

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Heather Lynn Grant

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Ruling

File No.: T1452/7809

Member: Sophie Marchildon

Date: December 19, 2013

Citation: 2013 CHRT 35

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I. Background and request for direction

[1] In *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 [*Grant (decision)*], this Tribunal found the Respondent had discriminated against the Complainant, pursuant to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. In sum, the Tribunal found that, despite being made aware of the Complainant's disability on various occasions and the effects of stress on her condition, the Respondent did not seriously consider whether the Complainant's disability was affecting her performance at work and how it could accommodate the Complainant in this regard. Rather, the Respondent simply appraised the Complainant's performance at work negatively, without considering her disability. As the Complainant's performance appraisals were used to compare her to another employee for the purposes of determining who would be laid-off, the Tribunal determined the Complainant's disability factored into the Respondent's decision to no longer employ her.

[2] To remedy the Respondent's discriminatory practice, the Complainant sought the following remedy, among others:

Missed Pension Contributions

78. Had the complainant kept her employment with the respondent, she would have been entitled to the benefits of being a part of the MTS pension plan from the years 2007 to present (in addition, of course, to the previous years of her employment with the respondent). The pension plan of which the complainant was a part is a defined benefit pension plan. This means that upon retirement, the complainant is entitled to receive a pension in a defined amount based upon a certain formula. The members of this pension plan pay 7% of their wages each year and the respondent is responsible for ensuring that the obligations of the pension fund are met.

79. In circumstances where an employee has been temporarily away from work, the respondent's portion of pension contributions is calculated at 7% of the employees' earning over the equivalent time.

80. This calculation is only required if there is a circumstance where an employee is not returning to work for the respondent. If reinstatement with full net credit service date is ordered in this case, this calculation is not required.

81. If reinstatement is not ordered, but liability is found, then the complainant's damages are estimated to be approximately \$17,087.42.

(Final Argument of the Complainant, dated March 16, 2011, at paras. 78-81)

[3] In *Grant (decision)*, the Tribunal retained jurisdiction on many of the remedies requested by the Complainant, including the missed pension contributions, in order to get further submissions and clarification from the parties (at para. 128).

[4] Both parties were given the opportunity to provide additional submissions on the Complainant's outstanding remedial requests from *Grant (decision)* on a conference call on July 10, 2012.

[5] In a subsequent decision, *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20 [*Grant (remedies)*], the Tribunal determined what remedial orders were necessary to address the Complainant's outstanding remedial requests from *Grant (decision)*. Among other things, the Tribunal determined there was insufficient evidence to reassess who, among the Complainant and the other employee, should have been laid off. Rather, the Tribunal was of the view that, in the circumstances, it was remedying "...the opportunity the Complainant lost to have her performance assessed in a non-discriminatory manner and, consequently, the possibility she shared with one other candidate of retaining her job with the Respondent" (*Grant (remedies)* at para. 7). The Tribunal added: "The difficulty in fashioning an appropriate remedy in this case lies in the fact that, regardless of the discriminatory practice, there was at least a 50% possibility that the Complainant would have been laid off anyways" (*Grant (remedies)* at para. 7).

[6] Pursuant to this reasoning, the Tribunal ordered the following with regard to the Complainant's pension:

The Respondent shall restore the Complainant's pension benefits to the position they were in at the time of her layoff. For the period from her lay off to the date when the terms of this order are implemented, the Respondent is to contribute to her pension plan half of the pension contributions it would have made during this period had the Complainant remained in its employ. If it is not possible to restore the previous pension plan, arrangements should be made to restore the lost pension benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive retirement benefits comparable to those she would have received through MTS. I will first leave it to the parties to work out the details of the Complainant's lost pension benefits pursuant to the parameters outlined in my reasons.

(*Grant (remedies)* at para. 22)

[7] In *Grant (remedies)*, the Tribunal again retained jurisdiction in the event the parties were unable to reach an agreement on the pension remedy, among others (at para. 23).

[8] The parties have been unable to work out the details of the Complainant's lost pension and disagree on what remedy the Tribunal ordered with respect thereof.

