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# Mandryk v. Anmore (No. 2), 2014 BCHRT 64 (CanLII)

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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:

Rory Mandryk

**COMPLAINANT**

A N D:

Municipality of the Village of Anmore

**RESPONDENT**

**REASONS FOR DECISION**  
**APPLICATION TO DISMISS: Section 27(1)(c)**

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Tribunal Member:	Murray Geiger-Adams
Counsel for the Complainant:	Sarah Hentschel
Counsel for the Respondent:	Anthony Price

### **Introduction**

[1] Rory Mandryk filed a complaint alleging that the respondent Village of Anmore discriminated against him regarding employment on the grounds of his physical and mental disability, contrary to s. 13 of the *Human Rights Code*. He alleges that the respondent denied him a position as chief administrative officer (“CAO”), at least in part because he had a medical disability.

[2] The respondent denies that it discriminated against Mr. Mandryk, and has filed an application to dismiss the complaint without a hearing, pursuant to s. 27(1) (c) of the *Code*, on the basis that it has no reasonable prospect of success. The respondent denies that Mr. Mandryk was disabled, or that it had any relevant knowledge of his disability. In any event, it says it offered the position of CAO to a better-qualified candidate, for non-discriminatory reasons.

[3] In, *Mandryk v. Anmore*, 2013 BCHRT 279 (CanLII), 2013 BCHRT 279, the Tribunal granted Mr. Mandryk’s application to amend his complaint, in which he specified that his disability was a major depressive disorder, and provided additional detail as to how, when, and through whom the respondent allegedly had knowledge of his disability, and allegedly acted on that knowledge to change its view of his qualifications, and deny him the position. At the Tribunal’s invitation, the respondent amended its response to the amended complaint, and its application to dismiss, to take account of the amendments.

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

### **Background**

[5] The following account is drawn from the amended complaint, the response, and the materials filed by the parties on the amended application to dismiss. I make no findings of fact, and do not address the merits of the complaint. Mr. Mandryk relies on his own affidavit, and one sworn by Tim Laidler, a former Anmore councillor, who says that he resigned his position in June 2012 over what he perceived to be a “sham process” in the selection of the CAO. The respondent relies on the affidavits of Anmore mayor Heather Anderson, councillors John McEwen,

Kerri Palmer Isaak, and Tracy Green; manager of corporate services Christine Milloy; and human resources consultant Barbara Wilton. In its reply, it relies on an affidavit of counsel's legal assistant, and additional affidavits of mayor Anderson, councillors Green and Isaak, Ms. Milloy, and Ms. Wilton.

[6] In about December 2011, Anmore began a search for a new chief administrative officer – the highest level manager for the Village of Anmore.

[7] Mr. Mandryk was the village manager in Lions Bay. In January 2012, he was on medical leave from that position, and involved in an appeals process with his employer's disability insurer. He says that, at all material times, he suffered from a major depressive disorder, which was the reason for his medical leave from his position in Lions Bay, and which was known to his employer and its legal counsel, Chris Murdy.

[8] Mr. Mandryk says that, in about January 2012, the incumbent CAO, Howard Carley, contacted him and told him the position of city manager would be coming available, and encouraged him to apply. He says he told Mr. Carley he was off work for medical reasons, but was told this would not be a problem. The legal assistant's affidavit attaches correspondence said to be from Mr. Carley which disputes encouraging Mr. Mandryk to apply for the CAO position, and denies knowledge of any permanent medical condition.

[9] Mr. Mandryk applied for the CAO position, supported, he says, by a reference from a Mr. Rosen, who had been a consultant providing planning advice to Lions Bay. Unfortunately, Mr. Rosen died before Anmore could obtain a reference from him.

[10] Mr. Laidler says that 39 applications were received, and reduced by Mr. Carley to a short list of four, including Mr. Mandryk and the person eventually hired, for interviews. He says that council held a number of meetings (whether formal or otherwise is not clear; at least one was apparently at a restaurant) related to the selection process, and that Ms. Malloy recorded these, except for the one at the restaurant. In her second affidavit, Ms. Malloy does not deny this.

[11] Mr. Laidler says that, during these meetings, an issue was raised about Mr. Mandryk's absences due to illness from his position in Lions Bay, and that he believed mayor Anderson's opposition to Mr. Mandryk as a candidate was because of those absences. She denies this. Mr. Laidler says that he and Mr. McEwen told council they thought Mr. Mandryk should be given an opportunity to explain his absences from Lions Bay.

