Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

BERYL NKWAZI

Complainant

- and -
CORRECTIONAL SERVICE CANADA

Respondent

RULING REGARDING LEGAL EXPENSES

Ruling No. 3

2001/03/29

PANEL: Anne Mactavish, Tribunal Chairperson

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[1] Beryl Nkwazi brought a human rights complaint alleging differential treatment in the course of her employment with the Correctional Service of Canada because of her race and colour. Ms. Nkwazi also alleged that CSC refused to continue her employment for the same reason. After a lengthy hearing, I rendered a decision wherein I concluded that several of Ms. Nkwazi's allegations against her former employer had been substantiated.

[2] At the hearing on the merits of Ms. Nkwazi's complaint, the parties asked that I retain jurisdiction to deal with the issue of Ms. Nkwazi's legal expenses, which I did. The parties have now made submissions on the issue, and what follows is my decision regarding Ms. Nkwazi's claim for reimbursement for her legal expenses.

I. JURISDICTION OF THE CANADIAN HUMAN RIGHTS TRIBUNAL TO AWARD COMPENSATION FOR LEGAL EXPENSES

[3] The first question that I must resolve is whether the Canadian Human Rights Tribunal has jurisdiction to award compensation to a successful complainant on account of legal expenses incurred by that party in the pursuit of the complaint. Unfortunately, the law on this point is not at all clear.

[4] The Canadian Human Rights Tribunal is a creature of statute. As a result, any consideration of the jurisdiction of the Tribunal must start with the *Canadian Human Rights Act*. I have already concluded that, as Ms. Nkwazi's complaint deals with issues occurring largely between 1995 and April of 1998, it is the provisions of the *Act* as it stood prior to June 30, 1998 that govern my remedial jurisdiction in this case.

[5] Any consideration of the *Canadian Human Rights Act* must begin with Section 2, which sets out the purpose of the legislation:

The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The provision of the *Act* in issue in this case is paragraph 53 (2) (c), which provides:

If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and Section 54 [neither of which are relevant here], make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

.....

(c) That the person compensate the victim, as the Tribunal may consider proper, for any or all costs 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]

[6] The question of whether paragraph 53 (2) (c) should properly be interpreted to include the power to reimburse a successful complainant for her legal expenses is a question that has been considered by both the Canadian Human Rights Tribunal and the Federal Court of Canada in a number of cases. Insofar as the decisions of the Tribunal are concerned, suffice it to say that the Tribunal has usually interpreted paragraph 53 (2) (c) to give it the power to compensate a successful complainant for her legal expenses.[(1)] There is, however, less agreement in the jurisprudence emanating from the Federal Court.

[7] The first judicial consideration of the question occurred in *Canada (Attorney General) v. Thwaites* [(2)], where Gibson J. said:

... I find no reason to restrict the ordinary meaning of the expression 'expenses incurred'. Costs of counsel and actuarial services incurred by Thwaites are, in the ordinary usage of the English language, expenses incurred by Thwaites. The fact that lawyers and judges attach a particular significance to the term 'costs' or the expression 'costs of counsel' provides no basis of support for the argument that 'expenses incurred' does not include those costs unless they are specifically identified in the legislation. On the basis of the principle that the words of legislation should be given their ordinary meaning unless the context otherwise requires, and finding nothing in the relevant context that here otherwise requires, I conclude that the Tribunal did not err in law in awarding Thwaites reasonable costs of his counsel including the costs of actuarial services.

[8] The Federal Court came to the opposite conclusion in *Canada (Attorney General) v. Green*[(3)], where Lemieux J. stated:

... [I]f Parliament had intended the Tribunal to award legal costs, it would have said so. Reference is had to paragraph 53 (2) (d)[(4)] which refers to compensation to the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation. There is no mention of legal costs, an indication that Parliament did not intend the Tribunal have the power to order the payment of legal costs.

