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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:

Shaun Eadie and Brian Thomas

COMPLAINANTS

A N D:

Les Molnar, Susan Molnar and Riverbend Bed and Breakfast

RESPONDENTS

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

Tribunal Member:

Murray Geiger-Adams

On their own behalf:

Shaun Eadie and Brian Thomas

On behalf of the respondents:

Les Molnar and Susan Molnar

Introduction

[1] Shaun Eadie and Brian Thomas filed a complaint, alleging that the respondents discriminated against them in the provision of a service because of their sexual orientation, contrary to s. 8 of the *Human Rights Code*.

[2] The respondents deny that they discriminated, and apply to dismiss the complaint.

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

Background

[4] The following account is drawn from the complaint, response, and the parties' submissions on the application. I make no factual findings, and do not address the merits of the complaint.

[5] Mr. Eadie and Mr. Thomas are a gay couple.

[6] Les Molnar and Susan Molnar operate the Riverbend Bed and Breakfast ("Riverbend") in their home in Grand Forks. They are Protestant, evangelical Christians.

[7] On June 18, 2009, by telephone to Ms. Molnar, Mr. Eadie reserved the Swan Room at the Riverbend for June 19th and 20th.

[8] A few minutes later, having learned from Ms. Molnar that Mr. Eadie had requested one bed, Mr. Molnar called him back and asked whether Mr. Eadie and Mr. Thomas were a gay couple. Mr. Eadie said that they were.

[9] The parties disagree about the precise words that Mr. Molnar used next. The complainants say he said, "Then this is not going to work out". Mr. Molnar says he said, "I'm sorry I don't think it's going to work out." For the purposes of this decision, nothing turns on the exact words used, or the tone, abrupt or otherwise, in which they were said.

[10] Mr. Eadie responded, "Wow", and hung up. There was no further discussion between the parties before Mr. Eadie and Mr. Thomas filed their complaint. The complainants did not stay at the Riverbend.

[11] Mr. Molnar acknowledges that they denied the complainants the particular accommodation they reserved, because, “[t]o allow a gay couple to share a bed in my Christian home would violate my Christian beliefs and cause me and my wife great distress” and would be “encouraging something which I believe to be wrong according to my religious beliefs and understanding of scripture.”

The Application

[12] The respondents apply to dismiss the complaint under s. 27(1)(b), (c) and (d) of the *Code*, which provide:

27 (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;
- (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
 - (ii) further the purposes of this Code.

[13] I will deal with each of these subsections separately.

Analysis

S. 27(1)(b) – Acts alleged do not contravene the *Code*

[14] The respondents appear to concede that denying accommodation to a gay couple, when that specific accommodation would be available to a heterosexual couple, is discriminatory on the basis of sexual orientation. However, they submit that, “our private dwelling house should have a modified standard under the *Code* under specific restrictive circumstances because of our religious (moral) beliefs.”

[15] In an application to dismiss under s. 27(1)(b), the Tribunal assesses whether, on its face, the complaint alleges facts which, if proven, could constitute a contravention of

the *Code*: *Bailey v. B.C. (Ministry of Attorney General) (No. 2)*, 2006 BCHRT 168, para. 12. The assessment under this section does not include the response to a complaint.

[16] In this case the complaint, on its face, alleges that the complainants belonged to a group protected under the *Code*, that they experienced adverse treatment from the respondents, by being denied rental of a room, and that there was a nexus between their membership in a protected group and the adverse treatment, because their sexual orientation was a factor in that denial.

[17] The respondents argue that the acts alleged against it were protected by their *Charter* rights to freedom of religion and association. Under s. 27(1)(b), the Tribunal considers only whether the allegations in the complaint could constitute a contravention of the *Code*, not whether a respondent may have a defence: *Bailey* (para. 12); *McCree v. L.I.F.E. Recovery Association*, 2009 BCHRT 129 (paras. 13-17). The argument based on religious freedom is best considered under s. 27(1)(c), and I will do so below.

