

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

DONNA MOWAT

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

RULING

MEMBER: J. Grant Sinclair 2006 CHRT 49
2006/11/15

[\(i\) Mowat - Ruling on legal expenses](#)

[1] In her complaint dated June 15, 1998, filed with the Canadian Human Rights Commission, Donna Mowat alleged that the Canadian Armed Forces (CAF) discriminated against her on the grounds of sex,

- (i) by adversely differentiating against her in employment and refusing to continue her employment with the CAF, contrary to s. 7 of the *Canadian Human Rights Act*; and
- (ii) by failing to provide her with a harassment free workplace contrary to s. 14 of the *Act*. Included in her harassment complaint is an allegation of sexual harassment.

[2] 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.

[3] 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 legal costs.

[4] The Tribunal found that Ms. Mowat's sexual harassment complaint was substantiated and awarded her \$4,000 plus interest for pain and suffering. The Tribunal dismissed all of her other allegations of discrimination.

[5] The hearing of Ms. Mowat's complaint consumed about 6 weeks of hearing time. The case consumed over 4,000 pages of transcript evidence. In addition, there were more than 200 exhibits filed with the Tribunal.

[6] The Tribunal noted in its decision 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. The Tribunal also noted that it would have been very helpful if she had particularized the facts upon which she was relying and had identified the nexus between these facts and the prohibited grounds of discrimination.

[7] Clearly the great majority of the evidence and exhibits introduced by Ms. Mowat related to the allegations of adverse treatment in employment, failure of the CAF to continue to employ her and harassment (other than sexual harassment) all of which were all dismissed.

[8] Ms. Mowat now seeks to be reimbursed for her legal expenses. There are three legal accounts submitted to the Tribunal by Feehely, Gastaldi, Ms. Mowat's counsel, covering the period of March 27, 2003 to October 24, 2005. These accounts total \$196,313. Ms. Mowat also claims \$800 for legal fees paid to Gahrns, Laliberté for legal services preceding her June 15, 1998 complaint.

[9] Both parties made oral and written submissions to the Tribunal on the question of legal costs. Initially, Ms. Mowat claimed costs on a substantial indemnity basis, or alternatively, on a partial indemnity scale. In her submissions to the Tribunal, she advised that she did not expect 100%, or even 75% of her legal fees, but did expect to be awarded reasonable costs whether she was totally or partially successful.

[10] CAF disputed the Tribunal's jurisdiction to award costs. If, however, the Tribunal did find jurisdiction, CAF argued that Ms. Mowat be denied any legal costs or that her costs be strictly limited. This is because Ms. Mowat was for the most part unsuccessful in her allegations. Further, the hearing was unnecessarily prolonged and complicated as a result of a lack of clear articulation of her complaints.

Jurisdiction of the Tribunal to Award Legal Costs

[11] If the Tribunal has jurisdiction to award legal costs, this jurisdiction must be found in ss. 53(2)(c) or 53(2)(d) of the *Act*, whereby the Tribunal can order compensation ". . . for any expenses incurred by the victim as a result of the discriminatory practice".

[12] There are five Federal Court decisions dealing with whether this Tribunal can order compensation for legal expenses under the *Act*. But there is no unanimity on this question. Chronologically the cases are as follows.

[13] *Canada (Attorney General) v. Thwaites*, (1994) 3 F.C. 38 involved a claim under s. 53(2)(c) for reasonable costs of counsel including costs for actuarial services. The Court agreed with the Tribunal that the complainant should be given these costs. The ordinary meaning of "expenses incurred" should not be restricted. Nor need the terms costs/costs of counsel be specifically identified in the legislation. The words of the *Act* should be given their ordinary meaning unless the context requires otherwise.

[14] After *Thwaites* came *Canada (Attorney General) v. Lambie*, (1996), 124 F.T.R. 303. In *Lambie*, at issue was compensation under s. 53(2)(d) for leave and time spent by the complainant to develop and prepare his complaint. The Federal Court rejected the claim for compensation, saying that the word "expense" can only cover time spent in preparation in "exceptional circumstances". There was no evidence that the leave and

preparation time in this case was exceptional. Parliament could have easily included in the *Act* the jurisdiction to award costs, but did not do so.

[15] The Federal Court in *Canada (Attorney General) v. Green* (2000), 183 F.T.R. 161, came to essentially the same conclusion as it did in *Lambie*. The Tribunal had ordered the complainant be compensated for the costs of legal advice and there was evidence that the complainant had retained professional services to assist in the preparation of submissions to the CHRC for its deliberation in its decision-making process. The Court reasoned that s. 53(2)(d) makes no mention of legal costs and this indicates that Parliament did not intend the Tribunal to have the power to award legal costs.

[16] In both *Attorney General of Canada v. Stevenson*, (2003), FCT 341 and *Attorney General of Canada v. Brooks*, (2006), FC 500, the Federal Court concluded the opposite, and agreed with *Thwaites*.

[17] The complainant in *Stevenson* asked under s. 53(2)(c) for costs of counsel consulted with regard to the possibility of filing a complaint with the CHRC and for the costs of legal assistance for submissions made to the CHRC.

[18] The Federal Court concluded that legal expenses incurred when a complainant consults a lawyer regarding the well-foundedness of his complaint are entirely justifiable. And counsel costs/legal costs incurred for filing a complaint constitute "expenses incurred by the victim as a result of the discriminatory practice".

[19] The absence of the term "legal costs" or "costs of counsel" in s. 53(2)(c) is not determinative. The language of the section is broad enough to include the power to award legal costs. As support for this position, the Court referred to s. 50(1) of the *Act* saying that it clearly contemplates that a complainant can retain counsel for direction and advice.

