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IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Tye Harvey

COMPLAINANT

AND:

Toby's Liquor Store and Rola Priatel and Jaskaran aka Lucky

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Kylie Buday
On their own behalf:	Tye Harvey
Counsel for the Respondents:	Stewart Elworthy
Date of Hearing:	January 16, 2024
Location of Hearing:	by videoconference

I INTRODUCTION

[1] This decision is about whether Tye Harvey proved he was discriminated against by his former employer, Toby's Liquor Store, and Rola Priatel and Jaskaran, aka Lucky [together, the **Respondents**]. It also addresses whether to award costs against Mr. Harvey for improper conduct.

[2] Mr. Harvey, the complainant, failed to appear at the hearing of this matter despite having notice. For the reasons set out below, I declined to reschedule the hearing and dismiss the complaint.

[3] The Respondents ask the Tribunal to award costs against Mr. Harvey pursuant to s. 37(4)(b) of the *Human Rights Code*. They say Mr. Harvey engaged in improper conduct during the course of his complaint by threatening a witness and Ms. Priatel, treating Respondents' counsel as well as the Tribunal staff disrespectfully, and wilfully disregarding the Tribunal's directions. I agree that this is one of the rare cases in which a costs award should be granted. For the reasons set out below, I order Mr. Harvey to pay costs to the Respondents in the amount of \$500.

II DECISION

[4] Mr. Harvey, as the complainant in this matter, has the onus of providing the Tribunal with evidence to substantiate his allegations against the Respondents. Because he did not appear for the hearing and did not have a compelling reason for not doing so, I declined to reschedule the hearing. Accordingly, there is no evidence for me to consider and, therefore, he did not meet that onus. I set out my reasons below.

[5] Mr. Harvey filed a human rights complaint against the Respondents on November 23, 2020. In it he alleged the Respondents discriminated against him on the basis of his mental disability and sexual orientation, contrary to s. 13(1) of the *Code*, which prohibits discrimination regarding employment. The Respondents deny discriminating.

[6] I set out some, but not all, of the correspondence between the Tribunal and Mr. Harvey to explain the basis for my conclusion that he had notice of the hearing. On February 28, 2023, the Tribunal contacted Mr. Harvey to confirm he wished to proceed to a hearing. Mr. Harvey replied that he did. In March 2023, the Tribunal set dates for the hearing of the complaint for January 16 and 17, 2024. It notified the parties of these dates on April 11, 2023. As is the usual practice, the Tribunal emailed Mr. Harvey on October 20, 2023, reminding him of the dates set for the hearing and asking if he would like a Tribunal assigned mediator to contact the parties. Mr. Harvey replied that he would. The Respondents declined the offer to mediate. At no point did Mr. Harvey indicate that he could not attend the hearing.

[7] The Respondents were present for the first day of the hearing. Mr. Harvey failed to appear despite having communicated with the Respondents, copying the Tribunal, in the days leading up to the hearing. Consistent with the Tribunal's practice in such situations, I adjourned the hearing for 30 minutes to allow Mr. Harvey time to appear. The Tribunal made several attempts to reach him during this time but was unsuccessful. When the hearing resumed, Mr. Harvey was still not present.

[8] Later that day, Mr. Harvey wrote to the Tribunal and explained that he did not attend because he now lives in Vietnam, where it was 3 a.m. when the hearing began. He also said he had not been paying attention to the Tribunal because it had taken so long to have his complaint heard and it was no longer his priority. He asked the Tribunal to reschedule the hearing. I declined to do so.

[9] Not paying attention to the Tribunal and living in a different time zone are not sufficient reasons for the Tribunal to reschedule hearing dates when a party who had notice, fails to appear. Mr. Harvey had notice of the hearing. Nothing prevented him from contacting the Tribunal to request a different hearing time. Had Mr. Harvey informed the Tribunal of his move to Vietnam and requested an adjustment to the hearing time, adjustments could have been made to accommodate him. He made no such request.

