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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:

Gisele Dandurand

COMPLAINANT

A N D:

The Owners, Strata Plan KAS 3558

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(b) and (c)

Tribunal Member:

Norman Trerise

Agent for the Complainant:

Christopher McKellar

Counsel for the Respondents:

Jordan A. Copeland

I INTRODUCTION

[1] Gisele Dandurand filed a complaint alleging that the Owners, Strata Plan KAS 3558 discriminated against her with respect to her strata occupancy on the basis of a mental disability contrary to s. 8 of the *Human Rights Code* (the “Complaint”). The Respondents deny discriminating and apply to dismiss the Complaint pursuant to section 27(1)(b) and (c) of the *Code*.

[2] The Complaint relates to the Strata Council’s enforcement of a bylaw prohibiting smoking within the bounds of the strata plan, including Ms. Dandurand’s patio. The relevant provisions of s. 27 of the *Code* provide as follows:

(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;

[3] I will be making no findings of fact in making my determination in this application. I have read all of the material presented by the parties but will refer only to the information I consider necessary to my analysis.

II BACKGROUND TO THE COMPLAINT AND APPLICATION

[4] Ms. Dandurand is a tenant of a strata unit owner in a unit located at Strata Plan KAS 3558 (the “Unit”).

[5] When Ms. Dandurand moved into the Unit in July 2012, smoking was allowed on the patios within the strata plan.

[6] In 2014, the strata passed a non-smoking bylaw which read:

Smoking is not permitted anywhere within the bounds of the strata plan or within any vehicle or real property which is a common asset of the Strata Corporation.

The new smoking bylaw allowed the Strata Council to provide exemptions to any bylaw or rule of the Strata Corporation to the minimum extent necessary to accommodate a physical or mental disability as defined in the B.C. *Human Rights Code* with certain specified restrictions.

[7] Ms. Dandurand is a smoker suffering from a serious anxiety disorder. She is mostly homebound and rarely ventures outside of her Unit.

III THE COMPLAINT

[8] The smoking bylaw commenced to be enforced on or about December 1, 2014 and shortly thereafter, on December 12, 2014, Ms. Dandurand filed her Complaint.

[9] On November 6, 2014, Ms. Dandurand's psychiatrist provided a letter, which in turn Ms. Dandurand provided to the Strata Council, which read:

Ms. Dandurand suffers from a serious anxiety disorder. She was informed that she is not allowed to smoke on the patio or anywhere around the building where she resides.

The patient has difficulty with her sleep patterns and due (*sic*) anxiety symptoms.

I am of the opinion that it will be detrimental to the patient's treatment if she needs to leave the building to smoke.

I strongly recommend that an exception be made to allow the patient to smoke on her patio.

[10] By letter dated December 3, 2014, the Strata Council refused to provide an exemption to the smoking bylaw.

[11] On the strength of those facts, the Complaint was filed.

IV THE APPLICATION TO DISMISS

[12] The Strata Corporation submits that the Complaint alleges discrimination in the area of services on the basis of a mental disability contrary to s. 8 of the *Human Rights Code*. I note that, in fact, the Complaint specifically refers to the area of discrimination as tenancy which is s. 10 of the *Code*. I also note that, in the case of the relationship between a strata corporation and an owner of a unit, a Complaint is properly made under s. 8

where it relates to the services a strata provides to the owners: *Williams v. Strata Council #728*, 2003 BCHRT 17, paras. 61 and 62.

[13] The relevant provisions of s. 10 read:

- (1) A person must not, without a bona fide and reasonable justification,
- a. deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - b. discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
- because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that class of persons.

[14] As previously stated, the application to dismiss is made pursuant to section 27(1)(b) and (c) of the *Code*.

The Acts or Omissions Alleged in the Complaint do not Contravene the Code – Section 27(1)(b)

[15] The Respondents submit that the Complainant, even if the Complainant could prove all of the facts alleged in the Complaint, could not prove a contravention of the *Code*. The Respondents acknowledge that, for purposes of s. 27(1)(b) of the *Code*, the Tribunal is only entitled to look at the facts alleged in the Complaint, without consideration of any explanation or additional facts raised by the Respondents.

