Canadian Human RightsTribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 25
Date: August 31, 2018
File No.: T2111/2715

[ENGLISH TRANSLATION]

Between:

Nahame O'Bomsawin

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Abenakis of Odanak Council

Respondent

Decision

Member: Anie Perrault

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[1] On February 17, 2017, I rendered a decision in favour of Nahame O'Bomsawin (the Complainant) in this case, allowing her complaint of discrimination on the ground of family status, and I ordered the following (see 2017 CHRT 4):

> **D. Interest (s. 53 (4))**
>
> [107] Pursuant to section 53(4) of the CHRA and Rule 9(12) of the *Tribunal Rules of Procedure (03-05-04)*, I order that interest be paid on all amounts to be paid to Ms. O'Bomsawin. Interest shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada. It shall accrue from the date of the decision by the Council not to hire the Complainant, that is, October 29, 2012, until the date of payment of the award of compensation.
>
> **VII. Order**
>
> Nahame O'Bomsawin's complaint is found substantiated and it is ordered that the Abenakis of Odanak Council:
>
> 1. Compensate the victim in the amount of $20,654.43 for lost wages.
> 2. Compensate the victim in the amount of $10,000 for the pain and suffering she experienced.
> 3. Compensate the victim in the amount of $7,500 for having engaged in the discriminatory practice willfully.
> 4. Pay interest on the foregoing compensation amounts in accordance with the terms outlined in paragraph 107 of this decision.

[2] The Abenakis of Odanak Council (Respondent) filed an application for judicial review of the decision and the Federal Court upheld it and dismissed the application for judicial review in February 2018. (*Conseil des Abénakis d'Odanak v. O'Bomsawin,* 2018 FC 112)

[3] Since then, the parties have agreed on the principal owing and costs, but not on the interest to be paid. They also agreed that said interest must cease to accrue on June 18, 2018.

[4] Despite the disagreement, the Respondent sent a cheque in trust to counsel for the Complainant for a total amount of $43,499.44, representing $38,154.43 in principal,

$2,414.48 in costs and $2,249.52 in interest; this last amount represented the interest owing according to the Respondent's calculations.

[5] The Complainant did not agree with the calculation of interest proposed by the Respondent, and filed a motion on June 28, 2018, with the Canadian Human Rights Tribunal (Tribunal) asking for a member to set the rate of interest applicable in the case.

[6] The Tribunal received the written submissions of the Respondent and the Canadian Human Rights Commission (CHRC) as well as the Respondent's representations in reply, further to the submission of the CHRC's written arguments and lastly the Complainant's additional submissions. Further to the additional submissions, the other parties did not request the additional right of sur-reply.

I. The Law

[7] Sections 48.9 and 53(4) of the *Canadian Human Rights Act* (CHRA) govern the Tribunal when ordering the payment of interest, and Rule 9(12) of the Tribunal's Rules of Procedure (03-05-04) (Rules):

> **48.9** (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
>
> …
>
> **53**(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.
>
> …
>
> **9(12)** Unless the Panel orders otherwise, any award of interest under s. 53(4) of the *Canadian Human Rights Act*,
>
> a. shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada; and
>
> b. shall accrue from the date on which the discriminatory practice occurred, until the date of payment of the award of compensation.

II. Issue and analysis

[8] The issue here is the following: what formula should be used to calculate the interest to be paid to the Complainant?

[9] Despite the Complainant's and the Commission's claims, the parties do not agree on the average monthly rate of interest.

[10] In its motion, the Complainant alleges that the average monthly interest rate for the period of October 2012 to June 2018—the period we are concerned with in this case—is 1.04%, and it must be multiplied by 12 to reach an annual rate.

[11] The Respondent claims in its written submissions that this 1.04% corresponds to an average annual interest rate, based on the monthly data on the official bank rate of the Bank of Canada (the Bank) and to reach an average monthly rate, for each year of the period, it must be divided by 12.

[12] For the period of October 2012 to June 2018, the average annual interest rates varied, according to the Respondent's submissions and the database provided by the Bank, between 1.04% and 1.07%

[13] According to the Bank's site, the average bank rate for the period of October 2012 to June 2018 was 1.07%.[1]

[14] The Respondent could have taken the average rate and multiplied it by the number of years corresponding to the period in question, adding the last 6 months of 2018. This would have given an amount of around $2,245 in interest. But to be as accurate as possible, the Respondent instead calculated the interest to pay the Complainant on the capital owing monthly. To set the applicable interest rate each month on the amount of capital owing, the Respondent took the annual interest rate set by the Bank for the month

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[1] https://www.bankofcanada.ca/rates/interest-rates/canadian-interest-rates/?lookupPage=lookup_canadian_interest_fr.php&startRange=2008-08-20&rangeType=dates&dFrom=2012-10-01&dTo=2018-06-29&rangeValue=1&rangeWeeklyValue=1&rangeMonthlyValue=1&series%5B0%5D=V122530&ByDate_frequency=&submit_button=Submit&_ga=2.231831391.1573277083.1551294186-846034258.1551294186

in question and divided it by 12. If we look at the various rates the Bank issued during the period in question, we can see that this monthly rate varies, according to the Respondent, between 0.06% and 0.13%. This gave a total of $2,249.52. On this, a complete and detailed table of the calculations was provided to the Tribunal in Annex 5 of the Respondent's written submissions.

