

Headline: The Case of the Unauthorized Solar Screen

Publication date: September 2010

Publication: CHOA Journal

Written by: Adrienne Murray, Law Corporation

A recent decision of the Human Rights Tribunal confirms and reinforces the obligation of a strata corporation to accommodate an owner who suffers from a disability.

In a recent case¹ the Tribunal was required to determine whether a strata corporation had discriminated against an owner when it refused to allow the owner to install a solar screen on the outside of a window.

Background

Mr. S lived in a manufactured home in a strata development in Osoyoos. Summer temperatures in Osoyoos are often in the 30°C range and at times can reach highs in the 40°Cs. As typical of many homes in the area, Mr. S's manufactured home was air conditioned.

Mr. S was diagnosed with emphysema, a form of chronic obstructive pulmonary disease, often referred to as COPD. A doctor's letter confirmed the diagnosis and stated that the use of the air conditioner in Mr. S's home likely exacerbated Mr. S's condition. In order to cool their home while minimizing the use of the air conditioning, Mr. S installed a solar screen on the exterior of the front window of their home in June 2008.

The strata corporation's bylaws included a bylaw that required the prior written consent of the Strata Council before making any changes to the exterior of a modular home. Mr. S failed to obtain permission from the Strata Council. In July 2008 the Strata Council wrote to Mr. S requesting that the screen be removed. Mr. S replied to the Strata Council advising that the screen was installed to alleviate a medical condition that Mr. S had with his breathing, that the medical condition was aggravated by the use of an air conditioner over a continued period and that he had a letter from a doctor which confirmed this information. Mr. S requested that the Strata Council approve the solar screen. Mr. S offered to send his doctor's letter to the Strata Council if it agreed not to divulge the contents outside of the Strata Council.

The Strata Council did not request a copy of the doctor's letter. After considering Mr. S's request at a September meeting, the Strata Council wrote to Mr. S denying his request. In its letter, the Strata Council advised that the screen could be installed on the interior of the window which would meet the needed function in respect of Mr. S's medical condition. At the Tribunal hearing, the President of the Strata Council testified that the three reasons for the Strata Council's decision were that 1) Mr. S had not sought prior approval for the installation of the screen; 2) the Strata Council had always refused requests to put up screens in the past; and 3) the screen did not conform to the Strata Council's design guidelines.

Mr. S's legal counsel then wrote to the Strata Council advising that the Strata Council decision was discriminatory under the *Human Rights Code* and that unless it provided consent for the screen, a complaint would be filed with the Human Rights Tribunal. At the hearing, the President testified that the lawyer's letter was the first time the Strata Council learned of the provisions of the *Code* protecting persons with disabilities.

¹ *Shannon v. The Owners, Strata Plan KAS 1613 (No. 2) 2009 BCHRT 438*

Despite the letter from the lawyer, the Strata Council continued to refuse permission to Mr. S to install the solar screen. The Strata Council did not obtain legal advice and instead relied on an opinion provided by its strata manager. Mr. S removed the solar screen. The Strata Council then proceeded to take bylaw enforcement action against Mr. S for installing the solar screen without permission. Mr. S attended a hearing of the Strata Council and personally explained his situation. This was the first meeting that Mr. S had with the Strata Council regarding the installation of the solar screen. After the hearing, the Strata Council wrote to Mr. S confirming their decision that a solar screen could not be installed.

Complaint to the Human Rights Tribunal

Mr. S filed a complaint that the strata corporation had discriminated against him on the basis of a physical disability contrary to section 8 of the *Human Rights Code*.

Before considering Mr. S's complaint the Tribunal confirmed the analytical structure that applied to such cases. The Tribunal stated that it was first required to determine whether the complainant established that the respondent had discriminated against him with respect to an accommodation, service or facility customarily available to the public. If the complainant established a *prima facie* case of discrimination, the onus shifted to the respondents to establish that their conduct was justified.

The Tribunal concluded that Mr. S had established that he has a physical disability and that the Strata Council was aware of Mr. S's physical disability. The Tribunal then considered whether Mr. S had received differential treatment with respect to a service available to the public.

The Tribunal noted that in denying him the ability to install a solar screen, Mr. S was treated in the same way as all other owners. However, the Tribunal stated that the same treatment did not prevent Mr. S from establishing that he had received differential treatment. The Tribunal explained that the Strata Council's refusal to allow Mr. S to install a solar screen had a differential and adverse impact on him by virtue of his disability as compared to other owners. In other words, treating all owners in the same manner is not an answer to a claim of discrimination if, by treating all owners the same, an owner is adversely affected by the decision as a result of a physical disability. The Tribunal found that the inability to install a solar screen, and the corresponding increased use of his home's air conditioner, adversely affected Mr. S's health. The Tribunal concluded that Mr. S was discriminated against on the basis of a physical disability.

