

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

**PUBLIC SERVICE ALLIANCE OF CANADA
AND
CATHY MURPHY**

Complainants

**- and -
CANADIAN HUMAN RIGHTS COMMISSION**

Commission

**- and -
CANADA REVENUE AGENCY**

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2009 CHRT 31
2009/10/16

[Delivered orally]

[1] On Friday, May 29, 2009, the Complainants served a new document on the Respondent. It consisted of an addendum to an expert's report that the Complainants had previously filed. Both documents had been prepared by Mr. Gary S. Katz, a chartered accountant, whom the Complainants intend to call as an expert witness in this case. The hearing was scheduled to commence on the next business day following the day of service, i.e., Monday, June 1, 2009.

[2] The Respondent has raised an objection to the filing with the Tribunal of this report, or more specifically, to the filing of certain portions of the report.

[3] The Tribunal had directed, in the course of its case management process herein, that the Complainants file all their experts' reports by December 1, 2008. The Complainants later requested an extension to file their reports, which the Tribunal granted, to December 12, 2008. Mr. Katz's first report was filed by that date. The Respondent was in turn instructed to file its experts' reports by the extended date of January 16, 2009. The Respondent obtained a report from the accounting firm of Deloitte, which was also filed on time.

[4] The Tribunal did not give any direction with respect to the filing of any experts' reports in reply to the Respondent's report. Moreover, the Complainants did not at any time during the pre-hearing process make any request to the Tribunal for leave to file any other reports, be it in the form of an "addendum" or a "reply report".

[5] Rule 1(5) of the Tribunal's Rules of Procedure states that unless the Panel grants an extension or an adjournment, all time limits for complying with the Rules and all dates set for a hearing, a motion or a case conference, are peremptory.

[6] Thus, the Complainants are clearly outside the peremptory time limits set by the Tribunal for the filing of their experts' reports in this case. For this reason alone, the late filing of the Complainants' 2nd expert report should not be permitted, or more accurately, when read with Rule 9(3)(e), the expert should not be allowed to testify with respect to matters that were solely raised in the 2nd report.

[7] However, even if that were not the case, the Complainants' request for leave to file the 2nd report beyond the prescribed time limits would also be denied, for the following reasons.

[8] Mr. Katz, in his initial report, reviewed the circumstances regarding the finances of the Complainant, Cathy Murphy, as well as those of another individual whose situation was analogous to hers. Mr. Katz gave his opinion of what would have been the financial outcome for both persons had they received their pay equity settlement payments in the years of service to which the payments related. Mr. Katz then compared these outcomes with the outcomes that would arise if these individuals received their settlement payment in the year 2000.

[9] Mr. Katz presented his findings in the form of several potential scenarios:

- a) That the recipient did not save any of her additional funds, but rather spent the entire sum;
- b) That she saved all of the funds by investing them in interest-bearing Treasury Bills;
- c) That she saved all of the funds by investing them in Treasury Bills held inside her Registered Retirement Savings Plan.

[10] As I mentioned earlier, the Respondent's expert report was prepared by the Deloitte accounting firm. The scope of Deloitte's mandate was to make a similar comparison of outcomes, as well as to review and comment upon Mr. Katz's first report. Deloitte made its calculations based on the same three scenarios presented by Mr. Katz. However, in the course of the report, Deloitte made several observations regarding some of Mr. Katz's assumptions, namely:

- a) That statistically, Canadians on average save only 15% of their after-tax income, so it would be unlikely that the recipients would have invested 100% of the additional funds;
- b) That Mr. Katz's report neglected to take into account the impact of inflation;
- c) That Mr. Katz's report did not take into account the amount of RRSP room actually available to Ms. Murphy;

[11] Deloitte incorporated these factors into its recalculation of Mr. Katz's scenarios, as well as in the one additional scenario that it advanced, namely, a situation where Ms. Murphy would have saved only 15% of the additional funds, of which only a portion

would have been made inside of her RRSP, in proportion to her historical patterns of contribution to the plan.

