Date Issued: February 29, 2012
File: 8507

Indexed as: McDaniel and McDaniel v. Strata Plan LMS 1657 and others,
2012 BCHRT 42

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:

Melanie McDaniel and Matthew McDaniel

COMPLAINANTS

A N D:

Strata Plan LMS 1657, Metro One and NAI Goddard & Smith Realty Services Inc.

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Sections 27(1)(c) and(d)(i)

Tribunal Member:	Norman Trerise
On behalf of the Complainants	Melanie McDaniel and Matthew McDaniel
Counsel for the Respondents:	Shawn Smith

I INTRODUCTION

[1] Melanie and Matthew McDaniel filed a complaint alleging that the Respondents discriminated against them with respect to services, on the basis of physical disability, contrary to s. 8 of the *Human Rights Code*. The Respondents deny discriminating, and apply to dismiss the complaint pursuant to ss. 27(1)(c) and 27(1)(d)(i) of the *Code*. These sections provides 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:
>
> (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... alleged to have been discriminated against...

[2] I make no findings of fact in making my determinations on this application. I have read all of the materials presented by the parties but will refer only to those I consider necessary to my analysis.

II COMPLAINT

[3] Mr. and Mrs. McDaniels were, at all relevant times, residents in and owners of a unit in Metro One, a strata complex ("Metro One").

[4] On August 5, 2010, they filed their complaint alleging that they were subjected to second-hand smoke by other residents in limited common property areas and in their units and that, despite their complaints, the Respondents took no action to correct the situation.

III FACTUAL BACKGROUND TO APPLICATION

[5] The McDaniels purchased their unit in Metro One in 2008. In the ensuing period, and in particular in 2009 and 2010, they experienced intrusive second-hand smoke entering their unit from the patio of the unit immediately below theirs. They requested the

assistance of the Respondent NAI Goddard & Smith Realty Services Inc. ("NAI") with their issue, commencing in July 2008. In a letter dated July 15, 2008, Mrs. McDaniel advised NAI that she has extreme health issues in response to cigarette smoke and other strong scents.

[6] In September 2009, the McDaniels communicated to NAI that they were requesting that the Strata hold a vote on a resolution to ban smoking in Limited Common Property areas of Metro One. This would have included patios, ground level yards and within 3 meters of exits and entrances.

[7] On August 18, 2009, the Council sent out a notice to residents at Metro One requesting that they exercise courtesy and not smoke on their patio or with their windows open.

[8] On October 27, 2009, unhappy with the efforts of the Council, the McDaniels threatened a human rights complaint if the issue was not rectified to their satisfaction. They enclosed a form of communication which they intended to circulate to residents seeking support for a smoking ban on Limited Common Property.

[9] Communications back from NAI, on behalf of the Council, made it clear that the Strata wished the McDaniels to make it clear to residents that what was sought was their initiative and not the Strata's.

[10] On March 24, 2010, the Strata agreed to hold a meeting on May 11, 2010 to vote on a resolution to ban smoking in the Limited Common Property areas. The special meeting was held and a resolution to ban marijuana smoking and to ban smoking generally in the Common Property areas only was passed. Through no fault of their own, the McDaniels were unable to attend the meeting.

[11] On July 9, 2010, the McDaniels wrote to NAI setting out that they experience "extreme health issues" related to second-hand smoke and requesting that the Council act to uphold the nuisance by-law in force at Metro One.

[12] On July 25, 2010, the McDaniels communicated to NAI that they were still experiencing second-hand smoke and that they suffer from Diabetes and extreme allergic reaction related to smoke exposure.

IV APPLICATION TO DISMISS

POSITION OF THE RESPONDENTS

[13] NAI states that the complaint has no reasonable prospect of success against them because NAI simply carried out the instructions of the Strata Council (the "Council") for Strata Plan LMS 1657 (the "Strata") and had no authority to change the course of actions determined by the Council. They also adopt the positions taken by the Strata in this complaint.

