

2017 BCHRT 62
British Columbia Human Rights Tribunal

Andruski v. Strata Plan LMS3199

2017 CarswellBC 684, 2017 BCHRT 62, [2017] B.C.W.L.D. 2449, [2017] B.C.W.L.D. 2461

**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

Heather Andruski (Complainant) and The Owners of Strata Plan LMS3199 Sonrisa (Respondent)

Emily Ohler Member

Judgment: March 10, 2017

Docket: 14939

Counsel: Freda Carmack, for Complainant

Philip Dougan, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Employment; Human Rights

APPLICATION by respondent for summary dismissal of discrimination complaint.

Emily Ohler Member:

I INTRODUCTION

1 Heather Andruski says that the Owners of Strata Plan LMS3199 Sonrisa (the "Strata") discriminated against her in the area of accommodation, service or facility on the basis of physical disability contrary to s. 8 of the BC *Human Rights Code* (the "*Code*").

2 The Strata denies discriminating, and has brought an application to dismiss Ms. Andruski's complaint under s. 27(1)(c) of the *Code*, which provides:

(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(c) there is no reasonable prospect that the complaint will succeed;

3 While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

II PROCEDURAL MATTER

4 Ms. Andruski has applied to file further submissions. The Tribunal will not consider submissions other than those permitted in a schedule for submissions, unless it allows an application to file further submissions: Rule 28(4). Rules 28(5) and (6) address applications for further submissions.

5 It is within my discretion to permit or consider additional submissions, but an application to file further submissions is an unusual procedure and should be limited solely to replying to new information or submissions contained in the reply: *Kruger v. Xerox Canada Ltd.*, 2005 BCHRT 24 (B.C. Human Rights Trib.), para. 22.

6 An overriding consideration is whether fairness requires an opportunity for further submissions: *Gichuru v. Law Society of British Columbia*, 2006 BCHRT 201 (B.C. Human Rights Trib.), para. 201; *Simpkin v. St'at'imx Tribal Police Board*, 2014 BCHRT 255 (B.C. Human Rights Trib.), para. 21. Additional submissions are not the norm, and caution must be exercised in granting applications for further submissions so as not to result in endless submission processes: *Murphy v. Vancouver Island Health Authority*, 2014 BCHRT 102 (B.C. Human Rights Trib.), para. 9.

7 I have reviewed the application — which is opposed by the Strata — and the submissions to consider whether fairness requires the addition of the new submission. I decline to exercise my discretion to accept the new submissions or evidence. It is not necessary to aid in my consideration of the matter nor would it change the outcome of my decision.

III BACKGROUND

8 Ms. Andruski has lived at her condo unit in Strata Plan LMS3199 since 2011. She says she has a disability that is characterized by severe reactions to scents and chemicals, both natural and synthetic. Exposure to such scents causes shortness of breath, migraines, confusion, dizziness, vomiting, exhaustion, muscle aches, and burning lips and eyes.

9 In her condo unit, Ms. Andruski says she has experienced ingress of scents that have exacerbated her disability. Specifically, she identifies ingress of fabric softener, cigarette smoke, and diesel from construction trucks related, it seems, to a remediation project at the complex. She says she began suffering from the ingress of scents in 2012 when her neighbours began using heavily scented fabric softeners.

10 Ms. Andruski has written to the Strata on numerous occasions with respect to the ingress issue, but says that the Strata has been unwilling to adequately address her request for accommodation related to the resulting impacts on her physical disability. She says that the Strata was very slow to respond to her complaints and that, when it would respond, it would do so dismissively and inadequately.

11 In 2014, Ms. Andruski complained to the Strata about the ingress of cigarette smoke, and first raised the issue of fabric softener. She says her complaints were met with doubt and irritation. She says that, after several complaints, the Strata would eventually issue general warnings or send letters to specific neighbours. Aside from this, no steps were taken by the Strata. The Strata has provided no evidence to dispute these points.

