Date: 20080130

Docket: T-2199-06

Citation: 2008 FC 118

Ottawa, Ontario, January 30, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DONNA MOWAT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Attorney General of Canada (the "Applicant") applies for a judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, of the decision made by the Canadian Human Rights Tribunal (the "CHRT") dated November 15th, 2006 awarding $47,000 in legal costs to Donna Mowat (the "Respondent"), payable by the Canadian Armed Forces.

[2] I have decided that the CHRT's interpretation of subsection 53(2)(c) that it has the power to make a compensation award of legal expenses in this case is reasonable. In arriving at this decision, I have concluded, that in the case at bar, that the standard of review for a Canadian Human Rights

Tribunal engaged in interpreting its own statute, a question of law, is reasonableness *simpliciter* rather than correctness.

[3] I have further decided that the CHRT was under a duty to provide adequate reasons for its award which it failed to do in making the compensation award for legal expenses. My reasons for arriving at these conclusions are set out below.

BACKGROUND

[4] In her complaint dated June 15th, 1998, filed with the Canadian Human Rights Commission (the "CHRC"), the Respondent, who had been a Master Corporal, 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 (the "*CHRA*"); and

(ii) by failing to provide her with a harassment free workplace contrary to section 14 of the *CHRA*. Included in her harassment complaint is an allegation of sexual harassment.

[5] The CHRC did not take carriage of the matter and the Respondent had her own legal representation in her hearing before the CHRT.

The Decision Under Review:
***Mowat v. Canadian Armed Forces,* [2006] C.H.R.D. No. 49 (*Mowat* Cost Decision)**

[6] The hearing of the Respondent's complaint consumed six weeks of hearing time. Over 4,000 pages of transcript evidence were submitted and more than 200 exhibits were filed with the CHRT.

[7] The CHRT found that the Respondent's sexual harassment complaint was substantiated and awarded her $4,000 plus interest to the statutory maximum of $5,000 for suffering in respect of feelings and loss of self respect as the Respondent's complaint had pre-dated the 1998 amendments to the *CHRA* which increased the statutory maximum to $20,000. The CHRT dismissed the Respondent's claim of adverse differentiation in employment and her claim based on the Canadian Armed Forces refusal to continue her employment.

[8] The Respondent initially claimed her legal expenses and submitted her legal accounts to the CHRT which totalled $196,313. In her submissions to the CHRT, the Respondent stated that she did not expect to recover 100% or even 75% of her legal fees, but did expect to be awarded reasonable costs.

[9] The Applicant disputed the CHRT's jurisdiction to award costs. It argued alternatively, if the CHRT did have jurisdiction, that the Respondent should be denied any legal costs or that her costs be strictly limited because the Respondent was for the most part unsuccessful in her allegations and the hearing was unnecessarily prolonged and complicated as a result of a lack of clear articulation of her complaints.

[10] The CHRT, after reviewing previous Tribunal decisions and the jurisprudence of the Federal Court, found that it had jurisdiction to award costs under subsection 53(2)(c) of the *CHRA*.

[11] The CHRT awarded the Respondent $47,000 in legal costs as expenses arising from discrimination under subsection 53(2)(c) of the *CHRA*.

ISSUES

[12] The Applicant submits five issues for consideration in this judicial review:

1. Does the CHRT have jurisdiction to award costs?
2. If the CHRT has jurisdiction to award costs, did the CHRT exceed that jurisdiction?
3. If the CHRT has jurisdiction to award costs, did the CHRT err in determining the allocation and amount of costs to be awarded?
4. Did the CHRT base its decision with respect to the amount of costs on an erroneous finding of fact that was made without regard for the material before it?
5. Did the CHRT fail to observe the principles of procedural fairness by failing to give adequate reasons for its decisions?

[13] The Respondent did not respond to or attend this application for judicial review. Counsel for the Respondent advised the Court that he had lost contact with his client and withdrew.

[14] This application for judicial review can be dealt by considering the following two issues:

1. Does the CHRT have jurisdiction to order compensation for legal expenses under s. 53(2)(c)?

2. Did the CHRT fail to observe the principles of procedural fairness by failing to give adequate reasons for its decisions?

