Borutski and others v. Crescent Housing Society and another (No. 2), 2012 BCHRT 69

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2012 BCHRT 69

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:

Rose Marie Borutski, Joan Murphy, Dorothy Watson, Barb Hamm, Lorraine Tumman, Ted Kopp, Henry Hamm, Linda Chandler, Rosemary Hancock and Trudy Thompson

COMPLAINANTS

A N D:

Crescent Housing Society and Janet Furcht

RESPONDENTS

REASONS FOR DECISION

APPLICATION FOR EXTENSION OF TIME TO FILE

APPLICATION TO DISMISS

APPLICATION TO DISMISS: Section 27(1)(d)(ii)

Tribunal Member:	Murray Geiger-Adams
Counsel for the Complainants:	Dan Soiseth
Counsel for the Respondents:	Vanessa Reakes Seema Lal

Introduction

[1] The complainants filed complaints in which they allege that Crescent Housing Society ("Crescent") and Janet Furcht, its general manager (collectively, "the respondents"), discriminated against them in an accommodation and with respect to tenancy premises on the basis of physical disability, and, in some cases, both physical and mental disability, contrary to s. 8 and s. 10, respectively, of the *Human Rights Code*. All the complaints relate to the respondents' alleged failure to prevent exposure to second-hand smoke in the complainants' subsidized housing. For the purposes of this decision, I do not think it is necessary to go further into the details of the complaints.

[2] In *Borutski and others v. Kiwanis Club of White Rock and others*, 2009 BCHRT 46 , 2009 BCHRT 46, the Tribunal joined both complaints, which at that time named additional complainants who have since withdrawn their complaints or died, and additional respondents, against whom the complaints have since been settled. I have amended the style of cause to reflect the current complainants and respondents.

[3] The remaining respondents now apply for an extension of time to file an application to dismiss the remaining complaints, and, if that extension application is granted, apply to dismiss the remaining complaints because the complainants have not accepted a reasonable settlement offer.

[4] This is my decision on both applications.

Application for Extension of Time to file Application to Dismiss

[5] The respondents' application for an extension is brought under Rules 26(3) and Rule 24 of the Tribunal's *Rules of Practice and Procedure*.

[6] The respondents say that they, with the knowledge and agreement of the complainants, put off filling an application to dismiss while the parties were engaged in settlement discussions. They first advised the complainants of their intention to bring an application to dismiss, if settlement discussions were unsuccessful, on February 9, 2010. They last made an offer to the complainants to settle the complaint on March 2, 2011. The complainants did not respond to that offer. On April 4, 2011, the respondents advised that they were preparing to file an application to dismiss. On April 27, 2011, Crescent's board of directors resolved to apply to dismiss the complaints. On May 27, 2011, the respondents filed the present applications.

[7] The respondents submit that their delay in bringing the dismissal application was because of continued negotiations; that, since no hearing dates have yet been set, there is no prejudice to the complainants in allowing them to make the dismissal application; and that an adjudication of the dismissal application may facilitate the just and timely resolution of the complaints.

[8] The complainants submit that, under Rule 26(2)(d), the respondents were obliged to apply for the extension, "within 30 days of the date on which the information or circumstances that form the basis of the application came to the respondent's attention". They say that the 30-day time began to run on March 2, 2011, when the respondents rejected the complainants' last settlement offer, that the time expired on April 1, 2011, and that the extension application is nearly two months late. While acknowledging that the Tribunal has discretion to extend the time, they say that the respondents have provided no explanation for their delay, and say that there is thus no basis on which the Tribunal could exercise its discretion in this case.

[9] In reply, the respondents submit that the complainants have been on notice of their intention to file a dismissal application since February 2010, and that their delay is explained by the parties' agreement not to bring such an application while settlement discussions were ongoing. They further say that the complainants have not shown any prejudice because of the delay, because the Tribunal has not yet set hearing dates. They cite, without discussion, *Watson v. B.C. (Ministry of Health)*, 2005 BCHRT 461, and ["]*Willman and Lions Housing Society v. Mount Seymour*["], 2006 BCHRT 85. (The correct citation for the latter case is: *Willimont v. Mount Seymour Lions Housing Society*, 2006 BCHRT 85. It is concerned with an application under Rule 30(8) to extend the time for filing a submission on a timely application, not an application under Rule 26(2) to extend the time for filing an application to dismiss.)