[10] I dismiss the complaint.

[11] At the hearing, and before I adjourned for the day, the Respondents sought an order for costs under s. 37(4) of the *Code*. I allowed them to apply for such an order in writing so that Mr. Harvey could respond. I now turn to that application.

III APPLICATION FOR COSTS

[12] Section 37(4) of the *Code* gives the Tribunal member hearing a complaint the power to award costs against a party who has “engaged in improper conduct during the course of the complaint.”

[13] The purpose of a costs award is punitive: *Terpsma v. Rimex Supply (No. 3)*, 2013 BCHRT 3 [*Terpsma*] at para. 102. It aims to deter conduct that has a significant and detrimental impact on the integrity of the Tribunal’s process: *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 at para. 246. Participants in the Tribunal’s process are entitled to be treated with respect, and a costs award is available to sanction parties who engage in conduct that is inflammatory, derogatory, disrespectful and inappropriate: *Colbert v. District of North Vancouver*, 2018 BCHRT 40 [*Colbert*] at para. 54.

[14] The Respondents say Mr. Harvey engaged in improper conduct, which they submit warrants a costs award of \$7,500.00. I agree that Mr. Harvey has engaged in improper conduct that should be sanctioned. However, I am of the view that a costs award of \$500.00 in Mr. Harvey’s case is an appropriate award. It is sufficient to achieve the punitive and deterrent purposes of s. 37(4) of the *Code*. My reasons are as follows.

[15] I received submissions on two categories of what the Respondents say is improper conduct for the purposes of s. 37(4): (1) Mr. Harvey’s conduct towards a witness [the **Witness**] and Ms. Priatel during document disclosure, and (2) Mr. Harvey’s conduct towards the Tribunal and Respondents’ counsel [**Counsel**].

1. *Conduct towards the Witness and Ms. Priatel*

[16] The Respondents say, and the evidence before me shows, Mr. Harvey threatened the Witness by telling her he had filed a police complaint about her affidavit, which he received through document disclosure in late August 2022.

[17] On August 30, 2022, Mr. Harvey sent the Witness the following message:

Recently read your affidavit against me.

Have you ever heard of libel? Or defamation of character?

[...]

Definitely I will be filing a case with the supreme Court [*sic*] for libel. Since I have proof you have/had been defaming my character to third parties.

Very hurt you or anyone would lie about me like that in a legal document that the police now have access too (also perjury [*sic*] is a criminal offense and I will be sending your affidavit over to the police [...])

You can google perjury [*sic*] and see what it means and it's consequences.

[18] The Witness attests that Mr. Harvey's messages frightened and stressed her. She says he intended to intimidate and bully her so she would not testify for the Respondents.

[19] The Respondents also say a cease-and-desist letter Mr. Harvey sent to Ms. Priatel on August 27, 2022, is evidence of improper behaviour. A copy of that letter is before me. It reads in relevant part: "you are being ordered to cease and desist making false and slanderous allegations" against me. And:

I may use telephone recording devices to document any telephone conversations that we may have in the future if you fail to comply with this cease and desist letter. You are hereby instructed to comply with this letter immediately or face legal sanctions under applicable Federal and Provincial or Territory law. I intend to keep a log of any contacts you make with me after you receive this letter.

[20] In response to the application for costs, Mr. Harvey does not deny he engaged in the above behaviour, or that it was improper for him to do so.

[21] I agree with the Respondents that Mr. Harvey's communication to the Witness and Ms. Priatel is the kind of behaviour contemplated by s. 37(4) of the *Code* as improper conduct. The Tribunal has held that attacking another party or their counsel, or otherwise engaging in inappropriate communications can constitute improper conduct: *Stoppes v. Just Ladies Fitness (Metrotown) Ltd. and D*, 2007 BCHRT 125. This includes threatening communications. The kinds of threatening communications that have attracted costs awards include threats to pursue criminal charges: *Colbert* at para. 33.

