

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Nancy Green

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

**Public Service Commission
Treasury Board
Human Resources and Development Canada**

Respondents

Decision

Members: Elizabeth Leighton and Sheila Devine

Date: October 28, 2003

Citation: 2003 CHRT 34

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I. Factual Background

[1] Nancy Green lodged a complaint with the Canadian Human Rights Commission in 1989 based on her view that she had not advanced in her career at the Respondent Department, Human Resources Development Canada (HRDC), because of the discriminatory practices of the Respondents.

[2] After the allegations were investigated, a referral was made by the Commission to the Canadian Human Rights Tribunal. There was a hearing into the complaint. The June 26, 1998 decision of the Tribunal found that Ms. Green had been the victim of discriminatory practices by the Respondents. This decision was upheld, with minor changes, after a judicial review by the Federal Court (Trial Division).

[3] In its decision, the Tribunal made a number of awards.

[4] In 2000, Ms. Green received a lump sum award to compensate her for wages lost from 1989 to 2000. Additionally, in the same year, she received an award of interest on the lump sum award, to address her loss of opportunity to invest the monies which she ought to have received during the 1989-2000 time period.

[5] The Commission had argued, in its submissions at the conclusion of the hearing on the substantive issues, that “Nancy Green is entitled to a ‘gross up’ to take into account any adverse income tax consequences arising from her receipt of lump sum compensation ... Nancy Green should not be required to pay any more income tax than she would have to pay had she been receiving the PM-6 income annually since 1988”.

[6] The Tribunal accepted the submission of both Ms. Green and Commission Counsel that remedial awards for Ms. Green should make her “whole”. In other words, the discriminatory practices of the Respondents should not cause Ms. Green to be in a position different from the position she would have found herself in, had she not been discriminated against.

[7] In its decision, dated June 26, 1998, the Tribunal made an Order that the Parties find “a figure, mutually approved by Ms Green and her department” which would address the income tax implications of the decision. This figure was to represent the ‘gross up’. In this case, this is an additional amount of money, untaxed, which must be paid to Ms. Green, a victim of discrimination. It is meant to address adverse income tax implications which arise when remedial awards are made.

[8] If such a mutually acceptable figure could not be found, the Tribunal noted in its decision that it would retain jurisdiction concerning the issue of the ‘gross up’. Any party could return to the Tribunal to ask that further information and evidence be received by the Tribunal to address the issue of the ‘gross up’ and how it was calculated to take into consideration the income tax implications of the remedial Orders.

[9] Ms. Green subsequently made that request, and the Tribunal has heard a number of days of *viva voce* evidence, including evidence of an expert witness, and has received a number of exhibits into evidence.

II. The Issue

[10] From Ms. Green’s evidence, there is a necessity for “someone [to tell her] that the actual income tax implications [of the remedial awards] have been considered”. Having been presented with a lump sum amount to address her loss of income from 1989 to 2000, as well as an interest award, and a cheque (not taxable) in an amount which was simply marked ‘gross up’, with no explanation of its creation, Ms. Green wanted to know how the calculation of the ‘gross up’ was made, what impacts on her income tax were considered when calculating the ‘gross up’, and what processes were used when the Respondents attempted to “make her whole” by the calculation of the ‘gross up’.

[11] More specifically, the question to be answered is: “Does the ‘gross up’, as calculated by the Respondents, represent a correct calculation of the amount to be awarded to Ms. Green to

address the income tax implications of the remedial awards which were ordered as a result of the discriminatory practices of the Respondents?”

III. The Evidence

[12] Ms. Green presented a number of different “scenarios” which showed how the addition of the lump-sum award to her employment income for the year 2000 Income Tax Return, plus the interest award, created an unprecedented income tax return for her. Her evidence of basic income tax information from past years substantiated her contention that she was used to receiving a small income tax refund annually. She believed that this situation would continue, due to the remedial Order for a ‘gross up’ to address the income tax implications of her receipt of monies pursuant to the Orders of the Tribunal. She even anticipated that, with an ability to make a substantial payment into her Registered Retirement Savings Plan, the 2000 income tax return would be more substantial than it had been in past years.