LEGISLATION

[15] Section 53 of the *CHRA* reads:

Complaint dismissed	Rejet de la plainte
53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
Complaint substantiated	Plainte jugée fondée
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any	c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

expenses incurred by the victim as a result of the discriminatory practice;	
(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;
(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	*e*) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

STANDARD OF REVIEW

[16] In *Pushpanathan v. Canada (Minister of Citizenship)*, [1998] 1 S.C.R. 982 at paras. 29-37, the Supreme Court of Canada set out the principles for determining the standard of review of a tribunal's decision according to the pragmatic and functional approach. The standard of review is to be determined having regard to the language of the statute and to the following factors set out in *Pushpanathan*, above:

a. the presence or absence of a privative clause or statutory right of appeal;

b. the expertise of the tribunal in relation to the reviewing court on the issue;

c. the purpose of the legislation and the relevant provision in particular; and

d. the nature of the question: law, fact, mixed law and fact, or discretionary.

Absence of a Privative Clause

[17] Justice Kelen in *Canada (Attorney General) v. Brooks*, 2006 FC 1244, above, at para. 10, in undertaking a judicial review of a *CHRA* tribunal's decision regarding a complaint related to racial discrimination held that the absence of a privative clause in the *CHRA* warrants a low level of deference. As the CHRT is a tribunal constituted under the same act as in *Brooks*, above, this factor tends towards a lesser degree of deference upon review.

The Expertise of the Tribunal

[18] Subsection 48.1(2) of the *CHRA* provides that individuals appointed to be members of the tribunal must have experience and expertise in human rights. The expertise of the CHRT on the subject of human rights and, more specifically, on appropriate remedies in cases of human rights discrimination tends towards more deference on review.

The Purpose of the Legislation and the Relevant Provision

[19] The purpose of the *CHRA* is to afford individuals equal opportunity to pursue the life they are able without being prevented by discriminatory practices. The specific provision in question, subsection 53(2)(c), gives the CHRT discretion to order compensation by the party responsible for the discrimination to the person who has been the subject of discriminatory practice. Accordingly, these factors tend to afford more deference.

The Nature of the Question

[20] The first issue involves the interpretation of subsection 53(2)(c) of *CHRA*. Usually, the interpretation of legislation is a question of law which invokes a standard of correctness. This Court has previously held that the jurisdiction of the CHRT to award costs is a question of law and thus must be reviewed on the standard of correctness *Canada (Attorney General) v. Brooks*, 2006 FC 500 at paras. 8-9 (*Brooks* 2006 FC 500).

[21] However, a recent decision of the Federal Court of Appeal invites revisiting this question. The Federal Court of Appeal, in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, recently considered the standard of review applicable to a reviewing court when considering subsection 53(2)(c) of the *CHRA*¸ the same subsection at issue here. Justice Pelletier held that the CHRT is owed "more deference on those questions of law with which it is intimately familiar (*Chopra*, above, at para. 56)".

[22] Justice Pelletier referred to Justice LeBel's observations in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77. Justice LeBel, while agreeing in result with the majority that the appeal should be dismissed on the basis of the doctrine of abuse of process, discussed the administrative law aspects of the case. Justice LeBel considered whether questions of law within the area of expertise of a tribunal are required to be reviewed on the correctness standard (*Toronto (City)*), above, at paras. 62-64). Justice LeBel stated at paragraphs 71-72:

> This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness.

> As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.
>
> As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para. 37.

[23] In following Justice LeBel's reasoning in *Toronto (City)*, above, Justice Pelletier found that the holding of the application's judge in *Chopra*, above, that the standard of review concerning questions of law emanating from subsection 53(2)(c) of the *CHRA* was correctness was overly

broad (*Chopra*, above, at para. 17). He stated that "[t]he standard of review varies with the nature of the legal question in issue. While the standard may be correctness, it need not be so." Justice Pelletier in effect concluded that the standard of review in reviewing the CHRT's interpretation of subsection 53(2)(c) of the *CHRA* was reasonableness *simpliciter* (*Chopra*, above, at para. 56).

[24] The question of law arising from the CHRT's interpretation of subsection 53(2)(c), that is whether it has jurisdiction to order compensation for expenses arising from discrimination, is one very much at the core of the human rights subject matter in which it has expertise. As a result, the CHRT is entitled to more deference in interpreting this subsection to determine whether it has jurisdiction to order compensation for legal expenses

[25] Lastly, the *CHRA* at subsection 50(2) provides that the CHRT may decide questions of law or fact.

Power to determine questions of law or fact	Questions de droit et de fait
(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.	(2) Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie.

Parliament's use of the words "law or fact" demonstrates it contemplated situations where the CHRT may have to decide questions of law in order to determine matters before it.

The Standard of Review of the CHRT *Mowat* Cost Decision

[26] I conclude, therefore, that the standard of review in a judicial review of the CHRT's decision on its jurisdiction arising from subsection 53(2)(c) to award compensation for legal expenses is reasonableness *simpliciter*.