12 In March 2015, Ms. Andruski became aware of a landscaping plan that would have fragrant plants placed under the windows of her condo unit. She wrote to the Strata asking for information about fragrant plants slated to go into the landscaping at the complex, or for a contact person who could provide her with information. On March 24, 2015, Ms. Andruski emailed the Strata noting that, as a number of people had sensitivities to fragrant plants, and it was a serious health concern for her, she was requesting that fragrant plants be replaced with unscented plants. Some weeks later, the Strata wrote to her advising that it was investigating the logistics of amending the landscape design, which was the subject of a signed contract. It also sought medical information from Ms. Andruski about what plants she is allergic to and "how the exterior plants would affect" her condition.

13 On November 5, 2015, Ms. Andruski provided the Strata with a letter from her doctor at an allergy clinic stating that she has "a serious debilitating medical condition which is exacerbated by exposure to all scents, natural or synthetic. She must avoid exposure to dryer vent exhaust in her condominium and any scented plants in the common area." Ms. Andruski says that the Strata communicated with her in a way that suggested she was not believed, and had a reputation as being a difficult, high-maintenance person rather than a person with a legitimate health concern.

14 In January 2016, the Strata raised the issue of changing the landscaping plants to provide for non-scented plants, without reference to it pertaining to accommodation of a medical condition. The Strata says this was in order to preserve Ms. Andruski's privacy. Ms. Andruski's perception of how the Strata perceived her appears to have received some confirmation at the special general meeting considering the issues of the plants, with owners making comments about how everyone knew who the owner was and that "they were unnecessarily causing other Owners time and money and the individual should put their unit up for sale and move."

15 In February 2016, the Strata amended the gym rules to request users not to wear scented products, and enquired about sourcing non-scented products.

16 In spring of 2016, the complex underwent a remediation project that gave rise to diesel fumes which aggravated Ms. Andruski's disability. She contacted the Strata on more than occasion and was ultimately put in contact with the contractor who provided two air purifiers for her to use. Ms. Andruski says that, while this did not solve the problem, it did help to avoid severe reactions. She notes, however, that this meeting was only arranged by the Strata after she had gone to the emergency room as a result of the diesel fumes.

17 On March 11, 2016, the Strata wrote to Ms. Andruski via counsel saying

Council has received multiple complaints and demands from you regarding various smells and scents. While complaining a great deal, you have still never provided any substantive medical information regarding your condition. ...What is lacking is any substantive evidence that you have a physical disability.

...We understand now that you are bothered by diesel fumes and that you are requesting that heavy machinery does not operate near your unit and / or that the Strata Corporation provides you with alternate paid accommodation away from your home. These accommodations you seek from the Strata are unreasonable and cannot be provided. During weekdays, we encourage you to keep all windows and doors closed tightly, and perhaps relocate yourself during construction hours.

18 On March 22, 2016, a special general meeting was convened to vote on a special resolution changing the landscaping plan to use non-scented plants. The resolution was defeated and it appears no changes were made to the landscaping plan. Ms. Andruski points out that the Strata could simply have planted unscented plants under the windows of her particular unit.

IV ANALYSIS AND DECISION

19 Under s. 27(1)(c), the Tribunal may dismiss a complaint if there is no reasonable prospect that the complaint will succeed. The mere chance a complaint will succeed is not enough to hold a hearing. The Tribunal considers the likelihood that facts supporting the complaint will be proved at a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 (B.C. C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 171 (S.C.C.), at paras. 22-26.

20 The analysis under s. 27(1)(c) considers whether — after an assessment of the evidence and submissions of the parties — the Strata has shown that there is no reasonable prospect that Ms. Andruski could succeed in establishing discrimination at a hearing of her complaint: *Stonehouse v. Elk Valley Coal Corp.*, 2007 BCHRT 305 (B.C. Human Rights Trib.); *Purdy v. Douglas College*, 2016 BCHRT 117 (B.C. Human Rights Trib.), at para. 50. If the Tribunal determines that there is no reasonable prospect that Ms. Andruski will prove one or more of the elements of the *prima facie* case, it may dismiss the complaint. Therefore, if the Strata disputes one of these facts, Ms. Andruski must have evidence to support it. As noted above, the complaint must be based on more than speculation: *Berezoutskaia*, at paras. 24-26.

