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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:

David Bratzer

COMPLAINANT

A N D:

Victoria Police Department and Jamie Graham and Jamie Pearce

RESPONDENTS

REASONS FOR DECISION
TIMELINESS OF COMPLAINT: Section 22

Tribunal Member:	Robert B. Blasina
On his own behalf:	David Bratzer
Counsel for the Respondents:	Sean Hern

Introduction

[1] The Complainant, Constable David Bratzer ("Cst. Bratzer"), is a member of the Victoria Police Department ("VicPD"). The Respondents are the VicPD, and, two members of the VicPD, Chief Constable Jamie Graham ("Chief Graham"), and Inspector Jamie Pearce ("Insp. Pearce"). On February 5, 2013, Cst. Bratzer filed a complaint alleging discrimination in the area of employment on the ground of political belief contrary to s. 13 of the *Human Rights Code*.

[2] Section 22 of the *Code* provides:

> (1) A complaint must be filed within 6 months of the alleged contravention.
>
> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
>
> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

[3] As the complaint was submitted on February 5, 2013, the six-month preceding period, expressed in s. 22(1), extends to August 5, 2012. However, the complaint included allegations of discrimination going back four years. Therefore, prior to accepting the complaint, the Tribunal sought time limit submissions from the parties.

[4] This decision is only concerned with the parties' submissions regarding the timeliness of the complaint. I make no findings of fact except as necessary to determine the s. 22 issues.

Background

[5] In 2008, Cst. Bratzer became a member of Law Enforcement Against Prohibition ("LEAP"). This is a U.S. based, non-profit organization of persons involved in law

enforcement, who are dedicated to changing existing drug laws. According to the information provided by Cst. Bratzer (taken from LEAP's website):

> LEAP's goals are: (1) To educate the public, the media, and policy makers about the failure of current drug policy by presenting a true picture of the history, causes and effects of drug use and the elevated crime rates more properly related to drug prohibition than to drug pharmacology and (2) To restore the public's respect for police, which has been greatly diminished by law enforcements involvement in imposing drug prohibition.

[6] Cst. Bratzer says he notified his superiors of his intent to join LEAP, and he notified them when he engaged in any activities, public presentations, or representations on behalf of LEAP. He provided assurances that he would always make it clear that he was expressing his personal views, and not those of his employer, and, that there would be no conflict or interference with his duty to uphold the law as a sworn peace officer. He says he has always abided by that commitment.

[7] Cst. Bratzer withdraws an allegation of discrimination for February 19, 2009. He now alleges 11 discrimination incidents in his complaint. I summarize these allegations as follows:

1) On January 28, 2010, Cst. Bratzer was warned not to criticise other officers or police departments, or spend so much time on LEAP that it took away from his first priority, being his job.
2) On February 24, 2010, Cst. Bratzer was ordered not to participate in a panel discussion at a forum on harm reduction to be held at Victoria City Hall.
3) On February 25, 2010, VicPD informed staff at Victoria City Hall that Cst. Bratzer was being withdrawn from the panel discussion, resulting in revocation of the invitation which had been extended to him.
4) On March 4, 2010, VicPD breached its media policy by declining to seek correction of an article in the Victoria Times Colonist relating to the order not to attend the harm reduction forum at Victoria City Hall.
5) Cst. Bratzer received a letter dated March 8, 2010 from Chief Graham to minimize saying anything publicly that has an impact on the VicPD, and if in doubt, to seek the advice of a supervisor or superior officer.
6) Cst. Bratzer received an e-mail reminder on November 3, 2010 to distance himself from VicPD when expressing personal views.

7) On February 24, 2011, prior to speaking at a movie night sponsored by a political party, Cst. Bratzer received a telephone call at home reminding him of Chief Graham's March 8, 2010 letter, and advising him that Chief Graham did not approve of his participation in this particular event.

8) By letter dated March 4, 2011 from the Office of the Police Complaint Commissioner to the British Columbia Civil Liberties Association, Cst. Bratzer was informed that a policy complaint he had filed a year earlier through the British Columbia Civil Liberties Association was still open, and, the investigation and review by the Victoria Police Board was still not completed.

9) On June 28, 2011, Cst. Bratzer received a letter dated June 2, 2011 from Chief Graham expressing limitations and restrictions.

10) On September 27, 2012, Cst. Bratzer received a letter from Insp. Pearce expressing limitations and restrictions.

