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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Elizabeth Menzies

COMPLAINANT

A N D:

The Owners of Strata Plan NW 2924

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(c),(d)(i), and (e)

Tribunal Member:

Tonie Beharrell

On her own behalf:

Elizabeth Menzies

Counsel for the Respondents:

Shawn M. Smith

I INTRODUCTION

[1] Elizabeth Menzies filed a complaint with the Tribunal, alleging that the respondents, The Owners of Strata Plan NW 2924 (the “Strata”), discriminated against her with respect to a service customarily available to the public, on the basis of physical and mental disability, contrary to s. 8 of the *Human Rights Code* (the “Code”).

[2] The respondents deny discriminating and apply to dismiss the complaint under ss. 27(1)(c), (d)(i), and (e), 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:

...

(c) there is no reasonable prospect that 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

...

(e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;

II BACKGROUND TO COMPLAINT

[3] I set out the following background in order to put the decision in context. In doing so, I am not making any findings of fact.

III ANALYSIS AND DECISION

[4] The Strata consists of four buildings, totalling 151 strata lots, in New Westminster. Ms. Menzies owns a basement apartment in one of the four buildings.

[5] Ms. Menzies states that she suffers from chronic pain related to scoliosis and degenerative spinal problems. She has difficulty sitting, standing still, and walking for

extended periods of time. She is unable to work. As a result, she spends approximately 90% of her time in her apartment.

[6] Ms. Menzies states that she also has difficulty dealing with stress and suffers from depression and anxiety.

[7] Starting in the summer of 2007, four buildings in the Strata began to undergo building envelope repairs. As part of the repair program, some of the existing aluminum windows were removed. The engineer in charge of the project recommended that they be replaced with new vinyl windows, complete with low-e glass. The replacement of the old windows was approved at a special general meeting of the Strata, held on November 9, 2006.

[8] Ms. Menzies states that she and other owners were told that there would be no significant difference between the old and new windows, and that there would be no change in the window configuration.

[9] The respondents state that there were no assurances given that the new windows would be identical to the old ones. In fact, the owners were made aware that the crossbars in the new vinyl windows would be larger than the old aluminum ones, and photographs of the new style of windows were made available for the owners to view. Ms. Menzies asserts that these photographs did not provide a real sense of the differences between the existing and proposed windows.

[10] The respondents state that Ms. Menzies was opposed to the building envelope repair project. She voted against the project at every stage and was vocal in her opposition. Ms. Menzies states that she has never been opposed to the building envelope repairs.

[11] By February 2008, the window replacements had been completed on two of the buildings. Ms. Menzies states that she heard that some owners in each of the buildings had been upset by the new windows, and had been given options for alternate windows.

[12] The respondents state that certain changes to some windows were made early on in the project, but these were the result of things that were discovered as the project moved from paper to realization. Where changes were permitted they were not based on

the request or complaint of just one owner. In each case, several owners objected and a wholesale change was made to keep a uniform appearance to the building. Those changes were carried forward into the other buildings; again, to keep a uniform appearance. None of the changes involved the use of a different type of window.

[13] On February 26, 2008, Ms. Menzies wrote to the respondents' Building Committee (the "Committee"), asking why owners had not been informed of the issues arising out of the new windows. In this letter, she did not raise the issue of her disability or any need for accommodation.

[14] In the Summer of 2008, work started on Ms. Menzies' building.

[15] Ms. Menzies states that in October, one of her neighbours came to her very upset over the new windows. She states that her neighbour appealed to the Committee, and the Committee replaced the window with a different kind of window. Ms. Menzies states that similar offers were extended to three other owners in the Strata.

[16] Ms. Menzies states that it was at this time that she began to appreciate the dramatic impact the new windows would have, and became concerned that she would not be consulted on a choice of windows.

[17] Between October 11 and November 21, 2008, Ms. Menzies wrote several letters to the Committee and the Strata Council, asking for options or appealing their decision on the configuration of her new windows.

[18] On October 11, 2008, she wrote raising issues regarding the wider framing on the windows. She made no mention of her need for accommodation. She stated in part:

Again, I have to ask who is responsible for the window selection? If TROW, what other reconstruction projects have they managed where the same windows have been installed? I would like names and addresses. If any, why were those photos not displayed in our lobby? In fact, out of interest I would like the names & addresses of any new or reconstruction projects that have chosen these windows. Was an architect, designer or other professional consulted to determine the design/visual impact of the windows selected?

I want options. What are they? I do not believe it is acceptable for one floor to be penalized or unfairly impacted by a decision which I believe was ill conceived. Any owner who would take exception to the concerns

that I have raised I believe should consider having their windows re-configured so that the 6" horizontal bar is placed the same distance from the ceiling on awning windows in my suite. This way we can both/all share in the misery. (reproduced as written)

[19] The Committee responded to Ms. Menzies' letter, and she replied on November 2, 2008, taking issue with that response. In that letter, Ms. Menzies asserted that no consideration had been given to the different sight lines in below ground as compared to above ground suites, and the resulting impact on resale value and aesthetics within the suites. In that letter, Ms. Menzies also references s. 164 of the *Strata Property Act*, which allows the court to remedy a significantly unfair decision or action of the strata corporation or council. Again, no mention was made of any disability or need for accommodation.

