HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Alex Gilmor

Applicant

-and-

Nottawasaga Valley Conservation Authority

Respondent

DECISION

Adjudicator: Mark Hart

Date: May 9, 2019

File Number: 2011-10549-I

Citation: 2019 HRTO 784

Indexed as: **Gilmor v. Nottawasaga Valley Conservation Authority**

APPEARANCES

Alex Gilmor, Applicant	)	Self-represented
Nottawasaga Valley Conservation Authority, Respondent	)	David Delagran, Counsel

[1] This is an Application filed on December 21, 2011 alleging discrimination with respect to services because of ancestry, place of origin and citizenship, as well as reprisal, contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The applicant and his spouse purchased a lot in 2009 and decided to build a home. Part of their lot is on a floodplain that is subject to the control of the respondent Nottawasaga Valley Conservation Authority ("NVCA"). In 2011, the NVCA denied the applicant's application for approval to build their home. The Application before this Tribunal alleges discrimination by the NCVA in relation to its denial of this approval, which is alleged to have been because the applicant is a Russian immigrant.

[3] The issue of the applicant's ability to build on his lot has already been the subject of extensive litigation. The applicant appealed the NVCA's decision to the Mining and Lands Commissioner, who conducted a hearing *de novo* in 2013. The Commissioner found that the applicant's proposed development was neither appropriate nor safe and denied approval. The applicant then appealed from the Commissioner's decision to the Divisional Court. By decision dated September 9, 2015, the Divisional Court allowed the applicant's appeal and directed approval of the proposed development by the NVCA. The NVCA then appealed to the Court of Appeal. By decision dated May 23, 2017, the Court of Appeal allowed the NVCA's appeal and reinstated the Commissioner's decision. The applicant sought leave to appeal to the Supreme Court of Canada, which was denied on February 1, 2018. On August 7, 2018, an Order was obtained from the Superior Court of Justice for the demolition of all structures and buildings on the applicant's lot at the applicant's expense. The applicant was notified that demolition was scheduled to proceed in January 2019.

[4] The Application before this Tribunal was deferred by Interim Decision dated March 19, 2012, pending the completion of the applicant's appeal to the Mining and Lands Commissioner. Following the Divisional Court's decision, the applicant sought to re-activate the Application. This was denied by Interim Decision dated October 8, 2015 pending the conclusion of the NVCA's motion for leave to appeal to the Court of Appeal

and any consequent appeal. A further re-activation request by the applicant was denied by Interim Decision dated March 23, 2016 as leave to appeal to the Court of Appeal had been granted. Following the denial of leave to appeal by the Supreme Court of Canada, the applicant sought again to re-activate his Application. This request was granted by Interim Decision dated May 23, 2018.

[5] In the Interim Decision dated May 23, 2018, this Tribunal directed that a combined summary and preliminary hearing be held to determine the following issues:

> a. whether the Application should be dismissed as having no reasonable prospect of success; and
>
> b. whether the Application should be dismissed pursuant to s. 45.1 of the *Code* because the substance of the Application already has been appropriately addressed in another proceeding.

[6] The summary and preliminary hearing proceeded by teleconference before me on February 7, 2019. At the hearing, the applicant was assisted by a Russian interpreter. At the hearing, I heard the parties' oral submissions on the two issues identified above. I also have considered the materials filed by the parties as identified by me at the outset of the hearing.

[7] At the commencement of the hearing, I stated that this Tribunal has no jurisdiction to overturn the decision of the Court of Appeal in this matter upholding the decision of the Mining and Lands Commissioner, nor does this Tribunal have any jurisdiction to overturn the Superior Court order dated August 7, 2018 regarding demolition of the buildings on the applicant's lot. I stated that those are matters that have already been dealt with in the courts, and cannot be appealed to or reviewed by this Tribunal.

[8] I stated that the only issue that is within this Tribunal's jurisdiction is whether the NVCA discriminated against the applicant in providing services because of his ancestry, place of origin or citizenship, or engaged in reprisal against the applicant because he sought to claim his rights under the *Code*.

