

**Canadian Human Rights Tribunal  
la personne**

**Tribunal canadien des droits de**

**BETWEEN:**

**KANAGS PREMAKUMAR**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**AIR CANADA**

**Respondent**

**RULING REGARDING MR. PREMAKUMAR'S**

**LEGAL EXPENSES**

## **Ruling No. 2**

**2002/04/26**

**PANEL:** Anne Mactavish, Chairperson

[1] Kanags Premakumar brought a human rights complaint against Canadian Airlines International (now Air Canada), alleging that Canadian refused to hire him for a Station Attendant position because of his race, his colour and his national or ethnic origin. After a hearing, I rendered a decision wherein I sustained Mr. Premakumar's complaint.

[2] Mr. Premakumar was represented by his own counsel throughout the hearing. In his final submissions, counsel for Mr. Premakumar asked that the Tribunal award Mr. Premakumar his legal costs associated with the prosecution of his complaint. Because Air Canada did not have prior notice that costs were being sought in this case, I did not deal with the issue in my decision regarding the merits of Mr. Premakumar's complaint. Rather, I asked that the parties provide additional written submissions addressing both my jurisdiction to award costs to a successful complainant, and whether such an order was appropriate in the circumstances of this case.

[3] What follows is my decision regarding Mr. Premakumar's claim for reimbursement for his legal expenses.

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

#### **A. The Jurisprudential Context**

[4] The remedial jurisdiction of the Canadian Human Rights Tribunal is governed by section 53 of the *Canadian Human Rights Act*. 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.**<sup>(1)</sup> [emphasis added]

[5] The first question that I must resolve is whether section 53 (2) (c) of the *Act* empowers the Canadian Human Rights Tribunal to award compensation to a successful complainant on account of legal expenses incurred in pursuit of the complaint. Unfortunately, the law on this point is not clear.

[6] This issue has been considered by the Trial Division of the Federal Court on three occasions of which I am aware: first in *Canada (Attorney General) v. Thwaites*<sup>(2)</sup>, again in *Canada (Attorney General) v. Lambie*<sup>(3)</sup>, and most recently in *Canada (Attorney General) v. Green*.<sup>(4)</sup> The Court came to differing conclusions in each case. In *Thwaites*, Gibson J. concluded that the Tribunal has the power to indemnify a successful complainant for his or her legal expenses. In *Green*, Lemieux J. came to the opposite conclusion. The import of the decision of Nadon J. in *Lambie* has been the subject of some debate.<sup>(5)</sup>

[7] I recently had occasion to consider this jurisdictional question in *Nkwazi v. Correctional Service of Canada*.<sup>(6)</sup> In attempting to resolve the disagreement in the jurisprudence, I reviewed the principles of statutory interpretation, as well as the policy considerations that, in my view, favoured adopting the interpretation of Section 53 (2) (c) of the *Canadian Human Rights Act* espoused by Gibson J. in *Thwaites*.

## **B. The Submissions in this Case**

[8] I have considered the submissions of each of the parties in this case. Nothing in those submissions has caused me to rethink the conclusion that I came to on the jurisdictional question in *Nkwazi*.

[9] Counsel for Mr. Premakumar has drawn an analogy to the remedial powers of an adjudicator appointed under the *Canada Labour Code* <sup>(7)</sup> in support of his contention that the Canadian Human Rights Tribunal does have the power to award costs to a successful complainant. I agree with counsel for Air Canada that the analogy is not particularly helpful, given the difference in the wording of the remedial provisions in issue.

[10] Air Canada submits that, unlike several provincial human rights codes, the *Canadian Human Rights Act* does not contain an express power to award costs. However, section 53 (2) (c) empowers the Tribunal to compensate a successful complainant for "any expenses incurred by the victim as a result of the discriminatory practice". As discussed in *Nkwazi*, I am of the view that Gibson J.'s conclusion in *Thwaites* that "expenses" includes legal expenses is one that accords with the principles of statutory interpretation applicable to human rights statutes. <sup>(8)</sup>

[11] The Supreme Court of Canada has stated that when interpreting human rights legislation, the language is to be given an interpretation that best ensures that the objects of the *Act* are attained. <sup>(9)</sup> For the reasons set out in *Nkwazi*, I am of the view that the remedial objects of the *Canadian Human Rights Act* are best attained by ensuring that successful complainants are able to recover their reasonable legal expenses associated with the prosecution of human rights complaints.

