

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Between:**

**Heather Lynn Grant**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Manitoba Telecom Services Inc.**

**Respondent**

**Ruling**

**File No:** T1452/7809

**Member:** Sophie Marchildon

**Date:** April 10, 2014

**Citation:** 2014 CHRT 14

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## **I. Background**

[1] In *Grant v. Manitoba Telecom Services Inc.*, 2013 CHRT 35 [the *Pension Remedy Clarification Ruling*], the Tribunal provided a detailed background of these proceedings (see paras. 1-10).

[2] In sum, the Tribunal has found the Complainant's allegations of discrimination to be substantiated (see *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10), pursuant to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. To remedy the discrimination, the Tribunal made an order related to the Complainant's pension, among other orders (see *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20 [*Outstanding Remedies Ruling*]). However, the Tribunal first left it to the parties to work out the details of implementing the pension remedy. The parties were unable to do so and returned to the Tribunal for clarification. In the *Pension Remedy Clarification Ruling*, the Tribunal clarified the pension remedy order, but requested further submissions from the parties before finally ruling on the matter.

[3] This ruling provides a final determination of the pension remedy.

## **II. The pension remedy and its intent**

[4] The Tribunal ordered as follows with respect to the Complainant's pension:

The Respondent shall restore the Complainant's pension benefits to the position they were in at the time of her layoff. For the period from her layoff to the date when the terms of this order are implemented, the Respondent is to contribute to her pension plan half of the pension contributions it would have made during this period had the Complainant remained in its employ. If it is not possible to restore the previous pension plan, arrangements should be made to restore the lost pension benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive retirement benefits comparable to those she would have received through MTS. I will first leave it to the parties to work out the details of the Complainant's lost pension benefits pursuant to the parameters outlined in my reasons.

(*Outstanding Remedies Ruling* at para. 22)

[5] The parties agree that the Respondent's obligation under the above order is to implement the Complainant's pension benefits to the position they were in at the time of her layoff; and, that those benefits can be provided under the applicable pension plan.

[6] With regard to the period following layoff, the parties disagreed with respect to what was owed the Complainant: 50% of the pension contributions the Respondent would have made; or, 50% of the pension benefits the Complainant would have received, less the contributions the Complainant would have made. In this regard, the Tribunal provided the following clarification:

For the period following her layoff, only half of the employer's pension contributions are awarded. Half, because the Tribunal is remedying the possibility the Complainant shared with one other candidate of retaining her job with the Respondent, and not the loss of the job itself; and, only the employer's pension contributions, because the Complainant did not lose her own contributions. She simply did not pay into the pension plan following her layoff.

*(Pension Remedy Clarification Ruling at para. 23)*

[7] The parties agree that half of the employer's normal contributions for the period of February 23, 2007 to June 1, 2013 is \$17,789.72. However, the parties disagree about the inclusion and calculation of special contributions and interest in the pension remedy. Following the *Pension Remedy Clarification Ruling*, further submissions were requested from the parties on the subject of the special contributions and interest.

[8] Now having reviewed the additional submissions and supplemental actuarial reports on the subject of special contributions and interest, I have a more complete understanding of the applicable pension plan and how it works. On this basis, I view the disagreement between the parties on the subject of special contributions and interest to be one of wording, based on the language used in crafting the pension remedy. That is, the Tribunal's use of the terms "benefits" for the period up until the Complainant's layoff, versus the use of term "contributions" for the period following layoff.

[9] The intent of the Tribunal in using these two separate terms was simply to distinguish between the period before and after the Complainant's layoff. Namely, "employer contributions" was used to describe the period following layoff to emphasize that the Complainant's contributions should not be included in the calculation of the lost pension for that time period. Otherwise, the aim of the remedy was to ensure "the Complainant can receive retirement benefits comparable to those she would have received through MTS" (*Outstanding Remedies Ruling* at para. 22). For the period after layoff, the Tribunal intended the Complainant to receive whatever amount the Respondent would have given her (at 50% and minus her own contributions) "...had the Complainant remained in its employ" (*Outstanding Remedies Ruling* at para. 22).