[9] The parties agree that the Respondent's obligation under the above order is to implement the Complainant's pension benefits to the position they were in at the time of her lay-off; and, that those benefits can be provided under the Respondent's pension plan. They disagree with respect to what is owed to the Complainant following the date of her lay-off: 50% of the pension contributions the Respondent would have made; or, 50% of the pension benefits the Complainant would have received, less the contributions the Complainant would have made.

[10] The following ruling is to provide further direction to the parties with respect to the implementation of the Tribunal's order regarding the Complainant's pension.

II. Positions of the Parties

A. Complainant

[11] The Complainant submits the Tribunal ordered the restoration of the Complainant's pension benefits.

[12] The pension plan is a defined benefit plan and, consequently, the Respondent does not contribute a defined and certain amount at regular intervals. Rather, the Respondent contributes to the pension plan a sufficient amount, based on market conditions, to ensure retirees receive their specified, defined, set benefits. Therefore, according to the Complainant, the amount of the Respondent's contributions to the pension plan may have no bearing on the amount of benefits received by the Complainant.

[13] Rather, the Complainant says the Tribunal's order was focused on making the Complainant whole and restoring her pension benefits. In this regard, at paragraphs 15 and 22 of *Grant (remedies)* the Complainant says the Tribunal appears to suggest a method to achieve the ultimate objective of making the Complainant whole and restoring her pension benefits: to contribute to her pension plan "half of the pension contributions it would have made during this period had the Complainant remained in its employ". The Complainant submits the Tribunal did not order the Respondent to simply pay into the pension plan an estimated amount of contributions, but rather it suggested that this may be one possibility or a possible method of achieving the ultimate goal of making the Complainant whole.

[14] Accordingly, the Complainant is of the view that the Respondent is to ensure retirement benefits for the Complainant comparable to those she would have received as if she had not been laid off (minus 50%). The Complainant provided an actuarial report wherein it has calculated the amount of the benefit per month that the Complainant has lost as a result of being laid off by the Respondent.

[15] In the alternative, if the Respondent is correct in interpreting *Grant (remedies)* as awarding pension contributions, as opposed to benefits, the Complainant submits the Respondent's assessment of contributions is incomplete. According to the Complainant, the Respondent's actuarial report only calculated normal contributions and failed to include special contributions and interest. When these amounts are added to the total normal contributions of \$17,789.72 the total of all contributions is \$98,863.81. If this amount were paid as a lump sum to the Complainant, she claims she would be made whole.

[16] With regard to her final arguments pertaining to the pension remedy, the Complainant submits the following should be borne in mind: it was prepared in the context of what the Complainant viewed as the unlikely scenario that the complaint would be upheld but reinstatement not ordered; the calculation provided was prepared based upon circumstances that are now three years out of date; arguments advanced prior to the Tribunal's decision are not

relevant to how the decision should be interpreted; and, the use of the concept of “contributions” was a ‘rough and ready’ proxy for pension benefits in the absence of actuarial evidence.

B. Respondent

[17] The Respondent believes the Tribunal ordered it to pay 50% of the pension contributions it would have made from February 23, 2007 to the date the order is implemented. The Respondent’s actuarial report calculates one half of its contributions from February 23, 2007 to June 1, 2013 to be \$17,789.72.

[18] According to the Respondent, the Tribunal’s order makes clear distinctions between: (a) points in time; and, (b) types of compensation. The two marked periods of time are: (a) the time of the lay-off; and, (b) the period following lay-off to the date the order is implemented. The two types of compensation are: (a) pension benefits; and, (b) pension contributions. In the Respondent’s view, the order does not use the terms contributions and benefits interchangeably; and, the terms are tied to their own unique points in time.

[19] As the Respondent interprets it, the order is consistent with the Tribunal’s decision not to reinstate the Complainant’s employment. The Respondent says the portion of the order pertaining to pension benefits coincides with the Complainant’s term of employment with the Respondent. From thereafter, the order directs pension contributions to be made. According to the Respondent, it would be illogical to not reinstate employment, but reinstate pension benefits as if reinstatement had been ordered.