Previous Federal Court Decisions

[27] The Federal Court has considered the jurisdiction of the CHRT to award costs; however, there have been conflicting decisions. In three cases, this Court found that the CHRT had jurisdiction to do so: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38 at para. 56, (*Thwaites*) see also: *Canada (Attorney General) v. Stevenson*, 2003 FCT 341 at paras. 23-26 (*Stevenson*); see also: *Brooks* 2006 FC 500, above, at para. 16. In two cases, this Court found that the CHRT lacked jurisdiction to award costs: *Canada (Attorney General) v. Lambie*, [1996] F.C.J. No. 1695 at para. 41; see also: *Canada (Attorney General) v. Green*, [2000] 4 F.C. 629 at paras. 185-186).

Does The CHRT Have Jurisdiction To Order Compensation for Legal Expenses Under s. 53(2)(c)?

Applicant Submissions

[28] The Applicant's position is that the CHRT lacks jurisdiction to award costs and exceeded its jurisdiction in awarding legal costs to the Respondent. The Applicant vigorously argues that the principles of statutory interpretation weigh against the CHRT having such jurisdiction.

[29] In support of its argument, the Applicant submits that the following militates against a statutory interpretation that Parliament intended that the CHRT could determine that legal costs are included in a category of expenses that may be awarded in compensation awards arising from discriminatory actions:

a. the *CHRA* does not expressly grant the CHRT the power to award legal costs;

b. the principles of statutory construction, including concepts of 'implied exclusion', strict construction of statutes that impose a levy or charge, *ejusdem generis* statutory interpretation rules, and the common law distinctions between damages and costs all suggest that clear and unambiguous language is needed before a tribunal can be found to have the power to award costs; and

c. 'costs' is a legal term of art and has a distinct and separate meaning from 'expenses'.

[30] The Applicant also submits that whereas some tribunals have express statutory grants of jurisdiction to award costs, this is notably absent in the *CHRA*. This supports the Applicant's contention that for the CHRT to have the jurisdiction to award costs, an express statutory grant would be required. The Applicant notes:

a. Parliament has expressly given other tribunals, such as the Canadian International Trade Tribunal, the Canadian Radio-Television and Telecommunications Commission, and the Canadian Transportation Agency, the capacity to awards costs but has not done so with the CHRT;

b. ten of 13 of the provinces and territories have expressly granted their respective human rights tribunals the power to award costs;

c. proposed Parliamentary amendments to the *CHRA* included express provision for awarding costs by the CHRT.

[31] The Applicant also argues that the CHRT's interpretation leads to a one-sided cost regime since only those claimants who successfully advance a discrimination claim could receive an award of costs. Where a claimant at the CHRT is unsuccessful, the successful respondent could never receive an award of costs. The Applicant submits that such a one-sided costs regime is an absurdity and legislation should be interpreted to avoid absurdities.

The CHRT Interpretation of its Ability to Award Legal Costs

[32] The CHRT, in the *Mowat* Cost Decision, above, the decision under review, began its costs analysis by chronologically reviewing the Federal Court decisions on awards of legal costs.

[33] Briefly, this Court held in its 1994 decision in *Thwaites*, above, that the *CHRA*'s words "expenses incurred" should be given their ordinary meaning which can include legal expenses. Two years later, in *Lambie*, above, in 1996 this Court rejected a claim for legal costs but indicated that legal costs could be awarded in "exceptional circumstances". In 2000, this Court in *Green*, above, reasoned that since the *CHRA* makes no mention of legal costs, Parliament did not intend that the CHRT have the power to award such costs.

[34] In 2003, this Court in *Stevenson*, above, agreed with the decision in *Thwaites*, above, that the language of the subsection was broad enough to encompass the power to award legal costs. In

coming to its conclusion, the Court noted that the CHRT, in *Nkwazi v. Canada (Correctional Service)*, [2001] C.H.R.D. No. 29, had concluded that human rights policy considerations supported a finding that the human rights tribunal had the power to award legal costs as part of a compensation award. Lastly, in 2006, this Court in *Brooks* 2006 FC 500, above, also followed the decision in *Thwaites*, above. The reference to *Nkwazi* in *Brooks* is an excerpt from Justice Rouleau's decision in *Stevenson* where he reviews the relevant jurisprudence.

[35] In the case at bar, the CHRT specifically noted the Federal Court's approval of the human rights policy approach to statutory interpretation undertaken in *Nkwazi*, above (*Mowat* Cost Decision, above, at paras. 22-23):

> 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.).
>
> 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*".

