

2017 BCHRT 45
British Columbia Human Rights Tribunal

Pope v. Strata Plan V1S30

2017 CarswellBC 583, 2017 BCHRT 45, [2017] B.C.W.L.D. 2099, [2017] B.C.W.L.D. 2105

**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

Bhavananda Pope (Complainant) and The Owners, Strata Plan V1S30 (Respondent)

Marlene Tyshynski Member

Judgment: February 21, 2017

Docket: 15195

Counsel: Cora Wilson, for Complainant

Trevor Morley, for Respondent

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

APPLICATION by respondent for summary dismissal of discrimination complaint.

Marlene Tyshynski Member:

I INTRODUCTION

1 Bhavananda Pope filed a complaint alleging that The Owners, Strata Plan V1S30 (the "Strata") discriminated against her based on a physical and mental disability with respect to a service customarily available to the public, contrary to s. 8 of the *Human Rights Code*.

2 My understanding of Ms. Pope's complaint is that she was diagnosed with a mental health condition akin to PTSD on or around January 2016. She alleges that startling loud noises have been emanating from the condo above (#602) since April 2013 and are exacerbating her disability. She alleges that the Strata failed to take action to address the noise from #602 and thus failed to reasonably accommodate her disability.

3 The Strata denies discriminating against Ms. Pope. It applies to have her complaint dismissed under ss. 27(1)(b), (c), (d)(i) and (ii) of the *Code*. In a letter dated January 26, 2017 it also applied to file submissions under s. 27(1)(f) of the *Code*. Those subsections of the *Code* provide:

(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:

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

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

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

...

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;...

II DECISION

4 The Strata's application to dismiss Ms. Pope's complaint under s. 27(1)(b) is successful in part. Allegations that pre-date December 3, 2015 are dismissed. The remainder of the complaint continues before the Tribunal.

5 The Strata's application to dismiss the complaint is otherwise dismissed.

III PRELIMINARY MATTER

6 In its letter dated January 26, 2017 to the Tribunal, the Strata advised that Mr. Pope filed what amounts to the same complaint with the Civil Resolution Tribunal ("CRT") and that the complaint was accepted for filing. On that basis, the Strata seeks leave to file further submissions to dismiss the complaint under s. 27(1)(f). Under s. 27(1)(f), a complaint may be dismissed when "*the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding*". The CRT has not rendered a decision, thus an application under s. 27(1)(f) is premature.

7 Where another proceeding is capable of appropriately dealing with the substance of a complaint, a party may apply to the Tribunal under s. 25 of the *Code* to defer further consideration of the complaint until the outcome of the other proceeding. Information about the deferral process is available on the Tribunal's website. The CRT controls its own process, and the Strata could also apply to it for a deferral of the claim filed in that forum.

8 The Strata filed a very brief application to dismiss the complaint and provided submissions that lacked detail in information or reference to relevant legal tests and did not file corroborating documentation. I will address the application later in my decision. Ms. Pope responded with an affidavit from Ms. Pope and submissions that relied on a statement of legal tests and their application to the information provided by Ms. Pope. The Strata's reply was more expansive. However, it introduced new arguments which are not appropriate in reply and put Ms. Pope to the strict test of proving that she had a disability. The Strata did not file any supporting documentation. Ms. Pope then filed, without an application to do so, what she referred to as a "Response to Reply". She filed another affidavit, a medical report made after the Strata's reply and she made further submissions.

9 I have based my decision on the material that in my view is properly before me; that is the application to dismiss, the response and the reply (but not including any new issue raised in the reply). After writing my decision and reviewing all of the material, consideration of the additional material filed would not have altered my decision.

10 I note that Ms. Pope's "Response to Reply" appears to include new allegations of ongoing discrimination by the Strata. Ms. Pope may wish to clarify this by filing an Amendment in Form 3.

IV BACKGROUND

11 I have briefly summarized the background and essence of the complaint and the response. This summary does not represent findings of fact.

12 The Strata is a Strata Corporation comprising 25 strata lots housed in a nine story building in Victoria, British Columbia.

13 Mr. and Ms. Pope purchased their condo, #502, in 2008. They describe themselves as elderly and state that their plan was to reside in their condo for the rest of their lives.

14 In 2010, the owners of condo #602 applied and received approval from the Strata to replace the carpeting in their condo with hard surfaces; wood and stone.

