May 3, 2022

Residential Tenancies, Mental Disabilities, and Evictions

By: Jonnette Watson Hamilton

Case Commented On: *AG obo ZG v FirstService Residential Alberta Ltd*, 2022 AHRC 38 (CanLII)

This case concerns a challenge to an eviction from a rented condominium – a challenge claiming the eviction discriminated against a tenant's child on the ground of mental disability. There is something wrong with this decision to confirm the Director's dismissal of the tenant's complaint. The conclusion that there was no reasonable basis in the evidence to proceed to a hearing does not follow from the facts that are recounted. This may simply be because all the relevant facts are not set out in the decision. But based on the facts that are summarized, the most plausible –perhaps the only possible – inference is that the tenancy was terminated because the tenant's son had a mental disability that the landlord, building manager, and other residents of the condominium building thought meant the son would endanger them or their property in the future, and no accommodation was possible.

Facts

The tenant, AG, had rented a condominium, apparently without incident, for more than two years (at para 21). The tenant had a minor child, ZG, who had a mentally disability (at paras 6, 9, and 20). The complaint was brought by the tenant on behalf of his son.

The condominium was owned by PL, the landlord. It was in a building managed by FirstService Residential Alberta Ltd (at para 5).

On August 27, 2019, there was a small fire in ZG's bedroom that was started when one of ZG's toys ignited (at para 21). The fire caused "some damage" to the carpet and the tenant and landlord agreed to share the cost of replacing the carpet (at para 6).

The landlord advised the building manager about the fire and "expressed her concern regarding the safety of the residents at the property" (at para 6). The building manager reported the fire at a meeting of the condominium corporation's Board (at para 7) and the Board voted to ask the landlord to evict the tenant (at para 7). We are not told the date of the Board meeting, but it must have been on August 27, 28, or 29 because it concerned the fire that occurred on August 27 and the landlord's notice of termination, which was served on August 29, referred to the Board's vote. We are not told if the Board meeting was called specifically to discuss the fire (at para 17).

The Board requested that the landlord evict the tenant pursuant to section 29 of the *Residential Tenancy Act,* SA 2004, c R-17.1 (*RTA*), which allows termination of a tenancy for a "substantial breach" on only 14 days notice. A substantial breach by a tenant is a breach of a covenant in section

21 *RTA*. In this case, the fire was said to be a breach of section 21(d) *RTA* which states that "the tenant will not endanger person or property in the premises, the common areas, or the property of which they form a part".

Two days after the fire, on August 29, 2019, the landlord served the tenant with a 14 day notice of termination of the tenancy. That notice said that the reason the tenancy was being terminated was because the tenant had "endangered person or property in the premises, the common areas or the property of which they form a part" (at para 8) – in other words, it parroted s 21(d) *RTA*. The notice also advised the tenant that the Board had voted in favour of the tenant being evicted.

The tenant complained to the Alberta Human Rights Commission. The complaint named FirstService on the cover page of the complaint form as the entity which discriminated against ZG in contravention of section 5(b) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*). However, it was clear in the content of both the complaint itself and the tenant's submissions that the complaint was actually against the landlord (at paras 2, 18).

The Director reviewed the complaint, the response, and the parties' submissions. That review appeared to focus on the fact the tenant named the wrong entity on the complaint form (at para 2). In dismissing the complaint, the Director also noted that "the information does not support that [ZG]'s mental disability was a factor in the termination" (at para 9).

The tenant requested a review of the Director's dismissal of his complaint under section 26 *AHRA*. It is the decision of Nduka Ahanonu, the member of the Commission conducting the review, that is the subject of this post. His decision, like that of the Director, looks at the fact that the landlord was not named on the cover sheet of the complaint and the building manager was the wrong entity to name (at paras 2, 11-13, 17-19). However, before considering if the landlord could be added to the complaint, Commission Member Ahanonu considered whether the complaint could succeed against the landlord (at para 18). He concluded, it could not. Based on the information provided to him, he determined that there was no reason to conclude ZG's mental disability was a factor in the termination of the tenancy.

