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Arndt v. Strata Plan LMS 1416

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

Kathryn Arndt and Douglas Arndt, Complainants and The Owners, Strata Plan LMS 1416, and Maureen Puffer,
Respondents

British Columbia Human Rights Tribunal

Murray Geiger-Adams Member

Judgment: August 10, 2011

Docket: 8476

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Counsel: Gerhard Pyper, for Complainants

Shawn Smith, for Respondent, Owners, Strata Plan LMS 1416

Greg Palm, for Respondent, Maureen Puffer

Subject: Constitutional

Human rights.

Murray Geiger-Adams Member:

Introduction

1 Kathryn and Douglas Arndt filed a complaint in which they allege that the respondents, The Owners, Strata Plan LMS 1416 ("Chelsea Gardens" or "the strata") and Maureen Puffer discriminated against them regarding an accommodation, service, or facility customarily available to the public because of their physical disabilities, contrary to s. 8 of the *Human Rights Code*. The Arndts say that Ms. Puffer, who lives in a townhouse below them, smokes in garage, patio, and other areas of the strata complex, and that her smoking affects their health. The Arndts say that Ms. Arndt suffers from chronic asthma. The Arndts allege that Ms. Puffer has refused to comply with strata by-laws, and that Chelsea Gardens has not taken effective steps to restrain her from smoking.

2 The respondents deny discriminating, and apply on various grounds to dismiss the complaint without a hearing.

3 This is my decision on the respondents' applications to dismiss.

Background

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4 The following background is drawn from the complaint, the responses to the complaint, and the materials filed by all parties on the applications to dismiss. I do not make any findings of fact, and do not address the merits of the complaint. The Arndts each filed an affidavit. The strata filed the affidavit of Gerry Blanchard, its manager. Ms. Puffer filed an affidavit of her own.

5 The relevant facts are not particularly complicated, or, with noted exceptions, contentious. The Arndts own a strata unit in Chelsea Gardens, a 235-unit complex in Surrey. Ms. Puffer moved into the unit below them in July 2009. On July 8, Ms. Puffer was smoking in the garage of her unit. Ms. Arndt, who was present in the garage to help Ms. Puffer's mother with a water problem, asked Ms. Puffer to move her cigarette, as Ms. Arndt had chronic asthma and could not breathe in cigarette smoke.

6 On July 22, 2009, Ms. Arndt wrote to Mr. Blanchard about the effect of Ms. Puffer's smoking on her asthma. She said in part:

I have chronic asthma and cannot be breathing in second hand smoke.

...

While the smoking has been going on, my asthma (which is usually well controlled by the use of an inhaler) has become worse. Not only have I had trouble breathing but have been getting headaches as well from the breathing difficulty. ... Not only is the smoking a nuisance, it is also a hazard to my health. I went to see my family doctor this morning and also explained the situation to him.

7 Ms. Arndt says that on July 26, 2009 Ms. Puffer's smoking became so detrimental to her health that she had to go to hospital emergency and be treated with ventalin.

8 From July 2009 until the complaint was filed in July 2010, the Arndts observed, and were disturbed by, Ms. Puffer and her guests smoking in patio, parking, and other outdoor areas near the two units. When the Arndts asked Ms. Puffer to curtail the smoking, she declined, and suggested they keep their windows closed. The Arndts made numerous representations to the strata council, which, beginning in June 2010, determined that Ms. Puffer was in breach of the strata's bylaws prohibiting activities causing nuisance or hazard to others, and levied a \$25 fine against Ms. Puffer.

9 On June 23, 2010, Mr. Blanchard wrote to Ms. Puffer, part:

We have received a number of complaints once again this year of guests or residents of your unit who are smoking outside and near your unit and the smoke to rising into the unit above.

The Owners above are extremely sensitive to smoke, in fact allergic to second-hand smoke. You are in contravention of both the bylaws of Chelsea Gardens and the City of Surrey smoking bylaw.

10 On August 12, 2010, Ms. Arndt obtained from her doctor a note, exhibited to her February 28, 2011 affidavit, which states:

Kathryn has asthma that is exacerbated by cigarette smoke and she should live in a smoke free environment.