11) On November 7, 2012, Cst. Bratzer was ordered not to comment to the media on the result of voting in the U.S regarding the legalization or decriminalization of marijuana (post Washington State Ballot Initiative I-502, November 6, 2012).

Time Limit Response

[8] The Respondents acknowledge the last two alleged incidents fall within the applicable time limit. However, they submit these are merely reiterations of earlier employment directions from outside the six-month time limit. Citing *Lewis v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2011 BCHRT 352, para. 81 ("*Lewis*"), the Respondents submit the last two incidents are not themselves timely, alleged contraventions.

[9] The Respondents submit all of the alleged contraventions should be found out of time and not reflective of a continuing contravention. They note that Cst. Bratzer referred to "ongoing situations". They submit a continuing contravention consists of separate instances, and not a single act of discrimination with continuing effects or consequences.

[10] The Respondents submit the Tribunal ought not to accept the complaint under s. 22(3) of the *Code*. They submit Cst. Bratzer must establish both that it is in the public interest that his complaint be accepted, and that no substantial prejudice will result to any person. They submit compelling reasons are required for a complaint to be in the public interest, and it is not enough to allege an important public institution has acted discriminatorily, or to speculate that other police officers are afraid to reveal their

political beliefs, or to express a desire to "realize justice". The Respondents submit Cst. Bratzer has made a timely complaint in the form of a grievance which he is free to pursue. Citing *A v. X and others*, 2013 BCHRT 46, paras. 37-38 ("*A v. X*"), the Respondents submit that an important factor in considering the public interest is the reason for a late filing. They submit a pursuit of alternate avenues of redress does not suspend the time limits under the *Code*, and Cst. Bratzer's delay has been significant.

[11] The Respondents submit that substantial prejudice to the VicPD would result. They submit that many of the incidents cited by Cst. Bratzer involve oral exchanges, and that delay naturally compromises the quality of the evidence and the ability to remember the details of what occurred.

Time Limit Reply

[12] Cst. Bratzer submits *Lewis* is distinguishable on the facts. He submits the successive letters to him are not mere reiterations, but are progressively prohibitive of his political activity.

[13] Cst. Bratzer acknowledges his use of the expression "ongoing situation", and explains he was referring to incidents, and not the effect or consequences of those incidents. He submits some incidents were continuing in the sense that the prohibitions were applied over a period of time, such that the incident itself was ongoing. Viewed this way, he submits the longest gap between incidents was 27 days; that being the time between January 28, 2010, when he was warned by Insp. Pearce not to criticise other police officers or police departments, and, February 24, 2010, when he was ordered not to participate in a panel discussion at City Hall.

[14] Cst. Bratzer submits there is a common thread linking all the alleged contraventions. He submits all the incidents relate to his political belief about drug prohibition, and all demonstrate repeated efforts by the Respondents to restrict, prevent, or deter him from publicly expressing his political belief outside of working hours.

[15] Cst. Bratzer submits it is in the public interest to accept his complaint. He refers to the public interest from a health and safety perspective, and the denial to the public of the opportunity to hear his political beliefs. He also refers to a concern about police

surveillance. Cst. Bratzer says this case raises unique and novel issues which will not be addressed if the Tribunal does not accept the older portions of his complaint.

[16] Cst. Bratzer submits that police officers fear discrimination, and are reluctant to publicly express that they share his belief. He referred to certain congratulatory e-mails he had received which also express concern about negative reaction at work. Cst. Bratzer submits it is a matter of public record that he was banned from speaking at a harm reduction forum.

[17] Cst. Bratzer submits *A v. X* is distinguishable because the Respondents are responsible for two significant delays. First, he submits, there was no review of department policy on off-duty speech following the policy complaint filed by the B.C. Civil Liberties Association pursuant to the *Police Act*. Second, he submits, there was almost a one-year delay in responding to an e-mail from the Victoria Police Union. Cst. Bratzer submits he diligently pursued other avenues, including a petition and obtaining letters of support from elected/appointed officials, with the intent of demonstrating to his employer the inappropriateness of restricting his off-duty activities.

[18] Finally, Cst. Bratzer submits there is no substantial prejudice to anyone in this case. Much of the evidence is documented, and the oral exchanges are between police officers who are trained and practiced in observation, memory retention, and note taking. Cst. Bratzer notes that the Respondents have not contradicted his assertions that all witnesses are available, and the Respondents have kept all or most of their records regarding this situation.