[14] The Strata submits that pursuing the complaint to a hearing, even if the Complainants were successful, would provide no benefit to the Complainants because the Complainants were foreclosed out of their unit in the Strata as of June 14, 2011. They have since moved to Kamloops.

[15] The Strata further submits that there is insufficient medical information available to establish a duty to accommodate the McDaniels' issue. They also suggest that the onus is on the McDaniels to prove their disability and that the Strata's actions adversely impacted on those disabilities. They submit that the McDaniels' communications respecting the impact of second-hand smoke were made in the context of second-hand smoke generally. They suggest that no medical information was provided to the Strata which supported Ms. McDaniel's assertion that her Candidiasis is aggravated by second-hand smoke. In the same vein, they submit that the information submitted to them respecting Mr. McDaniels' Diabetes condition does not suggest that the impact of second-hand smoke affects him differently than the public at large.

POSITION OF THE COMPLAINANTS

[16] Mr. and Mrs. McDaniels respond to the submissions of NAI by asserting that it is NAI's duty to manage and maintain the common property; therefore, they had a duty to mediate and otherwise intervene to assist the Complainants. Further, they submit, in response to the submissions of the Strata, that they derive a benefit, even if they no longer reside at the Strata, because they have a have a duty (to themselves it appears) to pursue this issue to resolution, they could have been liable to future owners should they experience the same problem, the topic is important in Canada today and a decision will

assist others fighting the same battle, other owners in the building support their position, and that just because the issue is no longer a live issue does not mean that discrimination has not occurred.

[17] On the s. 27(1)(c) issue, the McDaniels submit that they are not required to provide medical support for the impact of the cigarette smoke on their disabilities. They present medical notes and medical reports to the Respondents and the Tribunal that were apparently not in the hands of the Strata prior to their September 30, 2011 submission. They point out that the Strata did not request medical information at the relevant time.

[18] The McDaniels also dispute that the efforts of the Respondents in response to their issue were sufficient

RESPONSE BY THE RESPONDENTS

[19] The Strata points out that the complaint is not a representative complaint and the Tribunal's analysis should be restricted, therefore, to impact on the McDaniels. They submit that whether a potential solution would benefit other owners in the building is not relevant to this complaint.

[20] The Strata also submits that the medical evidence is too general and vague to invoke a duty to accommodate and that, in the case of the endocrinologist, the report provided strays into advocacy rather than proper opinion. They also submit that the reliance on an application to rent is an amendment to the complaint contrary to the Rules.

V WOULD PROCEDING WITH THE COMPLAINT BENEFIT THE COMPLAINANTS? – SECTION 27(1)(d)(i)

APPLICABLE LAW

[21] Under s. 27(1)(d)(i) of the *Code*, the Tribunal has the discretion to dismiss a complaint if it determines that proceeding with the complaint would not benefit the complainants. There is little jurisprudence respecting s. 27(1)(d)(i). In *Larsen v. Opel Financial and Investment Group and others (No. 3)*, 2009 BCHRT 186, the Tribunal stated:

> Ms. Larsen acknowledges that all the respondent companies are defunct. While she indicated in correspondence with the Tribunal that she wished her complaint against them to proceed, she agreed during the pre-hearing conference that there would be no benefit to her. The Tribunal's resources are not unlimited. As the respondent companies are no longer active, there can be no benefit to Ms. Larsen in continuing the complaint process.
>
> On this basis, I dismiss the complaint. (paras 22 and 23)

[22] Sections 27(1)(d)(i) and (ii) are related. Subsection (ii) is oblique, concentrating on whether the complaint furthers the purpose of the *Code*. Subsection (i) is more direct, concentrating on whether the complaint benefits the complainant. Both invite the Tribunal to consider the somewhat vague concepts of whether pursuing the complaint to a hearing is worthwhile for the complainant or for the advancement of human rights generally. Subsection (ii) concentrates on larger policy issues and ss. (i) on the potential of benefit to the complainant and, while not necessarily limited to direct benefit, is limited to benefit to a complainant.