[9] In support of this view, Lemieux J. referred to the earlier decision of Nadon J. in *Canada (Attorney General) v. Lambie* [(5)] as authority for the proposition that the *Canadian Human Rights Act* does not confer jurisdiction on the Tribunal to award costs. It is noteworthy that the expenses in issue in *Lambie* were not legal expenses incurred by a successful complainant. Rather, the issue before the Court in *Lambie* was whether the Tribunal had the jurisdiction to compensate the victim of a discriminatory practice for 'leave and time spent to develop and prepare [the] complaint'. Nadon J. concluded that "... the word 'expense' is not broad enough to cover time spent in preparation except in exceptional circumstances." In finding no exceptional circumstances present in the case before him, Nadon J. observed that the complainant's case was handled by legal counsel from the Canadian Human Rights Commission, and that there was no indication that Lt. Col. Lambie was obliged to do anything out of the ordinary in preparing for the hearing.

[10] Although Nadon J. notes that the *Act* does not make specific reference to the payment of costs, I do not read *Lambie* to decide the issue under consideration in *Green*. Indeed, it appears that Mr. Justice Nadon specifically left the door open for the reimbursement of legal expenses incurred by a successful complainant where, for example, the interests of that complainant were not represented at the hearing by counsel for the Canadian Human Rights Commission.

[11] It is also noteworthy that the Court's earlier decision in *Thwaites* does not appear to have been brought to the attention of Mr. Justice Nadon, as there is no mention of that decision in *Lambie*. Similarly, there is no mention of *Thwaites* in *Green*.

[12] The result of the decisions in *Thwaites* and *Green* is that I am left with two decisions of the Federal Court, both of which are binding upon me, which come to opposing conclusions. I prefer the reasoning of Gibson J. in *Thwaites* for a number of reasons. I do not accept CSC's contention that the term 'expenses' should be given a restricted meaning, based upon the *ejusdem generis* principle of statutory interpretation. I agree with Mr. Justice Gibson that the ordinary meaning of 'expenses incurred' includes legal expenses, and that there is nothing in the context in which the term is used in paragraph 53 (2) (c) that requires a different interpretation.

[13] While Mr. Justice Gibson was able to come to the conclusion that he did based upon conventional principles of statutory interpretation, it should be noted that human rights legislation is to be given a liberal and purposive interpretation.[(6)] This interpretive

approach extends, not merely to the construction of the rights protected under the *Act*, but to the interpretation of the Tribunal's remedial powers under the *Act*.[(7)]

[14] Having regard to the purposive approach to be taken to the interpretation of human rights legislation, there are compelling policy considerations relating to access to the human rights adjudication process which favour the adoption of the *Thwaites* approach. These considerations are illustrated by the circumstances of this case. Ms. Nkwazi did not originally have legal counsel in this matter. She understood that her interests were coincident with those of the Canadian Human Rights Commission, and that the Commission would be represented by counsel at the hearing. As is not uncommon in Tribunal proceedings, a few days before the hearing was originally scheduled to begin, counsel for the Commission advised the Tribunal and the parties that the Commission was withdrawing from the case. Ms. Nkwazi then sought and obtained an adjournment of the proceedings in order to retain counsel, which she did. Ms. Nkwazi was ably represented by her own counsel throughout what ended up being a long and factually complex hearing. There is absolutely no question in my mind that Ms. Nkwazi would not have been able to have her complaint heard by the Tribunal without the benefit of legal representation, and would have thus been unable to enjoy the full protection of the *Canadian Human Rights Act*.

[15] Interpreting the term 'expenses' in the narrow and restricted way that Lemieux J. did in *Green*, so as to deny victims of discriminatory practices the right to recover their reasonable legal expenses associated with the pursuit of their complaints would, in my respectful view, be contrary to the public policy underlying the *Canadian Human Rights Act*. The practical result of such an interpretation would inevitably be that the quasi-constitutional equality rights guaranteed by the *Act* would become meaningless in cases where the Canadian Human Rights Commission withdraws from the hearing: complainants of modest means such as Beryl Nkwazi would simply be unable to proceed further with their claims.