Law

Section 5(1) of the *AHRA* prohibits discrimination in tenancies at two different points in time – when a tenant makes an offer to rent, and during the tenancy. It is the latter that is relevant in this case:

> 5(1) No person shall
>
> …
>
> (b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling unit…
>
> because of the … mental disability of that person…

Section 26 *AHRA* allows for a review of the Director's decision by the Chief of the Commission and Tribunals, which in this case was delegated to Commission Member

Ahanonu under s 26(4) (at para 3). His role was to decide if the complaint should have been dismissed, which is assessed on the basis of reasonableness (at paras 4 and 15, citing *Mis v Alberta Human Rights Commission*, 2001 ABCA 212 at para 8, the leading case on this point).

> 26(1) The complainant may, not later than 30 days after receiving notice of dismissal of the complaint under section 21, by notice in writing to the Commission request a review of the director's decision by the Chief of the Commission and Tribunals.
>
> (2) The Commission shall serve a copy of a notice requesting a review referred to in subsection (1) on the person against whom the complaint was made.
>
> (3) The Chief of the Commission and Tribunals shall
>
> (a) review the record of the director's decision and decide whether
>
> (i) the complaint should have been dismissed, or
>
> (ii) the proposed settlement was fair and reasonable, as the case may be, and
>
> (b) forthwith serve notice of the decision of the Chief of the Commission and Tribunals on the complainant and the person against whom the complaint was made.
>
> (4) The Chief of the Commission and Tribunals may delegate the functions, powers and duties set out in subsection (3) to another member of the Commission.

The relevant sections of the *RTA* are the following:

> 1(1)(p) "substantial breach" means
>
> (i) on the part of a tenant, a breach of a covenant specified in section 21…
>
> 21 The following covenants of the tenant form part of every residential tenancy agreement:
>
> …
>
> (d) that the tenant will not endanger persons or property in the premises, the common areas or the property of which they form a part…
>
> 29(1) If a tenant commits a substantial breach of a residential tenancy agreement, the landlord may apply to a court to terminate the tenancy or may terminate the tenancy by serving the tenant with a notice at least 14 days before the day that the tenancy is to terminate.
>
> (2) The notice must
>
> …
>
> (d) set out the reasons for the termination …

Comments

The test for discrimination that the Commission Member referenced (at para 22) and was required to apply is set out in *Moore v British Columbia (Education),* 2012 SCC 61 at para 33:

> to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Commission Member Ahanonu determined that the tenant did show that ZG had a characteristic that was protected from discrimination (at paras 9, 20), satisfying the first part of the *Moore* test. The second part of the test, about whether ZG experienced an adverse impact was not discussed, but surely the eviction was proof of that. It was on the third point that both the Director and Commission Member Abanonu held that the tenant failed. He failed to show "that the landlord terminated the tenancy because of the mental disability of the complainant's son" (at para 22). Commission Member Abanonu writes that the eviction must be "because of the disability" throughout his decision, which does use the language of the statute and suggests that intent is required when it is not. He does quote the language of *Moore,* in which the protected characteristic need only be "*a factor* in the adverse treatment," at the end of his decision (at para 23, emphasis added).

A 14 day notice of termination under section 29 *RTA* requires that there be a "substantial breach" by the tenant. Substantial breach is defined in section 1(1)(p) *RTA* to mean "a breach of a covenant specified in section 21." A notice to terminate must set out the reasons for termination. Is parroting an *RTA* section enough? A 14 day notice which merely states that the reason for termination was a breach of section 21(d) is a notice that says, in effect, "your tenancy is being terminated in 14 days for a substantial breach because you committed a substantial breach." It is tautological. Reasons for the termination must be given and they should be the factual basis for the conclusion that the tenant's conduct will endanger persons or property.

