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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:

Lawrence Westbrook and Margaret Westbrook

COMPLAINANTS

A N D:

Strata Corporation Plan VIS 114

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(d)(ii)

Tribunal Member:	Murray Geiger-Adams
On their own behalf:	Lawrence Westbrook Margaret Westbrook
Counsel for the Respondent:	Claire Pagé

Introduction

[1] Lawrence and Margaret Westbrook filed a complaint in which, as amended, they allege that the respondent, Strata Corporation Plan VIS 114 ("the Strata"), discriminated against them regarding a service on the grounds of their physical disability, contrary to s. 8 of the *Human Rights Code*.

[2] The Westbrooks allege that, after they moved into the Strata in November 2009, they were exposed in their unit to second-hand cigarette smoke, originating in one or more neighbours' suites, and exacerbating their respiratory conditions. They say that the Strata has not taken sufficient measures, including enforcing or altering its by-laws, to prevent or ameliorate its effects on them. Further details of the background to the complaint are set out in the Tribunal's decision on the Westbrooks' application to amend the complaint, and need not be repeated here: *Westbrook and another v. Strata Corporation Plan VIS 114*, 2012 BCHRT 142, paras. 8-21 ("*Westbrook (No. 1)*").

[3] In March 2011, the parties participated in Tribunal-assisted mediation. They disagree over whether they entered into a settlement agreement, whether its terms were fulfilled, and over whether it is a bar to the Westbrooks' proceeding further with their complaint.

[4] On October 29, 2011, the Westbrooks sold their unit in the Strata, and moved out.

[5] On November 23, 2011, the Strata filed an application to dismiss the complaint without a hearing, under s. 27(1)(c) and (d)(ii) of the *Code*, on the basis that it had no reasonable prospect of success, and that proceeding with it would not further the purposes of the *Code*.

[6] On December 19, 2011, the Westbrooks applied to amend their complaint to allege:

- that, after March 2011, the Strata failed to take the measures which, under the settlement agreement, would have obliged the Westbrooks to withdraw their complaint; and
- that the Strata's changes to its by-laws in June 2011 did not prevent their neighbour from continuing to smoke.

[7] In *Westbrook (No. 1)*, issued on April 24, 2012, the Tribunal granted the Westbrooks' application to amend their complaint.

[8] The Tribunal also invited the Strata to file an amended response to the complaint, and to amend its November 23, 2011 application to dismiss the complaint. The strata did file an amended response, but did not amend the application to dismiss the complaint.

[9] This is my decision on the application to dismiss.

The Application to Dismiss

[10] As noted, the Strata's application is brought under s. 27(1)(c) and (d)(ii) of the *Code*, which provide that the Tribunal may dismiss a complaint if it determines either that the complaint has no reasonable prospect of success, or that proceeding it would not further the purposes of the *Code*.

[11] In my view, the application is most appropriately considered under s. 27(1)(d)(ii), and it is not necessary to consider it under s. 27(1)(c).

[12] The March 7, 2011 settlement agreement, signed by or on behalf of all parties, reads:

> 1. Within thirty days, the Strata Council will have a licensed contractor inspect and check the efficiency of the seals in Unit #902 and remedy any deficiencies and report to the Complainants.
> 2. Within thirty days, the Strata Council will have a qualified HVAC contractor inspect the air ventilation system checked for any obstructions within the building and repair any deficiencies and report to the Complainants.
> 3. Upon completion of #1 and #2 and receipt of the reports, the Complainants agree to complete and file a Form 6 – Complaint withdrawal Form with the Human Rights Tribunal and provide a copy to the Respondents.
> 4. Upon completion of #3, the Complainants and Respondent release each other of any and all claims, actions, causes or demands relating to those matters or merits[?] raised in the complaint.

[13] The parties appear to agree that clause 2 of the settlement agreement was satisfied; the issues between them are whether the Strata performed all its obligations under clause 1, and, in any event, whether the agreement settled the complaint.

Did the Strata perform clause 1 of the settlement agreement?

[14] On March 11, 2011, the Strata obtained an air quality assessment report from West Bay Mechanical Ltd. ("West Bay"). There does not seem to be any issue that West Bay was a licensed contractor, as provided for in the settlement agreement, that it inspected and checked the seals in unit #902, which was the unit from which the Westbrooks alleged cigarette smoke was escaping, and entering their unit, or that the report was provided to the Westbrooks.

