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A Stressful Legal System Creates Vexatious Self-Reps

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Case Commented On: Davis v Alberta (Human Rights Commission), 2019 ABQB 6 (CanLII)

Davis v Alberta (Human Rights Commission) is a judicial review of a decision by the Acting Chief of the Alberta Human Rights Commission (AHRC) to dismiss three complaints filed by Ms. Davis with the AHRC. There are no significant developments in human rights law in this decision, but it offers a good opportunity to consider the impact of administrative delays in dispute resolution mechanisms on individuals, especially self-represented ones. Davis also offers an example where the Alberta Court of Queen's Bench was invited to find a self-represented litigant vexatious for the purposes of a costs decision.

The Complaints

Ms. Davis had three complaints before the AHRC. The first complaint was that Peace River School Division No. 10 (The School Division, or PRSD) had discriminated against Ms. Davis in hiring decisions because of her age and place of birth. The second and third complaints were that the school division had taken retaliatory action against her for making the human rights complaint, contrary to section 10 of the Alberta Human Rights Act, RSA 2000, c A-25.5. Following an investigation, the Acting Chief of the AHRC dismissed all three complaints, concluding that there was "no reasonable basis in the evidence to proceed to a hearing" (at paras 9-11).

Ms. Davis brought three applications for judicial review, one for each dismissal. The Court heard them together. In his decision, Justice Brian Burrows commented that Ms. Davis did not fully grasp the purpose and scope of a judicial review (at para 14-15). Justice Burrows found all three dismissals to have been reasonable (at paras 17-20). He considered the material that Ms. Davis believed to show that Alberta Justice conspired with the Acting Chief of the AHRC to have the complaint dismissed and concluded that it showed nothing improper, and that the "allegations are totally misguided and entirely without merit." (at para 21) Ms. Davis also argued the AHRC process was procedurally unfair because the AHRC performed a deficient investigation and denied her the opportunity to meet the case against her. Justice Burrows found no merit to these arguments and concluded the process was not procedurally unfair (at paras 23 and 30).

The AHRC spent a long time addressing the complaints, which Justice Burrows commented on several times: "For reasons not fully explained, it took what seems to have been a very long time to deal with them." (at para 7), "The process was curiously slow but in my view that did not result in any procedural unfairness." (at para 30). Ms. Davis's first complaint was made on June 15, 2014 and dismissed by the Director of the AHRC around 31 months later, on February 3,

2017. (see the appendix to the decision) Ms. Davis's complaints were not filed in rapid succession, but each more than 7 months apart.

Costs and Vexatious Litigation

Justice Burrows dismissed Ms. Davis' applications and awarded ordinary costs in favour of the School Division. The School Division argued unsuccessfully that Ms. Davis's conduct and submissions in her judicial review applications displayed sufficient indicia of vexatious litigation to justify enhanced costs. AHRC and the Office of the Chief of Commission and Tribunals did not seek costs.

The discussion of costs is short and worth reproducing in full:

> [32] The PRSD sought enhanced costs noting that Ms. Davis' conduct and submissions in these applications display hallmarks of vexatious litigation.
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> [33] I agree with the PRSD's observation that Ms. Davis' complaints and her current applications were based on unfounded speculation, flawed logic and were not supported by evidence. At the same time, I believe that Ms. Davis genuinely believes that she was mistreated by the PRSD when she was not hired into a long term or permanent teaching position.
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> [34] It was misguided, however, for Ms. Davis to allege that the mistreatment she perceived constituted discrimination on the basis of age, ancestry or place of origin, or retaliation contrary to the AHRA s. 7 and s. 10.
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> [35] It was, in my view, extremely irresponsible for her to allege that officers of the AHRC or Alberta Justice conspired to ensure that her complaints were dismissed. That she did so within the protection of the absolute privilege against liability for defamation contained in court pleadings, could justify an award of enhanced costs against her. Of course those allegations affect parties who are not before the court, or who, in the case of the AHRC and the Office of the Chief of Commission and Tribunals do not seek costs.
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> [36] I have little doubt that if she had retained a lawyer to advise her with regard to these matters, and followed the lawyer's advice, Ms. Davis' human rights complaints would not have been made. I have no doubt whatsoever that if she had retained a lawyer to advise her, and followed the lawyer's advice, these applications for judicial review would not have been brought.
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> [37] The features of the circumstances which might justify an award of enhanced costs exist mainly because Ms. Davis, who genuinely felt she had been unjustly treated, without legal advice, commenced misguided proceedings and made irresponsible allegations not knowing, I assume, that doing so could result in an award of enhanced costs. In these circumstances I exercise my discretion not to award enhanced costs.

> [38] The PRSD will be entitled to ordinary costs. There will be one set of costs for all three applications together, as opposed to costs in each application. (emphasis added)

Commentary

While the decision does not fully set out the scope of the School Division's costs argument, it is apparent (at para 33) that the School Division raised Ms. Davis's conduct and submissions from the ARHC complaints process and her conduct and submissions in the judicial review application process jointly for their hallmarks of vexatious litigation. In order to garner an extraordinary costs award, the successful respondent appears to invoke then re-invoke the unfounded speculation and flawed logic that marred both Ms. Davis's AHRC complaints and the court applications that followed them (at paras 33 and 37). In our view, this seems inappropriate. If taken too far, the School Division's conflation of AHRC's statutory procedure and court's judicial review procedure could amount to an attempt to obtain costs compensation through the court for what is unavailable at the dismissal stage of an AHRC complaint. A human rights tribunal has the power to award costs to any party after a hearing (Alberta Human Rights Act, section 32(2)). This occurs in the context of a duly constituted tribunal process. But Ms. Davis's complaints were dismissed by the AHRC and Acting Chief instead of proceeding to a hearing.