[10] While the Tribunal indicated in the *Pension Remedy Clarification Ruling* that the Respondent was correct in interpreting the pension remedy for the period after layoff as being 50% of the pension contributions the Respondent would have made, when a consideration of special contributions and interest is taken into account, this is the equivalent of the Complainant's interpretation of 50% of the pension benefits the Complainant would have received, less the contributions the Complainant would have made. They are equivalent because the applicable pension plan is a defined benefit as opposed to a defined contribution. The Complainant aptly described the difference between the two:

12. In a defined contribution plan, the employees and the employer contribute a certain and set amount of money to the plan. These contributions are invested in the market to generate further money for the pension plan. The benefits that the pensioners receive upon retirement will depend upon the amount of the contributions and how well the market has done over the period of time that the contributions have been invested. For example, if the market has done very well over the time in which the contributions have been invested, the benefits will be relatively high. However, if the market did poorly over the time in which the contributions were invested, the benefits will be relatively low. The pension benefits under such a plan are not a set amount and are uncertain ("undefined"). A defined benefit pension plan is, in many ways, opposite of a defined contribution pension plan.

13. In a defined benefit pension plan, the employer's contributions are not set and are uncertain ("undefined"). However, the pension benefits are certain and set ("defined").

Accordingly, it does not matter how well or how poorly the market does, a defined pension plan guarantees a pensioner a sum certain in accordance with that pension plan.

14. In a defined benefit plan, the risk of the market doing well or poorly is borne by the employer. For example, when the market is doing well, the employer may not have to make any contributions at all to fund the promised pension benefits. However, when the market is doing poorly, the employer may have to make contributions that are far in excess of what the employees are required to contribute to fund the promised pension benefits. Either way, it is the employer's responsibility and obligation to ensure that the pension plan is funded sufficiently to ensure that retirees receive their specified, defined, set benefits upon retirement.

15. Accordingly, as may be seen, in a defined benefit plan, the amount of contributions that employers are required to make at any given time can vary dramatically. However, the amount of benefits that a pensioner is guaranteed to receive is fixed and certain, pursuant to the terms of the pension plan.

16. Since, under a defined benefit pension, the employer does not contribute a defined and certain amount at regular intervals, the amount of the contributions would have to be estimated based upon certain assumptions. Regardless of assumptions used, the amount of contributions, at any point in time, may have no bearing to the amount of benefits. Ultimately, the pension benefits must be funded but the pattern of contributions to fund the pension benefits can vary immensely.

*(Written Submissions of the Complainant regarding the Complainant's Pension, July 31, 2013, at paras. 12-16)*

[11] The Respondent is in agreement with this general explanation (*Written Submissions of the Respondent Pension Remedy, September 27, 2013, at para. 23*).

[12] As mentioned in the *Pension Remedy Clarification Ruling*, the Tribunal does not have expertise in interpreting and calculating pensions. It crafted the original pension remedy based on the submissions of the parties and evidence before it at the time. Only well after the original remedy did the parties provide actuarial evidence and evidence pertaining to the workings of the pension plan. In retrospect, given the pension is a defined benefit, it would have been much easier for the Tribunal to order that the Complainant's pension benefits be restored at a rate of 50% for the period after layoff, minus her contributions, as the Respondent has previously

indicated (*Written Submissions of the Respondent Pension Remedy*, September 27, 2013, at para. 27). However, and again as stated in the *Pension Remedy Clarification Ruling*, this is not a question of revisiting the Tribunal's pension order, but ensuring it is implemented properly and that a victim of discrimination receives the full amount that is due to her.

### **III. Calculation of the pension remedy for the period after layoff**

[13] While the parties have interpreted the Tribunal's order differently, fortunately, when the considerations above are taken into account, both parties' actuarial reports arrive at the same amount for the lost pension post layoff.

[14] At Appendix D of the Respondent's actuarial report submitted on September 27, 2013, it calculates 50% of the Complainant's pension benefit for the period following layoff and reduces the benefit for the value of what the Complainant's contributions would have been during that time. The Respondent calculates the lump sum value of the Complainant's pension following layoff, at 50% and minus her contributions, to be \$98,863.81.

[15] Similarly, at Appendix 1 of the Complainant's actuarial report submitted on October 18, 2013, the actuary calculates the "Missing Employer Contributions (normal cost plus special payments plus interest)" for the period following layoff and concludes that the Respondent's contributions would have been \$98,863.81.

