

2017 BCHRT 59
British Columbia Human Rights Tribunal

Talbot v. Strata Plan LMS 1351

2017 CarswellBC 682, 2017 BCHRT 59, [2017] B.C.W.L.D. 2455, [2017] B.C.W.L.D. 2462

**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

Erin Talbot (Complainant) and The Owners, Strata Plan LMS 1351 and Profile Properties Ltd. (Respondent)

Emily Ohler Member

Judgment: March 9, 2017

Docket: 15101

Counsel: Erin Talbot, for herself
Philip Dougan, for Respondent

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

APPLICATION by respondents for summary dismissal of discrimination complaint.

Emily Ohler Member:

I INTRODUCTION

1 Erin Talbot says that the Owners, Strata Plan LMS 1351 (the "Strata") and Profile Properties Ltd. ("Profile") 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 Respondents deny discriminating, and have brought an application to dismiss Ms. Talbot'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 BACKGROUND

1 Ms. Talbot is an owner of a condo unit in Strata Plan LMS 1351. She says that she has a disability that makes her particularly susceptible to the negative health impacts of second-hand smoke exposure. She also says that she was pregnant during part of the time that the events about which she complains occurred.

2 In 2013, Ms. Talbot complained to the Strata about a problem with cigarette and marijuana smoke entering her condo unit from neighbouring units. In a letter dated May 13, 2013, the Strata wrote to Ms. Talbot advising that it had sent out letters along with a handout entitled "Smoking in Strata Corporations." It also provided information on the dispute resolution bylaw to consider in case of ongoing issues with the involved neighbour. The letters sent out to the neighbouring units asked that they not smoke on their balconies and advised that the Strata could levy a fine were the smoking to persist and give rise to further complaints.

3 On June 4, 2014, apparently again in response to a complaint from Ms. Talbot about marijuana smoke entering her condo, the Strata sent out letters to the neighbouring units asking them to stop smoking.

4 In a letter dated September 23, 2015, the Strata wrote to a specific neighbour of Ms. Talbot's (the "Smoking Neighbour") about her smoking complaints, asking him to stop smoking on his balcony and sending him a handout about smoking in strata corporations. The next day, the Strata wrote to Ms. Talbot advising that the letters had been sent, but also noting that she had "reported severe smoke penetration into [her] unit that is unprecedented in the strata corporation's history therefore it is recommended you look into hiring an environmental engineer or expert to provide objective evidence of the extent of smoke penetration."

5 In notes on a letter dated September 29, 2015, it appears that the Strata manager wrote that the Smoking Neighbour denied smoking on his balcony, and said he only smoked inside. The Strata manager wrote that the Strata cautioned the Smoking Neighbour that he still needed to take steps to ensure the smoke did not interfere with other owners. The notes conclude by stating that "as council has no proof to contradict the owners statements the council was satisfied was doing everything to minimize the effects of smoke interference with other units" (reproduced as written).

6 On November 27, 2015, Ms. Talbot says she wrote to the Strata advising that second-hand smoke was entering her unit though the patio door, bedroom window, and also seemed to be entering through gaps around the plumbing or pipes. She mentioned her suspicion that it may be entering from the Smoking Neighbour's unit, given her condo did not have the problem prior to his moving in. She also outlined the particular difficulties posed by second-hand smoke to people with her conditions, and advised that she was unable to enjoy her balcony and the living areas of her condo as a result of the smoke. "Given the seriousness and urgency of the situation," she wrote, "I am asking that you talk to [the Smoking Neighbour] and [the other two owners] about their second-hand smoke entering my unit." She also suggested the Strata consider passing a non-smoking bylaw.

7 Subsequently, Ms. Talbot continued to notify the Strata on a number of occasions about second-hand smoke issues.

8 A letter dated January 12, 2016 from counsel for the Strata to Ms. Talbot says that as Ms. Talbot's complaints about smoke ingress were met by denials from other residents about their smoking activities, "thus far [her] complaints have created only a 'he said, she said' situation that does not give council any solid evidence on which to act to impose penalties on any owner...". It suggests that she retain an environmental engineering report to give them some solid evidence.

9 On February 15, 2016, Ms. Talbot again wrote to the Strata noting that, although she had alerted them several times to the issues with second-hand smoke ingress, no steps had been taken.

10 On March 31, 2016, the Strata wrote to Ms. Talbot confirming it had issued a letter of complaint to a unit about smoke ingress based on an email from Ms. Talbot dated March 17.

11 In a letter dated July 11, 2016, the Strata confirmed to Ms. Talbot that it had issued another letter of complaint and levied a fine against the unit she mentioned related to smoking. A further letter and fine were issued around July 15, 2016.

12 At some point amidst the flurry of complaints and letters and fines, Ms. Talbot wrote to the Strata seeking permission to rent out her condo. Currently, Strata has a limit of 10 units permitted to be rented at any given time, and Ms. Talbot applied on more than one occasion under the hardship exemption to the rental restriction bylaw. The Strata

denied the requests. In one letter from counsel for the Strata to Ms. Talbot, she was told that "nuisance is not a ground for a hardship application", and advised that significant financial or familial loss might be. That letter said that, if Ms. Talbot wished to move because she is affected by smoke, the Strata does not understand why she would not "simply sell and move." The letter ended by advising Ms. Talbot that, if she was not happy in her current circumstances, "we suggest this may be an excellent time of the year to have your unit put on the market."