[16] In essence, the Respondents submit that the Complainant's condition is a mental disability as alleged in the Complaint. They say it is not alleged that her disability requires that she smoke cigarettes, but rather that is a habit in which she engages. They say that smoking is not a necessary component of the Complainant's condition nor a treatment for it. The Respondents say, therefore, that the alleged adverse treatment (i.e. preventing her from smoking on her patio) is not related to Ms. Dandurand's disability and the Complaint must be dismissed.

There is no Reasonable Prospect that the Complaint will Succeed – Section 27(1)(c)

[17] The Respondents say that Ms. Dandurand is a tenant of the Unit but is not an owner. The Respondents understand that Ms. Dandurand has voting rights granted to her by the owner of the Unit in which she resides.

[18] The Respondents submit that permitting the smoking of tobacco on balconies is not a “service customarily available to the public”.

[19] The Respondents say there is no legal precedent for holding that a strata corporation is required to provide the “service” of allowing the smoking of tobacco on the limited common property or common property of a strata plan. Alternatively, they submit that Ms. Dandurand has not received differential treatment or been denied a service on the basis of a prohibited ground of discrimination.

[20] The Respondents submit that the facts of this case do not give rise to a duty to accommodate because there is an insufficient nexus between Ms. Dandurand’s mental disability and the nature of the accommodation sought, being exemption from the non-smoking bylaw. They say, at most, tobacco smoking can be said to be a habit that Ms. Dandurand engages in rather than a medical treatment for her disability or an integral part of her disability. In that regard, they rely on a letter dated October 15, 2015 from Ms. Dandurand’s psychiatrist which reads:

I, Alexander McIntyre, a registered psychiatrist in the Province of British Columbia hereby state that Ms. Dandurand is under my treatment.

Diagnosis:

1. Treatment resistant, Major Depressive Disorder recurrent. Severity: severe with anxious distress.
2. Post-Traumatic Stress Disorder.
3. Anxiety Disorder with comorbid panic attacks.

The patient is severely impaired as a result of her psychiatric conditions. As a result of these conditions, she is unable to leave her apartment for days at a time. She has a serious sleep disorder with middle and terminal insomnia.

Smoking is a coping mechanism for her mental health and asking her to change this habit will have painful consequences. Smoking cessation

strategies is (*sic*) not indicated due to the severity of her psychiatric illness and several of the pharmacological agents used in smoking cessation can lead to worsening of anxiety and depression.

I am of the opinion that it would be detrimental to this patient to leave her apartment to smoke as this will lead to a rapid decompensation.

[21] In addition, Dr. McIntyre provided a letter dated May 28th, 2015 which reads:

Ms. Dandurand has been under my treatment since June 2013.

The patient has a diagnosis of:

1. Treatment resistant Major Depressive Disorder Severity: severe with anxious distress.
2. Post-Traumatic Stress Disorder.
3. Anxiety Disorder with comorbid panic attacks.

This patient is severely impaired by her psychiatric illness and at times finds it difficult to leave her apartment for days at a time. She has a serious sleep disorder and is awake numerous times during the night. She does feel hopeless and worthless at times.

The patient unfortunately smokes and this habit helps her cope with some of her anxiety symptoms. Due to the severity of her psychiatric disorder she finds it very difficult to leave her apartment/building.

I am requesting that the patient be allowed to smoke on her patio.

I am of the opinion that it is detrimental to the patient's health if she needs to leave the building to smoke.

I once again strongly request that an exception be made for the patient to smoke on her patio due to the severity of her illness.

[22] The May and October 2015 psychiatrist letters did not come to the attention of the Respondents until after the Complaint was filed.

[23] The Respondents submit that to provide the Complainant with an exemption to the non-smoking bylaw would defeat the purpose of the bylaw which is to provide a non-smoking environment for the benefit of all owners and would constitute undue hardship. They say that the Tribunal has confirmed that, in particular circumstances, there may be a positive onus on strata corporations to provide non-smoking environments for the benefit

of certain owners protected by the *Code*. In that regard, they rely on *McDaniel and McDaniel v. Strata Plan LMS 1657 (No. 2)*, 2012 BCHRT 167.