11 In its response to the complaint, Chelsea Gardens says that Mr. Arndt does not allege that he has a disability, and that Ms. Arndt has not provided it with any evidence of a disability or need for accommodation. In any event, it says that, having fined Ms. Puffer, "there is nothing more it could have done in the circumstances".

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12 In her response to the complaint, Ms. Puffer questions whether the smoke affects the Arndts to the degree they allege, disputes her liability under the strata by-laws, and observes that the by-laws do not specifically prohibit smoking on strata lots, balconies or decks. She says she will "not be harassed or be a prisoner in [her] home".

Applications to Dismiss

13 Both Chelsea Gardens' and Ms. Puffer's applications to dismiss the complaint are brought under s. 27(1)(b) and (c) of the *Code*, which 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 that the complaint will succeed.

Ms. Puffer's application

14 Ms. Puffer's application to dismiss the complaint against her personally rests on two arguments: (1) that nothing she is alleged to have done could contravene the *Code* because she was not, as required by s. 8, engaged in providing "any accommodation, service or facility customarily available to the public" to the Arndts; and (2) that Mr. Arndt has not alleged that he suffers from a relevant physical disability of which Ms. Puffer was, or ought reasonably to have been aware.

15 In support of the first argument, [Ms. Puffer relies on *M. v. Strata Plan LMS 2768, 2010 BCHRT 198*](#). In that case, the complainant named BT, an individual resident of that strata, and the spouse of the president of the strata council, as a respondent to her complaint of discrimination based on mental disability. The complainant alleged that BT verbally and emotionally abused her, and that BT made complaints against her to the council. In dismissing the complaint against BT, the Tribunal said:

In considering applications to dismiss under s. 27(1)(b) of the *Code*, the Tribunal assesses whether the complaint, on its face, alleges facts that, if proven, could constitute a contravention of the *Code*. Consideration is not given to any alternative explanation or version of events put forward by the respondents: *Bailey v. B.C. (Ministry of Attorney General)(No. 2)*, [2006 BCHRT 168](#), para. 12.

BT is a resident of the Strata. BT is not a member of Council nor has she ever been. She does not provide any management services to the Strata or the Owners. As such, and in the circumstances of this complaint, I am of the view that she is not a person who provides a service to the Complainants such that her behaviour, even if proven, would be captured by the *Code*. On this basis alone, I would dismiss the complaint against her pursuant to s. 27(1)(b) of the *Code*.

M says that BT exerts influence on her husband who, at the relevant time, was the President of the Strata. Even if this were true, about which I make no finding, this does not suggest that BT is providing a service to the Complainants that is captured by the *Code*.

(paras. 146)

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16 In her affidavit, Ms. Puffer says that she is not, and has never been, a member of the strata council, and does not provide any services to it, its owners, or the Arndts.

17 In their response to this aspect of Ms. Puffer's application to dismiss, the Arndts say only that Ms. Puffer "is a member of the Chelsea Gardens community and contributes to the appointment of the Strata Council." They do not suggest that *M. v. Strata Plan LMS 276*, the reasoning in which I adopt, was wrongly decided, nor do they point to any material distinction between it and the present case. They do not refer to any contrary authority.

18 Accordingly, I do not think the Arndts' complaint alleges acts or omissions against Ms. Puffer that *could* contravene the *Code*, and I dismiss their complaint against her, pursuant to s. 27(1)(b).

Chelsea Gardens' application

19 The strata's application refers to both s. 27(1)(b) and (c), but as all of its submissions are directed to the assertion that the complaint has no reasonable prospect of success, I will deal with it on that basis.

Mr. Arndt's alleged disability

20 The strata submits that Mr. Arndt's application has no reasonable prospect of success, because he does not allege a relevant disability. I agree.

21 The complaint and amendment make no mention of Mr. Arndt's disability. In its response to the complaint, the strata asserts that Mr. Arndt has not alleged that he has a relevant disability. In spite of the fact that the strata makes this an issue in its response, neither of the Arndts' affidavits makes any reference to his having a disability.