[13] Ms. Green made a contribution into her Registered Retirement Savings Plan in an amount close to \$30,000.00 after her receipt of the lump sum ordered by the Tribunal. This RRSP payment amount represented the “room” she had in her plan, as she had not made the maximum allowable contributions each year from 1989 to 2000. Based on her prior income tax assessments, she believed that such a payment would result in a considerable tax saving. She expected the refund for the year 2000 to amount to a value of about one-half of the RRSP contribution, or \$15,000. Had she received no interest award, in the same year, 2000, she would have been correct. Her exhibit showing her calculations for the 2000 income tax return including her employment income, and her lump sum award, with the maximum RRSP contribution made, substantiates this view.

[14] The addition of the interest income, pursuant to the Order of the Tribunal in 1998, into Ms. Green’s 2000 income tax return changed the picture. The interest award was made without tax having been withheld. The *Income Tax Act* does not require such a withholding of tax for interest income, received for any reason. Therefore, in addition to any small amount of interest Ms. Green might have received from investments in 2000, she received an additional amount of

interest very close to the amount she contributed to her RRSP. This interest income was taxable income for the year 2000, and, at a tax rate of close to 50%, virtually removed any anticipated fifty percent refund based on the RRSP contribution.

[15] Ms. Green noted in her evidence before the Tribunal that her RRSP contributions, had they been made on an annual basis from 1989 to 2000 for the maximum allowable amount, would have grown exponentially. Historically, these years were financial growth years for equity investors, investing inside a Registered Retirement Savings Plan, where the money could grow without tax consequences until the time for its removal. Ms. Green missed this opportunity because she did not have available to her the monies which she should have had, had she not been a victim of discrimination.

[16] None of these tax implications were addressed by the Respondents when the calculation of the 'gross up' was made in 2000. Indeed, the calculation was made before the Respondents were aware of the details of Ms. Green's 2000 Income Tax Return. Roger Dart, the Acting Director of Financial Services, HRDC, Ontario Region, and the person to whom Ms. Green turned when she was attempting to understand the calculation of the 'gross up' presented to her, indicated in his evidence before the Tribunal that the 'gross up' represented merely the difference in tax payable as a result of Ms. Green's receipt of the lump sum employment income in one year, compared with the receipt of that income spread over an eleven-year period. Although he noted that the methodology of calculation of such a 'gross up' had never before been questioned, and that no thought to the "income tax implications" of the award had been given, his evidence was that this was the appropriate methodology based on the best estimates his department could make.

[17] Ms. Green's financial expert, Mr. Brian Saxe, a Chartered Accountant, agreed. His expert opinion was that the calculation of the 'gross up' by the Respondents was correct in its addressing of the lump sum remedial award made to Ms. Green. His concern, as an accountant who was asked to address the income tax implications of both the lump sum award and the interest award, was that Ms. Green was not in the same position that she would have been had

she received the interest award spread over the eleven years, as opposed to in one year. He opined that there should have been some methodology to address the adverse income tax implications to Ms. Green of this additional lump sum interest payment. However, he did not offer an alternate methodology for the calculation of the 'gross up'.

IV. Conclusion

[18] The Tribunal is most concerned that the evidence of Mr. Roger Dart, when combined with that of Ms. Green, indicates that there was no thought given to the "income tax implications" of the awards made in the June, 1998 decision of the Tribunal.

[19] Mr. Dart consistently answered Ms. Green's pointed questions in cross-examination that the 'gross up' "calculation was based on the reading of the decision" with some interpretive help from the Department of Justice. As he noted, he could not "recall discussing income tax implications. It was a matter of how to determine the gross up itself". [Mr. Dart's evidence at p. 33567] Ms. Green's evidence was that there was no communication between herself and HRDC concerning the 'gross up'.

[20] The original Order read as follows: "... that Nancy Green receive from her employer a "gross up" to compensate her for adverse income tax implications due to her non-receipt of annual income This "gross up" can be calculated by the compensation department of the Public Service Commission. The Tribunal will retain jurisdiction concerning this issue. If a figure mutually approved by Ms. Green and her department cannot be reached, the Tribunal will hear submissions upon this issue."

[21] This Order contemplated communication between Ms. Green and her department. This was lacking, as evidenced by Ms. Green's view that it was necessary to re-convene the Tribunal in order to receive the information which Mr. Dart gave in his evidence concerning the calculation of the 'gross up'.

