

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 16, 2022

CASE: 2022-00575N

Citation: Waterloo North Condominium Corporation No. 70 v. [REDACTED]. 2022 ONCAT 144

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Brian Cook, Member

The Applicant,

Waterloo North Condominium Corporation No. 70
Represented by Christopher Mendes, Counsel

The Respondent,

[REDACTED]
Not participating

Hearing: Written Online Hearing – October 13, 2022 to November 7, 2022

REASONS FOR DECISION

INTRODUCTION

- [1] This is an application by Waterloo North Condominium Corporation No. 70, seeking an order requiring the Respondent to remove her dog from the condominium.
- [2] The Respondent did not join the case. The Tribunal's Rules require an Applicant to give a copy of the Application and a notice from the Tribunal to the Respondent three times. The notices advise the Respondent that the case will proceed even if they do not participate. The Applicant has confirmed that the Respondent received the required notices. I am satisfied that the Respondent had notice of the Application and decided to not participate.
- [3] When a Respondent does not join a case, it must be decided on the basis of the evidence provided by the Applicant. By not participating, the Respondent has waived the right to challenge the evidence of the Applicant or provide their own evidence.
- [4] The evidence from the Applicant consists of an affidavit from Natasha Houser, the Applicant's condominium property manager, which includes attachments. My assessment of the evidence provided by the Applicant is that the evidence is credible and reliable.

BACKGROUND

[5] The Corporation's Rules include the following provisions:

3.12.1 No Resident shall keep any animal, other than:

- Small caged animals (birds, rodents, etc.);
- Goldfish, tropical fish, or other fish;
- One dog, the weight of which must not exceed 9 kg or 20 lbs, or
- No more than two domestic cats.

3.12.2 Any pet, which in the opinion of the Board of Directors is determined to be a nuisance, shall be permanently removed from the property.

3.12.3 Any person taking pets out of or bringing them into the building must do so via the garage. All pets, when in the common elements must be carried or crated.

[6] The Respondent's dog is a German Shepard and weighs more than 9 kilograms and therefore exceeds the weight limit established by the rule. The evidence indicates that the dog is not carried or crated when in the common elements.

[7] As discussed in more detail below, the Applicant alleges that the dog is a nuisance because of aggressive behaviour which the Respondent cannot always control.

[8] The Respondent has advised the Applicant that the dog is support animal and she has asserted that as a result she is legally allowed to keep the dog as an accommodation under the Human Rights Code of Ontario ("the *Code*").

ISSUES

[9] The issue in this case is whether the Respondent is entitled to an accommodation under the Ontario Human Rights Code to allow the Respondent to keep the dog. Assessment of this involves the following questions:

1. Does the Respondent have a disability?
2. If so, does she have disability-related needs that require an accommodation to allow her to keep her dog?
3. Would that accommodation result in undue hardship for the Applicant?
4. Is the weight restriction rule reasonable?

[10] The Applicant is also seeking an order requiring the Respondent to pay its legal costs of \$3,005, representing costs of \$970 for the period prior to the Application

and \$2,035 for the period after the Application was filed.

ANALYSIS

Accommodation under the *Code*

[11] There is no dispute that the *Code* applies to Condominiums and prohibits discrimination by a Condominium against a unit owner or tenant.¹ The *Code* establishes a number of protected grounds, including disability.

[12] “Disability” is defined in section 10 of the *Code* and includes

“disability” means,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997;

[13] The *Code* prohibits direct discrimination (for example, treating someone differently because of their race or colour). Section 11 of the *Code* also prohibits “constructive discrimination” or “adverse affect discrimination”. This type of discrimination can occur when a seemingly neutral rule has a discriminatory effect on a person because of a prohibited ground, such as disability. It can arise by trying to treat everyone equally, which may ignore the adverse impact of such an approach on an individual or group associated with a *Code*-protected ground. Section 11 of the *Code* requires an assessment of whether the needs of the individual can be accommodated to the point of undue hardship.

[14] In this case, the Condominium has adopted a rule that prohibits dogs weighing more than 9 kilograms. This is a seemingly neutral rule because it applies equally to everyone. However, it could result in discrimination if it adversely affects the

¹ See, for example, *Shvarstuhk v. Condominium Corporation No 570*, 2020 HRTO 413, paragraph 13

Respondent because of disability.