21 In an application under s. 27(1)(c), the threshold for Ms. Andruski is low: she need not establish a *prima facie* case at this stage but must only show that her complaint is not speculation or conjecture. The Tribunal may consider a defence in an application under s. 27(1)(c): *Trevena v. Citizens' Assembly on Electoral Reform*, 2004 BCHRT 24 (B.C.

Human Rights Trib.), para. 67. If it is reasonably certain that a respondent will establish a defence at a hearing of the complaint, then there is no reasonable prospect that the complaint will succeed: *Purdy* at para. 50.

A. Physical disability

22 The Strata disputes whether Ms. Andruski has a physical disability. In this regard, the Strata says that the only evidence is "a three line letter from a doctor", and that without "material evidence" of a disability there can be no complaint. The Strata contends that expert evidence setting out "parameters" such as the nature and cause of the disability, the significance of the symptoms, factors that increase or decrease the disability, treatment, the sensitivity of Ms. Andruski, the potential to avoid the exacerbating factors, and "the degree that living in a City of 2 million plus people will simply exacerbate the condition regardless of any precautions initiated."

23 The *Code* does not define what constitutes a physical or mental disability. The concept of physical disability, for human rights purposes, generally indicates a:

physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life. (*Boyce v. New Westminster (City)* (1994), 24 C.H.R.R. D/441 (B.C. Human Rights Council) at D/446)

24 In *Morris v. British Columbia Railway*, 2003 BCHRT 14 (B.C. Human Rights Trib.), para. 214, the Tribunal set out the following considerations for assessing whether an individual has a disability:

- 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, assessed in light of the concepts of human dignity, respect and the right to equality.

Proof of impairment and/or limitation, while relevant, will not be required in all cases.

25 Ms. Andruski provided the Strata with a letter from a doctor at an allergy clinic stating specifically that she has a debilitating condition that is exacerbated by scents. She has also included with her submissions a number of medical reports suggesting links between scents and the symptoms she has described.

26 At this stage, Ms. Andruski need only take her complaint out of the realm of conjecture. Based on the materials before me, with regard to her alleged disability, she has.

27 The Strata, conversely, has not persuaded me there is no reasonable prospect that Ms. Andruski will be able to establish at a hearing that she has a disability.

B. Adverse impact

28 The Strata says that Ms. Andruski will not be able to establish she experienced an adverse impact. In that regard, it argues that while there is "a bald allegation that fabric softener, for example, causes inter alia migraines, dizziness, confusion and vomiting", there is no evidence of "any cause and effect relationship"; and that there is no evidence that anything related to the Strata is causing impacts on Ms. Andruski.

29 These arguments do not persuade me that there is no reasonable prospect that Ms. Andruski could establish at a hearing that she experienced an adverse impact in relation to the ingress of scents to her condo unit that exacerbated her disability. Ms. Andruski's evidence is that her life was severely disrupted — to the point of trying to remain out of her home at certain times, even sleeping in her car at one point — by the ingress of specific scents and that the Strata took few steps to assist her. She has taken her allegation that she experienced an adverse impact out of the realm of conjecture.

C. Nexus

30 The Strata has a duty to accommodate owners who have a disability that is adversely affected by second-hand smoke: *Williams v. Strata Plan LMS 768*, 2003 BCHRT 17 (B.C. Human Rights Trib.); *Konieczna v. Strata Plan NW 2489*, 2003 BCHRT 38 (B.C. Human Rights Trib.); *Leary v. Strata Plan VRI001*, 2016 BCHRT 139 (B.C. Human Rights Trib.) ("*Leary*"). In this case, the evidence is that the ingress of the scents (ie. fabric softener, diesel fumes, and cigarette smoke) was causing negative impacts on Ms. Andruski's health arising specifically from her physical disability and that, as a result of the negative impacts she was experiencing because of her disability, she sought assistance from Strata. These facts, if proved at a hearing, could very well establish a *prima facie* case of discrimination.

