IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Gray v. UBC Students' Union,***
2008 BCSC 1530

Date: 20081017
Docket: 78401
Registry: Kelowna

IN THE MATTER OF THE ***JUDICIAL REVIEW PROCEDURE ACT***, R.S.B.C. 1996, c. 241 AND IN THE MATTER OF THE ***HUMAN RIGHTS CODE***, R.S.B.C. 1996, c. 210

AND IN THE MATTER OF the Decision of British Columbia Human Rights Tribunal member Barbara Humphreys in ***Gray and others v. University of British Columbia Students' Union - Okanagan (No. 2)***, 2008 BCHRT 16

Between:

Dianne Gray and Anna Rutherford and Dianne Gray on behalf of all members of the student group which refers to itself as University of British Columbia Okanagan - Students for Life

Petitioners

And

University of British Columbia Students' Union - Okanagan

Respondent

Before: The Honourable Mr. Justice Wong

Oral Reasons for Judgment

In Chambers
October 17, 2008

Counsel for the Petitioners:	L. Turner
Counsel for the Respondent:	D. Crane
Counsel for British Columbia Human Rights Tribunal:	J. Connell
Place of Hearing:	Kelowna, B.C.

[1] **THE COURT:** The petitioners apply for judicial review of the British Columbia Human Rights Tribunal's decision in which the Tribunal granted the respondent University of British Columbia Students' Union - Okanagan's application to dismiss the petitioners' complaint pursuant to s. 27(1)(a) of the ***Human Rights Code***, R.S.B.C. 1996, c. 210.

[2] It was submitted by the petitioners that this decision of the Tribunal was exercised arbitrarily and based entirely or predominantly on irrelevant factors and therefore was patently unreasonable. They seek an order to set aside the decision of the Tribunal and either allow the petitioners to proceed to a full hearing before the Tribunal or remit the matter to the Tribunal for reconsideration.

[3] The Tribunal decision is relatively brief and concise, and I will recite it in full.

> **1. Introduction**
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> [1] Dianne Gray and Anna Rutherford and Dianne Gray on behalf of all members of the student group which refers to itself as University of British Columbia – Okanagan Students For Life (together “SFL”) filed a complaint against the University of British Columbia and the University of British Columbia Students’ Union – Okanagan in which SFL alleged that they had been discriminated against regarding a service customarily available to the public because of religion, contrary to s. 8 of the *Human Rights Code*.
>
> [2] In *Gray and others v. University of British Columbia – Okanagan Students’ Union and another*, 2007 BCHRT 424, the Tribunal dismissed the complaint against the University of British Columbia. With its submissions, the University of British Columbia Students’ Union – Okanagan provided an affidavit from its Executive Chair (the “Chair"), who states that its correct name is the University of British Columbia Students’ Union – Okanagan (“UBCSUO”), and I shall refer to it as such in this decision.

[3] The essence of the complaint is that UBCSUO discriminated against SFL because of religion when SFL was not ratified as a club in the fall of 2006.

[4] UBCSUO has applied to the Tribunal to dismiss the complaint under s. 27(1)(b) and (c), which read:

> (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:
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> …
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
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> (c) there is no reasonable prospect that the complaint will succeed….

[5] The parties made extensive submissions. While I do not directly refer to every argument raised or every case cited, I have reviewed and considered all the material before me.

2. Background

[6] There is no significant disagreement between the parties regarding the background to the complaint. UBCSUO provided an affidavit from the Executive Chair of UBCSUO (the "Chair"); SFL did not provide any sworn statements.

[7] UBCSUO is a society offering services to students, including the ratification of clubs. The decision whether or not to ratify a club is a discretionary one. There is a written policy to provide guidance to the exercise of discretion; some of the factors to be considered are whether the club is discriminatory, whether it duplicates the aims and purposes of an existing club, and whether it behaves in a manner that is detrimental to, or jeopardizes the reputation of, UBCSUO.

[8] If ratified, a club receives a start-up grant of $30, and the right to apply for additional funding to a maximum of $800 a year. A ratified club receives other benefits, including the use of UBCSUO staff for their banking and bookkeeping needs and certain photocopying benefits. The fact that it is not ratified does not prevent a club from operating; the club, however, would not receive any benefits from UBCSUO.

[9] The aims and purposes of SFL as stated on its 2006 club registration form are: “To be a pro-life presence on campus. Provide information/education.” Its proposed activities were postering, guest speakers, display tables, and debates. In early 2005, SFL’s application for club status was approved. The status was valid until April 2006. During this period, SFL organized the presentation of an anti-abortion film and display (the “Genocide Awareness Project”). The film showed images of dismembered foetuses. The speaker who followed the film compared abortion to examples of genocide, such as the Holocaust. SFL also distributed pamphlets on campus. One pamphlet, entitled “Why Abortion is Genocide”, compared abortion to the Holocaust; the Cambodian Killing Fields; the lynching of Blacks; the Rwandan genocide; and the Battle of Wounded Knee.