[18] If the complainants can prove the facts they allege, and in the absence of a defence or non-discriminatory explanation from the respondents, they will have established, as required, a nexus between a prohibited ground of discrimination and the negative treatment alleged, and thus a contravention of the *Code*.

[19] I decline to exercise my discretion to dismiss the complaint on this ground.

S. 27(1)(c) – No reasonable prospect of success

[20] On this ground, too, the respondent's only submission is that their *Charter* rights to freedom of religion and association must prevail over the complainants' rights under the *Code* to be protected from discrimination based on their sexual orientation.

[21] The Tribunal has considered conflicts between religious beliefs and rights under the *Code*, including protection from discrimination based on sexual orientation: *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544. There, the respondents raised their religious beliefs as a *bona fide* and reasonable justification for conduct that would otherwise have contravened s. 8(1) of the *Code*. See also: *Brillinger v. Brockie*, [2000] O.H.R.B.I.D. No. 3; varied: *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375 (Sup. Ct. J. (Div. Ct.)).

[22] In *Smith* the Tribunal said:

The Knights argued that they could not accommodate the complainants because to be required to act contrary to their core religious beliefs would cause them undue hardship.

Before applying this part of the test to the facts of this case, it is appropriate to review the law related to the intersection and balancing of the constitutionally protected right of freedom of religion and other constitutionally protected rights, including the equality provisions set out in s. 15 of the *Charter*. Cases involving such a balance are inherently challenging and context specific.

(paras. 91-92)

[23] As *Smith* and *Brillinger* make clear, balancing competing rights is a legally and factually complicated exercise, for which the Tribunal requires detailed evidence, including expert evidence, as to the nature, sincerity and importance of the beliefs involved, and the impact on all parties of a decision to reconcile the rights in any particular way.

[24] At this stage, the burden is not on the complainants to establish a reasonable prospect of success: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305. Rather, this is the respondents' application, in which the burden is on them to establish that, under s. 27(1)(c) "there is no reasonable prospect that the complaint will succeed".

[25] In the absence of the kind of detailed evidence considered after a full hearing in *Smith* and *Brillinger*, and without any legal argument from the parties as to how the Tribunal should apply such cases to their specific circumstances, I cannot determine that the complaint has no reasonable prospect of success.

[26] I understand the Molnars' point that they were responding in good faith to their perception of what would make all their guests and themselves comfortable, and what their religious principles required, and their assertion that they have shown "doubt as to any ill intent on [their] part". However, s. 2 of the *Code* provides that discrimination "does not require an intention to contravene this Code." As the Tribunal and the courts have frequently held with respect to human rights legislation, it is not a respondent's intention, but the effect of their conduct on a complainant, which is relevant in considering whether discrimination has occurred.

[27] I decline to exercise my discretion to dismiss the complaint on this ground.

S. 27(1)(d) – Proceeding would not benefit person or further purposes of Code

[28] The respondents do not make an argument under either s. 27(1)(d)(i) or (ii), other than to characterize the complaint as “trifling and wanting in substance”. I cannot accept this characterization of a denial of accommodation, given the specific prohibition of such acts in s. 8(1)(a) of the *Code*, and the purposes of the *Code*, as set out in s. 3. I also note that, elsewhere in their submissions, the respondents acknowledge the complainants’ distress and anger at the treatment they experienced.

[29] Proceeding with the complaint may benefit the complainants. If they are successful, they will be entitled to a mandatory order under s. 37(2)(a) that the respondents cease any contravention, and refrain from similar conduct in future, and may be entitled to other relief under s. 37(2), including an order that the respondents compensate them for injury to their dignity, feelings and self-respect.

[30] Proceeding with the complaint may further the purposes of the *Code*, which include preventing discrimination and providing a means of redress for those who experience it.

[31] I decline to exercise my discretion to dismiss the complaint on this ground.

Decision

[32] The respondents’ application to dismiss the complaint is denied.

Murray Geiger-Adams, Tribunal Member