- [15] A request for accommodation process creates obligations for both parties. Dialogue may be necessary to find solutions that meet the needs of the person seeking the accommodation and that also respect the rights and needs of others. In this case, the Respondent refused to engage in any process and seems to have only asserted a right to keep the dog because she asserts that she has a disability.
- [16] I note that the Respondent did provide a copy of a card issued by the Assistance Dogs of America indicating that the Respondent's dog has been registered as a "Canadian Therapy Dog". This is evidence that the Respondent's dog is registered as therapy dog on the website of Assistance Dogs of America. It is not evidence that the Respondent has a disability or that she requires a therapy dog for disability-related needs.

Does the Respondent have a disability?

- [17] The only evidence on this point comes from a note the Respondent provided from her family doctor, Dr. Quartermain, which states as follows:

This patient is suffering from chronic medical conditions that require the use of a service dog, daisy. She has been using Daisy since 2018 for these conditions.

- [18] This note is dated May 2022. The Applicant's evidence is that medical information relating to the dog was first requested in May 2021, and the request was reiterated several times until the note from Dr. Quartermain was produced.
- [19] The Applicant's evidence is that the Respondent was informed that the letter of Dr. Quartermain did not address the nature of the disability or the medical requirement for a dog over 20 pounds. The Respondent was asked to provide additional medical information but did not do so. It further appears that she did not herself provide the Applicant with any information about her disability or the need for a dog that exceeded the weight limitation.
- [20] Medical evidence is not necessarily required to establish that a person has a disability as it may be obvious. A person who requires a wheelchair, for example, should not need to produce medical evidence of a disability (although medical evidence may be necessary to establish the person's disability-related needs). However, in most cases, the person or organization that is being asked to accommodate a person because of disability is entitled to have medical confirmation of the disability and entitled to ask for clarification if the initial information is not sufficient to establish that there are disability related needs. Medical evidence will also generally be required to establish that the person with the disability has needs related to that disability which require accommodation. The medical evidence that is required does not necessarily have to identify a diagnosis and care must be taken when seeking clarification to respect the dignity

of the person and their rights to privacy.²

- [21] In this case, the medical evidence provided by the Respondent is very limited and vague. “Chronic medical conditions” may or may not include conditions that meet the definition of disability as defined by the *Code*.
- [22] I find that the Respondent has not established that she has a disability as defined by the *Code*.

If the Respondent does have a disability, is she entitled to accommodation?

- [23] Although the Respondent has not established that she does have a disability, I have considered whether she might nevertheless have a disability-related needs that require her to keep her dog, as suggested by the note from Dr. Quartermain.
- [24] The note from Dr. Quartermain does indicate that the Respondent’s medical conditions “require the use of a service animal” but does not explain what disability-related needs exist that require the use of service animal. Most significantly, in the context of the rule from which the Respondent seeks accommodation, there is no evidence as to what disability-related needs may exist that require a service animal weighing more than 9 kilograms.
- [25] Although there is no evidence that the Respondent requires a dog that weighs more than 9 kilograms because of disability-related needs, it can be reasonably inferred that the Respondent has an attachment to this particular dog. It is generally true that pet owners have an emotional attachment to their pets, whether or not they have any disability-related needs.
- [26] Dr. Quartermain’s note indicates that the Respondent has had the dog since 2018. According to the Applicant’s evidence, the Respondent moved into the unit in March 2021. This means that the Respondent owned the dog when she moved into the building.
- [27] In the absence of any evidence from the Respondent, it is not possible to know whether she was aware of the weight limitation rule when she moved in. It is possible that she mistakenly believed that she was entitled to move in with her dog because she believed she was entitled to an exemption based on disability. This would have been a mistaken belief because the mere fact that a person has a disability does not itself entitle them to have a dog that contravenes the rules of the condominium. The person must still engage in the accommodation process and allow the condominium to determine if the accommodation is necessary and whether it may result in undue hardship. The Respondent in this case did not engage in the process despite numerous requests from the Corporation that she

² see Policy on Ableism and Discrimination based on Disability, Ontario Human Rights Commission, at pages 48 – 52.)

do so.

Is the weight limit rule reasonable?