[12] On March 5, 2012, Mr. Mandryk attended an interview for the position. He told council he was off work from Lions Bay for health-related reasons, but hoped to return to work soon. He did not refer to his experience or diagnosis of depression. Subsequently, in his complaint but not in his affidavit (perhaps because the same ground is covered, from personal knowledge, by Mr. Laidler), he says he was advised that he and one other candidate were short-listed, but that the other candidate was not nearly as qualified.

[13] Mr. Mandryk says that, on April 1, 2012, Ms. Wilton, who had been engaged by Anmore as a human resources consultant after the first round of interviews, called him to discuss salary and benefits, and to tell him about an e-mail assignment requiring a presentation. He says she told him that the references he

provided would only be contacted if he was the successful candidate, to whom an offer would be made.

[14] In her first affidavit, Ms. Wilton says she was retained in March 2012, but does not say where the interview process stood at that time, or, if interviews had already been held, explain why she only became involved when the process was underway. In her second affidavit, Ms. Wilton denies that she told Mr. Mandryk references would only be checked for candidates to whom Anmore intended to make an offer.

[15] On April 23, 2102, Mr. Mandryk attended a second interview, with some the Anmore councillors. (In his complaint, he says that this interview was on May 8.) Mr. Laidler says that the second interviews were on May 8, and that only Mr. Mandryk and the successful candidate attended. Ms. Wilton says they were on April 23, and that three candidates were interviewed.

[16] Mr. Laidler says the meeting was on May 8, rather than April 23, as apparently now agreed between Mr. Mandryk and Ms. Wilton. He supports (and may be the source of) Mr. Mandryk's allegations that, at the meeting, whether it occurred in April or May, the four councillors agreed that Mr. Mandryk was the best candidate for the job, and voted, over the mayor's opposition, to have Ms. Wilton check his references. He says a vote was required because council agreed that she would not check references unless council was willing to make an offer of employment.

[17] Mr. Mandryk says that, after the April 23 interview, Ms. Wilton told him that his references were being contacted, and that this would only happen if the respondent was willing to offer him the position. From this information, Mr. Mandryk inferred that he was the most qualified candidate. As noted, Ms. Wilton denies that she told him this at any time.

[18] Mr. Murdy, legal counsel for Lions Bay was also legal counsel for Anmore. Mr. Mandryk says that counsel "knew all the details of [his] disability and absences." Mr. Mandryk alleges that, in a meeting on May 23, 2012, Mr. Murdy told councillors that he had unspecified concerns about Mr. Mandryk's candidacy, but would not elaborate. After the meeting, Mr. Mandryk says that one or more of the mayor and councillors of Lions Bay discussed Mr. Mandryk's disability issues, and the fact that he was currently off work due to an illness, with their counterparts in Anmore. As a result of this information from counsel, and their discussions with their counterparts in Lions Bay, Mr. Mandryk says that the Anmore mayor and councillors changed their selection for the position from him to the next most qualified candidate.

[19] Mr. Laidler says that there was an *in camera* council meeting on May 22, 2013, which Mr. Murdy attended to give legal advice on an unrelated issue. He says that, at the meeting, Mr. Murdy, without providing any detail, volunteered that he wanted council to be aware that Mr. Mandryk had been off work for a considerable amount of time. Mr. Laidler says that Mr. Murdy acknowledged he was in a "gray area" with respect to a conflict of interest given his relationship with Lions Bay, but that he thought he should pass this information on to council, was surprised that Mr. Mandryk had not given his name as a reference, and that council should check out Mr. Mandryk's references very closely. As discussed below, Anmore objects to Mr.

Mandryk's reliance on this evidence, on grounds of both statutory confidentiality and solicitor-client privilege.

[20] Mr. Laidler says that, after the May 22, 2012 council meeting, councillor Palmer Isaak told him that, on the basis of unspecified information she had received at Mr. Rosen's funeral on May 15, and what she had learned from Mr. Murdy, she was no longer going to support Mr. Mandryk's candidacy. Ms. Palmer Isaak says that she only told Mr. Laidler that she was still considering her view as to the best candidate, but does not address what she may have learned, or from whom, at the funeral.

[21] On May 29, 2012, Mr. Mandryk says that Anmore told him that he would not be hired for the CAO position. An e-mail exchange between Mr. Laidler and mayor Anderson on June 6 and 7, 2012, appears to confirm the former's understanding that, at some point, the four councillors agreed on Mr. Mandryk as "the best compromise," and that Ms. Anderson had, and had shared with council, information, from connections that provided her with information before it was official, that Mr. Mandryk was "about to be dismissed" from his position in Lions Bay.