[16] It should also be noted that while Ms. Nkwazi did receive a monetary award on account of wages that she lost as a result of the discriminatory actions of her employer, not every human rights complaint involves monetary issues. Individuals with complaints relating to the denial of access to services, for example, may not have sustained any financial loss, and thus will have no prospect of a monetary remedy beyond, perhaps, a nominal award for their pain and suffering. This does not mean that their right to equal treatment is any less important than the rights of complainants in employment cases, who may benefit from significant financial awards. Most complainants in human rights cases are people of very modest means. It is difficult to see how an individual with an access complaint would be able to assert his or her right to equal treatment in a meaningful way when they are required to retain counsel at their own expense, with no prospect of a significant financial recovery at the end of the day, and no means of recovering their legal expenses.

[17] Finally, the interpretation of the word 'expenses' espoused by Gibson J. in *Thwaites* is one consistent with the principle governing remedial orders under the *Canadian*

Human Rights Act. Where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of the discriminatory practice, subject to principles of foreseeability, remoteness and mitigation.[(8)] A victim of a discriminatory practice could hardly be said to have been made whole if she were unable to seek reimbursement for the legal expenses associated with the pursuit of her complaint.

[18] For all of these reasons I am satisfied that the term 'expenses' as it is used in paragraphs 53 (2) (c) and (d) of the *Canadian Human Rights Act* should be interpreted to include the legal costs incurred by a complainant in connection with the pursuit of a complaint. This does not mean that successful complainants will automatically be entitled to indemnification for their legal expenses in every case: Section 53 (2) makes it clear that the Tribunal has the power to make the remedial orders that are appropriate having regard to the circumstances of each individual case.

[19] In the event that I am in error in my conclusion that the *Act* confers a general power on the Tribunal to reimburse a successful complainant for her legal expenses, I am satisfied that this case comes within the exceptional circumstances contemplated by Nadon J. in *Lambie*. In particular, the untimely withdrawal of the Canadian Human Rights Commission left Ms. Nkwazi with no alternative but to retain private counsel if her case was to proceed.

II. SHOULD MS. NKWAZI RECEIVE REIMBURSEMENT FOR HER LEGAL EXPENSES IN THIS CASE?

[20] CSC contends that Ms. Nkwazi should not be entitled to reimbursement for the legal expenses she incurred in pursuing her complaint as there is no causal connection between CSC's actions and the incurring of these expenses by Ms. Nkwazi. In the words of the *Act*, Ms. Nkwazi's expenses were not incurred 'as a result of the discriminatory practice'. According to counsel for CSC, Ms. Nkwazi's legal expenses were incurred entirely as a result of the decision of the Canadian Human Rights Commission to withdraw from this proceeding. The Commission's decision to withdraw constitutes a *novus actus interveniens* and breaks the chain of causation between the discrimination suffered by Ms. Nkwazi and her decision to retain independent counsel. In support of its argument, CSC relies on the Tribunal decisions in *Hinds v. Canada (Employment and Immigration Commission)*[(9)] and *Oliver v. Canada (Department of the Environment)*.[(10)] In each of these cases, the Tribunal recommended that the complainant be reimbursed for his legal expenses by the Canadian Human Rights Commission, given the Tribunal findings that it was the actions of the Commission that required that the complainant retain separate legal counsel. The Tribunal concluded that, as a result, the respondents should not be responsible for the costs.

[21] According to CSC, the Commission withdrew from the case as the Commission was satisfied that a settlement offer made by CSC addressed the Commission's public interest

concerns. CSC submits that to award costs against it in these circumstances would be to penalize CSC for making attempts to settle this matter.

[22] Counsel for Ms. Nkwazi says to find that the actions of the Commission in withdrawing from this proceeding were sufficient to break the chain of causation, thus disentitling Ms. Nkwazi to reimbursement for her legal expenses, would lead to a ludicrous result. A complainant left to prosecute a human rights complaint in the absence of the Commission would not be entitled to reimbursement for her legal expenses, whereas, in cases where the Commission remains active, complainants who retain independent counsel because their positions differ from that of the Commission would be able to recover their costs from respondents.

[23] As mentioned earlier, remedies granted under the *Canadian Human Rights Act* are designed to make whole the victim of discriminatory practices, subject to principles of remoteness, foreseeability and mitigation. Assuming, without deciding, that the principle of *novus actus interveniens* has any application outside of claims framed in negligence (11), I am not persuaded that the actions of the Canadian Human Rights Commission in withdrawing from the case on the eve of the hearing were sufficient to interrupt the chain of causation, nor am I persuaded that the incurring of legal expenses by Ms. Nkwazi was an unforeseeable consequence of the discriminatory actions of CSC.