[12] This does not mean that a successful complainant will automatically be entitled to indemnification for his or her legal expenses in every case: Section 53 (2) (c) of the *Act* 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. The issue of whether Mr. Premakumar should receive compensation for his legal expenses will be considered next.

## **II. SHOULD MR. PREMAKUMAR RECEIVE REIMBURSEMENT FOR HIS LEGAL EXPENSES?**

[13] A number of Tribunal decisions have ordered that complainants be reimbursed for their legal expenses by respondents. These decisions have been made in a variety of circumstances: where, for example, the Commission withdrew from the case <sup>(10)</sup>, where a conflict existed between the position of the Commission and the complainant <sup>(11)</sup>, or where the case was complex or involved a novel question. <sup>(12)</sup> Consideration has also been given to the value of the private counsel's contribution <sup>(13)</sup>, and to whether the Commission counsel and private counsel fulfilled different roles at the hearing. <sup>(14)</sup>

[14] Recognizing the clear lack of jurisdiction to make an order of costs against the Commission, the Tribunal has also *recommended* that a complainant be reimbursed for

his legal expenses by the Commission, where the conduct of the Commission in advance of the hearing necessitated the complainant hiring his own counsel. <sup>(15)</sup>

[15] In order to determine whether Mr. Premakumar should be reimbursed for the legal expenses that he incurred in connection with his human rights complaint, the circumstances surrounding the hearing of his complaint must thus be considered.

[16] Mr. Premakumar complained that he had been denied an employment opportunity because of his race, his colour and national or ethnic origin. The hearing took six days to complete. As is often the situation in cases of alleged racial discrimination, the evidence in Mr. Premakumar's case was largely circumstantial. Unlike the situation in *Nkwazi*, however, the Canadian Human Rights Commission was represented at the hearing, and Commission counsel played an active role in the prosecution of the case.

[17] I was not made aware of any conflict between the Commission's position and that of Mr. Premakumar.

[18] Counsel for Mr. Premakumar submits that this case was one of some complexity. With the greatest of respect, I disagree. While the case was no doubt of considerable importance to Mr. Premakumar, the fact is that it was a relatively straight-forward hearing, involving the type of complaint that is quite routinely heard by this Tribunal. There was nothing exceptional about it.

[19] Although I was advised at the outset of the hearing that counsel for Mr. Premakumar would primarily be dealing with the evidence relating to the issue of remedy, in fact, Mr. Bagambiire played an active role throughout the hearing, examining witnesses and making submissions on issues of both liability and damages. Mr. Bagambiire is an experienced and effective counsel, and his efforts contributed significantly to the success of his client.

[20] I am therefore left to decide whether a successful complainant should be able to recover his reasonable legal expenses, in the absence of most of the exceptional circumstances that have previously been found to support such an order, but where counsel has nonetheless made a valuable contribution to the process.

[21] Air Canada submits that Mr. Premakumar should not be entitled to his costs, noting that no explanation has been provided as to why Mr. Premakumar felt it necessary to retain his own counsel, and no circumstances have been shown to exist to warrant such a retainer. In Air Canada's submission, there is no reason why the company should be liable for a personal expense incurred by Mr. Premakumar as a result of what was a personal decision to hire his own lawyer.

[22] Counsel for Mr. Premakumar says that the right to counsel of choice is a fundamental principle of the Canadian justice system. Although the Commission is represented by legal counsel, Commission counsel represents the larger public interest. It is the complainant's counsel that represents the interests of the complainant.

Reimbursement for a successful complainant's legal expenses is necessary to make that complainant whole.

[23] The Commission essentially adopts Mr. Premakumar's submissions.

