complainant might leave the Respondents' employment during the period for which he seeks to be compensated: [Morris v. BC Rail, 2003 BCHRT 14](#).

172 On November 16, 2009, the Respondents decided to retain Mr. Lee's services for a further year. Given the issues that were emerging and gaining prominence in Mr. Lee's relationships with the Respondents and their tenants, I am persuaded that it would be appropriate to compensate Mr. Lee for no longer than one year following his dismissal. His continued employment beyond that, on the evidence before me, is somewhat speculative.

173 Accordingly, I exercise my discretion to award Mr. Lee loss of earnings of up to one year, calculated as follows:

• Annual salary	\$39,600.00
• Average overtime earnings (2009 actual)	\$ 2,245.19
• Vacation pay	\$ 1,731.72
Total	\$43,576.91

174 I do not include in this calculation any amount with respect to emergency response as Mr. Lee was seeking the Respondents' accommodation to relieve him of this aspect of his duties.

175 After his dismissal, Mr. Lee collected employment insurance totalling \$19,512.00. Although the Employment Insurance Commission may have recourse against Mr. Lee with respect to recovery of E.I. benefits he received, I do not deduct these, in accordance with the principles discussed in *Tozer v. British Columbia (Motor Vehicle Branch)*, [2002 BCHRT 11](#).

176 I also do not deduct any amount attributable to the time that Mr. Lee attended other programs or training which he pursued because of his termination and to mitigate his losses therefrom.

177 I reduce my award in relation to Mr. Lee's wage loss claim by the sum of \$5,663.72, representing the amount he received on January 5, 2010, under "Option B" of his severance package. (Ex. 14, Tab 11)

178 I award Mr. Lee the sum of \$37,913.17, less statutory deductions, in consideration of earnings

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lost as a result of his termination.

**Conclusion**

179 I find that the Respondents have contravened s. 13 of the *Human Rights Code* and I order the following:

- (1) The Respondents are ordered to refrain from committing similar contraventions;
- (2) The Respondents are ordered to pay Mr. Lee
  - (a) the sum of \$6,500.00 for injury to dignity, feelings and self-respect; and
  - (b) the sum of \$37,913.17, less statutory deductions for loss of earnings;
- (3) The Respondents are ordered to pay Mr. Lee post-judgment interest on the amount ordered for injury to dignity and pre and post-judgment interest on the amount awarded for lost earnings.

END OF DOCUMENT

Date of Printing: Jan 25, 2012

**KEYCITE**

**[Lee v. Strata Plan 4082 Strata Corp.](#), 2012 CarswellBC 53, 2012 BCHRT 3 (B.C. Human Rights Trib., Jan 12, 2012)**

**History**

**Direct History**

=> **[1](#) Lee v. Strata Plan 4082 Strata Corp., 2012 CarswellBC 53, 2012 BCHRT 3 (B.C. Human Rights Trib. Jan 12, 2012)**