31 The Strata has not persuaded me that there is no reasonable prospect that Ms. Andruski could succeed in establishing a nexus between her disability and the negative health effects arising from the ingress of the impugned scents.

D. Reasonable accommodation

32 Were Ms. Andruski to establish the facts she alleges, this would trigger a duty on the part of the Strata to accommodate her by, at the very least, working with her in good faith to investigate and mitigate the ingress of the scents: *Leary*.

33 The Strata argues that it has done what it can to accommodate Ms. Andruski "simply because she asked." It says that the Council cannot dictate — apparently in relation to the question of unscented plants — to the 280 owners how they may wish to vote in relation to their own property. With respect to fabric softener, it says that the Strata did not install the dryer vents, as they were pre-existing when all owners bought their respective units, and of course everyone needs to wash and dry clothes.

34 In *Purdy v. Douglas College*, 2016 BCHRT 117 (B.C. Human Rights Trib.), the Tribunal said at para. 63:

Whether a respondent has met the duty to accommodate is a question of fact. It will depend on the specific circumstances and relevant considerations appropriate to each case. In an application under s. 27(1)(c), the Tribunal's role is not to determine, as a matter of fact, whether the respondent met its duty. Rather, the Tribunal considers the likelihood that the respondent will be able to establish that defence. The respondent must persuade the Tribunal that it is reasonably certain it will be able to do so.

35 In order to succeed in a defence that the Strata accommodated Ms. Andruski, it would have to establish that it accommodated Ms. Andruski up to the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) ("*Grismer*"). The accommodation process is a cooperative one — no one is entitled to a perfect accommodation: *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.).

36 In this case, with respect to the replacement of fragrant plants in the landscaping plan with unscented plants, the materials before me indicate that the expense associated with changing the plants from fragrant to unscented varieties would result in a \$300-\$400 cost change, and there was concern about the significant difference in the aesthetics of the latter. This appears to me unlikely to establish that the Strata accommodated Ms. Andruski up to the point of undue hardship, notwithstanding that the owners voted against the resolution to make the change. On that point, I note that stratas cannot vote their way out of the obligations under the *Code*: *Leary* at para. 69. Further, there is no evidence that the Strata even investigated the possibility of restricting the unscented varieties to the areas beneath Ms. Andruski's windows, for example, or any other possible accommodation.

37 With respect to the fabric softener, there is no evidence of the Strata ever having taken any steps at all to investigate the ingress of the scents, nor investigating possible accommodation options for addressing the ingress issues Ms. Andruski was experiencing. Quite to the contrary, in fact, the Strata says that it did not install the dryer vents and

cannot stop people from doing laundry. Its approach certainly appears to be that Ms. Andruski must simply live with the situation or sell her condo unit and move.

38 On the diesel fumes, it appears that the Strata advised Ms. Andruski to leave her unit during construction hours or keep all of her windows and doors tightly closed. It was only after her trip to the emergency room that a meeting was arranged with the contractor resulting in the provision of air purifiers.

39 In *Leary*, the Tribunal set out a number of steps to guide stratas in navigating their accommodation obligations. The Tribunal said that a strata council must, among other things:

- Address requests for accommodation promptly, and take them seriously. A strata should consider how it will process accommodation requests on a timely basis, including between council meetings. For example, the strata council should ensure that someone is responsible for receiving such requests and promptly beginning the accommodation process.
- Gather enough information to understand the nature and extent of the need for accommodation. The strata is entitled to request medical information that is related to the request for accommodation. It is not entitled to any more information than is strictly necessary for this purpose. If the strata requests further medical reports, it should be at the strata's expense.
- Restrict access to a person's medical information to only those individuals who are involved in the accommodation process and who need to understand the underlying medical condition. The strata council should keep medical information confidential from the general membership of the strata.
- Obtain expert opinions or advice where needed. For second-hand smoke, a "sniff test" undertaken by another strata member will rarely be sufficient to evaluate the extent of a problem with smoke in a suite. The strata may have to retain air quality experts. The strata should pay for any tests or expert reports.
- Take the lead role in investigating possible solutions. Co-operate with the person seeking accommodation to constructively explore those solutions.
- Rigorously assess whether the strata can implement an appropriate accommodation solution. In doing so, the strata may have to consider the financial cost and competing needs of other strata members with disabilities. In some circumstances, a solution may not be possible without the strata suffering an undue hardship. In that case, the strata council should document the hardship and test its conclusion to ensure there is no other possible solution.
- Recognize that the strata cannot, through its membership, contract out of the *Human Rights Code*. This means that a strata cannot rely on a vote of its membership to deny an accommodation.
- Ensure that the strata representatives working on the accommodation are able to approach the issue with an attitude of respect. Members of a strata council whose behaviour risks undermining genuine efforts at co-operation and conciliation may need to be removed from the process. (para. 69).

40 There is little evidence before me that the Strata did much of the above, nor to allow me to conclude that it is reasonably certain the Strata would establish that it accommodated Ms. Andruski to the point of undue hardship, were the matter to proceed to a hearing.

E. Novel argument

41 The Strata has levied an additional argument: that even if there were discrimination, "the Tribunal cannot craft an order that will actually be enforceable; so the Claimant's claim should be dismissed as having no reasonable prospect of success at a hearing."

42 It seems to base this assertion on its argument that the remedies Ms. Andruski has sought in her complaint pertaining to certain bylaws are "unworkable", and its contention that even a remedy granted under the *Code* will not protect Ms. Andruski. On that note, it says that "even if [Ms. Andruski] had a reaction to a scent or smell of some sort, it would be impossible to determine, except in the most obvious of cases, as to where a smell that actually caused a reaction ... actually came from."

43 Leaving aside the obvious enforceability of an award of damages for injury to dignity were the Tribunal to find that the Strata had discriminated against Ms. Andruski, the Tribunal has at its disposal a myriad of possible, "workable" remedies in cases such as these, examples of which could be found, among others, in *Leary; Williams (supra)*; *Konieczna (supra)*; *Vamburkar-Dixit v. Brown, 2007 BCHRT 437* (B.C. Human Rights Trib.); *Shannon v. Strata Plan KAS 1613, 2009 BCHRT 438* (B.C. Human Rights Trib.); and *McDaniel v. Strata Plan LMS 1657, 2012 BCHRT 167* (B.C. Human Rights Trib.). It is well known that Ms. Andruski cannot expect a perfect accommodation. However, she can certainly expect *some* accommodation and it is within the realm of the Tribunal's power to craft orders that do that where complainants succeed in establishing their case.

44 Contrary to what the Strata suggests, the Tribunal is rather likely to put its mind to the enforceability of any remedies it orders before rendering such orders. At the same time, the hypothetical dissatisfaction of a complainant with a possible order that may be made by the Tribunal after a hearing of a matter does not constitute a reasonable consideration in favour of a respondent in the context of an application under s. 27(1)(c).

45 I reject outright the Strata's argument in this regard.

V CONCLUSION

46 The application to dismiss the complaint is denied.

47 I encourage the parties to consider Tribunal-assisted mediation in order to resolve the complaint without further difficult and expensive proceedings, which may serve neither of their interests. If they wish to take advantage of that opportunity, they should communicate their interest to the case manager.

48 Further, if the tone of the arguments submitted in support of this application are indicative of the Strata's dealings with Ms. Andruski to this point, I would also invite it to review the Tribunal's sage guidance in *Leary* to inform itself as it goes forward in how to deal with other members of its community in a productive and compassionate way.

Application denied.