22 The Arndts' submission in response to the application to dismiss, which was filed after the Arndts' affidavits were sworn, alleges that Mr. Arndt "suffers from postpolio syndrome" and is "patently in a weakened state of health". The Arndts do not provide any affidavit or medical information to support these assertions, or any material tending to show that there is, or could be, a connection between "post-polio syndrome" and a susceptibility to cigarette smoke, amounting to a disability under the *Code*. Rather, they ask the Tribunal to "take notice that post-polio syndrome qualifies as a 'physical disability' for the purposes of the *Code*".

23 In the absence of any information showing that Mr. Arndt has a relevant disability, there is no reasonable prospect that Mr. Arndt's complaint will succeed. I therefore exercise my discretion to dismiss it, pursuant to s. 27(1)(c) of the *Code*.

Strata's knowledge of Ms. Arndt's alleged disability

24 The strata submits that Ms. Arndt's complaint has no reasonable prospect of success because she has "never demonstrated any connection between her health conditions(s) and the smoke", and because "[n]o medical evidence to support Katherine's assertion that she is highly allergic to smoke has ever been provided to the Strata Corporation". It says that "the first reference she makes to her asthma is in an e-mail dated July 12, 2010".

25 The strata relies on *Brown v. The Owners, Strata Plan LMS 952*, 2005 BCHRT 137 for the proposition that a complaint has no reasonable prospect of success unless the complainant can show that, at the time of the alleged discrimination, she had a disability, that the respondent knew or ought reasonably to have known that she did, and that she requested an accommodation. Further, it says that a lack of medical evidence supporting a request for accommodation resulted in dismissal of complaints in *Calderoni v. Strata Council Plan No. K6*, 2009 [BCHRT, *Testar v. The*](#)

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[Owners, Strata Plan VR1097, 2009 BCHRT 41](#), *Menzies v. Strata Plan NW2924*, [2010 BCHRT 33](#).

26 The factual component of the strata's assertion seems to be answered by Ms. Arndt's July 22, 2009 e-mail to Mr. Blanchard, in which she says in part:

New neighbours have moved in below in Townhouse #267. ... When I entered their garage, [Ms Puffer] was smoking in front of the door to where the hot water tank sat. I politely asked if she would mind moving it as I have chronic asthma and cannot be breathing in second hand smoke.

...

My husband spoke to you on the morning of July 22nd at which time you indicated we should send an email to you which would then be presented to the strata council. You also indicated that you would call the owners of Townhouse #267 to have the situation stopped.

While the smoking has been going on, my asthma (which is usually well controlled by the use of an inhaler) has become worse. Not only have I had trouble breathing but have been getting headaches as well from the breathing difficulty. I do not feel that we should have to keep our doors and windows closed in order to accommodate someone smoking around our home. Not only is the smoking a nuisance, it is also a hazard to my health. I went to see my family doctor this morning and also explained the situation to him.

...We hope the situation can be resolved and once again, it is unfortunate that the situation has escalated to this, however, smoking anywhere around our home most certainly must stop.

(emphasis added)

27 In an October 4, 2009 e-mail to the strata council, copied to Mr. Blanchard, Ms. Arndt wrote, in part:

Once again, I find myself having to inform you of the problems we continue to encounter with the owners of Townhouse #267 which is situated directly below us.

...

On September 24th ... [m]y husband also said [to Ms. Puffer's brother] that he didn't need me to end up in the hospital over second hand smoke again.

...

How am I supposed to survive when my house is filled with smoke. I am once again having trouble breathing from my chronic asthma problem.

...

This situation needs to be addressed and as soon as possible. I do not plan on ending up in the hospital again because of this.

(emphasis added)

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28 In a May 15, 2010 e-mail to Mr. Blanchard, copied to the strata council, Ms. Arndt wrote, in part:

I regret to have to email you again about the second hand smoke problem from the people who live down below us. ...

I thought this problem had been solved last year but obviously, it has started again. I believe they smoke outside to their townhouse does not have smoke in it but why should my townhouse have to be filled with smoke. Why can't I open my windows and not have to be subjected to this attack on my health[?]

... My health is more important than allowing these people to smoke right below our windows.

Surely something can be done to have this stopped.