III ANALYSIS AND DECISION

A. No reasonable prospect of success — Section 27(1)(c)

13 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.), leave to appeal ref'd [2006] S.C.C.A. No. 171 (S.C.C.), at paras. 22-26.

14 To succeed at a hearing, Ms. Talbot must prove that: she has the protected characteristic of physical disability; the Respondents' conduct caused an adverse impact with respect to accommodation, service or facility; and her physical disability was a factor in the adverse impact: *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 (S.C.C.), at para. 33.

15 The analysis under s. 27(1)(c) considers whether — after an assessment of the evidence and submissions of the parties — the Respondents have shown that there is no reasonable prospect that Ms. Talbot 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. Talbot will prove one or more of the elements of the *prima facie* case, it may dismiss the complaint. The complaint must be based on more than speculation: *Berezoutskaia*, at paras. 24-26.

16 In an application under s. 27(1)(c), the threshold for Ms. Talbot 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.

17 The Strata argues that there is no evidence "that the Strata caused the smoking; or ignored [Ms. Talbot's] concerns; or did nothing to address the Complainant's allegations; or did anything to encourage any adverse impact on the Complainant." It argues that Ms. Talbot cannot possibly succeed in her complaint because she has not "set out how the Strata used the Complainant's medical conditions to discriminate against her." The Strata argues that:

...there is nothing in the complaint that says because the Complainant had these physical disabilities the Strata chose to treat her differently, or; negligently, the Strata did not act to assist the Complainant because she had medical conditions that they interpreted to somehow make the complainant less valuable in the community.

On the contrary, the Strata took part in none of the impugned behaviour, did not condone any of the alleged incidents; investigated them as they became aware of them; dealt with them within the powers provided to them under the Strata Property Act, and did its best to investigate the veracity of the Complainant's concerns.

The Strata received strong denials from the neighbours accused of wrong doing, and was left with an inconclusive evidentiary basis to take any further steps against owners accused of breaching the nuisance bylaw, who adamantly denied wrong doing.

Never, was any of the process related to the Complainant's medical conditions, only to the ability of the strata council to adjudicate and enforce its own bylaws.

With no nexus between the alleged grounds for discrimination, the alleged discrimination and the actual actions and decisions of the Strata Corporation, the Respondent says there can be no claim of discrimination that may be adjudicated under the *Code*, and the complaint must therefore be dismissed.

18 As mentioned above, in order to succeed at a hearing of her complaint, Ms. Talbot would have to persuade the Tribunal, on a balance of probabilities, that she has a physical disability, that she experienced an adverse impact, and that there is a nexus between those two things. On the first and second points, there is no dispute at this stage that Ms. Talbot has a physical disability, nor that she complained to the Strata that she was experiencing adverse impacts arising from the ingress of second-hand smoke into her condo. On the third point, it appears to me that the Strata is fundamentally misunderstanding the way in which the test for discrimination operates in these circumstances.

19 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 VR1001*, 2016 BCHRT 139 (B.C. Human Rights Trib.) ("*Leary*"). In this case, the evidence is that the ingress of second-hand smoke was causing negative impacts to Ms. Talbot's health in large part due to her physical disability and that, as a result of the negative impacts she was experiencing because of her disability, she sought assistance from Strata. Thus, Ms. Talbot could very well establish a *prima facie* case at a hearing.

20 When Ms. Talbot notified the Strata that she had a disability and was experiencing adverse health impacts as a result of the ingress of second-hand smoke into her condo, this triggered a duty on the part of the Strata to reasonably accommodate her disability to the point of undue hardship by investigating and mitigating the ingress of the second-hand smoke.

21 The Strata does not appear to be arguing that it did accommodate Ms. Talbot. In any event, even if I interpret the evidence to determine if accommodation was attempted, the materials submitted show only that Strata wrote to residents when confronted with a complaint from Ms. Talbot about the smoke, and asked them to stop. What the Strata does not appear to have done is take any steps, beyond asking other residents about what their smoking habits were, to investigate the source of the smoke or whether steps could reasonably be taken to prevent its ingress into Ms. Talbot's home. Conversely, the Strata instructed Ms. Talbot to pay to hire an environmental expert to gather such evidence or, simply, sell her home and move. Notably, and evident from the letters and fines issued, the Strata does not appear to be taking the position that there was no smoke ingress into Ms. Talbot's apartment. One is left wondering why the Strata would have required Ms. Talbot to undertake the task of further investigation for the purpose of gathering evidence.

22 The Tribunal has previously stated that:

As service providers, stratas have an important role to play in removing barriers that may affect their owners with disabilities. This includes taking a serious and rigorous approach to complaints related to smoking. (*Leary* at para. 66).

23 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)

24 In this case, the Strata has not said it did anything beyond warning and, possibly, fining neighbouring units under its nuisance bylaws. It appears the whole of its investigation into the smoke ingress consisted of asking neighbouring residents about their smoking habits. The Strata does not argue that this amounts to reasonable accommodation or that there is undue hardship in addressing Ms. Talbot's concerns. In any event, the hardship analysis was not applied to Ms. Talbot's request for an exception to allow her to rent out her apartment.

25 Based on my review of all of the materials before me, it appears that Ms. Talbot has brought her complaint beyond the realm of conjecture. The Respondents have not persuaded me that there is no reasonable prospect that Ms. Talbot's complaint could succeed.

IV CONCLUSION

26 The application to dismiss the complaint is denied.

27 I encourage the parties to avail themselves of the mediation assistance offered by the Tribunal to resolve this matter.
Application denied.