[16] Both parties have arrived at the same figure of \$98,863.81, whether the calculation is based on 50% of the employer contributions or 50% of the pension benefit, less the Complainant's contributions, for the period following layoff. Again, this is due to the fact that the applicable pension plan is a defined benefit as opposed to a defined contribution plan.

### **IV. Respondent's submissions for the exclusion of special contributions and interest**

[17] The Respondent submits that special contributions and interest should not be taken into account in implementing the pension remedy ordered by the Tribunal.

[18] According to the Respondent, the Tribunal ordered payment of contributions for the period following layoff; and, theoretically, the special contributions attributable to the Complainant do not concern the period following layoff, they concern the period before layoff. In other words, the special contributions arising after the layoff are not “for the period following layoff” they are “for the period before the layoff” because they fund, in part, the benefit earned through service before the layoff. In the Respondent’s view, for the special contributions required in the period following layoff to be theoretically applicable to the Complainant, the Tribunal would have had to direct that the benefits accrue past the date of layoff; however, the *Pension Remedy Clarification Ruling* confirms the opposite order was given. If special contributions for the period following layoff were awarded to the Complainant, the Respondent says this would result in double recovery for the pre-layoff period because the Complainant would be receiving both the benefit and the contributions which fund that benefit for the same pre-layoff period.

[19] In the alternative, if special contributions were to be awarded, the Respondent estimates the Complainant’s portion of the “actual special contributions” required “during” the period following layoff to be \$8,501.00, 50% of that amount being \$4,251.00.

[20] The Respondent’s argument for the exclusion of special contributions is a narrow and strict interpretation of the distinction between benefits and contributions, and the wording of the Tribunal’s order. Given the pension is a defined benefit, the exclusion of special contributions, or only including the “actual special contributions” required “during” the period following layoff, would stray far from the intent of the Tribunal’s order of awarding the Complainant comparable retirement benefits to those she would have received from the Respondent had the Complainant remained in its employ. There is no double recovery because, again, the pension is a defined benefit. Regardless of whether the special contributions were paid pre or post layoff, the pension benefit remains the same. Furthermore, to award only the special contributions “actually paid” after the layoff would not come close to remedying the Complainant’s actual loss and, again, is irrelevant to the defined benefit scheme of the applicable pension.



[21] The Respondent also submits the Tribunal has no jurisdiction to order interest on employer contributions. It says the *Pension Remedy Clarification Ruling* confirmed the Tribunal ordered the Respondent to pay pension benefits for the period before the layoff and 50% of employer contributions for the period after layoff. The Tribunal never ordered the Respondent to pay interest on either the benefits or the contributions. In fact, the Respondent points to the *Outstanding Remedies Ruling* where, in awarding interest on other compensatory remedies, the Tribunal declined to award interest on the pension because “the remedies related to the Complainant’s pension [...] were not awards of compensation, as they were made to restore a privilege pursuant to section 53(2)(b) of the *Act*” (at para. 21). According to the Respondent, the Tribunal’s reasoning is in line with section 53(4) of the *Act*, which gives the Tribunal the authority to include an award of interest on orders to pay compensation only. As the pension remedy is not an award of compensation, there is no authority to include an award of interest. In the Respondent’s view, that decision stands and cannot now be changed except through judicial review.

[22] In the alternative, the Respondent submits that if the Tribunal concludes it can award interest on the pension remedy, the Tribunal should not grant the interest claimed because it is well beyond the rate of interest normally awarded by the Tribunal and there are no circumstances before the Tribunal justifying a departure from that normal practice (see Rule 9(12) of the Tribunal’s *Rules of Procedure (03-05-04)*). In the further alternative, the Respondent claims the Complainant’s actuarial report does not properly calculate interest on normal or special contributions because it does not use the appropriate rate of return.