[10] In her affidavit, the Chair affirmed that she heard complaints about the pamphlets from a number of angry students.

[11] In the fall of 2006, SFL again applied for club status for the school year 2006 – 2007. The Chair has affirmed that she was informed on or about October 10 by a member of SFL that it intended to bring the Genocide Awareness Project (the “Project”) back to the campus.

[12] At UBCSUO Board of Directors meetings on September 25 and October 10, 2006, no member of the Board was prepared to move for ratification of SFL. The Directors decided that the decision should be left to the membership. A Special General Meeting for this purpose was scheduled for November 28, 2006 (the “Meeting”).

[13] The Meeting was chaired by an individual who was not a member of UBCSUO. Views for and against the ratification of SFL were expressed. The motion to ratify was defeated. Members of the Board of Directors did not vote.

[14] The Chair has affirmed that there was no hostility expressed toward Christians generally, or Catholics specifically, at the Meeting. She further affirmed that a number of students stated that they were opposed to ratification because they had been offended by the methods and materials used by SFL to promote its views.

[15] Other religious-based clubs have been ratified by the UBCSUO, for example, University Christian Ministries; Focus (Catholic Campus Ministry); and Peace Seekers.

[16] I will first consider the application to dismiss under s. 27(1)(c) of the *Code*.

3. Decision

[17] For the reasons which follow, I have decided that there is no reasonable prospect the complaint will succeed.

4. Reasons

[18] SFL submits that its opposition to abortion is a sincerely-held religious belief. While no affidavits were provided about the religious beliefs of any member of SFL, UBCSUO does not dispute that SFL's opposition to abortion is based on sincerely-held religious beliefs. SFL maintains that, for members, the SFL club is their chosen way to manifest their opposition to abortion, and that denying them club status is discrimination prohibited by the *Code*.

[19] UBCSUO submits that operating a ratified club is not a religious practice. In my view, this argument does not accurately reflect the complaint, which is that the denial of ratification of SFL constituted discrimination because of religion.

[20] In response to UBCSUO's submission that there is a difference between belief and conduct, and that the freedom to hold beliefs is broader than the freedom to act on them, SFL says that it has always held the same view on abortion, and that, nevertheless, it was granted club status in 2005. SFL argues that the "real reason" SFL's club status was not renewed in 2006 was because UBCSUO held a contrary view on abortion.

[21] There is no information before me regarding any stated position taken by UBCSUO on abortion. The Chair has affirmed that UBCSUO had no policy regarding the ratification of an anti-abortion club. The decision not to ratify SFL was made by the membership at large of UBCSUO, which members, as demonstrated by the minutes, had varying views both on abortion and the activities of SFL.

[22] Further, in my view, SFL's argument that it was denied club status in 2006 because of religion, specifically SFL's opposition to abortion, is belied by the fact that its application for club status in 2005, when its anti-abortion views were known, was granted. The fact that status was granted in 2005 suggests that it was something that occurred between that time and the fall of 2006 which explains the different way UBCSUO treated SFL's application in 2006.

[23] In her sworn statement, the Chair provides evidence about the Project which SFL brought to the Okanagan campus, and the pamphlets which SFL distributed. Some of these pamphlets were attached as exhibits to the affidavit.

[24] The Chair affirmed that she heard complaints about the anti-abortion material distributed by SFL. A description of some of those documents was provided above in paragraph 9.

[25] SFL provided no sworn evidence which linked the Project to its sincerely held religious belief against abortion.

[26] The Court in *R. v. Lewis*, 139 D.L.R. (4th) 480 (B.C.S.C.) (at para. 141) stated:

> Without engaging the debate of rights and wrongs of abortion, … I observe that, on the evidence the message of some protesters and leaflets contains some exaggeration and misrepresentation. Further, the evidence establishes that the messages are often offensive in tone and content….

[27] Without engaging in a debate about the differing views on abortion, I reach the same conclusion on the documents before me that the material distributed by SFL was offensive in tone and content.

[28] The only mention of the Project in the submissions of SFL is a reference to a film, which it says was shown to six members of SFL. SFL states that the submission of UBCSUO indicates that the film was shown in early 2005. To the contrary, UBCSUO's submission indicates only that the film was brought to the campus during the 2005 – 2006 school year. Moreover, the Chair has affirmed that she attended a showing of this film; clearly, then, the showing was not limited to six members of SFL. Regarding the pamphlets, SFL states only that it was unaware of any complaints.