[10] Rule 3(3) provides that a Member may "lengthen any time limits in these rules, as the member considers appropriate in the circumstances". The purpose of the *Rules* is to "facilitate the just and timely resolution of complaints".

[11] In the present circumstances, where the complainants were aware at all relevant times that, if settlement discussions were not fruitful, the respondents planned to file an application to dismiss; the complainants ignored, rather than rejecting, the respondents' last settlement offer, leaving the respondents uncertain, for an indefinite period, whether the settlement discussions were at an end; the respondents moved reasonably promptly to file their application to dismiss once they had a basis for inferring that the discussions were over; the Tribunal has not yet set hearing dates; and the application may decide the complaint without the need for a lengthy hearing well in the future, I consider it appropriate to exercise my discretion to extend the time for the respondents to file their application to dismiss, and to consider that application on its merits.

Application to Dismiss

[12] The respondents' application to dismiss the complaints is brought under s. 27(1)(d)(ii) of the *Code*, which provides:

> (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:
> ...
> (d) proceeding with the complaint would not
> ...
> (ii) further the purposes of this Code.

[13] The parties both refer to *Carter v. Travelex Canada Limited*, 2009 BCCA 180 , 2009 BCCA 180, in which the Court confirmed the Tribunal's authority to dismiss a complaint under s. 27(1)(d)(ii) when a complainant rejects a reasonable settlement offer, and approved of the Tribunal's approach to determining the reasonableness of such offers. Both also refer to *Grant v. Fortis BC.*, 2009 BCHRT 336 , 2009 BCHRT 336, as setting out relevant criteria for the Tribunal to consider.

[14] In *Grant*, which I adopt, the Tribunal said:

> In *Carter*, the Court of Appeal referred with approval to the Tribunal's two-step process, that is, first to determine if the settlement offer was reasonable, and second, if so, whether it would serve the purposes of the *Code* to allow the complaint to proceed. The Court also noted that the assessment of remedy is conducted on the premise that the complainant's allegations would be proven and considering what the Tribunal would award in the circumstances (paras. 44-45).
>
> Was the Revised Offer Reasonable?
>
> In *Pasutti v. Best Buy Canada and Bowal*, 2008 BCHRT 56 , 2008 BCHRT 56, para. 17-18, the Tribunal set out the following factors for consideration when assessing whether to dismiss a complaint based on a reasonable settlement offer:
>
> > In reviewing the relevant Tribunal decisions, two criteria must be satisfied. First the offer must be a "with prejudice" offer and second, the offer must

be reasonable. In determining if the offer is reasonable, the Tribunal will consider the following factors:

a. is there an admission of liability by the respondent;

b. has the respondent taken steps to address the alleged discriminatory conduct;

c. are the remedial steps consistent with the types of orders that the Tribunal might make if the complaint was found to be justified;

d. is the compensation payable within a reasonable range of what the Tribunal might award; and

e. does the settlement offer remain open for the complainant's acceptance even if the application to dismiss is granted.

I note that whether to grant a dismissal pursuant to s. 27(1)(d)(ii) is a discretionary determination and is made on a case-by-case basis: *Harrison v. Nixon Safety Consulting and others (No. 2)*, 2007 BCHRT 394, para. 35. I will therefore generally rely on the *Pasutti* factors as they provide a considered and comprehensive framework for the assessment. However, I employ the list of factors as a framework, not specific requirements, as the assessment must consider the particular circumstances of each complaint.
(paras. 35-37)

No admission of liability

[15] In this case, the settlement offer contains no admission of liability. I accept the respondents' submission, relying on *Grant*, para. 41, that a failure to admit liability is not a bar to a determination that a settlement offer is reasonable. However, it is a factor to consider in individual cases. Here, the remedies sought by the complainants include both a mandatory order that the respondents cease the alleged contravention, and refrain from committing one in future, and a discretionary declaration that the respondents' conduct constituted discrimination contrary to the *Code*.

[16] As noted, in deciding this application, the allegations in the complaints must be taken as proven. The purposes of the *Code* include preventing discrimination, and providing redress (not merely compensation) to those who suffer it. Identifying conduct as discrimination, and ordering that it cease, are both consistent with these purposes. To dismiss the complaint on this application would deprive the complainants of remedies which are available under the *Code*, which they have chosen to pursue, and which are consistent with the purposes of the *Code*. Thus, in this case, I consider that the respondents' failure, in their settlement offer, to admit any liability, is a factor which militates in favour of its being considered unreasonable.