[20] New windows were installed in Ms. Menzies' suite on November 21, 2008. On the same day, Ms. Menzies' counsel wrote to counsel for the respondents regarding the issue of windows. In the letter, Ms. Menzies' counsel discusses her concern about the windows, the role of the *Strata Property Act* and, for the first time, raises the issue of Ms. Menzies' disability in connection with the windows. The letter states:

Our client suffers from chronic pain and depression. ... As a result, our client spends the majority of her time in her strata lot, which she considers to be her sanctuary. We understand that the new windows that the Strata Council and Building Committee propose to install in our client's unit will affect her condition. Specifically, the significant loss of natural light and the great reduction in her view to the outside.

[21] Counsel requested that the respondents refrain from installing the new windows in Ms. Menzies' unit. The respondents state that, by the time the letter was reviewed by its legal counsel and forwarded to the Committee, the windows had already been installed.

[22] On November 28, counsel for the respondents wrote to counsel for Ms. Menzies. Counsel noted that there was no medical evidence provided to support the claim that Ms. Menzies requires accommodation under the *Code*. Counsel noted that, until such evidence was provided, the respondents could not properly consider a claim for accommodation.

[23] On December 8, Ms. Menzies wrote to counsel for the respondents stating that she would not provide the requested medical information unless she could be assured that it would not be shared with the Strata Council and the Committee.

[24] On December 11, counsel for the respondents responded that such an assurance could not be provided since the Council had to see the information in order to assess her claim for accommodation. Counsel reiterated the respondents' position that, in the absence of medical evidence substantiating her claim, they could not properly assess her claim for accommodation.

[25] Ms. Menzies states that the reduction in light as a result of the installation of the new windows has been dramatic, and the heavy framing of the two new vented windows means that she can no longer see out of those windows. She states that the glass area in her new windows is between 18 and 22% less than the previous windows. In addition, the type of glass used (Low E) transmits 22-30% less visible light. She states that the net result is a significant loss of light through the new windows.

[26] She states that her apartment, which was once her sanctuary, has become a dark prison with bars on the windows. She states that she can no longer live in her apartment, and that her anxiety and stress level has risen dramatically. As a result, her physical pain level has also increased significantly.

[27] She states that the respondents are aware that she suffers from chronic pain and depression, and that she is house bound. She states that they are also aware that the reduction in light and loss of view will negatively affect her condition. They refuse to change the windows.

[28] Ms. Menzies asserts that the selection of the windows and the decisions on window configuration did not take into account the significant reduction in light. This, in turn, discriminates against those who are physically and emotionally affected by a significant reduction in light. Ms. Menzies states that she is sensitive to the absence of natural light, that it affects her energy level and her mental state.

[29] The respondents state that Ms. Menzies' request, through legal counsel, to consider alternatives to the windows, was received at the same time the windows were

being installed, and thus there was no opportunity to avoid the installation of the windows.

[30] The respondents also deny that the windows have any notable impact on Ms. Menzies' health, and notes the following:

- a) The new windows are the same configuration as the old windows. The only difference is in the sizing of the "bars" in the windows themselves;
- b) The reduction in the glass area of each window is not as great as Ms. Menzies' asserts, and the reduced glass area has no noticeable impact on the amount of light entering the unit;
- c) The use of low-e glass does not reduce the amount of light entering the unit; only the harmful effects of the light; and
- d) Ms. Menzies can in fact see out of all her windows.

[31] The respondents state that it has not discriminated against Ms. Menzies and therefore has no obligation to accommodate her medical conditions. There is no negative impact on Ms. Menzies' health, and the respondents have never been provided with medical evidence of Ms. Menzies' medical condition or the impact of the windows. Further, the respondents state that Ms. Menzies' unit is in all substantive respects the same as when she purchased it. The unit is a ground floor suite which is partially underground and thus naturally has less light than other units.

IV ANALYSIS AND DECISION

[32] In my view, the application is appropriately decided under s. 27(1)(c) of the *Code*.

[33] In order to succeed in her complaint that the Strata discriminated against her with respect to an accommodation, service or facility customarily available to the public on the basis of her disability, Ms. Menzies would have to establish that she has a disability, and that the respondents knew or ought reasonably to have known of that disability; that she suffered an adverse impact; and that the adverse impact was related to her disability.

[34] I find that Ms. Menzies' allegations can be divided into two time periods: the first relating to the time period prior to the installation of the windows and her counsel's letter of November 21, 2008; the second relating to the time period after the windows were installed.