29 On June 23, 2010, before the strata says it knew anything about Ms. Arndt's asthma, Mr. Blanchard wrote to Ms. Puffer, copied to the strata council:

We have received a number of complaints once again this year of guests or residents of your unit who are smoking outside and near your unit and the smoke ... rising into the unit above.

The Owners above are extremely sensitive to smoke, in fact allergic to second-hand smoke. You are in contravention of both the bylaws of Chelsea Gardens and the City of Surrey smoking bylaw.

(emphasis added)

30 On July 8, 2010, still before the strata says it knew about Ms. Arndt's asthma, Ms. Arndt wrote to Mr. Blanchard, copied to the strata council:

I am writing this letter with respect to the ongoing smoking situation with Ms. Maureen Puffer in Townhouse #267

...

This problem began in early July of 2009. I sent you a very detailed letter via email on July 22, 2009 and have had numerous email and telephone correspondence with you since that time. This entire situation is a matter of a serious health hazard to me. I again emphasize to you that I have chronic asthma and currently take two medications daily to keep it under control.

(emphasis added)

31 The respondents do not dispute that these communications took place. The strata's assertion that it did not know about Ms. Arndt's alleged disability, or that she was requesting an "accommodation", in the form of effective steps to end the smoking which she said affected her health, until July 12, 2010, cannot stand. The materials before me do not suggest that the strata requested medical substantiation of Ms. Arndt's disability or her need for accommodation in July 2009, or at any time thereafter.

32 In my view, Chelsea Gardens has not shown that Ms. Arndt's complaint has no reasonable prospect of success on this basis.

Strata's accommodation of Ms. Arndt

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33 The strata also argues that, if it had a duty to accommodate Ms. Arndt, it fulfilled that duty by first warning, and then fining, Ms. Puffer under its bylaws. It says that "the extent of its duty under the Code is to enforce its bylaws." It also says that the method by which it enforces its bylaws is in its discretion, and that "[s]o long as the bylaw was enforced it is not the role of the Tribunal to judge the method of doing so."

34 I am not persuaded that these arguments deprive Ms. Arndt's complaint of any reasonable prospect of success. Section 4 of the *Code* provides that it prevails over any other enactment, including, for example, the *Strata Property Act*, or by-laws made under it.

35 In my view, the timing, extent and effectiveness of the strata's chosen means of enforcing its bylaws are matters to be considered on evidence and argument at a hearing, if and when Ms. Arndt establishes a *prima facie* case of discrimination based on her physical disability.

36 The strata alleges, and Ms. Arndt does not appear to dispute, that the Arndts have not raised further complaints about Ms. Puffer's alleged breaches of the by-laws since the strata fined her in July 2010. That may go to any remedy to which Ms. Arndt may be entitled, but it does not persuade me that her complaint as to the strata's actions between July 2009 and July 2010 has no reasonable prospect of success.

Decision

37 Ms. Puffer's application to dismiss the complaint against her by both Ms. Arndt and Mr. Arndt is granted.

38 The strata's application to dismiss the complaint against it by Mr. Arndt is granted.

39 The strata's application to dismiss the complaint against it by Ms. Arndt is denied.

40 The case will proceed on Ms. Arndt's complaint against the strata.

Mandatory Mediation

41 As noted, the strata asserts that Ms. Arndt has not raised further problems with smoking from Ms. Puffer's unit since the complaint was filed. It may be that, with the assistance of a Tribunal mediator, the parties can find a resolution which will address Ms. Arndt's past difficulties with the strata, and meet the future needs of both parties, without conducting a hearing, in which neither party is guaranteed success.

42 In these circumstances, I exercise my discretion pursuant to s. 27.3(2)(h) and (3) of the *Code* to require the parties to engage in mediation to attempt to resolve the complaint. The case manager will contact the parties to arrange the mediation on a schedule that will give both parties sufficient time to prepare, if necessary, for the hearing, scheduled for November 2011.

43 In view of my decision with respect to the complaint by Mr. Arndt, and against Ms. Puffer, the parties to the mediation will be Ms. Arndt and the strata.

END OF DOCUMENT