Compensation within a reasonable range

[17] The settlement offer includes no compensation for injury to dignity, feelings, and self-respect, which is also among the remedies sought by the complainants, provided for in the *Code*, and consistent with its purpose of providing redress for those who suffer discrimination.

[18] The respondents simply submit, without elaboration, that, "compensation is not likely to be awarded in the circumstances". Again, taking the complainants' allegations of significant risk to their health caused by the respondents' failure to accommodate their disabilities, and of their frustration and distress at being unable to obtain effective assistance from the respondents, as proven for the purposes of this application, it would be unusual if the Tribunal did not make some award under this head. The respondents do not point to any circumstance of this case which would make the Tribunal unlikely to do so, and do not refer to any similar case in which the Tribunal has declined to do so.

[19] The respondents further submit that there is "evidence that the Society would face undue hardship if monetary compensation were required". This submission is not borne out by any of the materials the respondents have put before the Tribunal. Neither the statement in Ms. Furcht's affidavit that "[t]he Society does not have the financial resources to incur any expenditures without significant and long term financial planning", nor the bare figures in the financial statements exhibited to her affidavit, tend to establish that the Tribunal will likely find undue hardship for the respondents, and decline to make <u>any</u> compensatory award in favour of the complainants if they are successful in a hearing.

[20] In these circumstances, I consider the complete absence of any reference in the settlement offer to monetary compensation to be an additional factor which militates in favour of its being considered unreasonable.

Remedial steps

[21] The remedial steps contained in the settlement offer are limited, sometimes indefinite or vague, and largely in the discretion of the respondents. On their face, they lack the certainty of any remedies the Tribunal would likely award if the complaints were successful.

[22] For example, they offer to "establish written policies setting out the consequences of a resident's failure to abide by the no smoking provisions" of its existing policy with respect to common areas, but do not say what those consequences might include.

[23] The respondents say in their settlement offer that they will "consider the possibility of installing a re-circulating type air filtration unit", and that even this is "subject to [Crescent's] budgetary constraints". As written, the respondents could satisfy this term of the settlement proposal by considering, and deciding against, the installation, for budgetary or any other reasons, and the complainants would have no recourse.

[24] The settlement proposal says that the respondent "will make efforts to create a non-smoking floor on the ground floor of the Phase 3 building, in units 212 to 224, on the basis that the Complainants agree to relocate to these units." Again, the respondents could fulfill this agreement simply by "making [unspecified] efforts" (not even "reasonable efforts" or "best

efforts"), and apparently would only do so if the complainants made a blind agreement to relocate, without any assessment of whether this would ameliorate any of the complainants' concerns about second-hand smoke.

[25] These remedial steps, which generally involve vague promises of "consideration" and "effort" rather than specific promises of performance, are not, in the words quoted above from *Grant*, "consistent with the types of orders that the Tribunal might make if the complaint was found to be justified". When the Tribunal determines that a complaint is justified, and that remedies are appropriate, its remedial orders must be definite, clear, and enforceable. To the extent that the remedial steps in the settlement proposal lack these attributes, the proposal is not reasonable.

Offer remains open

[26] The respondents confirm that their offer will remain open for acceptance even if the application to dismiss is granted. This is a factor, and in my view the only factor, militating in favour of finding the respondents' settlement offer to be reasonable.

Conclusion on reasonableness of the settlement offer

[27] Considered as a whole, in light of the factors discussed above, I find that the respondents' settlement proposal is not reasonable. Since the sole basis on which they seek to have the complaint dismissed without a hearing is the complainants' alleged refusal to accept a reasonable settlement offer, I exercise my discretion to deny the application to dismiss. The Tribunal will convene a pre-hearing conference to set hearing dates and deal with other pre-hearing matters.

Decision

[28] The respondents' application for an extension of time to file an application to dismiss the complaint is granted.

[29] The respondents' application to dismiss the complaint without a hearing is denied.

Comments

[30] I have denied the application to dismiss. This should not be understood as an assessment of the merits of the complaint, or of the likelihood of its succeeding, in whole or in part, at a hearing, or of the Tribunal making any particular remedial order. Those are all matters to be determined on the basis of the evidence at the hearing.

[31] I encourage the parties to consider Tribunal-assisted mediation to attempt to resolve the complaint in ways that meet all their needs, and that do not involve the further delay and expense which will be required to schedule and conduct a hearing, and render a decision. If the parties are interested in mediation, they should contact the case manager.

Murray Geiger-Adams, Tribunal Member