[36] The CHRT in this case adopted the human rights policy approach articulated in *Nkwazi*, above, instead of the approach the Applicant argued being that subsection 53(2)(c) should be interpreted in accordance with conventional rules of statutory interpretation

[37] The Supreme Court of Canada considered the relationship between these two approaches to statutory interpretation of the *CHRA* in *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at paras. 24, 29. Chief Justice Dickson, writing for the unanimous Court, stated:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87 has written:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> […]
>
> In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-7:
>
> > It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but

> certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

[38] I have found that the standard of review of the CHRT's conclusion that it had jurisdiction to award legal costs pursuant to subsection 53(2)(c) is reasonableness *simpliciter*.

[39] I note that the Respondent did substantiate a portion of her claim relating to sexual harassment and that the Commission did not take carriage over the matter.

[40] Keeping in mind the remedial purpose of human rights legislation and the approach to its statutory interpretation approved by the Supreme Court of Canada in *C.N.R.*, above, and also the Federal Court of Appeal decision in *Chopra*, above, I conclude that the CHRT's interpretation that subsection 53(2)(c) gives it the jurisdiction to award legal costs as an expense arising from discriminatory conduct is reasonable.

[41] The human rights policy approach to statutory interpretation of subsection 53(2)(c) explains the question raised by the Applicant about a one-sided legal costs award regime. Simply stated, the award of compensation for expenses, here legal expenses, is an award that arises as a result of proven discrimination and not an award based on the success of a party to litigation.

Did The CHRT Fail To Observe The Principles Of Procedural Fairness By Failing To Give Adequate Reasons For Its Costs Decision?

[42] The next issue involves whether adequate reasons were given in the CHRT's decision to award legal costs.

[43] The question arising on a failure to give adequate reasons derives from the nature of the impugned conduct. If the conduct is a breach of procedural fairness then no assessment of an appropriate standard or review is required *(Morneau-Bérubé v. Nouveau Brunswick (Judicial Council)*, 2002 SCC 11 at para. 74). A breach of procedural fairness will result in setting aside the CHRT's decision.

[44] The Applicant argues that, although the duty to give reasons does not arise in every case, in this case where it is required to pay $47,000 in costs, it should be provided with adequate reasons for the basis of the award.

[45] The obligation to provide reasons is part of the general duty to act fairly. In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 24, Justice L'Heureux-Dubé stated:

> The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution*, *supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

[46] Justice L'Heureux-Dubé went on to say that there is a right to procedural fairness if the decision is significant and has an important impact on the individual (*Knight*, above, at para. 35). She further observed that the concept of procedural fairness was flexible and to be decided in the context of each case (*Knight*, above, at para. 46).

[47] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L'Heureux-Dubé elaborated on the flexible nature of duty of procedural fairness. Justice L'Heureux-Dubé concluded that the duty of procedural fairness included the duty to give reasons. She stated at paragraph 43:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

[48] The duty to give reasons requires that reasons be adequate. In *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paras. 17-19, Justice Sexton for the Federal Court of Appeal held:

> The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the

> decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
>
> > Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. [citations omitted].
>
> Reasons also provide the parties with the assurance that their representations have been considered
>
> In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

[49] Accordingly, procedural fairness requires that reasons be given where the duty arises. For the duty to be discharged, the reasons must be adequate. Adequate reasons permit the affected parties to understand why the decision was made, assure them their evidence and submissions were heard, and allow an assessment of possible grounds of appeal or review.

[50] The CHRT concluded that the Respondent was a victim of sexual harassment and awarded her the statutory maximum of $5,000 for damages and interest for suffering in respect of feelings and loss of self respect. The CHRT dismissed the Respondent's allegations of adverse differential treatment in employment, harassment other than sexual harassment, and failure to continue employment as these claims were not substantiated.

[51] During final submissions on March 20, 2006, the CHRT heard submissions from both the Applicant and the Respondent's legal counsel on whether the Respondent should be compensated for legal costs under subsection 53(2)(c) of the *CHRA*. The CHRT had suggested that considerations on cost await its decision on liability. The Applicant insisted on making submissions on the issue of legal expenses arguing issues of jurisdiction and quantum of any award.