[22] As was evident at the original Tribunal hearing, so it appears to remain. After the hearing, there is a distinct lack of communication between the Respondents and their employee, leading to mistrust and misunderstanding. Certainly, there has remained a chasm between Ms. Green and the Respondents in the communication area. This has been, and appears to remain, the main cause of Ms. Green's anxiety and difficulties with understanding the rationale of her employer. The Tribunal, however, has no jurisdiction at this time to deal with this ongoing problem of communication. Some of the Orders made by the Tribunal in its 1998 decision attempted to address this issue.

[23] From the evidence before the Tribunal concerning the 'gross up' calculation, on a balance of probabilities, the calculation made by the Respondents was the correct one. Both the evidence of Mr. Roger Dart and Ms. Green's expert, Mr. Brian Saxe, underline the methodology as one which addresses the income tax implications of the lump sum award adequately and correctly.

[24] The interest award was made to address the loss of opportunity to invest which was caused by the discriminatory practices which did not allow Ms. Green to continue her position as a PM-6, and to advance as she should have in the public service. Pursuant to the *Income Tax Act*, this is interest income and is taxed in the year received. Ms. Green had to address this income in her 2000 Income Tax Return. Her submission concerning the interest award is that it is an integral part of the remedial award for the discriminatory practices of the Respondents, and, as such, should have been considered when calculating the 'gross up'.

[25] How this was to be done was not addressed before the Tribunal. Although Ms. Green presented a number of "scenarios", there are many others which come to mind in attempting to deal with such awards. Should Ms. Green have requested that the interest income award be spread over a number of years? Should she have requested that her Income Tax Returns for a number of years past be re-assessed, with a portion of the interest income added to each of those re-assessments?

[26] This raises an interesting question: can the victim of discrimination ever be made completely “whole”? In his evidence, Mr. Dart said he had never been advised what the phrase “making the person whole” meant and indicated that he did not understand it. Surely, this concept arises from the purpose of the *Canadian Human Rights Act* as elucidated in section 2. The *Act* has been promulgated to address discriminatory practices and to effect remedies which will redress those practices so that persons will “have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have”

[27] In Ms. Green’s case, as with most cases, this probably can never be completely and fully achieved. Financially, Ms. Green is likely never going to live through a stock market period similar to the 1990’s. Her opportunity to invest at that unusual time is lost forever. There is no methodology to make her “whole” in that scenario.

[28] Should the Respondents be responsible for the tax on the interest award, made to address Ms. Green’s lost investment opportunity? Had Ms. Green made investments outside her RRSP during the 1989-2000 period, and received a rate of return equal to the Tribunal award (the Canada Savings Bond rate), she would have been responsible for the tax payable on that interest. Had she made investments inside her RRSP during the period, and received the Canada Savings Bond rate of return, she would have been responsible for the tax consequences of her growing fund when the monies were withdrawn sometime in the future. How can the calculation of the ‘gross up’ take these speculative tax implications into consideration? On a balance of probabilities, it cannot. There was no evidence before this Tribunal which indicated that another ‘gross up’ calculation would be more likely a better method to take all the income tax implications of such awards into consideration.

[29] Therefore, although the Tribunal finds that the lack of communication and involvement by the Parties in the ‘gross up’ calculation is unacceptable, the final calculation of the ‘gross up’ made by the Respondents is probably as close as they could reasonably ascertain without moving into the realm of speculation and hypothetical reasoning.

[30] Accordingly, the Tribunal finds that the 'gross up' as calculated by the Respondents addresses adequately that part of the June 26, 1998 decision which ordered that Ms. Green receive a 'gross up' to compensate her for the income tax implications of her receipt of the remedial awards made in that decision.

Signed by

Elizabeth Leighton
Chairperson

Sheila Devine
Tribunal Member

Ottawa, Ontario
October 28, 2003

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T447/0296

Style of Cause: Nancy Green v. Public Service Commission of Canada, Treasury Board
and Human Resources Development Canada

Decision of the Tribunal Dated: October 28, 2003

Date and Place of Hearing: August 12-13, 2003

Toronto, Ontario

Appearances:

Nancy Green, for herself

Philippe Dufresne, for the Canadian Human Rights Commission
(Motion on Remedy only)

Jan Brongers, for the Respondents

Reference: T.D. 6/98
June 26, 1998