As noted, above, once a *prima facie* case of discrimination is found, the onus shifts to the strata corporation to show that its conduct was *bona fide* and reasonably justified. The Tribunal held that in order to establish justification, the strata corporation must prove:

- 1) It adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- 2) It adopted the standard in good faith, in the belief that it is necessary to the fulfillment of the purpose or goals; and
- 3) The standard is reasonably necessary to accomplish its purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

The Tribunal found that the refusal of the Strata Council to permit the installation of solar screens (the standard) was adopted for aesthetic purposes in order to maintain a consistent design. The Tribunal concluded that the bylaw was rationally connected to the fulfillment of the goal and that it had been enacted in good faith. The Tribunal found that the strata corporation satisfied the first two elements of the test.

The Tribunal was unable to find however, that the strata corporation could not accommodate Mr. S without incurring undue hardship. The Tribunal rejected the various reasons that the Strata Council gave for refusing Mr. S's request.

With respect to the Strata Council's concern over design consistency, the Tribunal found that the solar screen did not represent a radical departure from the design prevailing in the development. The solar screen made the front window appear dark, however, it was well-built and was made to measure for the window. Additionally, Mr. S had offered to install white mullions which would have reduced the degree to which the screen differed in appearance from the windows of his neighbours.

In her evidence the Strata Council President stated that another reason for refusal was the Strata Council's fear of setting a precedent. The Tribunal declared this fear to be unfounded. The Tribunal stated that an exemption given by the Strata Council on medical grounds would not mean that anyone who wanted a solar screen could install one. Rather, it would only be a precedent for the fact that the Strata Council was willing to grant an exemption from its bylaw where the exemption was supported by medical evidence.

The Strata Council decision was also based on the fact that Mr. S had installed the solar screen prior to seeking permission from the Strata Council. The Tribunal accepted that this was a mistake by Mr. S and stated that the Strata Council should not continue to hold this against Mr. S as a basis for not granting his request.

The Strata Council also denied permission for the solar screen because it was of the view that there were alternatives to installing a solar screen. However, the Tribunal found that the strata corporation had failed to establish that there were reasonable alternatives. Although the Tribunal acknowledged that there may be alternatives, the Tribunal found that the Strata Council failed to meet its burden in establishing that they exist. The Strata Council was unable to show the Tribunal what evidence or documents it considered to determine that there were alternatives at the time Mr. S requested permission to install the screen.

The Tribunal noted that once the Strata Council was informed and accepted that Mr. S had a breathing problem which was exacerbated by the in home air conditioning, and after receiving a request for the solar screen in order to reduce his exposure to the air conditioning, it was incumbent on the Strata Council to explore any possible alternatives with Mr. S. The Strata Council failed to do this.

The Tribunal also noted that the Strata Council did not appear to appreciate that it was under a duty to accommodate Mr. S's disability to the point of undue hardship. The Tribunal stated that "the duty to accommodate is a multi-party process in which all parties are under a legal obligation to act reasonably and cooperatively, working together to find a reasonable solution."²

² Shannon (para 210)

In *Testar* the Tribunal quoted from a prior decision which described the nature of the accommodation process as a cooperative dialogue where the parties work together to find a solution that adequately balances competing interests.³

In this case, the Strata Council did not make any attempt to discuss the issue with Mr. S or to work with Mr. S to find a solution. Although the Strata Council President expressed the view that it was not up to the Strata Council to find solutions, the Tribunal stated that the Strata Council did have such a duty, if it was unwilling to accept the proposal offered by Mr. S.

As demonstrated in this case, a strata corporation's duty to accommodate a disability is often misunderstood. The Strata Council did not even attempt to meet with Mr. S to discuss possible alternatives. The Strata Council therefore did not meet its duty to work with Mr. S in a reasonable and cooperative manner to find a solution that met Mr. S's needs. As can be seen from this case, the onus of finding a solution is not solely on the person with the disability.

Strata Councils that are presented with a request for an exemption from a bylaw on the basis of a physical or mental disability have a number of issues to consider. The Strata Council must determine that there is a disability as recognized by the *Code*, and that the person making the request is adversely affected by the bylaw. Once these facts are determined, the Strata Council is obligated to accommodate the person. As this can be a complicated process, the Strata Council would be well served to obtain legal advice on all matters relating to the request, including its obligation to accommodate the person making the request, something that the Strata Council in this case did not do.

³ *Testar v. The Owners, Strata Plan VR 1097*, 2009 BCHRT 41 (para 48)