Analysis and Decision

[19] I have reviewed the material presently before the Tribunal. This decision is only concerned with whether the complaint should be accepted for filing, in consideration of s. 22 of the *Code*.

[20] Section 22(1) states, “A complaint must be filed within 6 months of the alleged contravention.” The complaint was submitted to the Tribunal on February 5, 2013. According to s. 22(1), the six-month timeliness period commenced on August 5, 2012. There are two alleged contraventions which occurred within that six-month period.

However, the Respondents submit these alleged contraventions are not timely incidents, but are merely reiterations of earlier out-of-time alleged contraventions.

[21] The facts in *Lewis* are that the complainant had been required to provide the Office of the Superintendant of Motor Vehicles with a functional driving assessment in order to maintain her driver's licence. The complainant failed the "DriveABLE" computer test twice. She was therefore deemed to be too high a risk to take an on-road driving test, and the Office of the Superintendant of Motor Vehicles cancelled her driver's licence. The complainant successfully completed a Young Drivers of Canada classroom theory course, and asked to take a road test, and with the support of a Certified Driver Rehabilitation Specialist, she again asked to take a road test. As the DriveABLE test was the determinative indicator upon which the Office of the Superintendant of Motor Vehicles relied to determine whether it was safe to conduct an on-road test, it refused the complainant's requests. The Tribunal held that the refusals were merely reiterations of its original decision:

> In none of the events after the last determination, did OSMV make a further determination based on DriveABLE computerized testing results. Rather, I consider the communications respecting the YDC course, the CRDS report and the July letters to reflect a reiteration of its earlier determinations and an explanation as to why the submitted information did not form a proper basis for a review or reconsideration of those determinations. While Ms. Lewis' self-help efforts are to be commended, her attempt to challenge the two determinations in various ways, which resulted in a reaffirmation of the OSMV's earlier determinations, is similar to those situations where the Tribunal has concluded that the repetition of requests, which elicit the reiteration of an original decision, does not constitute a separate act of the same character so as to give rise to a continuing contravention: *Callaghan* [*Callaghan v. University of Victoria et al.*, 2006 BCSC 1503], *Cowie* [*Cowie v. Grand Forks District Savings Credit Union,* 2006 BCSC 2008]. (para. 81)

[22] Insp. Pearce's September 26, 2012 letter expressed certain "protocols" for Cst. Bratzer to provide advance notice of engaging in a public forum or making public communications, and advises of the circumstances when permission will be denied or will likely be permitted. These are similar to the "directions" expressed in Chief Graham's letter of June 2, 2011. The September 26, 2012 letter also provides a further direction:

> In advance of proposing to engage in a public forum or making public communications which take or advocate positions that are contrary to positions that the executive of Board of the Victoria Police Department is taking, or is reasonably expected to take on behalf of the Department, you must give your immediate OIC notice of the proposed communication and request permission to do so. In the absence of your immediate officer in charge you must give the same form of notice to the duty officer.

[23] In addition, the September 26, 2012 letter is concerned with Cst. Bratzer's public statements on other policing issues.

[24] Furthermore, the tone of the September 26, 2012 letter is progressively severe as compared to earlier correspondence; and, therefore may present an elevated level of compulsion.

[25] I do not consider the letter of September 26, 2012 as a mere reiteration of an earlier decision, and I accept it as a timely alleged contravention of the *Code*.

[26] Were the September 26, 2012 a mere reiteration of earlier directions, I would still not discount it as not constituting a recent and separate alleged contravention. This is unlike the situation in *Lewis* where the decision to deny the complainant an on-road driving test, based on the DriveABLE results, was done and concluded. *Lewis* is a continuing effect case, not an ongoing adverse treatment case. Here, the adverse treatment is alleged to be on-going, and this event constitutes another incident of alleged adverse treatment.

[27] Cst. Bratzer alleges he was discriminated against on November 7, 2012 when he was directed by an Acting Inspector, under the instructions of Chief Graham, not to comment on the result in the recent Washington State ballot initiative on the decriminalization or legalization of marijuana. At Cst. Bratzer's request, the Acting Inspector confirmed the order in an e-mail that day.

[28] I do not consider this order to be a mere reiteration of an earlier decision. It is an order arising from a recent and particular event. The direction to not comment on ballot results in the US is qualitatively different, and, in the alternative, it constitutes another incident of alleged adverse treatment.