[23] In *Tillis v. Pacific Western Brewery and Komatsu*, 2005 BCHRT 433, a s. 27(1)(d)(ii) decision, the Tribunal stated:

> Further, as noted by the Tribunal in *Dar Santos v. University of British Columbia*, 2003 BCHRT 73, at para. 57, the assessment of whether proceeding with a complaint would further the purposes of the *Code* involves more than an assessment of an individual complaint, but encompasses broader public policy issues, such as the efficiency and responsiveness of the human rights system, and the expense and time involved in processing a complaint to hearing.
>
> In my view, public policy issues such as the efficiency and responsiveness of the human rights system are appropriately taken into account under s. 27(1)(d)(ii) of the *Code*.

[24] Section 27(1)(d)(i) is much more limited in scope, even assuming a broad reading of the provision as required for remedial legislation. As succinctly set out in *Larsen*, the focus is whether the complainant can derive a benefit from proceeding. No remedy at the Strata will benefit the Complainants because they are no longer resident there. They are no longer at risk on the sale of the property because the foreclosing bank will be the vendor on a foreclosure sale and the other benefits described by them are not to them, but

to others who are not parties to the complaint and therefore are not the beneficiaries contemplated by s. 27(1)(d)(i) of the *Code*.

[25] As set out above, the Complainants have submitted that, even where the circumstances leading to the complaint no longer apply, the Tribunal has proceeded to a hearing and defined a remedy. They appear to rely on cases decided under s. 13 of the *Code* related to discrimination in employment. In such cases the circumstances have changed but the very nature of the complaint seeks remedy retrospectively for the impact of termination of employment, including wage loss, reinstatement in some cases and loss of benefits to which the complainant was entitled. Those sorts of remedies are not available here.

[26] The Complainants rely on *Pardy v. Earle and others (No.4)*, 2011 BCHRT 101. That case arises from a sexual harassment incident perpetrated upon a paying customer at a comedy establishment. As such, it related to a single incident which the *Code* is designed to address. It is open for the Tribunal to hear a matter where the circumstances which surround the alleged discrimination cease to exist. In fact, many such cases are heard before the Tribunal. In those cases, there is generally a benefit potentially available to the complainant from proceeding to a hearing.

[27] A benefit to the Complainants may be available in this case as well. If the Complainants are successful, they would be entitled to seek a remedy under s. 37(2) of the *Code* to redress the effects of the discrimination, including an award for injury to dignity.

[28] I find that proceeding to a hearing on this complaint could benefit the McDaniels. As a result, I dismiss the Respondents' application to dismiss under s. 27(1)(d)(i).

VI IS THERE A REASONABLE PROSPECT OF SUCCESS OF THIS COMPLAINT? – SECTION 27(1)(c)

[29] Under s. 27(1)(c) of the *Code*, the Tribunal has the discretion to dismiss a complaint if it determines that the complaint has no reasonable prospect of success. The principles which the Tribunal employs in considering applications to dismiss under s.

27(1)(c) are well-established. In *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, the Tribunal stated:

> [t]he role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the *bona fides* of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.
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> The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet. Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the Information available to it. (*Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, paras. 11 and 12)

[30] Thus, the Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed. The Tribunal's role in this regard was most recently described by the Court of Appeal in *Workers Compensation Appeals Tribunal v. Hill*, 2011 BCCA 49, at para. 27:

> It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31

[31] I agree with the Respondents' submission respecting the rental issue and will not consider the McDaniels' submissions on that issue in my decision.

[32] Additionally, I make no findings of fact in arriving at my decision herein.

