

DONNA MOWAT

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

REASONS FOR DECISION

MEMBER: J. Grant Sinclair 2008 CHRT 11
2008/04/22

[1] In a judgment dated January 30, 2008, the Federal Court set aside my decision on costs in the present case and referred it back to the Tribunal for redetermination (*Attorney General of Canada v. Mowat*, 2008 FC 118). The Court's judgment agreed with the Tribunal's power to make a compensation award of legal expenses in this case. It also made no comment on the appropriate quantum of compensation for legal costs awarded by the Tribunal. However, the Court decided that the Tribunal had failed under a duty to provide adequate reasons for its award of legal expenses and remitted it to the same Tribunal decision maker, without the necessity of further submissions or hearing.

[2] The Attorney General of Canada has appealed the Federal Court decision on the ground of jurisdiction to award costs. The Attorney General of Canada has not brought a motion before the Tribunal to defer the issuance of its supplementary reasons nor, to the Tribunal's knowledge, has the Attorney General sought or obtained a stay prohibiting the Tribunal from rendering supplementary reasons in this matter.

[3] Ms. Mowat was a Master Corporal at the time of her complaint, dated June 15, 1998 and filed with the Canadian Human Rights Commission. She alleged that the Canadian Armed Forces discriminated against her on the grounds of sex:

- i) by adversely differentiating against her in employment and refusing to continue her employment with the Canadian Armed Forces, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6; and
- ii) by failing to provide her with a harassment free workplace contrary to section 14 of the *Act*. Included in her harassment complaint is an allegation of sexual harassment.

[4] Ms. Mowat also alleged retaliation under s. 14.1 of the *Act*. This allegation was heard as a preliminary motion and dismissed by the Tribunal. In her Statement of Particulars filed with the Tribunal, Ms. Mowat claimed compensation of \$430,685 (not including unspecified amounts for CPP contributions, CAF pension, mental suffering and punitive bad faith damages and excluding her legal costs).

[5] The hearing of her complaint, which consumed approximately six (6) weeks, over 4,000 pages of transcript evidence and more than 200 exhibits. The Tribunal found that Ms. Mowat's complaint of sexual harassment was substantiated and she was awarded \$4,000 plus interest for pain and suffering. The Tribunal dismissed all of her other

allegations of discrimination, including her claims of discriminatory discharge, adverse differentiation in employment and harassment other than sexual harassment.

[6] Both parties made written and oral submissions, on March 20, 2006, to the Tribunal on the question of legal costs. Ms. Mowat stated that she did not expect to recover 100%, or even 75%, of the total \$196,313 of the legal fees she initially submitted. The Respondent argued that the Complainant's account should be denied or that her costs be strictly limited because the Complainant was unsuccessful for the most part of her allegations and the hearing was unnecessarily prolonged and complicated as a result of a lack of clear articulation of her complaints.

[7] As noted above, the Tribunal's decision that it had jurisdiction to award costs under subsection 53(2)(c) of the *Act* was undisturbed by the Court's judgment. My supplemental reasons for assessing to Ms. Mowat the amount of \$47,000 for her legal costs under subsection 53(2)(c) are as follows.

[8] In the particular circumstances of this case, the Tribunal felt it would be helpful to have the Complainant's legal expenses expressed in a format similar to Tariff B of the Federal Court Rules. The Complainant complied by submitting her Bill of Costs dated May 30, 2006. By letter dated June 30, 2006, the Respondent replied with its own suggested amounts based on the Bill submitted by the Complainant.

[9] The Complainant claimed preparation and attendance fees in respect of mediation and settlement conferences that took place separately in March 2002 and September 2003. This complaint was referred to the Tribunal in January 2003. I agree that the Complainant should recover partial fees before this Tribunal for participating in the September 2003 conference, but not for both. I therefore allowed 15 units for 5 hours of attendance and 4 units for preparation as being reasonable costs to be recovered by Ms. Mowat in respect of the settlement conference in 2003 only.

[10] The Complainant claimed 5 units for documents disclosure. Full and complete disclosure is a requirement in proceedings before this Tribunal. I therefore allowed this item as claimed.

[11] The Complainant claimed a total of 24 units with respect to the motion regarding the participation of the Canadian Human Rights Commission. I note that Complainant counsel prepared no materials, took no clear position and only made very brief submissions with respect to this motion. It would therefore be unreasonable, in my view, to expect the Respondent to bear this expense. I have disallowed this claim.

[12] The Complainant requested the maximum units under column III of Federal Court Tariff B in respect of counsel fees for preparation for hearing under item 13(a) and then for 26 days of hearing under item 13(b). She further claimed the maximum for 22 full days and 5 half-days of attendance at hearing under items 14(a) and 14(b) of the Tariff.

[13] As noted above, the Tribunal dismissed all of the Complainant's allegations of discrimination, as well as the allegation of retaliation under s. 14.1 of the *Act*. Ms. Mowat succeeded only on her complaint based on sexual harassment. The Tribunal also noted in its decision on the merits of the complaint that, apart from Ms. Mowat's allegation of sexual harassment, the case was marked by a fundamental lack of precision in identifying the theory of her case.