[23] Including interest on normal and special contributions in the pension remedy is in no way connected to the Tribunal’s ability to award interest under section 53(4) of the *Act* or Rule 9(12) of the Tribunal’s *Rules of Procedure (03-05-04)*. Rather, the interest or the rate of return on the investment of normal and special contributions, is a function of and included within the applicable pension plan. Again, this is because the pension is a defined benefit as opposed to a defined contribution plan. As a defined benefit, the starting point in calculating the present remedy is what the Complainant’s pension benefit would have been had she remained in the

employ of the Respondent. Subtract what the Complainant's contributions would have been and you are left with what the employer must contribute to provide for the defined benefit. While the wording and interpretation of the Tribunal's order has led both parties to calculate the remedy differently, ultimately, they have arrived at the same amount: \$98,863.81. Any difference in the applicable rate of return on normal and special contributions does not change this end result.

[24] Whether you describe the employer's contributions to the pension plan as normal or special contributions; and, whatever method you use to account for the rate of return on those contributions; at the end of the day, the Respondent must provide a defined benefit to its employees. While the Respondent's contributions vary, the benefit remains the same. Therefore, to exclude special contributions and interest from the present remedy, and only award normal contributions as the Respondent advocates, would not come anywhere close to ensuring "the Complainant can receive retirement benefits comparable to those she would have received through MTS [...] had the Complainant remained in its employ" (*Outstanding Remedies Ruling* at para. 22).

## **V. Implementation of the pension remedy**

[25] For the period up to the Complainant's layoff, the parties have confirmed that the Complainant's full pension benefits are available to her; and, that those benefits can be provided under the applicable pension plan.

[26] For the period after layoff, the Respondent says the applicable employer contributions cannot be paid directly into the pension plan as contemplated by the Tribunal's order. According to the Respondent, doing so would be a violation of the *Income Tax Act* and could have serious consequences to the pension plan and its members. The Respondent proposes providing the amount as a lump-sum payment, which the Complainant can then deposit into an RRSP.

[27] Alternatively, the Complainant proposes that the Respondent could purchase an annuity that pays the Complainant a guaranteed defined benefit of \$405.44 per month. The Respondent is not in favour of this option because of the extra cost that it would have to incur to implement it, which it estimates to be between \$24,000.00 and \$60,000.00. According to the Respondent, imposing such an option, when a more cost effective option is available to provide the same benefit, is not consistent with the *Outstanding Remedies Ruling*, stating that the pension remedy is not an attempt to punish the Respondent.

[28] The Complainant's RRSP deduction limit as of 2013 is not sufficient to cover \$98,863.81 (Tab 5 of the *Expert Report of Louis Ellement*, July 29, 2013). Unless the Complainant's 2014 RRSP deduction limit is sufficient to cover the amount, the pension remedy will have to be provided to the Complainant as an annuity. The added cost of paying for the annuity is not a punishment against the Respondent. It is the cost of implementing the Tribunal's order, which the Respondent says it cannot implement through its own pension plan. The Tribunal's order provided:

If it is not possible to restore the previous pension plan, arrangements should be made to restore the lost pension benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive retirement benefits comparable to those she would have received through MTS.

*(Outstanding Remedies Ruling at para. 22)*

[29] Also, the amount due to the Complainant will have to be adjusted to the date the terms of the order are implemented.

## **VI. Order**

[30] Therefore, pursuant to the reasons above, the Tribunal's final ruling and order with regard to the Complainant's pension remedy is as follows:

- (1) The Respondent shall restore the Complainant's pension benefits to the position they were in at the time of her layoff and pay those benefits to her through the pension plan.
- (2) For the period from her layoff to the date when the terms of this order are implemented, the Respondent is to provide the Complainant half (50%) of what her pension benefits would have been had she not been laid-off, minus what her contributions would have been (\$98,863.81 adjusted to the date of implementation).
- (3) If the Complainant has sufficient room in her RRSP for the total amount awarded in Order (2) above, then the amount will be provided to her as a lump-sum payment.
- (4) If the Complainant does not have sufficient room in her RRSP for the total amount awarded in Order (2) above, then the Respondent shall purchase an annuity that pays the Complainant a guaranteed defined benefit equivalent to half (50%) of what her pension benefits would have been had she not been laid-off, minus what her contributions would have been (\$405.44 per month adjusted to the date of implementation).

*Signed by*

Sophie Marchildon  
Administrative Judge

Ottawa, Ontario  
April 10, 2014