15 In 2013, condo #602 was purchased by a new owner. At or about the same time Mr. and Mrs. Pope were disturbed by noises emanating from #602 during both the day and night. The Popes complained about the noise to the Strata, orally and in writing. The Strata responded in a variety of ways including telling #602 about the complaints, fining #602, asking the parties to enter mediation, and trying to obtain expert evidence about the noise. Ms. Pope states that from time to time the noise would abate, but then it would start up again.

16 On or around December 3, 2015, while in surgery, Ms. Pope had a traumatizing experience. She was referred to counselling by her physician. In January she advised the Strata that the noises from #602 were now exacerbating her PTSD symptoms. She provided the Strata with a letter dated April 21, 2016 from her counsellor who is qualified with a Master's in Social Work and has experience working with people with PTSD. The Counsellor described Ms. Pope's symptoms to those similar to if not identical to PTSD. He set out Ms. Pope's symptoms of sleep disturbance/deprivation, hyper-vigilance, sensitivity to sudden noise or other unexpected changes in her environment and difficulty concentrating at times. He asked the Strata to address the noise in her environment as it was detrimental to her health.

17 Ms. Pope refers to an Alteration Agreement between the former owners of #602 and the Strata that provided that the owners of #602 would be required to replace the flooring by installing carpet or take steps to alleviate the problem within 30 days after receipt of complaints validated by the strata council due to the hard surface flooring. She submits that the Strata has not taken adequate steps to accommodate her disability. In short, the noise from #602 continues to detrimentally affect her.

18 On May 31, 2016, Ms. Pope filed this complaint.

The Complaint

19 The gist of the complaint, in my words, is that Ms. Pope has been diagnosed with symptoms akin to PTSD. Due to the circumstances of the conduct of the occupants of #602 and the nature of the flooring in #602, she is suffering the adverse impact of exacerbation of her PTSD symptoms. The service the Strata provides is to enforce its bylaws in a manner that is consistent with the *Code*. Ms. Pope states that it failed to do so when it did not take steps to accommodate her disability.

The Response

20 The gist of the Strata's response, in my words, is that the real issue is a personal dispute between the Popes and #602, that the Strata cannot be held responsible for the conduct of #602, and that Ms. Pope seeks a remedy that neither it has authority to fulfill, nor the Tribunal has authority to order, that is, interference with the property rights of an individual condo owner in their condo.

V ANALYSIS

Section 27(1)(b)

21 Complaints may be dismissed under s. 27(1)(b) only if the acts as alleged in the complaint, if proven, could not contravene the *Code*. Determinations under this section are made on the basis of the allegations outlined on the face of the complaint, without reference to any alternative explanation or evidence which the Respondent may put forward: *Bailey v. British Columbia (Attorney General)*, 2006 BCHRT 168 (B.C. Human Rights Trib.), para. 12.

22 The Strata argues that Ms. Pope's complaint about flooring has nothing to do with the *Code* and that she has provided no information about a mental or physical disability and that there is no connection between its conduct and the alleged ground of discrimination.

23 I disagree; Ms. Pope alleges that she was diagnosed with a mental health disability akin to PTSD in January 2016. She alleges that the Strata's failure to reasonably accommodate her disability by enforcing the bylaws on noise caused her to suffer the adverse impact of exacerbation of her condition. If proven, this portion of the allegation would amount to a breach of the *Code*.

24 If a protected ground does not form the basis of a complaint it cannot constitute an allegation of discrimination or a breach of the *Code*. In her complaint, Ms. Pope does not refer to a mental disability that pre-dates her surgery or the January 2016 diagnosis. Thus any allegations that predate the December 3, 2015 surgery are not based on a protected ground and could not amount to a breach of the *Code*. They are dismissed.

25 The Strata's application to dismiss the complaint under s. 27(1)(b) is successful in part. However, all allegations from December 3, 2015 forward continue before the Tribunal.

Section 27(1)(c)

26 The Strata's submissions under both ss. 27(1)(c) and (d)(i) and (ii) are cursory. For the most part they simply state the subsection and then conclusively state with no corroborating documentation that the Strata does not have the authority to provide the remedy Ms. Pope seeks. In an application to dismiss the respondent bears the burden of persuasion. It is required to convince the Tribunal, based on the material filed, that under (c) there is no reasonable prospect a complaint would succeed if it went to a hearing or that under (d) that proceeding with the complaint or that part of the complaint would not benefit the person, group or class alleged to have been discriminated against, or further the purposes of this *Code*. I will deal with each in turn.