[15] So far as it concerned the seals in unit #902, the West Bay report recommended replacement of plastic patches on wall penetrations under the kitchen sink and behind the washer and dryer with permanent drywall patches. It also recorded that it had replaced a masking tape seal on the range hood ductwork with tin tape, and that it was now adequately sealed.

[16] In subsequent correspondence, the Strata advised the Westbrooks that, as West Bay did not provide drywalling services, it had engaged its property management company to perform the required drywall patches. It provided photographs of the repairs.

[17] The Westbrooks objected to the introduction of an "administrative third party" (apparently a reference to the property management company), said that they would not accept "third-party photographs", and said that what was required was sealing of the unit to confine smoke to it, and their "in-person visual inspection of the sealing process".

[18] In my view, the materials before me suggest that the Strata substantially complied with clause 1 of the settlement agreement. It set out a mutually-agreeable process under which an "independent expert" would inspect the seals and recommend needed changes. This is what happened, and the improvements to the seals recommended by West Bay were implemented.

[19] The agreement did not guarantee that implementing West Bay's recommendations would eliminate the Westbrooks' experience of second-hand smoke. As acknowledged by the Westbrooks in an April 15 letter to counsel for the Strata, the agreement did not specifically provide for an inspection of their unit, or a determination that the repairs had been effective.

[20] Section 30 of the *Code* provides that enforcement of settlement agreements is a matter for the courts, rather than the Tribunal. Quite apart from the question of whether, in the face of s. 30, the Westbrooks could seek to enforce compliance with the settlement agreement by pursuing their complaint before the Tribunal, I find that the Strata did what the settlement agreement required it to do, and that there was nothing left to enforce against it.

Did the settlement agreement settle the complaint?

[21] In their correspondence with the Strata's counsel in April 2011, the Westbrooks refer to, and rely on the "obligations" created by "the Settlement Agreement that was signed on March 7, 2011", and to "the settlement contract signed on March 7, 2011". In their August 23, 2011 letter to the Tribunal, copied to counsel for the Strata, the Westbrooks refer to the "Settlement Contract that was negotiated at the Early Settlement Meeting on March 7, 2011".

[22] By contrast, in their submissions to the Tribunal on this application, the Westbrooks say:

> The hand-written document, on which the Respondents rely in their application, is not a "settlement contract"; rather it is an "informal settlement proposal" that provided for terms that the Respondent would undertake within a 30-day time period.
>
> The "informal settlement proposal" is not, nor ever was, a valid contract that would legally bind the parties to its terms, unless the parties had taken the additional steps to ratify and formalize it. ... There is some question as to the document's confidentiality, the document does not identify the parties' names, only one (of the 3) Respondents signed it, it provides for no consideration or compensation, there is no admission of liability, and its terms expired within 30 days. It does not meet the criteria of a "reasonable settlement proposal" as defined by *Pasutti v. Best Buy*, 2008 BCHRT 56, para. 17.

[23] There is no support in the materials before me for the suggestion that the March 7, 2011 document was an informal proposal, rather than an agreement. It refers to an "agreement" of the parties. It references the Tribunal's case number. It is signed by both of the Westbrooks, and on behalf of the Strata – i.e. by all the parties to the complaint. It does not refer to any process of ratification or formalization by others. It contemplates withdrawal of the complaint when the Strata's obligations under it are fulfilled. It does

not refer to any other obligations or understandings, nor does it, as asserted by the Westbrooks, depend on an assurance from the occupant of unit #902 that she will stop smoking in her unit. It does not provide that its terms "expire" after 30 days. As noted, after the 30 days, the Westbrooks continued to refer to it as a "Settlement Agreement" and "Settlement Contract", and sought to have the Strata perform obligations created by it.

[24] The Westbrooks' reliance on *Pasutti* is misplaced. That was a case in which the respondent sought dismissal of a complaint, not, as here, on the basis that it had been settled by the parties between themselves, but on the basis that the complainant had refused a reasonable settlement offer. It was in that context that the Tribunal was required to assess the reasonableness of the settlement offer. Here, the question is not whether the agreement the Westbrooks signed was reasonable, but whether it was effective to settle the complaint. In my view, it was.