[24] Further, they rely on a decision of the Supreme Court of British Columbia in *Young v. Saanich Police Department*, 2003 BCSC 926, in which the court stated:

Although the alleged CRHC policy may have had an adverse effect on Mr. Young by reason of the characteristic incidental to his disability, that policy is reasonably necessary to avoid undermining the legitimate objectives for which the CRHC was established. To force the CRHC and its tenants to tolerate Mr. Young's marijuana smoking would, in my view, constitute an imposition of undue hardship. para. 93, affirmed on other grounds 2004 BCCA 224, leave to appeal to SCC denied [2004] S.C.C.A. No. 255.

[25] The application to dismiss is supported by two letters received from owners of units in the strata. The first is a letter dated May 22, 2015 from owners residing in Unit 304 expressing concern about secondhand smoke entering their unit from a neighbouring unit. There is no indication in the material that either of the signatories to the letter fall within a ground under the *Code* or that the secondhand smoke in any way affects any disability that they may suffer from. The thrust of their concern is respecting odour.

[26] The second letter dated May 30, 2015 is from a resident in Unit 605 expressing concern about residents of the strata who smoke cigarettes on their balcony and the transportation of tobacco smoke into their unit. Again, there is no suggestion that any of the residents of Unit 605 suffer from any disability which might be adversely affected by tobacco smoke. The thrust of this letter is the potential health consequences of inhalation of secondhand smoke both to the signatories and their two young sons.

V THE COMPLAINANT'S RESPONSE

[27] Ms. Dandurand makes a number of submissions that are grounded in and reveal information arising from the Tribunal's mediation process. That is inappropriate. The parties to such mediation processes sign an agreement that the mediation process is confidential and that information from the mediation process cannot be entered in evidence in any proceeding, including a Tribunal hearing. No such submissions will be considered in this decision.

[28] Further submissions are presented with respect to nicotine addiction as a disability. I note that the Complaint confines itself to Ms. Dandurand's mental disability and that there is no evidence that she is addicted to nicotine, albeit in the circumstances described in Dr. McIntyre's correspondence, it is reasonable to assume that she might be. Once again, given the parameters of the Complaint, those submissions are not being considered in this decision.

[29] Ms. Dandurand further submits that her smoking on the patio outside her unit does not cause nuisance or hazard to another person such that it would offend the *Strata Property Act*.

[30] Ms. Dandurand submits that the smoking prohibition bylaw is not enforceable because it contravenes the *Human Rights Code*.

[31] Ms. Dandurand submits that the Respondents had sufficient information in the medical report provided to them to invoke a duty to inquire and failed to make the necessary inquiries regarding her medical condition which would allow them to have meaningful conversations respecting accommodation.

[32] Additionally, Ms. Dandurand submits that the Strata Council's refusal to allow her to smoke on her patio had a differential and adverse impact on her by virtue of her disability.

VI RESPONDENTS' REPLY

[33] The Respondents say that the two letters from owners objecting to residents of the strata smoking on their patios are illustrative of the views of some residents in the complex concerning secondhand smoke and that the owners have collectively expressed their "majority will" by passing the non-smoking bylaw.

[34] Further, the Respondents state that they will not be aware of whether any current residents suffer from *Code*-protected disabilities exacerbated by secondhand smoke until such disabilities are in fact diagnosed and suggest that they are being asked by the Complainant to take a chance that the smoke will not cause an actionable nuisance to other residents, nor disturb or cause harm to a person with a disability.

VII ANALYSIS AND DECISION

The Acts or Omissions Alleged in the Complaint do not Contravene the *Code* – Section 27(1)(b)

[35] As previously stated, the Tribunal, under this subsection of the *Code*, must look only at the allegations in the Complaint to determine whether those allegations could constitute a contravention of the *Code*.

[36] The Respondents say that the allegations could not contravene the *Code* because the facts alleged in the Complaint do not establish a sufficient connection or nexus between Ms. Dandurand's mental disability and the adverse effect resulting from the Strata Council's decision to decline an exemption to the non-smoking bylaw.

[37] There is enough information in the Complaint to support that:

1. Ms. Dandurand suffers from a mental disability, being a serious anxiety disorder
2. that she was prohibited from smoking on her patio, and
3. that it will be detrimental to her treatment if she is not allowed to smoke in the vicinity of her unit.