[20] As for *Lambie*, *Stevenson* interpreted *Lambie* as deciding that the Tribunal does have jurisdiction to award legal costs, but only in exceptional cases. The leave and time compensated there did not amount to exceptional circumstances.

[21] Dealing with *Green*, the *Stevenson* Court noted that there was no finding in that case whether there were any exceptional circumstances to justify the claim.

[22] Also of importance in *Stevenson* is the Court's acknowledgement of the underlying policy considerations enunciated in the Tribunal decision in *Nkwazi v. Correctional Services Canada*, (2001) C.H.R.D. No. 29 (Q.L.).

[23] There the Tribunal concluded that "there are compelling policy considerations relating to access to the human rights adjudication process which favour the adoption of the *Thwaites* approach. 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 be contrary to the public policy underlying the *Canadian Human Rights Act*".

[24] In *Brooks*, the claim was under s. 53(2)(c) for legal costs relating to litigation before the Tribunal. In its decision, the Court referenced the extensive analysis of the case law undertaken by the *Stevenson* Court and agreed with *Stevenson* that there is no reason to restrict the ordinary meaning of "any expenses incurred" so as to exclude expenses of litigation, prosecution or other legal transaction.

[25] The Court rejected the suggestion that *Stevenson* should be read as allowing only the legal costs leading up to legal action. The Tribunal can award not only those costs, but also costs for the ongoing legal expenses of litigation.

[26] Again in *Brooks*, the Court referred to and in my view, endorsed, the policy considerations set out in the *Brooks* Tribunal decision. Namely, that "the Tribunal has the obligation to protect the efficacy and integrity of the *Canadian Human Rights Act*. The entire purpose of the *Act* is to provide a meaningful remedy for those who have suffered discrimination. I do not see how this is possible, at least in a case where the Commission decides not to appear, without an award of costs..."

CONCLUSION ON JURISDICTION

[27] The predominance of authority from the Federal Court (*Thwaites*, *Stevenson and Brooks*) is that the Tribunal has the power to award legal costs under s. 53(2) of the *Act*. Even *Lambie*, according to *Stevenson*, recognized that the Tribunal has jurisdiction to award legal costs in exceptional circumstances.

[28] On the basis of these authorities, I conclude that the Tribunal has the jurisdiction to award legal costs under s. 53(2)(c) of the *Act*.

[29] But it is not only from these decisions that I reach this conclusion. I also rely on the policy considerations set out in the Tribunal's decisions in *Nkwazi* and *Brooks* that were specifically referred to by the Federal Court in *Stevenson* and *Brooks*. I agree that, absent the power in the Tribunal to award legal costs where a complaint of a discriminatory practice is substantiated, such a finding would amount to no more than a pyrrhic victory for the complainant. A result of this nature would frustrate the remedial provisions and purpose of the *Act*.

WHAT IS A REASONABLE AWARD OF COSTS IN THIS CASE?

[30] Section 53(2) requires that the legal costs must be incurred as a result of the discriminatory practice. In this case, the practice in question was the sexual harassment of Ms. Mowat by the CAF. The case law establishes that the Tribunal can award pre-hearing legal costs and costs for ongoing legal representation.

[31] In determining the legal costs award, I have considered three sources: the description of the legal services set out in the legal accounts submitted for Ms. Mowat; the quantity of evidence and number of exhibits submitted at the hearing relating to the sexual harassment allegation, relative to the total evidence and exhibits for the dismissed allegations; and the Bill of Costs submitted by each party calculated on a party/party basis.

[32] I am mindful that the Tribunal in *Brooks* used as a guideline the *Federal Court Rules* on the assessment of costs, specifically Rule 400(3).

[33] On the question of the assessment of costs (not the jurisdiction question) the Federal Court quashed the Tribunal's decision. The reason was that the Tribunal, having referenced the *Federal Court Rules*, failed to take into account written offers of settlement of the respondent which it is required under to do Rules 400(3) and 420(2).

[34] However, I do not read anything in the Federal Court's decision in *Brooks* that requires the Tribunal to apply or even reference the *Federal Court Rules* when making an award of costs. I have not done so in this case.

[35] On the basis of the sources referred to above and the parties' oral and written submissions, I award Ms. Mowat the amount of \$47,000 for legal costs under s. 53(2)(c) of the *Act*.

[36] Ms. Mowat asked for interest on the award of costs. Interest is not an expense under s. 53(2) of the *Act*. The Tribunal, under s. 53(4), has the discretion to make such an award and may do so to make whole the victim of a discriminatory practice. It is not clear

from the evidence whether Ms. Mowat has paid any of the legal accounts which she has received (other than the \$800 account from Gahrns, Laliberté) or has paid any interest on outstanding legal accounts. Accordingly, Ms. Mowat's interest claim to the date of this decision is denied.

[37] However, I do order that interest be paid on the costs award from the date of this decision to the date of payment of the award, calculated in accordance with Rule 9(12)(a) of the Tribunal *Rules of Procedure*.

"Signed by"

J. Grant Sinclair

November 15, 2006

OTTAWA, Ontario

PARTIES OF RECORD

TRIBUNAL FILE:	T822/7203
STYLE OF CAUSE:	Donna Mowat v. Canadian Armed Forces
RULING OF THE TRIBUNAL DATED:	November 15, 2006
APPEARANCES:	
Jerry W. Switzer	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Sandra Nishikawa Derek Allen	For the Respondent