[52] The CHRT decided that it required further evidence and submissions from the parties. The CHRT indicated that the parties should have the opportunity to make submissions on considerations that are, in the CHRT's words, "highly relevant to the disposition of the claim for expenses compensation (*Mowat v. Canadian Armed Forces*, 2005 CHRT 31 at para. 410)" including:

- The distinction (if any) to be made between pre-hearing legal expenses and legal expenses incurred at the hearing, insofar as it relates to the Tribunal's jurisdiction to grant compensation;
- The significance of the Tribunal's rulings in *Brown v. Royal Canadian Mounted Police* 2004 CHRT 30 (judicial review pending) and *Brooks v. Department of Fisheries and Oceans* 2005 CHRT 26 (judicial review pending); and,
- The significance, from the perspective of expense compensation, of my dismissing the allegations of discriminatory discharge, adverse differentiation and harassment other than sexual harassment.

[53] The CHRT also asked the Respondent to submit a bill of costs based on Tariff B of the *Federal Courts Rules*, S.O.R./98-106, predicated on the assumption that the Respondent was

entirely successful and entitled to party and party costs under the *Federal Courts Rules*. The Applicant was to respond to these submissions.

[54] Considering that the CHRT, after hearing submissions from the parties on costs, required further information and submissions on specific topics related to costs, most significantly on the relative success of the parties, I am satisfied that the CHRT was under a duty to provide reasons for the compensation award on legal expenses given the scale of legal costs incurred for the CHRT hearing.

[55] Both the Respondent and the Applicant provided written and oral submissions on March 20, 2006. Counsel for the Respondent submitted, among other factors to be considered that "you take the victim as you find them", presumably addressing the argument that the Respondent's complaint lacked precision. The Applicant challenged the Respondent's proposed bill of costs ($115,815.98) responding with its own ($77,718.05), emphasized application of the weighing factors in rule 400(3) of the *Federal Courts Rules*, and stressed the degree of success it achieved relative to the Respondent.

[56] In its decision, the CHRT stated that subsection 53(2)(c) requires that legal costs must be an expense incurred as a result of the discriminatory practice. In this case the only substantiated discriminatory practice suffered by the Respondent was sexual harassment. The CHRT decided that it was not bound to follow the *Federal Courts Rules* on the assessment of costs. The CHRT

awarded compensation for legal costs to the Respondent in the amount of $47,000 for legal costs payable by the Canadian Armed Forces.

[57] Given that reasons were provided by the CHRT in the form of the *Mowat* Cost Decision, above, the next step in the analysis requires a determination of whether they were adequate. The Federal Court of Appeal has said that a mere recitation of submissions and evidence of the parties and stating a conclusion does not satisfy the obligation to provide adequate reasons (*Via Rail Canada Inc*., above, at para. 22).

[58] In this case, the CHRT, having declined to assess costs using the *Federal Courts Rules*, fails to provide any reasoning as to how it arrived at its total legal costs of $47,000. The CHRT merely states that it considered three sources in arriving at its total: the description of legal services set out in the legal accounts of Respondent; 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 allegation; and the bill of costs submitted by each party calculated on a party/party basis (*Mowat* Cost Decision, above, at para. 31). Upon my reading of the *Mowat* Cost Decision, above, the Applicant is not provided any instruction on how the quantum of $47,000 was arrived at by the CHRT in light of the three factors considered.

[59] This CHRT proceeding has been long and involved. The parties are very familiar with the evidence and submissions made. It is not necessary that the CHRT develop extensive reasons for a legal costs award. In *Knight*, above, at paras. 49-51, the Supreme Court of Canada concluded that

Knight was entitled to reasons for his dismissal but held that he had received adequate reasons in the course of negotiations with the Indian Head School Board. Given the length of the proceedings in this case, the CHRT, is entitled to expect the parties will understand its reasons, briefly stated, for awarding the amount it does. Nevertheless, the CHRT must provide adequate reasons by providing its reasoning in arriving at its decision on quantum.

CONCLUSION

[60] The decision on costs will be quashed and the matter remitted back to the CHRT to decide anew. Given the length and complexity of the CHRT proceeding, the matter should go back to the same CHRT member.

[61] Further, the process now appears to have exhausted the capacity of the Respondent to participate. Given that the Applicant has twice argued its case on costs before the CHRT and that the submissions of the Applicant have not changed in any substantive way, the CHRT may forego a further hearing and rely on the existing written materials and hearing transcripts in issuing its decision on the amount of the legal costs award.

[62] Finally, I make no comment on the appropriate quantum of compensation for legal costs award decided by the CHRT.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The award decision giving $47,000 to the Respondent in legal costs as an award of expenses under subsection 53(2)(c) is quashed.

2. The matter is remitted to the same decision maker for an award of compensation for expenses with reasons thereto without the necessity of further submissions or hearing.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2199-06
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. DONNA MOWAT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Mandamin, J.
DATED:	January 30, 2008

APPEARANCES:

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