[38] I appreciate that the November 6, 2014 correspondence from Dr. McIntyre was not a model of clarity, however, it contained enough information to support the points enumerated immediately above. The Tribunal has clearly stated that, in the context of an employee relationship, where sufficient information is made available to a respondent to alert them to the possibility of a connection between a ground under the *Code* and the adverse effect of their decisions respecting a complainant, a duty to inquire arises; *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376, para. 332; *XS v. YP*, 2015 BCHRT 97, paras. 61-63. In my view, the analysis employed in employment cases is equally applicable in these circumstances.

[39] I am satisfied that there is sufficient information in the Complaint to be capable of supporting a decision that the facts alleged in the Complaint contravene the *Code*. I am not prepared to dismiss the Complaint pursuant to s. 27(1)(b) of the *Code*.

No Reasonable Prospect of Success – Section 27(1)(c)

[40] This section involves a preliminary assessment by the Tribunal of whether there is no reasonable prospect that the Complaint will succeed; *Workers' Compensation Appeals Tribunal v. Hill*, 2011 BCCA 49. This provision provides a gatekeeping function that permits the Tribunal to conduct that preliminary assessment in order to remove those matters that do not warrant the time and expense of a hearing: *Hill*, para. 27.

[41] Section 27(1)(c) is a discretionary exercise by the Tribunal and does not require factual findings; the Tribunal just assesses the evidence submitted by the parties; *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, para. 22. The threshold for the Complainant in such a review is low. They must only show that their complaint is not merely speculation or conjecture: *Hill*, para. 27.

[42] When considering an application under s. 27(1)(c) of the *Code*, the Tribunal does not determine whether the Complainant has established a *prima facie* case of discrimination: *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, para. 11. It is true, however, that if it can be demonstrated that a complainant has no reasonable prospect of proving an element of the *prima facie* test at a hearing, the complaint may be dismissed.

[43] In order for Ms. Dandurand to establish that the Respondents discriminated against her contrary to s. 8 of the *Code* on the basis of a mental disability, she will be required to show:

1. that she suffers from a mental disability;
2. that she received differential treatment with respect to an accommodation, service or facility customarily available to the public or that, in her particular circumstances, the application of the strata's bylaw had an adverse impact on her; and
3. that her disability was a factor in that adverse treatment. *Harton v. Strata Plan LMS 195*, 2010 BCHRT 132, paras. 19 and 20 and *Moore v. British Columbia (Education)*, 2012 S.C.C. 61, para. 33.

[44] Quite properly, given the letters from Dr. McIntyre, the Respondents have accepted, for the purposes of this application, that Ms. Dandurand suffers from a mental disability in the form of an anxiety disorder. It is clear that she also suffers from a major, severe depressive disorder and a post-traumatic stress disorder. Those letters say that comorbid panic attacks are a feature of her anxiety disorder. It is clear that she meets the first component of the *prima facie* discrimination test.

[45] The Respondents argue that the issue of a bylaw prohibiting the smoking of tobacco on the strata property is not a service customarily available to the public. I would take issue with the suggestion that the service provided by the strata which is at issue is prohibiting the smoking of tobacco on balconies. That is an excessively limited interpretation of the terminology “accommodation, service or facility customarily available to the public” which the Tribunal is obliged to interpret using a broad, liberal and purposive approach, *University of British Columbia v. Berg* [1993] 2 S.C.R. 353, p. 370.

[46] They also state that, “This Tribunal has confirmed that in particular circumstances, there may be a positive onus on strata corporations to provide non-smoking environments for the benefit of certain owners protected by the *Code*”; *McDaniel*. Upon a review of that decision, I am unable to find any such statement therein. In any event, there is no evidence before the Tribunal that any unit holder in the strata other than Ms. Dandurand suffered from any disability or any other ground specified in the *Code* which made them unusually susceptible to the impact of cigarette smoke.

[47] I prefer the approach taken by the Tribunal in *Shannon v. The Owners, Strata Plan KAS 1613 (No. 2)*, 2009 BCHRT 438 in which it is stated:

Tribunal case law, including *Holowaychuk and Ross*, drawing on *Konieczna v. The Owners Strata Plan NW 2489*, 2003 BCHRT 38, paras. 12-37, and *Williams v. Strata Council #768*, 2003 BCHRT 17, paras. 59-62, has firmly established that strata corporations are, in some respects, in a service relationship with the owners who make up their membership. In providing services to their members, strata corporations are subject to the requirement, contained in s. 8 of the *Code*, not to discriminate.