[24] I have already found that Ms. Nkwazi was subject to appalling treatment in the course of her employment at the Regional Psychiatric Centre operated by CSC in Saskatoon. In today's litigious climate, it was, or should have been, entirely foreseeable to CSC that an employee subjected to the type of behaviour that occurred here would retain counsel and incur legal expenses. Had it not been for the discriminatory actions of CSC, Ms. Nkwazi would have had no need for Ms. Glazer's services. It was the actions of CSC that were the root cause of Ms. Nkwazi's need for legal assistance, not the actions of the Canadian Human Rights Commission.

[25] In my view, in order to satisfy the remedial goal of making Ms. Nkwazi whole, an order requiring that she be reimbursed for her legal expenses is appropriate in this case.

III. SHOULD MS. NKWAZI BE FULLY OR PARTIALLY INDEMNIFIED FOR HER LEGAL EXPENSES?

[26] CSC says that if I were to find that Ms. Nkwazi was entitled to reimbursement for her legal expenses, my award should take into account the fact that Ms. Nkwazi raised 'a plethora' of issues in the course of the hearing, many of which I found did not constitute discriminatory practices, which greatly lengthened the hearing. CSC submits that I should also take into account the time that was spent dealing with the applications for interested party status made by various advocacy groups, contending that the costs associated with these applications should not be borne by CSC.

[27] CSC notes that the Supreme Court of Canada has stated that solicitor and client costs should only be awarded where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.[(12)] In CSC's view, the circumstances of this case dictate that any order for costs should be on a party and party basis.

[28] There are a number of reasons why, in the circumstances of this case, Ms. Nkwazi should be entitled to her reasonable solicitor and client legal expenses. First and foremost, the principle that I should try to make Ms. Nkwazi whole, insofar as that may be possible, requires that she be fully indemnified for her reasonable legal expenses.

[29] Although the parties chose to approach this issue on the basis of concepts imported from the civil litigation context, the end result is the same. I note that there is some dispute in the jurisprudence as to whether the reprehensible, scandalous or outrageous conduct that will attract an order for solicitor and client costs is conduct in the course of the litigation, conduct that gives rise to the litigation itself, or both.[(13)] It is not necessary for me to attempt to resolve this question, however, as in this case CSC's conduct on both fronts meets the test for such an award.

[30] Insofar as CSC's conduct giving rise to the litigation is concerned, I have found that Diane Neufeld, a senior manager with the Regional Psychiatric Centre, intentionally attempted to exclude Ms. Nkwazi from participation in a job competition because of Ms. Nkwazi's race and colour, and that Ms. Neufeld subsequently made an insulting comment alluding to the ethnicity of Ms. Nkwazi's surname. I have also found that when Ms. Nkwazi complained about Ms. Neufeld's actions, managers within the RPC closed ranks and manufactured concerns with respect to Ms. Nkwazi's competence, which led to the loss of Ms. Nkwazi's position as a casual nurse. Ms. Nkwazi was subjected to a humiliating confrontation with Ms. Neufeld, in a purported attempt to smooth things over between the two of them, at a time when the decision had already been made not to renew Ms. Nkwazi's contract. After working for CSC for 2 ½ years, and after having had her contract renewed some nine times, Ms. Nkwazi was not extended the basic human courtesy of so much as a telephone call to tell her that her contract had not been renewed. Ms. Nkwazi was invited to return to the RPC to collect her property, only to be unceremoniously escorted out of the institution by security guards, in full view of her colleagues. The conduct of CSC in relation to the matters giving rise to this litigation was clearly reprehensible, scandalous and outrageous.

[31] CSC's conduct in the course of the litigation also meets the test established by the Supreme Court of Canada for awards of solicitor and client costs: I found that prior to the commencement of the hearing, Ms. Neufeld attempted to intimidate a witness whose evidence was supportive of Ms. Nkwazi's complaint.

[32] In all of the circumstances, I am satisfied that CSC should reimburse Ms. Nkwazi for her reasonable solicitor and client legal expenses.