[29] Whether or not SFL were aware of complaints regarding the pamphlets, the Chair's affidavit indicates that she received complaints about them. I also accept her statements that there was no hostility toward Christians generally, or Catholics specifically, at the Meeting. The motion to ratify was defeated by a majority of students.

[30] Based on all the information before me, I conclude that there is no reasonable prospect that SFL's complaint of discrimination because of religion will succeed. In these circumstances, I do not need to consider UBCSUO's application to dismiss the complaint under s. 27(1)(b).

5. Conclusion

[31] The application is granted and the complaint is dismissed under s. 27(1)(c) of the *Code*.

[4] The respondent's submission was that the Tribunal member dismissed the complaint because she found there was a non-discriminatory explanation for the student society's refusal to renew the ratification of the SFL club. She found that the denial of ratification was not due to any antipathy on the part of the student union to the petitioners' religion or their religious views but, rather, to their conduct in displaying and distributing offensive and disturbing materials on campus as part of advancing their anti-abortion cause.

[5] Counsel further submits that while the ***Human Rights Code*** protects the petitioners from discrimination in relation to their religion, the Tribunal concluded that it does not extend to protecting them from the results of their conduct. The student union submits that the Tribunal was correct to so hold, and in any event, its decision was not patently unreasonable.

[6] With respect to the standard of review of s. 27(1)(c) decisions, pursuant to s. 32 of the ***Code***, the standards of review in relation to the Tribunal's decisions are legislated pursuant to s. 59 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, which provides:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
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> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
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> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.
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> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[7] It would appear that the standard of review applicable to s. 27(1)(c) decisions is well settled. In ***Berezoutskaia v. British Columbia (Human Rights Tribunal)***, 2006 BCCA 95, 51 B.C.L.R. (4th) 4, the British Columbia Court of Appeal held that the Tribunal's decisions pursuant to s. 27(1)(c) are discretionary. The applicable standard of review is patent unreasonableness pursuant to s. 59(3) of the ***Administrative Tribunals Act***, as that term is defined in s. 59(4) of that ***Act***, and there is no need to invoke a common law definition of patent unreasonableness.

[8] Section 59(3) of the ***Administrative Tribunals Act***, as that term is defined in s. 59(4) of that ***Act,*** is an extremely deferential standard of review that recognizes the legislature's intention to give the tribunal the exclusive function of determining which human rights complaints warrant the time and expense of a hearing, while ensuring that the tribunal's exercise of discretion does not exceed its jurisdiction.

[9] In ***Berezoutskaia***, the Court of Appeal described the Tribunal as performing a gate-keeping function on s. 27(1)(c) applications that involves an assessment of evidence in a specialized area and invokes the highest degree of curial deference:

[24] Mr. Justice Donald described the function of the Human Rights Commission under the prior scheme as that of a gate keeper. He said:

> [26] . . . [T]here will almost always be some evidence of the possibility of discrimination when a member of a minority group is passed over in favour of a member of the majority group. But a mere possibility surely cannot be enough to require a hearing. The scheme of the statute involves a screening process so that only complaints with sufficient merit will proceed to a hearing. The HRC was assigned the role of gate keeper. Thus the HRC had to assess this case in a preliminary way and make a judgment whether the matter warranted the time and expense of a full hearing. The threshold is not particularly high: whether the evidence takes the case "out of the realm of conjecture" . . . As the tribunal is assumed to know the law, the HRC must be taken to have applied this test.

[25] As to the proper approach to a review of a decision made at the gate keeping stage, Mr. Justice Donald said,

> [27] In my view the evaluation of the complaint at the gate keeping stage attracts the highest degree of curial deference. It involves the assessment of evidence in a specialized area.

[26] Although there is now a single tribunal, the scheme has not changed in its essence. The discretion to dismiss a claim that, on a preliminary assessment, does not warrant a full hearing has passed from the former Human Rights Commission to a panel or a member of the Tribunal under the current s. 27(1). The nature of this gate keeping function has not changed. In my view, the approach set out by Mr. Justice Donald to a gate keeping decision of the Human Rights Commission is equally applicable to a gate keeping decision made by a panel or a member of the Tribunal.

