

FEDERAL COURT OF APPEAL RULES SUCCESSFUL HUMAN RIGHTS COMPLAINANTS CANNOT BE AWARDED THEIR LEGAL COSTS

*By Barry W. Kwasniewski**

A. INTRODUCTION

In a judgment released on October 26, 2009 in *Canada (Attorney General) v. Mowat*¹, the Federal Court of Appeal ruled on the contentious issue concerning whether the Canadian Human Rights Tribunal (hereinafter the “CHRT”) had authority to make an award of legal costs to a successful complainant under the *Canadian Human Rights Act*² (the “Act”). The issue came by way of an appeal by the Attorney General from a Federal Court decision which upheld the CHRT’s determination that it did have authority to award costs to a successful complainant, who had brought a proceeding against her employer, the Canadian Forces, for sexual harassment. The CHRT awarded the complainant damages and \$47,000.00 for legal costs.

B. THE DECISION

The Federal Court of Appeal (the “FCA”) determined that the CHRT does not have the authority to make an award of costs under the *Act*. At issue in *Mowat* was whether paragraph 53(2)(c) of the Act grants the CHRT the jurisdiction to award legal costs to a successful complainant. Paragraph 53(2)(c) provides as follows:

53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory

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¹ [2009] F.C.J. No. 1359

² R.S.C. 1985 c. H.6

practice and include in the order any of the following terms that the member or panel considers appropriate:

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and *for any expenses incurred* by the victim as a result of the discriminatory practice. [emphasis added]

Therefore, the question for the court was, “does compensation for ‘any expenses incurred by the victim as a result of the discriminatory practice’ include payment of the victim’s legal costs in relation to the hearing before the CHRT?”

The FCA determined that the word “expenses” in paragraph 53(2) does not include legal costs. The word “costs” is a legal term of art and it is well established that the power to award “costs” must be found in a statute. The Act does not expressly provide that costs may be awarded. The FCA concluded that Parliament did not intend to grant, and did not grant, to the CHRT the power to award costs.

The FCA examined the human rights legislation in the various provincial and territorial jurisdictions. In many jurisdictions, specific provision is made for costs, in addition to compensatory provisions similar to paragraph 53(2) of the federal Act. The FCA reasoned, therefore, that the compensatory provisions on their own do not provide for legal costs. Like the federal jurisdiction, the Saskatchewan, New Brunswick, Nova Scotia and Ontario statutes do not expressly provide for costs. The FCA pointed to jurisprudence in Ontario, New Brunswick and Nova Scotia where the courts have determined that absent express authorization in the statute, no power to award costs exists.

The FCA also pointed out that amendments to the Act regarding costs have been considered, but not enacted. Also, express provision is made in the Act for witness fees and the awarding of interest. Therefore, if Parliament intended to grant the CHRT the authority to award costs, it would have expressly provided for costs in the Act.

The FCA addressed the argument that to deny costs awards would result in many complainants being denied access to justice. However, the FCA stated that the issue of costs in human rights adjudication is a policy matter best left to Parliament to decide, not the CHRT or the courts.

C. POTENTIAL APPLICATION TO THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

As discussed by the FCA in *Mowat*, the Ontario *Human Rights Code*³ does not expressly authorize the Human Rights Tribunal of Ontario to award costs. The *Human Rights Code* contains a similar provision to paragraph 53(2) of the federal Act. Paragraph 45.2(1)(1) provides as follows:

45.2(1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

In *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission)* (1988)⁴, the court concluded that the power to order monetary compensation was not an express provision for the award of costs to complainants under the *Code*. Since the Ontario *Code* does not contain an express grant of authority to award costs, the Human Rights Tribunal of Ontario also cannot award costs to successful complainants. As discussed in *Mowat*, costs can only be awarded in human rights proceedings where the relevant human rights legislation so provides. For example, the Alberta, Quebec, P.E.I. and Newfoundland statutes empower their respective adjudicators to make any order as to costs considered appropriate. In B.C., Manitoba, N.W.T., Nunavut and the Yukon, costs can be awarded in certain limited circumstances.

³ R.S.O. 1990 c. H.19

⁴ 25 O.A.C. 161, 27 O.A.C. 246 (addendum) (Div. Ct.)

D. CONCLUSION

Given the differing statutory provisions in provinces and territories of Canada, a successful complainant's entitlement to be reimbursed for legal costs will be dependent on the jurisdiction in which the complaint is heard. Given the complexity of proceedings before human rights tribunals, many complainants may not be able to proceed with potentially meritorious complaints if there is no chance their legal costs will be reimbursed, even if they are successful. An application for leave to appeal to the Supreme Court of Canada was filed on December 22, 2009, on behalf of the Canadian Human Rights Commission.