[14] Compelling as this may be for reducing the amount of fees that the Respondent should have to bear, it remains compelling also that the Commission exercised a clear discretion in deciding to refer Ms. Mowat's complaint to the Tribunal for inquiry. The

Complainant, without the benefit of today's hindsight, was thus compelled to pursue the full gambit of her complaint. Such cases of alleged discrimination are very often factually complex. Moreover, at the end of the day, the Respondent was found to have discriminated against Ms. Mowat.

[15] Having considered the foregoing, as well as the outcome of the complaint, the manner in which the Complainant's case was presented at hearing and having reviewed the number of days at hearing, I allowed 5 units under item 13(a) for preparation for hearing and 50 units under item 13(b) in respect of the 25 days following the first day of hearing. As to the claims for counsel fees for attendance at hearing, I have allowed a total of 275 units in respect of 137.5 hours of hearing.

[16] No special reason being apparent for the need for second counsel, I have disallowed the Complainant's costs claimed under Tariff item 14(b). Based on the foregoing considerations and the complexity required in fitting the Tribunal's proceedings to the itemized Tariff of the Federal Court, I have allowed 5 units for counsel fees for the preparation and presentation of the Complainant's bill of costs.

[17] The account submitted by the Complainant included an hourly rate of \$250 for her counsel's fees. Counsel for the Respondent replied that the Federal Court Tariff B unit value of \$120.00, as at April 1, 2005, would be more appropriate. In the circumstances of this case, and having particular regard for the limited success of Ms. Mowat's complaint, I am inclined to agree with the Respondent on this point. I have allowed a total of 359 units in respect of counsel fees. Applying a unit value of \$120.00, this equates to an assessment of \$43,080 for counsel fees.

[18] The Complainant has submitted a claim of \$6,499.83 for legal fees payable to the law firm of Gahrns & Laliberté. It is unclear how much and to what extent these services relate to the present complaint, but it is evident from the invoice produced that some consultation was relevant to the complaint referred before this Tribunal. The Respondent has been found liable for discriminating against Ms. Mowat. It is therefore reasonable, in my view, to allow the \$800 paid out of pocket by the Complainant for this service, as was also agreed by Respondent counsel in oral submissions.

[19] The approach taken by Respondent counsel with respect to the Complainant's claim for hotel expenses seems entirely reasonable to the circumstances of this case. It has therefore been allowed in an amount of \$2,754. The claim of \$265 for parking and taxis is less clear, however, and has been reduced to \$115. Some documentation for parking and taxis has been produced as evidence of an expense, but a clear and convincing accounting is lacking. The claim for courier expenses has been reduced as well to \$26.10 for similar reasons.

[20] The claim of \$81 in respect of the witness Campbell has been allowed. The witness's testimony was relevant to the complaint and it is clear that this amount was paid out of pocket.

[21] The claims in amounts of \$10.83, \$2,166.75, \$187.25, \$26.75 and \$404.46 for photocopies, faxes, binders, tabs, computer prints, long distance and mileage have been disallowed for lack of a clear accounting and their precise relationship to the proceedings before this Tribunal. It is not reasonable to expect the Respondent, on an assessment that is akin to a party-and-party basis, to pay for expenses such as these, which may otherwise be considered overhead, unless clearly accounted and demonstrated to have been incurred in direct relation to the proceedings at hand.

[22] The Complainant also claims for a Pension Valuation costing \$856.00. Respondent counsel argued that the Complainant was entirely unsuccessful with respect to the pension issue and should not be able to recover this expense from the Respondent as a disbursement. I agree and this amount has therefore been refused.

[23] The Complainant has submitted a claim as well of \$3,045.67 for transcripts. The Tribunal's remark that the case was marked by a fundamental lack of precision in identifying the theory of Ms. Mowat's case is once again relevant to the consideration of this item. Transcripts, other than for purposes of appeal, are a luxury. Absent special circumstances substantiating their exceptional utility to assist counsel at the hearing of this complaint (e.g., to help in reducing the time at hearing), the Respondent should not be expected to pay for this. This disbursement has therefore been refused.

[24] Invoices were also submitted by the Complainant for a total of \$343.90 for Quicklaw Research. It is fair to say that human rights law is somewhat less pervasive in practice as other areas of law. It is therefore extremely important, in the scheme of presenting a convincing argument to support a claim of discrimination under the *Act*, to assist the Tribunal in its deliberation by providing accurate and current case law. It might otherwise be argued that the cost of Quicklaw research should be considered as part of a law firm's overhead, rather than being an out-of-pocket expense. I have reduced this item to \$143.90. This research is as much helpful to the Tribunal as it is to a party's case, but the very narrow success of the Complainant's complaint militates against allowing this expense in full.

[25] Accordingly, and in addition to the earlier reasons given by this Tribunal, Ms. Mowat is awarded the total amount of \$47,000 for her legal costs under s. 53(2)(c) of the *Act*. Ms. Mowat's interest claim to the date of this decision, for reasons already explained, is denied. However, interest is to be paid on the costs award from the date of this decision to the date of payment of the award, again calculated in accordance with Rule 9(12)(a) of the Tribunal *Rules of Procedure*.

Signed by
J. Grant Sinclair

OTTAWA, Ontario
April 22, 2008

PARTIES OF RECORD

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APPEARANCES:	
Jerry W. Switzer	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Derek Allen Sandra Nishikawa	For the Respondent