[9] The allegations raised in the Application that are within this Tribunal's jurisdiction are as follows:

> a. That the NVCA views the applicant as an immigrant to take advantage of, and looks at the applicant with disdain for causing trouble that the NVCA did not expect from an immigrant family;
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> b. That the NVCA told three local engineers that the applicant is a criminal and would not pay them for their work;
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> c. That the NVCA prolonged the process and caused the applicant to perform unnecessary engineering work, as they saw the applicant as an immigrant to get money from; and
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> d. That the NVCA took reprisal actions against the applicant after he threatened legal action against it.

[10] In my view, allegations (a) and (c) are of a piece. Essentially, the applicant alleges that the NVCA asserted jurisdiction it did not have, required him to have unnecessary work performed, made unreasonable demands, and required him to expend an excessive amount of money. This allegation was addressed by the Mining and Lands Commissioner at p. 13 of her Decision, where it is stated:

> The Gilmors agreed to the undertaking of all the studies required by the NVCA. This would be the normal requirement for any development – large or small. In Mr. Plazek's view and experience there could have been more give and take or team-like discussions with the NVCA in so far as this is a single-development issue. However, nothing was requested that was not improper (sic).

[11] There can be no doubt that the hearing held before the Mining and Lands Commissioner was a proceeding within the meaning of s. 45.1 of the *Code*. The authority to conduct the appeal by way of a *de novo* hearing is granted to the Commissioner under s. 28(15) of the *Conservation Authorities Act*. The hearing was conducted over the course of four days. The parties, including the applicant, were well-represented by legal counsel. Four witnesses testified for the applicant, and three witnesses testified for the NVCA. The Commissioner's decision runs to some 58 pages, and deals extensively with the evidence and issues. The Commissioner's decision was subject to appeal to the Divisional Court pursuant to s. 133 of the *Mining Act*.

[12] I further find that the finding made by the Commissioner appropriately dealt with the substance of allegations (a) and (c) as raised in the Application. While the Commissioner's decision did not address the issue of whether the applicant was subjected to discrimination by the NVCA as a result of being required to undertake unnecessary work and expense, the Commissioner nonetheless made a specific factual finding that deprives the applicant of the factual foundation required to support these allegations: see *Qiu v. Neilson*, 2009 HRTO 2187. Despite the triple negative used by the Commissioner in the last sentence of the passage quoted above, it is clear that the Commissioner found that the NVCA did not make improper demands or requests of the applicant. In order to prove allegations (a) and (c) before this Tribunal, the applicant would first need to prove that the NVCA "took advantage" of him and caused him to perform unnecessary work, and then prove that the NVCA did this because he is a Russian immigrant. The Commissioner's finding that the NVCA did not make improper demands or requests of the applicant deprives him of the factual foundation or underpinning he requires to prove allegations (a) and (c).

[13] As a result, allegations (a) and (c) are dismissed pursuant to s. 45.1 of the *Code*.

[14] With regard to allegation (b), it is important to note the factual basis asserted by the applicant in support of this claim. This claim arises from an affidavit sworn by the project manager for the property on May 8, 2017, in which he attests to the truth of a letter he had written dated June 12, 2012 about the applicant's treatment by the NVCA. In this letter, the project manager states that an environmental officer employed by the NVCA had told an engineer who worked on the project that the applicant was not trustworthy and that it was best not to get involved as the applicant would not pay his bills. The project manager states that subsequently he spoke with another engineer, who said that the environmental officer at the NVCA had said the "same bad things" about the applicant, although it is not clear from the letter what precisely she is alleged to have said to this second engineer.

[15] Setting aside the fact that this is hearsay evidence, at the summary hearing stage this Tribunal generally assesses reasonable prospect of success on the basis that

the applicant's allegations are true, unless there is undisputed evidence to the contrary. In this case, the actual allegation is that an environmental officer employed by the NVCA told at least one engineer and perhaps two that the applicant was not trustworthy and would not pay his bills. The issue for me to determine is whether this allegation has a reasonable prospect of success in establishing at a merits hearing that these alleged comments were made because the applicant is a Russian immigrant.

[16] It is trite law that this Tribunal does not have jurisdiction to address general allegations of unfairness. This Tribunal's jurisdiction is only over alleged violations of the *Code*, which require an applicant to be able to prove a link or connection to the *Code*-protected grounds alleged in the Application. In this regard, I note that the project manager's June 12, 2012 letter generally alleges that the NVCA was trying to scare off engineers from working with the applicant on the project. The project manager's letter states that the "word on the street" was that the applicant's project was a "taboo case", and that engineers were reluctant to work on the project. The applicant also is stated to have had experiences with two engineers who initially expressed interest in the project, but after speaking with the NVCA and its environmental officer, they would not agree to proceed with the work. The project manager states that one person was told that it would be "bad for their career" to work on the project.