[29] Section 22(2) of the *Code* provides, "If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of a the contravention." Section 22(2) permits the inclusion of alleged contraventions from before the six-month timeliness period, if they are similar in nature to a timely alleged contravention. In *Lynch v. B.C. Human Rights Commission*, 2000 BCSC, para 35, the B.C. Supreme Court adopted the following definition of continuing contravention expressed by the Manitoba Court of Appeal in *Re The Queen in Right of Manitoba and Manitoba Human Rights Commission et al.* (1983), 2 D.L.R. (4th) 759, p. 764:

> What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

[30] Cst. Bratzer submits that all the incidents about which he complains are linked because they relate to his political belief about drug prohibition. He submits these incidents demonstrate repeated efforts to restrict, prevent or deter him from the responsible public expression, outside working hours, of his political belief.

[31] The alleged adverse treatment in the two timely alleged contraventions include instructions, directions, and orders regarding public communications. Evidence regarding the following events may be relevant as part of the background or circumstances of the case, but are not of the same character as the instructions, directions, or orders given to Cst. Bratzer. I decline to accept the following events, listed as discrimination incidents 3, 4, and 8 above, as continuing contraventions under s. 22(2) of the *Code:*

> On February 25, 2010, VicPD informed staff at Victoria City Hall that Cst. Bratzer was being withdrawn from the panel discussion, resulting in revocation of the invitation which had been extended to him.

> On March 4, 2010, VicPD breached its media policy by declining to seek correction of an article in the Victoria Times Colonist relating to the order not to attend the harm reduction forum at Victoria City Hall.
>
> By letter dated March 4, 2011 from the Office of the Police Complaint Commissioner to the British Columbia Civil Liberties Association, Cst. Bratzer was informed that a policy complaint he had filed a year earlier through the British Columbia Civil Liberties Association was still open, and, the investigation and review by the Victoria Police Board was still not completed.

[32] However, the remaining allegations, if proven, disclose separate incidents connected to each other and to the recent alleged contraventions; and, I accept them as a continuing contravention under s. 22(2).

[33] The s. 22(3) considerations of public interest and substantial prejudice apply to those alleged contraventions which are found to be untimely under ss. 22(1) and (2). If the allegations regarding VicPD informing City Hall that Cst. Bratzer was being withdrawn from the panel discussion, or VicPD breaching its media policy, or regarding the non-completion of the investigation and review of the complaint filed through the British Columbia Civil Liberties Association, disclose incidents which if proven contravene the *Code*, then Cst. Bratzer's delay in submitting his complaint is significant, and, I find no compelling public interest to include these as separate contraventions. I need not deal with the matter of substantial prejudice.

Conclusion

[34] I declare that Cst. Bratzer's complaint is accepted for filing with respect to the following alleged contraventions:

1) On January 28, 2010, Cst. Bratzer was warned not to criticise other officers or police departments, or spend so much time on LEAP that it took away from his first priority, being his job.
2) On February 24, 2010, Cst. Bratzer was ordered not to participate in a panel discussion at a forum on harm reduction to be held at Victoria City Hall.
3) Cst. Bratzer received a letter dated March 8, 2010 from Chief Graham to minimize saying anything publicly that has an impact on the VicPD, and if in doubt, to seek the advice of a supervisor or superior officer.

4) Cst. Bratzer received an e-mail reminder on November 3, 2010 to distance himself from VicPD when expressing personal views.

5) On February 24, 2011, prior to speaking at a movie night sponsored by a political party, Cst. Bratzer received a telephone call at home reminding him of Chief Graham's March 8, 2010 letter, and advising him that Chief Graham did not approve of his participation in this particular event.

6) On June 28, 2011, Cst. Bratzer received a letter dated June 2, 2011 from Chief Graham expressing limitations and restrictions.

7) On September 27, 2012, Cst. Bratzer received a letter from Insp. Pearce expressing limitations and restrictions.

8) On November 7, 2012, Cst. Bratzer was ordered not to comment to the media on the result of voting in the U.S regarding the legalization or decriminalization of marijuana (post Washington State Ballot Initiative I-502, November 6, 2012).

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Robert B. Blasina, Tribunal Member

This version of the reasons for decision is corrected in accordance with the correction released October 25, 2013:

[1] This corrects an error in paragraph 17 of the decision. The reference to "Vancouver Police Union" is changed to "Victoria Police Union".