[24] In deciding the issue before me, it is important to consider the roles ascribed to the various participants in a Tribunal hearing by the *Canadian Human Rights Act*. The role of the Commission is clearly defined by Section 51 of the *Act*, which directs the Commission to "... adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint." The Federal Court has observed that, in this regard, the role of the Commission is analogous to that of Crown counsel in a criminal proceeding.<sup>(16)</sup>

[25] The analogy to the criminal process breaks down, however, insofar as the role of the complainant is concerned. Unlike a criminal trial, where a complainant is merely a witness, with no independent right to participate in the proceeding, a complainant before the Canadian Human Rights Tribunal is a full party, with the right to appear at the hearing (either in person or through counsel), to present evidence, and to make representations.<sup>(17)</sup>

[26] The role of the Commission vis-à-vis the complainant in a human rights proceeding was considered recently by the Ontario Court of Appeal in *McKenzie Forest Products v. Ontario Human Rights Commission* <sup>(18)</sup>, where the Court noted that:

The Commission does, of course, have a responsibility to advocate its view of the public interest and in so doing, may also advocate for the interests of the individual complainant. However, the Commission's role as a party to the proceeding cannot derogate from the independent status of the individual complainant.

[27] In *McKenzie*, the Ontario Court of Appeal concluded that a complainant has an independent right to proceed with his complaint, despite the withdrawal of the Commission from the case. The Court came to this conclusion, notwithstanding the provision of the Ontario *Human Rights Code* assigning carriage of the case to the Commission.<sup>(19)</sup> There is no comparable provision in the *Canadian Human Rights Act*. Having regard to the differences in the wording of the two statutes, it seems to me that the Court's comments as to the independent status of a complainant are all the more apt in describing the status of a complainant under the *Canadian Human Rights Act*.

[28] As a result, I am of the view that the Commission and the complainant have distinct roles before the Tribunal under the *Canadian Human Rights Act*. The role of the Commission is to represent what it considers to be the public interest, whereas the role of the complainant is simply to advance his or her own interests. Commission counsel does not represent the complainant.

[29] In light of my conclusion as to the respective roles of the Commission and the complainant, I have some difficulty with the reasoning of the Tribunals in *Potapczyk* and *Pond*. In these cases, successful complainants were denied their legal costs, in the absence of any identifiable conflict between the position of the Commission and that of the complainant. While noting the obligation of the Commission to represent the public interest, the Tribunal in *Potapczyk* went on to observe that the *Canadian Human Rights Act* "... permits an individual who has a complaint to have it prosecuted by competent counsel for the Commission without incurring personal expense." This observation was subsequently relied on by the Tribunal in *Pond* to deny Ms. Pond her legal expenses.

[30] It seems to me that if a complainant is truly an independent party before the Canadian Human Rights Tribunal, he or she should not be compelled to entrust his or her case to counsel whose statutory duty is not to represent the rights of that individual, but rather to represent the public interest. This conclusion is strengthened, in my view, when one considers that the rights of the complainant in issue in a human rights case are quasi-constitutional rights.

[31] Where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of a discriminatory practice, subject to principles of foreseeability, remoteness and mitigation. <sup>(20)</sup> Section 53 (2) (c) of the *Canadian Human Rights Act* empowers the Tribunal to reimburse the victim for any expenses incurred by that individual as a result of the discriminatory practice. Had it not been for the discriminatory actions of Canadian, Mr. Premakumar would not have had any need to retain counsel. Had he not retained his own counsel, Mr. Premakumar may well have been unsuccessful before the Tribunal. Having regard to the value of his pecuniary and non-pecuniary damages, to deny Mr. Premakumar reimbursement for his reasonable legal expenses would render his victory before the Tribunal essentially a Pyrrhic one.

[32] In my view, in order to satisfy the remedial goal of making Mr. Premakumar whole, an order requiring that he be reimbursed for his reasonable legal expenses is appropriate in this case.

### **III. ORDER**

[33] For the foregoing reasons, Air Canada shall reimburse Mr. Premakumar for his reasonable legal expenses incurred in connection with his human rights complaint. 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.