[20] The Respondent acknowledges the Tribunal’s jurisdiction to provide direction with respect to the implementation of its order and notes that the implementation of the order is the specific area the Tribunal expressly reserved jurisdiction over due to the lack of evidence pertaining to the administration of the Respondent’s pension plan (see *Grant (remedies)* at para. 15). However, the Respondent notes that there was no reservation of jurisdiction with respect to the substantive order itself, and that the Tribunal is *functus officio* with respect to the actual pension remedy set out in the order.

[21] The Respondent raises this issue because it views the Complainant's position and submissions as an attempt to revisit, or appeal, the pension order itself. According to the Respondent, up until this motion, the Complainant has always requested she be compensated for lost pension contributions, and not benefits. The Respondent submits that this was the Complainant's position in her Statement of Particulars and in her final written submissions filed after the hearing. In the Respondent view, the Complainant cannot now be heard to make a different request.

III. Ruling

[22] The Respondent has interpreted the Tribunal's order correctly. The Tribunal **did not** award the Complainant half of her pension benefits for the period following her layoff. Rather, the award is for **half** of the **employer's pension contributions** for the **period following the layoff**.

[23] Given the Tribunal's decision not to reinstate the Complainant, the order was crafted to distinguish between the period before and after her layoff. For the period up until her layoff, the Tribunal wanted to make clear that she should still receive the full benefit of her pension, which there is no dispute between the parties. For the period following her layoff, only half of the employer's pension contributions are awarded. Half, because the Tribunal is remedying the possibility the Complainant shared with one other candidate of retaining her job with the Respondent, and not the loss of the job itself; and, only the employer's pension contributions, because the Complainant did not lose her own contributions. She simply did not pay into the pension plan following her layoff.

[24] The Tribunal does not have expertise in interpreting and calculating pensions. The Tribunal crafted the pension remedy based on the submissions of the parties and evidence before it at the time. During the July 2012 case conference call, where the parties were given the opportunity to provide submissions on the outstanding remedies from *Grant (decision)*, the Complainant indicated that its calculations of the Respondent's missed pension contributions were an estimate in the absence of a calculation from an actuary. In fact, various sections of the

pension plan in this case provide for adjustments and calculations of contributions and benefits based on recommendations from an actuary. This is why the Tribunal first left it to the parties to work out the details of the pension remedy:

Given the complexities and considerations that may be involved in determining the functionality of this order; given the lack of evidence permitting the Tribunal to best determine the functionality of this order; given the parties' acknowledgement that an actuary may need to be involved in making these pension calculations; and given that insufficient evidence was led before me to make such calculations, therefore, I will first leave it to the parties to work out the details of the Complainant's lost pension benefits pursuant to the parameters outlined above.

(Grant (remedies) at para. 15)

[25] In the Tribunal's view, the parties were in the best position to calculate the quantum of the pension remedy and determine how best to implement it. Unfortunately, the parties have been unable to reach an agreement on this issue.

[26] That said, the parties have now presented the Tribunal with actuarial reports, which assist in determining this remedy. Both reports seem to be in agreement with respect to what half of the employer's normal contributions would be for the period of February 23, 2007 to June 1, 2013: \$17,789.72.

[27] However, in reply, the Complainant has raised an alternative argument and submitted a supplemental actuarial report, wherein it is argued the Respondent's report did not take into account special contributions and interest. Raising this alternative argument and supplemental report in reply is not helpful to determining the issue at hand and is unfair to the Respondent. The alternative argument should have been raised as part of the Complainant's initial submissions on the issue at hand.

[28] That said, in the interests of justice, the Tribunal wants ensure the Complainant, a victim of discrimination, receives the full amount that is due to her under the Tribunal's order. This is

not a question of revisiting the Tribunal's pension order, but ensuring the order is implemented properly.

[29] On this basis, the Respondent is to provide a response to the Complainant's supplemental actuarial report and, more specifically, on the issues of special contributions and interests, by January 31, 2014. Following which, the Complainant will have until February 28, 2014 to provide a reply. The Complainant is reminded that the purpose of the reply is not to raise new arguments, but to respond to those raised by the Respondent.

[30] Following the additional submissions, and only if the Tribunal deems it necessary, a case conference call may be held to seek further clarification from the parties on their additional submissions.

[31] I will continue to retain jurisdiction on the pension remedy until such time as it is finally determined.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
December 19, 2013