[28] A number of condominium corporations have a weight limit for pets. A 25-pound weight limit was the subject of a decision of the Ontario Court of Appeal in *York Condominium #382 v. Dvorchik*, 1997 (ON CA). The Court said as follows:

In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

With respect, we do not agree that the rule restricting the size of pets is either unreasonable or inconsistent with the Condominium Act. This is a condominium with several hundred units and over a thousand residents. On its face, it is both reasonable and consistent with the legislation that there be a limit on the size - or for that matter the number - of pets to prevent the possibility of "unreasonable interference with the use and enjoyment of the common elements and of the other units." There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the "25 pound rule" is not the best rule or the least arbitrary. But this does not make it an unreasonable one.

[29] Although that case was decided under an earlier version of the legislation, the principles discussed still apply. In the absence of any evidence to the contrary, I cannot find that the weight restriction rule is unreasonable.

Is the dog a “nuisance”?

[30] The Applicant’s evidence and submissions include issues that have arisen concerning the dog. These include:

- On or about April 18, 2021, the Condominium Manager received a complaint that the Respondent’s dog attacked another owner’s dog. This was reported to be the second attack on the owner’s dog by the Respondent’s dog. Security video related to this incident shows the Respondent and the dog in an elevator. When the door opens, the dog lunges out of the elevator and it is evident that the Respondent is having difficulty controlling the dog. The attack on the other dog is not captured in the video.
- On or about April 20, 2021, a resident complained after an encounter with the Respondent and her dog in which the dog seemed very aggressive with loud barking. The complainant was concerned that the Respondent did not seem to be able to control the dog. It was also noted that the dog was never crated or carried while in the common areas.

- On October 18, 2021, a resident complained that the Respondent's dog had leaped from the open door of the Respondent's unit and jumped on the resident's back. The resident reported they were terrified by this encounter.
- On March 6, 2022, there was a complaint, verified with security video, of aggressive behaviour on the part of the Respondent's dog towards another dog. The video shows that the Respondent was unable to adequately control her dog.
- In addition to the weight limitation, the Condominium's Rules require that dogs be carried or crated when being transported on Condominium property. The Applicant's evidence is that the Respondent does not do this, and it would be difficult to do so because of the dog's size and weight.

[31] Because the Respondent has not joined the case, there is no evidence available from her about these incidents. In the absence of any evidence contradicting the evidence presented by the Applicant, I accept the Applicant's evidence and conclude that the Respondent's dog has been aggressive towards other dogs and residents of the Condominium and that the Respondent has difficulty controlling her dog on these occasions.

[32] The Condominium's Rules allow the Board to determine that a dog is a nuisance and to require the removal of the dog from the building. On the basis of the evidence before me, I find that this determination was reasonable.

[33] Even if the Respondent has disability-related needs that require an emotional support or service animal, and if she had engaged in a discussion about accommodation to allow her to keep her dog, the issue of the dog's aggressive behaviour would have to be addressed. Aggressive behaviour by a dog that threatens the health and safety of others can result in undue hardship for the condominium.

Conclusions about the Respondent's dog

[34] In this case, the Respondent did not engage in the process. She did not provide sufficient medical evidence to support the request for accommodation to allow her to keep her dog, she did not provide additional evidence when asked to do so, refused to engage in any dialogue, and refused to join this case.

[35] The available evidence from the Applicant indicates that the Corporation and its counsel attempted to engage with the Respondent in a reasonable and appropriate manner. The available evidence does not support that the Respondent has disability-related needs that require her to have a dog that weighs more than 9 kilograms. While it can be inferred that the Respondent has a strong attachment to her dog, this itself is not sufficient to require an accommodation under the *Code*. In addition, the available evidence indicates that an accommodation to allow the Respondent to keep the dog could result in undue hardship for the Condominium

because of the risks to safety from the dog's aggressive behaviour and the Respondent's inability to control her dog.

- [36] For these reasons, I find that the Respondent cannot continue to have the dog with her while she lives in the Condominium. The decision of the Board that the dog is a nuisance and must be removed is upheld. The Respondent is ordered to remove her dog from the Condominium within three weeks of the date of this Decision, or such longer period that the Board may allow.

Costs

- [37] The Applicant seeks an order that the Respondent pay the Applicant's legal costs which are \$970 for the period prior to the Application and \$2,035 for the period after the Application was filed.