[33] I do not think that any reduction should be made to my award to take into account either of the factors suggested by counsel for CSC. While not all of Ms. Nkwazi's

allegations succeeded before the Tribunal, most of the unsuccessful allegations related to the purportedly uneven application of various policies within the RPC. I have already found that these polices were confusing, and were not clearly explained to the employees. In addition, while these issues certainly took some time during the hearing, the allegations on which Ms. Nkwazi succeeded occupied the majority of the hearing time. The amount of time spent dealing with the various applications for interested party status was minimal in the grand scheme of things, and as a result, no adjustment should be made in this regard.

IV. ORDER:

[34] For the foregoing reasons, CSC shall reimburse Ms. Nkwazi for her reasonable solicitor and client legal expenses. I would encourage the parties to endeavour to agree on an appropriate amount in this regard, but will remain seized of the matter in the event that no agreement is possible.

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Anne L. Mactavish

OTTAWA, Ontario

March 29, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T538/3399

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DECISION OF THE TRIBUNAL DATED: March 29, 2001

APPEARANCES:

Christine Glazer For the complainant

Denis Bonthoux For the Correctional Service Canada

REFERENCE: T.D. 1/01

February 5, 2001

1. See, for example, the decisions of the Canadian Human Rights Tribunal in *Bernard v. Waycobah Board of Education*, [1999] C.H.R.D. No. 2, *Koeppel v. Department of National Defence*, T.D. No. 5/97, *Swan v. Canada (Armed Forces)* (1994), C.H.R.R. D/259, varied (1995), 99 F.T.R. 250 (F.C.T.D.), *Grover v. Canada (National Research Council)* (1992), 18 C.H.R.R. D/1, aff'd (1994) 80 F.T.R. 256, *Kurvits v. Canada (Treasury Board)*, (1991), 14 C.H.R.R. D/469 and *Druken v. Canada (Canada Employment and Immigration Commission)* (1987), 8 C.H.R.R. D/4379, aff'd [1989] 2 F.C. 24 (F.C.A.). The only contrary Tribunal views of which I am aware were expressed in *Morrell v. Canada (Employment and Immigration Commission)*, (1985), 6 C.H.R.R. D/3021 and *Corlis v. Canada (Canada Employment and Immigration Commission)* (1987), 87 C.L.L.C. 17, 020.

2. (1994), 21 C.H.R.R. D/224.

3. [2000] 4 F.C. 629 (T.D.)

4. Paragraph 53 (2) (d) deals with compensation for the denial of services, facilities and accommodation, whereas paragraph 53 (2) © deals with compensation in the employment context. With respect to the question of reimbursement for expenses, however, paragraphs © and (d) use identical language.

5. (1996), 124 F.T.R. 303.

6. *Canadian National Railway Co. v. Canada (Human Rights Commission),* [1987] 1 S.C.R. 1114, at 1136.

7. *Canadian National Railway Co.*, supra., and *Robichaud v. The Queen*, (1987), 40 D.L.R. (4th) 577, at 583-584 (S.C.C.).

8. See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401, and *Canada (Attorney General) v. McAlpine,* [1989] 3 F.C. 530

9. [1988] C.H.R.D. No. 13.

10. [1989] C.H.R.D. No. 15.

11. I note that even in relation to negligence claims, a defendant's liability is no longer necessarily negated by intervening causes: See *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, 51 O.R. (3d) 603 at p. 620 (Ont. S.C.).

12. *Young v. Young (1994),* 108 D.L.R. (4th) 193.

13. In *Amway Corp. v. The Queen*, [1986] 2 C.T.C. 339, the Federal Court of Appeal held that solicitor and client costs should only be awarded on the ground of misconduct in the course of the litigation, whereas in *Prise de Parole Inc. v. Guérin, Éditeur Ltée*, [1996] F.C.J. No. 1427, the Court affirmed an order of solicitor and client costs made to sanction conduct in relation to matters giving rise to the litigation. In *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (B.C.C.A.), the British Columbia Court of Appeal indicated that the reprehensible conduct must be *either* conduct giving rise to the litigation *or* conduct in the course of the litigation.