[22] The respondent says that, by early June, it had narrowed the field of applicants to two: Mr. Mandryk and one other. It says that on June 11, 2012, council voted to offer the position to the other candidate. That vote occurred *in camera*, but Ms. Milloy says that, on April 9 2013, council voted to make public a portion of the minutes, relating to the vote to hire the other candidate. She does not explain the circumstances or timing of this decision, but I note that it occurred between service on Anmore of Mr. Mandryk's human rights complaint, on October 4, 2012, and a few days before Anmore's initial response, on April 16, 2013. Council has evidently not voted to make public any portion of the relevant minutes of its other meetings during the hiring process, which are the focus of Mr. Mandryk's allegations.

[23] Anmore says that, throughout 2011 and 2012, the members of its council who voted to offer the position as chief administrative officer to a candidate other than Mr. Mandryk did not know that he was disabled, and did not know that he suffered from a major depressive disorder.

[24] Anmore also says that the successful candidate was more qualified than Mr. Mandryk, in that he had worked for the Village since 1994, had been its manager of public works for more than a decade, and had been acting as the chief administrative officer since February 2012. The affidavits of mayor Anderson, and councillors Palmer Isaak and Green, who voted in favour of the successful candidate, support this view, though I am given pause in assessing them by the fact that significant portions of them are in substantially identical language. I also note that the second affidavits of councillors Palmer Isaak and Green are not responsive to Mr. Mandryk's allegation, supported by Mr. Laidlaw, that, at some point prior to the ultimate decision in June 2012, all four councillors considered Mr. Mandryk the best candidate.

[25] The affidavits of Mr. Laidler and Mr. McEwen, both of whom voted against the decision to offer the CAO position to the other candidate, state their views (in Mr. Laidler's case supported by considerable detail, including documentation of

interview scores) that the successful candidate was not better qualified than Mr. Mandryk.

[26] In the alternative, Anmore says that, even if Mr. Mandryk was better qualified, it hired the successful candidate for a non-discriminatory reason, in that he provided stability during a period when other staff and consultants were leaving.

[27] On September 21, 2012, Mr. Mandryk filed the present complaint.

### **Application to Dismiss**

[28] The respondent's amended application to dismiss the complaint without a hearing is brought pursuant to s. 27(1)(c) of the *Code*, on the basis that it has no reasonable prospect of success. As set out in more detail in *Rajigadu v. UBC and others*, 2012 BCHRT 7 (CanLII), 2012 BCHRT 7, paras. 74-78, this involves an assessment, on the whole of the material before the Tribunal, whether it takes the complaint "out of the realm of conjecture", or whether there is "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". The respondent's arguments, as summarized above, are that the people who voted to offer the CAO position to the person hired, in preference to Mr. Mandryk, did not know that the latter was disabled (and indeed he may not have been); the successful candidate was better qualified; and Anmore had a non-discriminatory reason for its hiring decision.

[29] To succeed in his complaint at a hearing, Mr. Mandryk would have to show that he had a disability, that the respondent treated him adversely with respect to his prospective employment, and that there was a connection between the characteristic and the adverse treatment. He need only show that his disability was a basis for the adverse treatment, not the only, or even the principal basis for such treatment: *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 at para. 131.

[30] On an application under s. 27(1)(c), the burden is not on him to establish a *prima facie* case on these three elements. Rather, the burden is on the respondent to show that he has no reasonable prospect of success in establishing one or more of them: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.

[31] In *Jussila v. Finning International*, 2009 BCHRT 413 (CanLII), 2009 BCHRT 413, the Tribunal said:

[T]here is conflicting affidavit information before me relating to a number of issues which are central to the complaint. ... The fact that there are credibility issues does not necessarily mean that the Tribunal cannot dismiss a complaint under s. 27(1)(c): *Bell v. Sherk*, paras. 28-29. However, where there are significant differences in the versions of events put forward by the parties on issues that are crucial to a determination of the matter, a hearing will often be necessary to fully explore and test that conflicting evidence: *Keller v. Canada West Promotions and others*, 2006 BCHRT 553, para. 11.  
(paras. 75-76)

[32] The situation is similar here, in that there are many important conflicts between the parties with respect to the disputed factual issues at the heart of the complaint: whether Mr. Mandryk had a disability, or whether, if he did, Anmore was aware of it, or should have been aware of it, or whether it was a factor in its

decision not to offer him the CAO position. If those conflicts are resolved in Mr. Mandryk's favour, he will have gone some distance toward establishing the elements of a *prima facie* case of discrimination: *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), 2012 SCC 61, para. 33. If not, of course, the complaint may be dismissed.