What was the reason for termination in this case? What conduct allegedly endangered persons or property in the condo or the building? We are only told "the tenancy was terminated on a ground that is different than the protected grounds" (at para 20). What ground was that? Is it the fire? If it is the fire, is Commission Member Ahanonu suggesting that the fire was not connected to ZG's disability?

I think that the fire was the reason for the eviction given the timing; the service of the notice of termination was made only two days after the fire. And given that the landlord expressed concern about the safety of the residents in the building while reporting the fire to the building manager. And given that the building manager was called to a condominium board meeting about the fire. And given that the Board voted to ask the landlord to evict the tenant at the meeting where the Board members learned about the fire. And given that the landlord served a notice of termination just two days after the fire and immediately after the Board's request.

But, according to the evidence, it was a small fire. It caused only "some damage" to a carpet. It was started by one of ZG's toys igniting. That was the evidence about the fire that was summarized in the decision.

Where is the danger to person or property in the building from this small fire? What is the danger to them? Why was the landlord concerned about the safety of the residents of the building? Why did the building manager inform the Board so quickly? Why did the Board vote to ask the landlord to terminate so quickly? Why did the landlord act immediately?

All of this precipitous action by so many people was not triggered by a small fire that caused some damage to a carpet when a toy ignited.

No, the only evident reason for such a drastic response and immediate termination would have been a concern about the cause of this fire that motivated a fear that *more* fires would be ignited in the near future. And why would the landlord, building manager and other building residents be concerned about more fires? Was it because they were concerned that more of ZG's toys might ignite? If manufacturer's product defects were their concern, would eviction be required?

The only plausible inference from the facts set out in this decision is that the tenant was evicted because the landlord, building manager, and residents of the condominium building thought the tenant's son had a role in starting the fire. And they thought he would do it again. And they thought so because the son had a mental disability that they saw as likely leading to conduct that endangered people or property.

Commission Member Ahanonu stated that "[t]he termination notice issued by the landlord does not mention the mental disability of the complainant's son as a reason for the termination of the tenancy" (at para 22). He said the information in the termination notice that he was provided was "contrary to" the tenant's claim that the notice served on him said the family was being evicted because his son "has disabilities and he is a danger to others in the building" (at para 22). Commission Member Ahanonu did not say the termination notice offered any other reason for the termination. He did not say that it specified any facts that were the basis of the allegation that the tenant was endangering persons and property.

Nevertheless, the finding that discrimination had nothing to do with this eviction is suspect. It may be that the tenant simply failed to produce the required evidence of discrimination. The burden of doing so was on him. The complaint was also side-tracked by the tenant's failure to name their landlord on the complaint cover sheet.

However, given the evidence that was said to be before the Director and Commission Member Abanonu about the actions of the landlord, building manager and condominium Board, and given that Z.G.'s disability only needed to be a factor in the eviction, that evidence should have been enough to accept rather than dismiss this complaint.

I would like to thank my colleague, Professor Jennifer Koshan, for her very helpful comments on a draft of this post. Any remaining errors are mine alone. As Professor Koshan noted, this decision is reminiscent of Stewart v Elk Valley Coal, [2017 SCC 30 (CanLII)](), where the employer argued that the employee was not

dismissed because of his addiction-related disability, but rather because he came to work with drugs in his system and there was a zero-tolerance policy against that. The AHRC agreed with the employer and found no discrimination, which the SCC upheld as a reasonable decision. Justice Clément Gascon's dissent in Stewart is far more compelling. See Joshua Sealy-Harrington, "Embodying Equality: Stigma, Safety and Clément Gascon's Disability Justice Legacy" (2021) 103 SCLR (2d) 197, online at SSRN: https://ssrn.com/abstract=4004618.

This post may be cited as: Jonnette Watson Hamilton, "Residential Tenancies, Mental Disabilities, and Evictions" (May 3, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/05/Blog_JWH_Residential_Eviction_Mental_Disability.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)