[22] Mr. Harvey threatened the Witness with police action. That kind of threat effectively asks witness to modify their testimony or face legal consequences. The letter Mr. Harvey sent to Ms. Priatel in my view also crossed a line. That letter included threatening language. It suggests Ms. Priatel should exercise caution about how she describes Mr. Harvey or face legal consequences. Mr. Harvey's communications were improper attempts to alter how his case would unfold. They also appear to be retaliatory, which is prohibited under s. 43 of the *Code*.

[23] The proper place for Mr. Harvey to dispute the veracity of the information disclosed to him by the Respondents was at a hearing, where he would have had an opportunity to cross-examine the Respondents and their witnesses. I have considered that Mr. Harvey may have misunderstood that cross-examination was the appropriate place to raise his objections to statements made by witnesses in affidavits about him. However, even if he misunderstood the Tribunal's process, that does not excuse sending witnesses threatening communications. Threatening and retaliatory communications impact the integrity of the Tribunal's process and are the kind of improper conduct contemplated by s. 37(4) of the *Code*.

[24] In sum, I find Mr. Harvey's communications with the Witness and with Ms. Priatel over the contents of their affidavits is improper conduct that warrants a costs award under s. 37(4) of the *Code*.

2. *Conduct towards the Tribunal and Counsel*

[25] The Respondents submitted copies of emails Mr. Harvey sent to the Tribunal and Counsel between August 29, 2022, and September 1, 2022. The Respondents argue those

emails show Mr. Harvey failed to follow the Tribunal's directions, made unfounded allegations against the parties and the Tribunal, and was rude to Tribunal staff. This, the Respondents, say amounts to improper conduct under the *Code*. I set out those emails below, as they were written.

[26] On August 30, 2022, Mr. Harvey wrote to the Tribunal, copying Counsel:

After receiving legal help today I have filed a police report and requested the vancouver [sic] police department to initiate an investigation for potential criminal charges. The respondents have made lies about me under oath and I can prove they aren't true and are made up to either protects themselves/retaliate against me. If needed I can provide the police file #.

This is a criminal act of purgery. Aswell as libel. (Which will be dealt with accordingly)

So please take these affidavits statements/allegations for what they are worth. And I will continue with other means to resolve this issue outside of the human rights case that is ongoing.

[emphasis in original]

[27] Counsel replied to Mr. Harvey: "Please provide me with the police file number. Thank you."

[28] Mr. Harvey responded, copying the Tribunal:

Please Stewart Elworthy when sending emails requesting documents or contacting me do not send them directly to me include the tribunal aswell.

If and when the time comes for us to communicate privately on this matter then we can communicate without cc'ing the commisioners.

Just as I have cc'd the commisioners with everything I have sent or needed to be said in accordance to your client and this case.

Some emails I have sent by accident only to the commissioner because I clicked reply instead of clicking "reply all"

I will not communicate privately with you without cc'ing the tribunal at this point.

[29] Counsel replied:

I look forward to receipt of the police file number which, according to your email from today at 4:34 pm shown below, you indicated you would provide. It appears that you may have forgotten to provide it as there is no police file number in your response email from 5:18 today.

It is my understanding that the Tribunal does not want us to copy them on every email made between us.

[30] Mr. Harvey wrote back:

Also If you read my previous email you will see I never said I am going to provide the police file # I Said I can provide it if needed.

Please don't make it sound as if I am lieing and distorting my words when it is clearly stated in the email "I can provide police file # IF needed" I did not forget to send anything.

[31] Mr. Harvey then sent several other emails to Counsel and the Tribunal which I do not find necessary to repeat here, though I have considered them all.

[32] On September 1, 2022, the Tribunal wrote to the parties:

Dear Participants,

The Tribunal has received 11 emails from yesterday and today, the majority from the complainant, that appear to be argumentative communications between the parties that have been inappropriately sent to the Tribunal. These emails are rejected for filing and will not be considered beyond the purpose of providing this information.