[33] On an assessment of all the material before me, I am not able to resolve these factual issues, or to say that Mr. Mandryk has no reasonable prospect of establishing the facts he alleges. Mr. Mandryk has provided limited medical evidence tending to show that, at least in his family doctor's opinion, he did suffer from a depressive disorder that limited his ability to work. Whether this evidence will be sufficient to establish the existence of a relevant disability, or whether other evidence will be sufficient to show that Anmore was, or should have been, aware of such a disability, are matters for exploration at a hearing. For the purposes of deciding this application, the material before me is sufficient to take Mr. Mandryk's allegations beyond the realm of conjecture. In these circumstances, I am not able to determine that his complaint has no reasonable prospect of success.

[34] Most importantly, I am left with Mr. Laidler's evidence with respect to councillors Palmer Isaak and Green's apparent change in views of Mr. Mandryk's qualifications and suitability; with respect to councillor Palmer Isaak's obtaining and acting on negative information about Mr. Mandryk; with respect to mayor Anderson's obtaining and communicating negative information about Mr. Mandryk (which may or may not have related to his alleged disability); and with respect to Mr. Murdy's alleged communications to council, which arguably may have affected its members' views as to his ability to attend work, and put it on inquiry as to the reasons for any inability to do so.

[35] I appreciate that Anmore says that much of this evidence was confidential under s. 117 of the *Community Charter*, SBC 2003, c.26, or subject to solicitor-client privilege, or both. However, it is apparent, in the circumstances of this case, that council could make information about council deliberations and decisions available, and did so, just before filing its response to the complaint, with respect to the information which it says favours its position, but has not done so with respect to information which may not favour that position.

[36] Further, it appears to me that the *Community Charter*, while it may restrain Mr. Laidler from disclosing confidential information, and give Anmore remedies against him for doing so, is not necessarily a bar to the Tribunal's consideration of such information once disclosed. Section 27.2(3) of the *Code* provides that the Tribunal's power to receive evidence that would not be admissible in court does not override an *Act* expressly limiting the evidence which may be admitted in a proceeding, but it is not clear to me whether the *Community Charter* has that effect. In the absence of full legal argument on this point, I express no opinion on it.

[37] I am unable to give effect, at this stage, to the claim for privilege, as I lack the detailed factual foundation which would establish that any comments Mr. Murdy made were made on an occasion of privilege, and even if they were, I lack full legal argument on whether the claim for privilege would, or would not, be defeated by the nature of Mr. Mandryk's allegations.

[38] On the latter point, I note the decision in *McIntosh Estates Ltd. v. Surrey (City)*, [1997] B.C.J. No. 2030 (B.C.C.A.), application for leave to appeal denied, [1997] S.C.C.A. No. 533, in which the Court upheld a Master's order requiring disclosure of otherwise privileged city council documents, in "a situation where privilege would prevent full scrutiny of the conduct of a public body in circumstances where it has been found to have acted with oppression and discrimination against the party alleging wrongdoing." If this complaint proceeds, and Mr. Mandryk seeks disclosure of evidence, or seeks to rely on evidence, over which Anmore claims privilege, the parties will have a full opportunity to address the applicability of this, and other relevant authorities.

[39] Finally, on this point, some of the information about his medical background Mr. Mandryk says was passed to members of council, between the time four councillors identified him as the best candidate, and two allegedly changed their minds, arose from alleged communications at the funeral, in discussions between members of the Anmore and Lions Bay councils, and from mayor Anderson's unofficial connections. Quite apart from the information Anmore says must be excluded because of statutory confidentiality or privilege, these facts, if proven, may support an inference that at least part of the reason the council changed its collective view of Mr. Mandryk's qualifications or suitability for the CAO position was related to a perception that he suffered from a disability. At this stage, I cannot say that Mr. Mandryk has no reasonable prospect of proving the necessary facts to support such an inference.

[40] The respondent has not given me an adequate basis for concluding that its evidence, when tested by searching cross-examination in light of the available documentary evidence, will necessarily prevail over that of Mr. Mandryk, when similarly tested, such that the latter's complaint has no reasonable prospect of success.

[41] This does not mean that Mr. Mandryk's complaint is bound to succeed, or even likely to do so; only that the respondent has not shown that it has no reasonable prospect of success. Accordingly, I decline to exercise my discretion to dismiss it under s. 27(1)(c) of the *Code*.

## Order

[42] The respondent's application to dismiss the complaint is denied.

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Murray Geiger-Adams, Tribunal  
Member



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