27 Under s. 27(1)(c), the Tribunal may dismiss a complaint if there is no reasonable prospect that the complaint will succeed. Section 27(1)(c) allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing. 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.) at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171 (S.C.C.). A decision to dismiss a complaint under s. 27(1)(c) is discretionary. The Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed at a hearing.

28 The entirety of the Strata's submission is:

The complaint has no reasonable prospect of success because the respondent has no legal authority under the Code or any other enactment to provide the complainant with the remedy she seeks

It later states:

The Strata Corporation has no power to compel the owner of the unit above the complainant to change the flooring. The position of the Strata Corporation is limited to imposing fines when there is a finding of unreasonable noise from a unit. The Strata Corporation has done this on multiple occasions.

The Strata also submits:

The Complainant alleges she suffers from PTSD after an event on December 3, 2015. There is no direct evidence of her suffering PTSD.

29 As noted, no corroborating documentation was filed.

30 These few conclusive statements made in a submission do not convince me that there is no reasonable prospect the complaint will succeed.

31 First, I do not accept the Strata's bald statement that Ms. Pope did not establish a disability under the *Code*. At this stage in the proceeding Ms. Pope is not required to establish a *prima facie* case of discrimination. She filed an affidavit in which she explained her symptoms, her diagnosis and her treatment. This was corroborated by the Counsellor's Report dated April 2016. The Strata has not convinced me there is no reasonable prospect that Ms. Pope will not succeed because she cannot establish that she has a disability.

32 Second, the parties take different positions respecting what the Strata could have done to assist Ms. Pope. Ms. Pope argues that indeed the Strata did have authority under its bylaws to try to assist with noise reduction. In addition, she refers to the Alteration Agreement. The Strata provided no documentary foundation for its argument that it did not have the authority to do anything more respecting Ms. Pope's noise complaints. This dispute appears material to the complaint and cannot be resolved on the material provided.

33 Third, the Strata's submissions do not address the correct question. Under s. 27(1)(b) I have explained how Ms. Pope's allegations could if proven amount to discrimination. Under s. 27(1)(c) the Strata should be filing evidence and making submissions that pertain to whether Ms. Pope can make out her complaint. While the Strata characterizes the issue about the remedy sought, the remedy is not relevant at this stage of the proceeding. The Strata could have taken the position that it had accommodated Ms. Pope to the point of undue hardship, thus there is no reasonable prospect her complaint would succeed. It did not do so. To the extent that it relies on its asserted lack of authority, the Strata has not persuaded me that it could not have reasonably done more to accommodate Ms. Pope.

34 The application to dismiss the complaint under s. 27(1)(c) is denied.

Section (d)(i) and (ii)

35 Under ss. 27(1)(d)(i) and (ii) the Tribunal may dismiss the complaint if it has been convinced that proceeding with the complaint will not benefit Ms. Pope or will not further the purposes of the *Code*. In *Williamson v. Mount Seymour Park Housing Co-operative*, 2005 BCHRT 334 (B.C. Human Rights Trib.), the Tribunal stated:

Generally, the Tribunal's ability to ensure that any purposes of the *Code* will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings. More specifically, where a complaint of discrimination has already been appropriately resolved, through whatever means, there is no need to proceed with the complaint in order to prevent discrimination or provide a means of redress — the discrimination has already been remedied. ... (para. 13)

36 The Strata provided no submissions in its application to have the complaint dismissed under 27(1)(d)(i) and (ii). It addressed this subsection briefly for the first time in its reply. Having determined that I cannot dismiss the complaint under s. 27(1)(c), there is no reason to conclude that it would not benefit Ms. Pope or further the purposes of the *Code* to proceed with it.

37 The Strata's application under ss. 27(1)(d)(i) and (ii) is dismissed.

VI CONCLUSION

38 The Strata's application to dismiss Ms. Pope's complaint under s. 27(1)(b) is successful in part. Allegations that pre-date December 3, 2015 are dismissed. The remainder of the complaint continues before the Tribunal. The Strata's application to dismiss the complaint is otherwise dismissed.

Application granted in part.

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