In this case, Justice Burrows exercised his discretion in a manner that does not tie enhanced costs in the judicial review procedure all the way back to Ms. Davis's allegedly vexatious conduct during the ARHC complaints investigation. However, the decision does not clearly cleave the two procedures or distinguish rights to costs available under each.

In certain circumstances, a court can award enhanced costs when one party forced another party to spend extra money and time when it wasn't necessary. The possibility that a court may order enhanced costs is supposed to prevent vexatious proceedings. Enhanced costs can also partially compensate the better-behaved party for expense it could have avoided if the vexatious party had been more cooperative. Enhanced costs are one part carrot, one part stick.

We distinguish enhanced costs awards from court access restriction orders (also known as vexatious litigant orders). Costs awards apply after the fact to specific proceedings and conduct within those proceedings that a court deems to be vexatious. Court access restriction orders look to the prior conduct of a vexatious litigant to justify binding that litigant's future conduct. Courts in Alberta have recently expanded the use of their inherent jurisdiction to make vexatious litigant orders [see recent ABlawg commentary on this issue here and here].

While a costs award require a court to find that a proceeding or conduct within it was vexatious, and a court access restriction order requires a court to find that a litigant is vexatious, courts approach these distinct determinations through a common root inquiry into the conduct and submissions of the litigant herself.

The decision appropriately restricts itself to the features and circumstances that might justify enhanced costs, but it does demonstrate why that common root inquiry invites an analysis beyond the context of the immediate proceeding. There is no indication Ms. Davis resembled the organized pseudolegal commercial argument litigants described by Meads v Meads, 2012 ABQB

571, who offer legal conspiracy theories and have garnered the attention of the legal community in recent years. However, the decision focuses on Ms. Davis's misguided proceedings and irresponsible allegations, which suggests either the court or School Division characterized her final resort to judicial review as a hopeless or escalating proceeding containing unsubstantiated allegations of conspiracy, fraud, and misconduct. (See Chutskoff v Bonora, *2014 ABQB 389 (CanLII)* at para 92, affirmed *2014 ABCA 444 (CanLII)*). The decision does not identify any other indicia that would point to Ms. Davis being a consistently vexatious litigant.

What Ms. Davis demonstrated was more likely an understandable and very human reaction to an opaque and slow administrative process. The human rights complaint process, like most legal processes, is a dispute resolution mechanism. So long as individuals have to engage in these processes without lawyers or advocates, and so long as these processes work as slowly as they do now, many people are going to end up like Ms. Davis: feeling that the system is corrupt and untrustworthy.

That insight is cold comfort for the individuals whose trust in such processes has been damaged, and who react to that distrust by asking a court to review the conduct of the statutory bodies and government actors that are primarily responsible for that opacity and delay. On that point, this decision contains a potent finding: Ms. Davis may have been spared an enhanced costs award only because the AHRC did not ask for costs to be awarded against her (at para 35). Such forbearance by a statutory body is common practice and appropriate. In this instance, we observe that the restraint of a statutory of government party is no substitute for clarity in the law of costs.

Alberta's human rights complaint process is supposed to be accessible enough that a person can engage with it without a lawyer. This decision shows a failure to live up to that goal. The final decision may leave Ms. Davis sounding unreasonable and paranoid, as many decisions about self-represented individuals can, but we encourage full appreciation of the broader context. She had a genuine grievance and complaint about something important to her – her career (the difference in pay, benefits, and working conditions between full time teachers and substitutes is very substantial in Alberta). Since Ms. Davis made her complaint without a lawyer, no one familiar with human rights commission process could talk to her with complete candour: the AHRC had to keep her at arm's length in case they dismissed the complaint. Then the AHRC investigation goes on for months and years, and we have no way of knowing whether Ms. Davis received few or any updates during this period. To any reasonable person, this would be frustrating.

The frustration of being kept in the dark while waiting—and the effect that has on people participating in the justice system—is well-known to the legal profession. It is so well-known, lawyers in training are formally warned of the phenomenon. For example, new articling students in Alberta receive a book called Safe and Effective Practice by Jean Côté. On page 60, it warns of the problem of not keeping clients updated: "[m]ost people who sue their lawyers do so because they feel their lawyer has not tried very hard for them. Usually they have no idea of all the things the lawyer has done for them or of the obstacles met, because their lawyer has not told them". Whatever the outcome of a case, if a client waits long periods of time with no updates, the lawyer is likely to end up facing a complaint. This is part of why an opaque and legally complex administrative process is not friendly to self-represented individuals. People are left to

wait for a process they do not understand, being run by individuals they have no particular reason to trust, while an important issue for their life hangs in the balance. It is predictable and unsurprising that people become suspicious and distrustful of these processes, and ultimately bring any kind of complaint they can.

Justice Burrows believes that the complaints and judicial review could have been avoided if Ms. Davis had access to a lawyer (at para 36). He's probably correct. There is also a second possibility: that two complaints and three judicial review applications could have been avoided if the AHRC had been able to reach a decision faster. Either option would have saved years of stress for Ms. Davis and a good measure of legal costs for the School Division and the AHRC. Vexatious litigants are often thought of as a cause of delays and inefficiencies in legal dispute resolution mechanisms; however, in our view, those delays and inefficiencies can also cause vexatious litigants.

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