[12] In its report, Deloitte made an additional observation regarding the form of investments considered by Mr. Katz in his report. Deloitte suggested that Ms. Murphy was unlikely to have invested in Treasury Bills given the minimum investment threshold of \$10,000. However, although Deloitte made this last observation, it nonetheless conducted its analysis on the assumption that the recipients invested in Treasury Bills, as proposed by Mr. Katz.

[13] Mr. Katz's second report addressed Deloitte's recalculations of his scenarios directly. Accordingly, he recalculated his scenarios to take inflation into account. He also adjusted his calculations to consider the available room for contributions in Ms. Murphy's RRSP. In addition, Mr. Katz presented a modified version of his scenarios to reflect a 15% savings rate (as opposed to a 100% rate). The investment vehicles in these recalculations remained Treasury Bills.

[14] Interestingly, the Respondent has no objection to the late filing of these portions of Mr. Katz's 2nd report. The Respondent contends that these sections address the questions and comments raised by Deloitte in its report. Indeed, the Respondent asserts that Mr. Katz is "correcting" himself in these sections of the report, although I am not persuaded by this argument, at least not at this stage.

[15] Mr. Katz, however, expanded even further. He presented a number of additional scenarios. Given Deloitte's comments regarding his use of Treasury Bills' rates of return in his calculations, he conducted a new analysis based on the rates of return of mutual funds. I note that for its part, Deloitte had not made any specific mention of mutual funds or any other form of investment. Its remarks had been limited to the above noted observations regarding the advisability of relying upon data derived from Treasury Bills.

[16] Mr. Katz also proposed another scenario in which Ms. Murphy would have used the additional funds to pay down her mortgage, had she received them in the years to which they relate. Mr. Katz even developed what he referred to as a "New Hybrid Option", which assumed an investment of some of the additional sums in mutual funds, while another portion would be used to pay down the mortgage, and the remainder would be spent.

[17] In addition, Mr. Katz added a section setting out several additional factors, which he believes could also have increased Ms. Murphy's tax disadvantage had she opted to claim the pay equity settlement payments in the years to which they relate.

[18] The Respondent objects to the filing of these latter portions of the report. They raise new matters, it is argued, that were not dealt with either in Mr. Katz's first report or in Deloitte's report. The Complainants contend that all Mr. Katz is presenting in his second report is a reply to the analysis presented by Deloitte. In my view, however, while that may be so with respect to the earlier portions of Mr. Katz's second report (i.e., those to which the Respondent does not object), the same cannot be said of the latter section. This is new material.

[19] The Complainants argue that in any event, even if new matters are being touched upon, the Respondent has not demonstrated that it would be prejudiced by the late filing of the report. This is not the point. The service and filing of the report literally on the eve of the hearing without any prior request for leave from the Tribunal for the late filing, is inherently unfair to the other parties, as well as prejudicial, not only to them but to the administration of the Tribunal's process as well. One need only look at the three and a half day delay to the start of this hearing that has resulted merely on account of this second report, as well as the potential pressure this will put on parties to proceed even more expeditiously in the time allocated for the hearing.

[20] Any party seeking leave or authorization from the Tribunal to file documents outside prescribed time limits should at least be able to demonstrate that there was some valid justification for the late filing. In the present instance, the only reason proffered would seem to be that Mr. Katz was very busy during the recent income tax filing season. This is not a valid justification, particularly given that the Complainants have been in possession of the Deloitte report since January 2009.

[21] For all these reasons, I accept the Respondent's partial objection to the filing of Mr. Katz's 2nd report or addendum to his first report. Only the non-redacted portion of the report (as appears in the version that the Respondent handed up to the Tribunal) can be filed by the Complainants. Mr. Katz will be allowed to testify only with respect to the non-redacted portions of his second report, as well as his entire first report, subject obviously to his being qualified as an expert in the ordinary course.

"I hereby certify that the foregoing is a true and accurate representation of my ruling given to the parties on June 5, 2009."

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario
October

16,

2009

PARTIES OF RECORD

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APPEARANCES:	
David Yazbeck	For the Complainants
Daniel Poulin Sheila Osborne-Brown	For the Canadian Human Rights Commission
Catherine A. Lawrence	For the Respondent