- [38] In support of this, the Applicant's counsel has, at my request, disclosed invoices for legal services in this case. Counsel argues that these should not form part of the record in this case as they are protected by solicitor-client privilege.

- [39] It is not clear to me that the invoices provided here raise a concern about solicitor-client privilege. However, since the Respondent is not participating in the case, I find that it is not necessary to include the invoices in the record in this case, especially because the amounts charged seem reasonable and are not excessive. The invoices provided have accordingly been deleted from the record.

- [40] Article XI of the Condominium's amended Declaration states:

Each owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, any other resident of his unit or any guests, invitees or licencees of such owner or resident to or with respect to the common elements and/or all other units except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments pursuant to this clause are deemed to be additional contributions towards the common expenses and recoverable as such.

- [41] The Condominium's Rule 3.20.0 states:

If found to be in violation of these rules, the unit owner shall receive written notice from management or the Board of Directors. If the issue is not resolved within 30 days, the unit owner shall be held responsible for all costs incurred by the Corporation in the process of resolving the issue. These costs shall be recovered in the same manner as common expenses. In the event of an emergency, the corporation may choose to act immediately to resolve the issue.

- [42] Section 1.44 of the Act permits the Tribunal to make the following orders:

- An order directing a party to the proceeding to pay compensation for damages incurred by another party to the proceeding as a result of an act of non-compliance up to the greater of \$25,000 or the amount, if any, that is prescribed;
- An order directing a party to the proceeding to pay the costs of another party to the proceeding; and,
- An order directing a party to the proceeding to pay the costs of the Tribunal.

[43] The Tribunal's Rule 48.1 provides:

If a Case is not resolved by Settlement Agreement or Consent Order and a CAT member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

[44] Rule 48.2, provides:

The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behavior that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[45] The Tribunal's practice direction, "CAT Practice Direction: Approach to Ordering Costs" (the "Practice Direction"), states that a determination of costs, including indemnification, shall consider,

- (i) whether a party's conduct was unreasonable, for an improper purpose, or caused a delay or expense;
- (ii) the conduct of all parties and representatives requesting costs;
- (iii) the potential impact an order for costs would have on the parties;
- (iv) Whether the parties attempted to resolve the issues in dispute before the CAT case was filed;
- (v) the provisions of the condominium corporation's declaration, by-laws and rules, including whether the parties had a clear understanding of their respective requirements and/or the potential consequences for contravening them; and
- (vi) whether the costs are reasonable and were reasonably incurred.

[46] As noted above, the Tribunal does not usually make award costs for legal services incurred in the course of the proceeding before the CAT. Since the Respondent did not participate, there are no issues regarding her behaviour apart from the

possibility that the matter could have been settled in mediation if she had participated.

- [47] The legal costs for the period before the Application are reasonable. It is clear that the Condominium acted appropriately and reasonably. They tried to communicate with the Respondent to resolve matters before involving counsel. After counsel was retained, the communications to the Respondent were respectful and explained the issues and what was required from her. I find that the Respondent is responsible for legal costs in the amount of \$970.
- [48] The Respondent is also responsible for the CAT filing fees paid by the Applicant, in the amount of \$150.

CONCLUSION

- [49] The evidence establishes that the Respondent's dog exceeds the weight limit established by the Condominium's Rules. The evidence also establishes that it is more probable than not that the dog is aggressive towards other dogs and people living in the Condominium.
- [50] The evidence before me does not support that the Respondent has disability-related needs that require her to keep her dog and she is not entitled to an accommodation under the Human Rights Code.
- [51] The decision of the Board that the dog is a nuisance and must be removed is upheld.

ORDER

- [52] The Respondent is ordered to remove her dog from the Condominium within three weeks of the date of this Decision, or such longer period that the Board may allow.
- [53] The Respondent is ordered to pay the Applicant's legal fees for the period before the Application was filed, in the amount of \$970. The Respondent is not required to pay the legal fees incurred in the course of this proceeding.
- [54] The Respondent is also ordered to pay the Applicant's Tribunal filing fees in the amount of \$150.
- [55] Under subsection 1.45(2) of the Act, the Applicant is entitled to add the amounts payable by the Respondent to her common expenses.

Brian Cook
Member, Condominium Authority Tribunal

Released on: November 16, 2022