Mr. Harvey, I note that you say you will not communicate with the respondent without the Tribunal being copied. You are required to communicate without copying the Tribunal on communications that are between the parties. The Tribunal is not to be copied on communications between the participants accept [sic] as permitted by Rule 10 of the Tribunals Rules of Practice and Procedure below.

The parties are in direct communication with each other unless they have counsel or an agent.

Communications to the Tribunal ARE to be copied to the other party.

Be advised that the parties are expected to treat each other with courtesy and respect see Rule 7 – Representation before the Tribunal [...]

[33] Mr. Harvey replied:

Be advised that the parties are expected to treat each other with courtesy and respect see Rule 7 – Representation before the Tribunal

And exactly why are you stating this in an email to me? Are you insinuating I am being disrespectful? By writing evidence down and sending it? Please show me a time I didn't treat someone with respect or courtesy? Please don't sent me things like this unless it is necessary.

Stressful enough the tribunal took 2 years to even open this case and my mother just died and I'm dealing with mental health issues.

Thanks.

[34] The Tribunal clarified:

Mr. Harvey, the information was for and sent to both parties. The Parties are awaiting a member of the Tribunal to review and determine the next steps of the process. That will take place as soon as is possible.

[35] Later that day, Mr. Harvey wrote to the Tribunal only:

I'd appreciate it if you could tell me what's happening with forms 7.1 that I sent in yesterday. Thanks.

DO NOT CC THE RESPONDENTS

Yesterday the tribunal was careless and shared our private conversation with the respondent and that is not okay.

[36] The Tribunal replied, copying Counsel:

Dear Mr. Harvey,

The Tribunal has not been careless with your communications. As you were informed, all written communications to the Tribunal are to be

provided to the other party by the sender. The parties do not exclude each other from written communication with the Tribunal. When you write to the Tribunal, you are to copy the Respondent.

[37] On the above communications, I agree that at times Mr. Harvey was disrespectful to Tribunal staff and that he disobeyed Tribunal directions regarding communications between him and the Tribunal, and him and Counsel. However, he only appears to have done so on one occasion. On September 1, 2022, the Tribunal pointed out his obligations under the Tribunal's Rules of Practice and Procedure regarding communications. Mr. Harvey replied later that day asking the Tribunal not to copy the Respondents and accusing the Tribunal of being careless. The Tribunal followed up reminding Mr. Harvey that parties do not exclude each other from written communications with the Tribunal and explaining that it had not been careless with Mr. Harvey's communications.

[38] The Respondents did not submit communications from Mr. Harvey following this last email on September 1, 2022, to support their assertion that he "continually disobeyed Tribunal requests that he copy the Respondent's counsel on all emails to the Tribunal." Mr. Harvey may have failed to comply with the Tribunal's orders in one email, but he did not continue to do so. While Mr. Harvey's conduct between August 29 and September 1, 2020, was not ideal, it was brief and I do not consider it to be the kind of conduct that would warrant sanction under s. 37(4).

[39] Next, I explain how I assessed quantum.

3. Quantum

[40] As I said above, the primary purpose of a costs award under s. 37(4) is punitive. The Tribunal also considers the following principles in assessing quantum under s. 37(4):

- cost awards are intended to have a deterrent effect, and to sanction conduct that has a significant and detrimental impact on the integrity of the process;
- at the same time, cost awards ought not to have a chilling effect on the filing of complaints;

- repeated use of inflammatory, derogatory, disrespectful and inappropriate comments would constitute improper conduct;
- the Tribunal has an obligation to protect the integrity of the process, and ensure participants are treated respectfully; and,
- an award of costs is discretionary, and, in assessing quantum, the factors to be considered include the nature of the improper conduct, any actual costs as a result of the improper conduct, seriousness of the effects on the parties and the human rights system.