ORIGINAL SIGNED BY

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Anne L. Mactavish, Chairperson

OTTAWA, Ontario

April 26, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T622/1001

STYLE OF CAUSE: Kanags Premakumar v. Air Canada

RULING OF THE TRIBUNAL DATED: April 26, 2002

APPEARANCES:

Davies Bagambiire Counsel for the Complainant

Giacomo Vigna Counsel for the Canadian Human Rights Commission

Maryse Tremblay Counsel for Air Canada

1. <sup>1</sup> Section 53 (2) (c) of the *Canadian Human Rights Act* was amended in June of 1998 to delete the words "as the Tribunal may consider proper". (See *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9). For the reasons given in my decision regarding the merits of the *Nkwazi* complaint (*Nkwazi v. Correctional Service of Canada* (2001), 39 C.H.R.R. D/237), I am of the view that I am bound to apply the remedial provisions of the *Canadian Human Rights Act* as they stood at the time that the discriminatory practice in issue took place. In Mr. Premakumar's case, this was prior to the amendments to the legislation.

2. <sup>2</sup> (1994), 21 C.H.R.R. D/224 (T.D.)

3. <sup>3</sup> (1996), 124 F.T.R. 303 (T.D.)

4. <sup>4</sup> [2000] 4 F.C. 629 (T.D.)

5. <sup>5</sup> 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." Nadon J. did not identify what those exceptional circumstances might be. However, Justice Nadon went on to observe, arguably in *obiter*, that "The statute does not confer the jurisdiction to award costs although Parliament could easily have included such a power."

6. <sup>6</sup> (2001), 41 C.H.R.R. D/109

7. <sup>7</sup> R.S.C., 1985, c. L-2

8. <sup>8</sup> Counsel for Mr. Premakumar has also drawn my attention to a number of other, non-human rights decisions in which the word "expenses" has been interpreted to mean the out-of-pocket disbursements incurred by a party: see *First National Mortgage Co. Ltd. v. Realistic Homes Ltd. et al.*, (1981), 18 R.P.R. 83 at p. 89, and *Hobbs v. General Accident Assurance Co. of Canada Ltd.*, (1989), 38 C.C.L.I. 234 at 238. See also Black's Law Dictionary, 5<sup>th</sup> ed., (St. Paul: West) 1979, at p. 518.

9. <sup>9</sup> *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 150.

10. <sup>10</sup> *Nkwazi*, *supra*.

11. <sup>11</sup> *Koepfel v. Canada (Department of National Defense)*, (1997) 32 C.H.R.R. D/107. See also *Potapczyk v. MacBain*, (1984), 5 C.H.R.R. D/2285 and *Pond v. Canada Post Corp.*, (1994) 94 C.L.L.C. 17,024, where costs were denied, given the absence of any conflict between the position of the complainant and the Commission.

12. <sup>12</sup> *Thwaites v. Canada (Armed Forces)*, (1993), 19 C.H.R.R. D/259

13. <sup>13</sup> *Koepfel*, *supra*., and *Grover v. National Research Council of Canada*, (1992), 18 C.H.R.R. D/1. In *Potapczyk*, however, the Tribunal denied the complainant her costs, notwithstanding its finding that complainant counsel had done an excellent job. The Tribunal noted that the Commission is charged with bringing cases forward in the public interest. In this case, the interests of the complainant and the Commission were the same. The Tribunal found that the structure of the *Act* permitted complainants to have their cases prosecuted by Commission counsel, without expense. As a result, the Tribunal held

that this was not an appropriate case for an award of costs. The Tribunal also observed that the complainant's legal costs had been largely underwritten by a fund, and appeared concerned that any award of costs would not go to the complainant, but would be used to reimburse this fund.

14. <sup>14</sup> *Grover, supra.*

15. <sup>15</sup> *Hinds v. Canada (Employment and Immigration Commission)*, (1988), 10 C.H.R.R. D/5683

16. <sup>16</sup> *Canada (National Health and Welfare) v. Chander, Joshi and the Canadian Human Rights Commission*, (1997), 29 C.H.R.R. D/300, where Muldoon J. adopts the comments of the Ontario Divisional Court to this effect in *Ontario (Human Rights Commission) v. House*, (1993) 67 O.A.C. 72.

17. <sup>17</sup> Section 50 (1), *Canadian Human Rights Act*

18. <sup>18</sup> (2000), 48 O.R. (3d) 150

19. <sup>19</sup> Section 39 (2) (a)

20. <sup>20</sup> See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (F.C.A.), and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530 (F.C.A.)