[25] In *Dyson v. University of Victoria*, 2009 BCHRT 209, the Tribunal discussed factors it may consider in deciding whether to give effect to a settlement agreement:

> [W]here a complaint has been settled, proceeding with it will not further the purposes of the *Code*: see *Thompson v. Providence Health Care*, 2003 BCHRT 58. In that case, the Tribunal set out a non-exhaustive list of the factors it would consider in deciding whether it would further the purposes of the *Code* to allow a complaint to proceed in the face of a settlement agreement:
>
> - The language of any release signed by the parties;
> - Whether the party seeking to file a complaint in the face of a settlement agreement received independent legal advice;
> - Whether the agreement is unconscionable, meaning that there was an inequality of bargaining power and a substantially unfair settlement;
> - Whether there was undue influence, such as coercion, oppression, abuse of power or authority or compulsion;
> - Whether there was duress, not merely stress or unhappiness; and
> - The knowledge of the party executing the release of their rights under the *Code*: para. 44
>
> (para. 29)

[26] In the present case, the release in the settlement agreement is comprehensive, encompassing all matters raised in the complaint. The complainants were represented in

the earlier stages of the process, and there is no indication that they did not have access to independent legal advice before signing the settlement agreement. There is nothing unconscionable about the agreement. There is no indication in the materials of undue influence, or duress. The Westbrooks clearly had knowledge of their rights under the *Code*.

[27] In these circumstances, there is no basis on which the Tribunal could refuse to give effect to the settlement agreement negotiated between the parties, reduced to writing in a formal agreement, and signed by or on behalf of all of them. The complaint as it stood in March 2011 was settled in its entirety. Further, and assuming, without deciding, that the Strata's performance of its obligations under the settlement agreement was a precondition to withdrawal of the complaint, rather than a matter of enforcement through the courts, I have found that the Strata fulfilled those obligations.

Could the June 2011 by-law amendments found a further complaint?

[28] As noted, in *Westbrook (No. 1)*, the Tribunal permitted the Westbrooks to amend their complaint to allege that the Strata changed its by-laws without preventing their neighbour in unit #902 from continuing to smoke there.

[29] In June 2010, the Westbrooks sponsored a petition seeking a special general meeting to consider a resolution to amend the Strata by-laws to prohibit smoking anywhere in the Strata. On July 5, 2010, the meeting was held, and the motion was defeated. The Westbrooks then promptly filed their complaint. I have determined that, in March 2011, they settled that complaint, in its entirety.

[30] On June 13, 2011, the Strata owners adopted a new by-law, which banned smoking throughout the Strata, but exempted those, including the Westbrook's neighbour, who registered as smokers. Clearly, the Westbrooks do not think that the new by-law went far enough.

[31] In my view, the original complaint included an allegation that the then-existing by-laws were sufficient to prevent the occupant of unit #902 from smoking (as a nuisance), and that, if they were not, then the Strata was obliged to amend the by-laws to bring them into conformity with the *Code*. The Westbrooks' December 21, 2011

amendment to their complaint appears to me to be a restatement of that allegation, which has already been settled, as between the Westbrooks and the Strata, by the March 2011 settlement agreement. Accordingly, I do not think it is open to the Westbrooks to revive this allegation, and to pursue it in the face of the settlement agreement.

Conclusion

[32] The settlement agreement settled the original complaint, and prevented the Westbrooks from pursuing a complaint raising substantially the same allegations. The Strata performed its obligations under the settlement agreement. In these circumstances, I determine that it would not further the purposes of the *Code* for the Tribunal to permit the Westbrooks to proceed with their complaint.

[33] This is a decision on the existence and effect of a settlement agreement, in the particular circumstances of this case. Nothing in it should be taken as a comment on the validity or otherwise of the positions taken by the parties on the merits of the Westbrooks' complaint, or with respect to the validity or otherwise of strata by-laws which may be raised as a defence to other claims of discrimination based on disability.

Summary of Decision

[34] The respondent's application to dismiss the complaint, under s. 27(1)(d)(ii) of the *Code* is granted.

[35] The complaint is dismissed.

Murray Geiger-Adams, Tribunal Member