Terpsma at para. 141.

[41] The circumstances of the particular case should guide the Tribunal’s assessment of quantum. A just punishment in response to improper conduct should be proportionate.

[42] The Respondents ask me to consider Mr. Harvey’s behaviour as similar to that in the case of *MacGarvie v. Friedmann (No. 4)*, 2009 BCHRT 47 [**MacGarvie**], where the Tribunal ordered Mr. Friedmann to pay Ms. MacGarvie \$7,500 as costs for improper conduct.

[43] I do not find Mr. Harvey’s conduct to be similar to what attracted costs in *MacGarvie*. In that case, the respondent engaged in improper behaviour in a broader range of circumstances, over a much longer period, including during two hearings. Mr. Friedmann’s conduct included threats of violence to witnesses and participants in the proceeding, going so far as to say he “wanted to take a gun and shoot everyone involved in this case”: para. 209. Mr. Harvey’s conduct does not approach the kind of egregious conduct that resulted in the Tribunal ordering Mr. Friedmann to pay \$7,500.00 in costs.

[44] In my view, cases like *Terpsma*, *Colbert*, and *Stein v. Vancouver Coastal Health Authority and another (No. 2)*, 2014 BCHRT 227 [**Stein No. 2**], are comparable to the circumstances of this case. For example, in *Terpsma* the complainant’s representative, Ms. Bergeron, accused one of the respondent’s potential witnesses of perjury based on statements made in an affidavit. Ms. Bergeron also threatened the respondent with media attention on multiple occasions, including by bringing media attention to an unrelated death of a person while working for the respondent. Additionally, Ms. Bergeron yelled at counsel for the respondent, accused counsel

of trying to use the Tribunal's case manager as a "scape goat," and then of shifting his focus "to include me, as another one of his escape goats, and what appears to be of a criminal nature." This is not an exhaustive list of the improper conduct Ms. Bergeron engaged in while representing Mr. Terpsma.

[45] The Tribunal determined Ms. Bergeron's behaviour warranted a costs order against Mr. Terpsma under s. 37(4). It ordered him to pay \$750.00, noting that at no time did he attempt to apologize for Ms. Bergeron's improper conduct, or distance himself from her. The Tribunal noted in particular that invoking the tragic workplace death in his case, "was a gratuitous, bullying tactic, indicative of Mr. Terpsma's loss of reasonable perspective": para. 150. Though the Tribunal considered the conduct worthy of a larger costs award, it considered Mr. Terpsma's financial circumstances in its decision on quantum, though he had not made an express ability-to-pay argument.

[46] In *Stein v. Vancouver Coastal Health Authority and another (No. 2)*, 2014 BCHRT 227 [**Stein No. 2**], the Tribunal also issued a relatively low costs award for improper behaviour. In *Stein No. 2*, the Tribunal ordered Ms. Stein to pay \$750.00 for, among other things, making baseless allegations of improper conduct against counsel for the respondents, including accusing him of hacking into her computer. Notably, Ms. Stein had previously engaged in conduct that warranted a \$500.00 costs awards under s. 37(4) for failing to provide the respondents notice for an adjournment request: para. 28. In assessing quantum, the Tribunal considered the fact that Ms. Stein was a self-represented litigant and that she suffered from mental and physical disabilities, noting however that while those factors "may argue for greater flexibility, they do not inoculate her against having to follow the rules or excuse unfounded allegations": para. 194.

[47] Finally, in *Colbert* the Tribunal ordered Mr. Colbert to pay \$750.00. The basis of the costs award was Mr. Colbert sending inappropriate, threatening, and disrespectful communications to District council and staff, and to the District's counsel, including allegations of perjury and threats of retaliation if the District did not engage in settlement discussion with him. Mr. Colbert engaged in such behavior during a span of at least seven months. The Tribunal

considered that his behaviour, while serious, had taken place at the early stages of the process before any findings of fact had been made, as well as the fact that his complaint had been dismissed. However, the Tribunal also considered the fact that Mr. Colbert had “shown himself to be unwilling to change his behaviour.”