[17] At the same time, the project manager's letter sets out a significant amount of information suggesting that the NVCA generally was a difficult conservation authority to work with. The project manager states that one engineer said that the applicant would need more than good proof with the NVCA if they had decided against the development. This engineer is reported as saying that he had presented a few cases to the NVCA, and even if there was 100% evidence on his side, the NVCA would deny the application anyway and that they are "that unreasonable". The project manager further states that when he was preparing for a meeting with the NVCA's board, he spoke to several engineers and professionals in the field, and "no-one was shy to tell [him] just what they thought of the NVCA". He states that one firm manager told him that the NVCA was the worst and most difficult to work with of all the conservation authorities. He states that he

then spoke with a planner, who said that the NVCA was “just terrible” and charged unreasonable amounts to proceed with a small development she had worked on, and that they were “out of their minds and just crazy to deal with”.

[18] It is not my role at the summary hearing stage to make factual findings, and in this Decision I am not making any factual finding as to the veracity of the contents of the project manager’s letter. Rather, my role is to describe the evidence that the applicant would be relying upon to prove discrimination if this matter proceeded to a merits hearing and to accept this evidence as being capable of proof. However, accepting the truth of the underlying evidence does not mean that I need to accept the applicant’s assumption that the alleged statements made by the NVCA environmental officer were made because the applicant is a Russian immigrant.

[19] In this regard, I note that the evidence underlying allegation (b) is that the NVCA environmental officer said that the applicant was not trustworthy and would not pay his bills, and that she or the NVCA generally may have discouraged engineers from working on the applicant’s project. This underlying evidence is presented in the context of more general evidence that the NVCA is unreasonable, is difficult to work with, charges exorbitant amounts, and is not disposed to change its mind if it is opposed to a project. This more general contextual evidence does not indicate that the other clients who had difficulties with the NVCA were also Russian immigrants or otherwise identified by their ancestry, place of origin or citizenship. I further note that the evidence supporting an allegation that the NVCA environmental officer said that the applicant was untrustworthy and would not pay his bills, does not on its face show a link or connection to support that this alleged comment was made because of the applicant’s status as a Russian immigrant.

[20] I am well aware that allegations of discrimination of this nature are often subtle and contextual, and that in the current time, it is not often that an applicant will be able to point to direct evidence to support a claim of discrimination, such as a statement by an NVCA employee that “the applicant is not trustworthy because he’s a Russian immigrant” or “the applicant won’t pay his bills because he’s a Russian immigrant”. At

the same time, the evidence the applicant relies upon must support more than a bare allegation of a link or connection to a *Code*-protected ground of discrimination.

[21] In the instant case, while I accept the truth of the underlying evidence relied upon by the applicant for the purpose of the summary hearing, I find that the applicant has not provided a sufficient basis to support a link or connection between this underlying evidence and his status as a Russian immigrant, particularly in the context of the totality of the information contained in the project manager's letter. As a result, I find that allegation (b) does not have a reasonable prospect of success in proving the required link or connection to a *Code*-protected ground, and the allegation is dismissed on that basis.

[22] With regard to allegation (d), an allegation of reprisal requires an applicant to prove that the respondent took reprisal or retaliatory action against him because he sought to claim or enforce his *Code* rights. While the applicant's then counsel certainly threatened the NVCA with legal action at the time it denied approval for the project, the applicant acknowledged at the summary hearing that no allegation of discrimination based on a *Code* ground was raised until the Application was filed. By that time, the NVCA already had denied approval of the project, and the applicant's legal recourse laid with an appeal by way of hearing *de novo* to the Mining and Lands Commissioner. As a result, there is simply no proper legal foundation to support the applicant's reprisal allegation, and it is dismissed as having no reasonable prospect of success.

ORDER

[23] For the foregoing reasons, the Application is dismissed pursuant to s. 45.1 of the *Code* and/or as having no reasonable prospect of success.

Dated at Toronto, this 9th day of May, 2019.
"Signed by"

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Mark Hart
Vice-chair