[10] In ***Berezoutskaia***, the Court of Appeal rejected the petitioner's attempt to, in effect, parse out findings of fact and thereby recast the Tribunal's exercise of discretion pursuant to s. 27(1)(c) as attracting a different standard of review. In that case, the petitioner argued that the applicable standard of review was not s. 59(4) but, rather, 59(2) because she alleged that the Tribunal must make findings of fact

before it could exercise its discretion to dismiss a complaint. The court disagreed and described the Tribunal's role in s. 27(1)(c) applications as follows:

> [21] In my view, if the Tribunal member had made findings of fact that were not supported by the evidence or were otherwise unreasonable as the appellant alleges, her decision to dismiss the complaint based on that error would have been arbitrary in the sense that it would not have been made according to reason and principle, and it would therefore have been patently unreasonable by virtue of s. 59(4)(a). Thus, even accepting the appellant's allegations of error, the applicable standard of review would be patent unreasonableness as defined in s. 59(4).
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> [22] However, the appellant's submission overlooks the differences in nature between decisions made with and those made without a hearing. The latter involve findings of fact on a balance of probabilities reached after a weighing of the evidence presented, while the former involve only a preliminary assessment of the evidence submitted in order to determine whether that evidence warrants going forward to the hearing stage. Thus, in dismissing the appellant's complaint without a hearing, the Tribunal member did not weigh the evidence and make findings of fact that would be subject to review pursuant to s. 59(2). Rather, she merely concluded that the evidence did not justify the time and expense of a full hearing because, in her judgment, there was no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence. Accordingly, s. 59(2) is not engaged and the exercise of this discretion falls to be reviewed according to the standard of patent unreasonableness pursuant to s. 59(3).

[11] A tribunal's decision will only be patently unreasonable pursuant to s. 59(4)(a) of the ***Administrative Tribunals Act*** if the court finds that the tribunal engaged in an arbitrary decision process, clearly excluded a principle or key issue from its analysis, and made factual errors so extreme as to render the decision arbitrary. This high threshold is a function of the tribunal's expertise and gate-keeping role on a s. 27(1)(c) application.

[12] With respect to s. 59(4)(c), namely, the discretion based entirely or predominantly on irrelevant factors, in the case of ***Schnurr v. Douglas College and another*** (February 1, 2008), Vancouver S072033 (S.C.), a decision of the British Columbia Supreme Court, the court said:

> [16] … Section 59(4)(c) says that a decision will be patently unreasonable if it is based entirely, or predominantly on irrelevant factors. Having carefully reviewed the decision of the Tribunal member in this case, I am satisfied that it was not based entirely or predominantly on irrelevant factors; the best counsel was able to do was to suggest some possibly irrelevant factors that may have been taken into account. I emphasize that to meet the test of the statute, it is necessary for the decision to be based, at minimum, predominantly, on irrelevant factors. I am satisfied that is not the case in the case before me.

[13] I have concluded that the Tribunal member's decision to dismiss was not patently unreasonable. I accept and adopt the respondent's written submissions, especially at paras. 23 to 40. The following comments by counsel at paras. 47 to 49 are especially apposite:

> 47. The petitioners . . . Whether or not the Students for Life Club is ratified, its members are entitled to meet together, to act in concert to advance their views, to refer to themselves as "Students for Life" or any other name which they may choose, and otherwise to give expression to their anti-abortion views. The UBCSUO has no general right to control activities on the UBC campus, and if the Students for Life wish to organize displays on the common areas of the campus, or in classrooms or other UBC facilities, the UBCSUO has no authority to hinder them. The issue, again, is not whether the petitioners may hold the beliefs they do, or express those beliefs by any means they see fit, but rather whether they can force, in the name of religious freedom, every student on campus to fund them to do so.
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> 48. The implication of such a finding would be that any religious group on campus who wished to form a club to promote their religious teachings would have an unqualified right to student society funding,

> whereas secular groups with the same purpose would be left to the discretion of the society.
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> 49. It was never the intention of the Legislature in enacting the *Human Rights Code,* nor of Parliament in enacting the *Charter,* that the protection of religious freedom should become a sword by which religious groups are able to secure advantages not possessed by similarly-situated secular groups. In order to ensure against this outcome, it is necessary to draw a clear line between, on the one hand, protecting true religious practices and beliefs from discrimination, and, on the other, ensuring that no one is compelled to support the promotion of another person's religious views.

[14] Accordingly, the petition to set aside the Tribunal's dismissal order must fail.

[15] I will hear from counsel on the issue of costs.

[16] **MR. CRANE**: I seek an order of costs, My Lord.

[17] **THE COURT**: I think I had your position earlier with respect to the Tribunal --

[18] **MS. CONNELL**: The Tribunal does not seek costs --

[19] **THE COURT**: -- that they did not seek costs.

[20] **MS. CONNELL**: -- no.

[21] **THE COURT**: Do you have any comments in that regard, Mr. Turner?

[22] **MR. TURNER**: No, My Lord.

[23] **THE COURT**: All right. One set of costs.

"The Honourable Mr. Justice Wong"