[33] The material reveals that the medical information provided by the McDaniels is marginal in the sense that an endocrinologist provided a report that, as suggested by counsel for the Respondents, liberally crosses the line into advocacy rather than opinion evidence respecting the direct connection between second-hand smoke and danger to a Diabetic, which is not shared by the public at large. It does, however, contain a statement that the second-hand smoke presents diabetics with considerably increased risk of complications and death as opposed to diabetic non-smokers or non-diabetics exposed to such smoke. Similarly the letter from a Naturopath could be taken as support for Mrs. McDaniel's health regression being related to second-hand smoke although it is not as clear as it might be. Taken together, there is certainly some information respecting a nexus between adverse health consequences experienced by Mrs. McDaniel and second-hand smoke. There is also some information respecting a nexus between second-hand smoke and increased risk to Mr. McDaniel's health.

[34] In *Drobic v. BC (Ministry of Employment and Income Assistance) and others (No. 2),* 2008 BCHRT 143, the Tribunal stated:

> The question which arises is whether the information which the respondents did have was sufficient to impose a "duty to inquire" on them.
>
> In cases involving accommodation in the context of employment-related complaints, the Tribunal has held that, where a respondent is in possession of information that raises the possibility that an employee requires accommodation, the respondent is under a duty to make enquiries with respect to the need for accommodation, whether or not the complainant has formally notified the respondent that they require such accommodation: *Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 32 C.H.R.R. D/71 (B.C.C.H.R.), *Rozon v. Barry (c.o.b. "Barry Marine")*, 2000 BCHRT 15.
>
> Although the duty to inquire has arisen primarily in employment-related complaints, it is also applicable to complaints under s. 8 of the *Code*. However, as noted by the Tribunal in *Martin v. 3501736 (c.o.b. "Carter Chevrolet Oldsmobile)*, 2001 BCHRT 31, the duty only arises where the respondent knows, or reasonably ought to have known, of the relationship between the prohibited ground and the need for accommodation: para. 29. (paras 136-138)

[35] The Respondents state that NAI is the "primary point of contact" between owners and the Council. The materials filed make it clear that the requests of the McDaniels were conveyed by NAI to the Council – the Council scheduled a special general meeting to deal with the smoke issue raised primarily by the McDaniels. I would also point out that on a s. 27(1)(c) application, the burden is on the applicant to demonstrate that there is no reasonable prospect that the complaint will succeed. Accordingly, the absence of material from the Respondents denying that the Strata received the McDaniels' information respecting the health impact of second-hand smoke on the McDaniels, in my view can be taken, for purposes of a s. 27(1)(c) application, as an implied acknowledgement that the information was conveyed.

[36] I am of the view that sufficient information was provided by the McDaniels to the Respondents to invoke the duty to enquire. An enquiry may or may not have elicited information which would have required further exploration of accommodation, given the McDaniels' position that they are not required to produce medical support for their position. Suffice it to say that they do. However, in this case, the enquiry was never made and, therefore, the absence of medical support at the relevant time cannot assist the Respondents.

[37] I am unable to conclude, on the material before me, that there is no reasonable prospect that the McDaniels' complaint will succeed against the Strata.

[38] My conclusion is different in respect of NAI. NAI does not, on the material before me, have the authority to impact the decisions of the Strata which are of concern to the Complainants. I do not agree that NAI had a duty to mediate the dispute between the Complainants and the Council, as suggested by the Complainants. The materials do not suggest any authority in NAI to impact the Council's decisions on behalf of the Strata nor have the Complainants pointed to any provisions which would refute that observation. The fact that the McDaniels addressed their concerns to NAI does not impact that conclusion.

[39] In those circumstances, I allow NAI's application to dismiss the complaint against them on the basis that it had no reasonable prospect of success. I dismiss the Strata's application to dismiss the complaint against them.

VIII CONCLUSION

[40] For the reasons set out above, I grant the application of NAI to dismiss the Complaint against them pursuant to s. 27(1)(c). I dismiss the application of the Strata to dismiss the Complaint against them.

Norman Trerise, Tribunal Member