[48] In *Shannon*, the specific service provided by the strata was that of considering, and either approving or rejecting, a request to install a solar screen on the front window of the Shannons' home. This was seen as a particular example of the strata's more general service of enforcing and applying its bylaws, including Article 5 (paras. 175 and 176).

[49] I am satisfied that the same service relationship exists where, as here, the Complainant rents a unit from an owner who makes up a portion of the membership of the strata. Further, it is clear to me that the specific service provided by the Respondents herein was that of considering and either approving or rejecting a request for an exemption to the smoking bylaw. This is a particular example of the strata's more general service of enforcing and applying its bylaws, including Articles 3(10) and 34.

[50] It is of no import that the no-smoking bylaw was enacted by a majority of the owners in the strata corporation if the bylaw is enforced without regard to the requirements of the *Code*.

[51] In this particular instance, on the facts in this case, the Respondents have failed to convince me that Ms. Dandurand has no reasonable prospect of proving a *prima facie* case of discrimination. On the facts, it is possible that she could establish:

- a. that she suffers from a mental disability,
- b. that the decision not to grant her an exemption from the non-smoking bylaw was adverse to her health, and
- c. that adversity arose because of the role that smoking played, according to her physician, as a coping mechanism for her mental health, ie. the bylaw made her condition worse.

[52] In other words, she is capable both of establishing that there was an adverse treatment of her and that her mental health disability was a factor in such treatment being adverse. It is not necessary that she establish that the smoking was an addiction, although it seems likely that it was, given the language in her doctor's letters, but only that there be a connection between the refusal to exempt her from a non-smoking bylaw and the adverse health effects occasioned by her disability.

[53] That is not the end of the matter, however. At the hearing of her Complaint, if Ms. Dandurand is successful in establishing a *prima facie* case of discrimination, she will still need to deal with the Respondents' argument that there was a *bona fide* and reasonable justification for their decision. They say this was the requirement to protect the other members of the strata from the known carcinogenic impact of secondhand tobacco smoke.

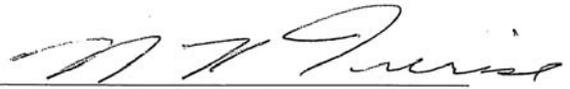
[54] In that regard, there is insufficient material before the Tribunal to make a determination respecting the prospect of success of such an argument. Ms. Dandurand resided in Unit 203 of the strata. The letters from strata members complaining of secondhand smoke came from inhabitants of Units 304 and 605 of the strata. No information is presented respecting the relative location of either of those units to Unit 203. It might reasonably be suspected that Unit 203 is close in proximity to Unit 304, but there is no material presented that would substantiate that fact. Further, there is no information respecting what, if any, efforts were made by the strata to consider whether it was possible to accommodate Ms. Dandurand's request without exposing other members of the strata to the ill effects of secondhand smoke. Nor is there any evidence to suggest that any owner of a unit in the strata experienced a disability which could be exacerbated or impacted by the secondhand smoke issue.

[55] It is understood that secondhand smoke is potentially harmful and there is certainly a possibility that, even in the absence of specific evidence of the disabilities which may or may not exist in other owners, a *bona fide* reasonable justification could be successful. It is doubtful that Ms. Dandurand's submissions to the effect that secondhand smoke could not potentially constitute a nuisance to other owners in the strata would be persuasive. However, on a s. 27 application, a party to a complaint is obliged to put before the Tribunal all information that they consider would be relevant to support their position. The Respondents have failed to do that in that there is no information respecting the relationship of Unit 203 to other units in the strata from which the Tribunal might discern the strength or weakness of the *bona fide* reasonable justification argument.

VIII CONCLUSION

[56] The Respondents have failed to establish that this Complaint has no reasonable prospect of success and, accordingly, I decline to dismiss the Complaint pursuant to s. 27(1)(c) of the *Code*.

[57] I point out that this is not a conclusion that the Complaint will be successful. The outcome will turn, as in most cases, on the facts presented to the Tribunal at the hearing of this matter. I would encourage the parties to engage in the Tribunal's mediation process.



Norman Trerise, Tribunal Member