[35] With respect to the first period, I am persuaded that there is no reasonable prospect that Ms. Menzies would be able to establish that the respondents were aware of the particulars of her disability, and its relationship to the installation of the new windows. Despite having written a number of letters to the respondents relating to the issue of the window installation, Ms. Menzies never raised the issue of her disability, or any potential impact on her disability until her counsel's letter of November 21, 2008: the day on which the windows were installed. While Ms. Menzies states that she did not appreciate the significant impact the installation of the new windows would have, the fact is that the letter from her counsel was written (very shortly) prior to the installation of the new windows, so it is clear that Ms. Menzies did anticipate some impact relating to her disability.

[36] In addition, there is no information before me that would indicate that the respondents had any other notice of the relationship between Ms. Menzies' disability and the installation of new windows.

[37] As noted by the Tribunal in *Gardiner v. British Columbia*, 2003 BCHRT 41, where a respondent is not aware of a disability, and no accommodation is requested, the duty to accommodate is not triggered (para. 168).

[38] I therefore find that, as of the date that the windows were installed, the respondents had no notice that there were any disability or accommodation issues relating to the impact of the new windows on Ms. Menzies. I find that any complaint that relates to the respondents' decision with respect to the initial installation of the windows has no reasonable prospect of success.

[39] This finding is not, however, determinative of the issue. It is clear on the information before me that, subsequent to the windows being installed, the respondents were provided with information that the new windows may have an adverse impact on Ms. Menzies' health. This is the information contained in the letter from Ms. Menzies' counsel to the respondents on November 21, 2008.

[40] Following this letter, the respondents made attempts to obtain more information from Ms. Menzies with respect to her disabilities and any adverse impact of the new

windows in relation to her disabilities. Ms. Menzies declined to provide that information, citing privacy concerns.

[41] The respondents did not take the position that they would refuse to consider the matter once the windows had been installed. Rather, they asked Ms. Menzies for medical information relating to her assertions that the new windows had a negative impact on her medical conditions. Ms. Menzies did not provide such information to the respondents. She did, however, provide a letter from her general practitioner in her submissions on the respondents' application to dismiss the complaint.

[42] This letter, dated September 26, 2009, states in part:

I have been asked to provide some medical details to support my above patient who has good grounds to object to her new window installations to her apartment.

...

I have examined photos of her windows before and after new installations, and I am in clear support that the new changes do limit light and view to a significant and obvious degree. Such a state is well documented to adversely affect mental state, and thereby physical conditions. I am clearly aware her medical condition restricts her often to her apartment, so with all things considered, this recent installation of her new windows is unacceptable.

[43] Notably, the letter does not detail any specific adverse effect on Ms. Menzies' medical condition as a result of the installation of the windows.

[44] On the basis of all of the information before me, I find that Ms. Menzies' complaint, as it relates to the situation after the installation of the windows, also has no reasonable prospect of success. I come to this decision for the following reasons.

[45] First, while the current medical information discloses a disability, it does not specifically indicate any adverse impact on Ms. Menzies as a result of the installation of the new windows.

[46] Second, I find that the complaint is premature. Ms. Menzies argues that an appropriate accommodation of her would involve the removal of the windows, and their replacement with new ones. Such a remedy would give rise to a potentially significant

cost to the respondents, or the loss of uniformity in the Strata appearance. As noted by the Tribunal in *Calderoni v. Strata Council Plan No. K6*, 2009 BCHRT 10, and *Testar v. The Owners, Strata Plan VR1097*, 2009 BCHRT 41, a strata has a duty to ensure that it makes informed decisions based on adequate information. In this case, the Strata has on at least two occasions advised Ms. Menzies that it cannot adequately assess her concerns in the absence of medical information; information which she has refused to provide.

[47] In *Testar*, the Tribunal relied on the Tribunal's decision in *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)* (1999), 36 C.H.R.R. D/306 (B.C.H.R.T.). In that decision, the Tribunal described the nature of the accommodation process as a cooperative dialogue where the parties work together to find a solution that adequately balances competing interests:

To my mind, the process ... is one in which all those involved are required to work together to find a solution that adequately balances the competing interests. The process requires the party best placed to make a proposal to advance one. The other party or parties must then respond with alternative suggestions and refinements as necessary and the exchange should continue until a satisfactory resolution is achieved or it is clear that no such resolution is possible. A spirit of cooperation is obviously beneficial to this process. (para. 77)

[48] In this case, as in *Testar*, I find that the parties have not yet fully engaged in this type of process. In particular, Ms. Menzies has not provided the respondents with the type of information they would reasonably require to enable them to determine whether Ms. Menzies needs to be accommodated; if so, the extent to which accommodation is required, the options available, and whether do so would amount to undue hardship on them.

V CONCLUSION

For the reasons outlined above, I allow the respondents' application under s. 27(1)(c) of the *Code*, and dismiss Ms. Menzies' complaint.

Tonie Beharrell, Tribunal Member