[48] Turning to the present case: Mr. Harvey says I should consider his mental health conditions in any assessment of a costs award against him. I do not find it necessary to share the details of Mr. Harvey’s mental health conditions here but, if true, the account he provides persuades me that his mental health is a relevant factor I should consider. Mr. Harvey also says he experienced a mental health crisis in 2022, triggered by the passing of his mother. The Respondents submit Mr. Harvey has not provided any evidence of his mental health conditions, and by inference, ask that I not consider the state of Mr. Harvey’s mental health at the time of the improper behaviour.

[49] Though it is true that Mr. Harvey has not provided the Tribunal with documentary evidence of his mental health conditions, the Tribunal’s records show that Mr. Harvey has mentioned his mental health conditions on more than one occasion since filing his complaint. Indeed, his complaint was based in part on allegations of discrimination based on mental disability. He has been consistent in asserting that he has a mental disability. He also referred to his mother’s passing in communication with the Tribunal around the time of the improper conduct. Considering the references Mr. Harvey makes to his mother’s death and his mental health, I accept that he was experiencing at least some mental distress in August 2022. Though this does not excuse his behaviour, I have considered it in assessing quantum.

[50] Next, I turn to Mr. Harvey’s submission that he cannot afford the \$7,500.00 the Respondents seek. He says this is equivalent to 80 percent of his annual income for the 2023 tax year. In reply, the Respondents state Mr. Harvey has not provided the Tribunal with any evidence of his asserted income. They also argue that if Mr. Harvey can afford to be in Vietnam, he can afford to pay an award of \$7,500.00. I am not persuaded by this argument because I have no evidence on the circumstances that took Mr. Harvey to Vietnam or on his income or expenses whilst living there. In any event, I have not considered either Mr. Harvey’s asserted

low income or the Respondents' assertions about his ability to pay a costs award as factors in my assessment of quantum.

[51] The Respondents ask that I consider "that Mr. Harvey made his unfounded complaints against three different Respondents, not just one." While I dismissed Mr. Harvey's case for lack of evidence, I am not prepared to consider this as evidence that he brought "unfounded" allegations justifying a costs award under s. 37(4). In fact, I consider the dismissal of Mr. Harvey's complaint to be a factor that would warrant a lower award, as was the case in *Colbert*.

[52] The Respondents also say I should consider that he caused "great fear and distress to [the Witness]." They further submit an award for \$7,500.00 costs under s. 37(4) should be divided as follows: \$2,000.00 to Andrew Priatel, the owner of Toby's Liquor Store, \$2,000.00 to Rola Priatel, \$2,000.00 to Jaskaran (aka Lucky) and \$500.00 to the Witness. This part of the Respondents submission appears to be based on the incorrect premise that an award under s. 37(4) is both punitive and compensatory. I am not prepared to divide my order into different amounts for each respondent and the Witness.

[53] In my view several factors are relevant to quantum in this case. Those factors are: Mr. Harvey's mental state at the time of the improper conduct; the challenges he experienced navigating the Tribunal's process as a self-represented litigant; the fact that the improper conduct in this case occurred over a relatively short period of time; and, the fact that Mr. Harvey's complaint was dismissed. Mr. Harvey's conduct towards the Witness and Ms. Priatel was improper in similar, but less sustained ways, than in *Colbert*, *Stein No. 2*, and *Terpsma*. Therefore, I consider an award of \$500.00 to be appropriate.

IV CONCLUSION

[54] Mr. Harvey's complaint against the Respondents under s. 13(1) of the *Code* is dismissed in full.

[55] Pursuant to s. 37(4) of the *Code*, I order Mr. Harvey to pay \$500.00 to the Respondents for improper conduct.

Kylie Buday
Tribunal Member