[15] After reading the Respondent's calculations for the payment of interest to the Complainant, I feel that it was done fairly and in compliance with the decision I had rendered.

[16] Indeed, if we accept the Complainant's allegations in the motion filed on June 28, 2018, the annual interest rate would correspond to a rate of more than 12% (1.04% *12), whereas the Bank's average rate for this period was, according to the annual rates published monthly by the Bank during the period in question, around 1.07% (as noted above).

[17] It is therefore clear that the rate set monthly by the Bank is an annualized rate. This is like a photo at a specific moment—therefore, during a specific month, the annual bank rate is, according to the Bank, a given percentage. Thus, it should not be multiplied by 12 but divided by 12 to give a monthly interest rate.

[18] If we multiply the rate, as the Complainant suggested in her motion, it deviates significantly and does not correspond at all to the average annual interest rate in effect for the period in question in this case.

[19] If I followed the Complainant's methodology, and applied it to a situation such as the annual interest rate of our credit cards, which is often close to 18-20%, I would multiply by 12 and we would get an annual interest rate that would be much too high and completely unreasonable. If I took the current mortgage rate in force, say 3%, and I multiplied it by 12 using to the Complainant's proposed method, I would get an annual mortgage rate of 36%, which clearly does not correspond to the rate currently in force. At that rate, nobody could buy a house! These examples may be simple and do not take all the factors into consideration (such as the credit card or mortgage contract) but they

quickly and concretely show that the calculation proposed by the Complainant does not make sense.

[20] If the average annual rate for the period in question was around 1.07%, according to the Bank's own website, it is completely unreasonable to think that to calculate the interest owing to the Complainant it would be greater than 12%. And this is what would happen if I multiplied by 12 as the Complainant suggested. This method of calculating interest is, in my opinion, completely unreasonable and does not respect the spirit or the letter of subs. 53(4) of the CHRA or rule 9(12) of the Rules included in my decision.

[21] The Complainant presented additional submissions to her motion on the calculation of interest, this time stating that it was the legal rate in force in Quebec that should be used to calculate the interest she was owed, not the bank rate published by the Bank, multiplied by 12 as she had alleged in her original motion.

[22] In her written additional submissions, the Complainant also submitted that there is no res judicata preventing the Tribunal to review the issue of interest. On this, she cited the Federal Court judge in his decision on the judicial review of my decision. He had indicated that the calculation of interest had not been done.

[23] It is true that the judge did indicate this at paragraph 29 of his reasons, but he did so at the time he was describing the decision I had rendered. He does not do so during his analysis and even less so at the time of his decision.

[24] Moreover, a finding by the court that "interest…was not calculated in the decision" is not a finding that the method for calculating interest was not established in the decision. I did indeed address this issue and established the method of calculation.

[25] In fact, the Federal Court judge did not indicate anywhere in his decision that rule 9(12) is not appropriate or justified in the calculation of interest. In light of the decision rendered by the Federal Court, this issue of interest does not appear to have been raised at all during the judicial review. The Federal Court judge does not make any mention of it.

[26] The judge simply dismissed the application for judicial review and confirmed my decision in these terms:

> [55] Lastly, I reviewed the evidence submitted to the Tribunal regarding the after-effects of the decision not to hire the Respondent and the impact of that decision on her, including her psychological condition, her decision to leave the community and the necessity of finding another job that did not pay as well. In summary, I am of the view that the compensation set by the Tribunal, which was lower than the amounts sought by the Respondent, representing a fair, equitable, and above all, reasonable compromise in light of the facts and law. Since the applicant did not identify a reviewable error, the Court's intervention is not justified (*Dunsmuir*; *Khosa*).
>
> VII. Conclusion
>
> [56] There is no basis in law that warrants the Court setting aside the Tribunal's decision. Consequently, I am dismissing the application for judicial review with costs.
>
> [Emphasis added]

[27] It was the Complainant's responsibility to initiate her own application for judicial review of this aspect of the decision—namely the method of calculating interest—if she wanted to have it overturned in order to propose another calculation method. She did not do so.

[28] As I mentioned above, the Complainant indicated in her additional written submissions that the interest rate should have been the one that applies in Quebec and not that defined by rule 9(12) of our Rules. On this, she refers the Tribunal to her Statement of Particulars.

[29] I acknowledge that this Statement of Particulars does indeed make mention of it. However, it is only a few words at most, in the middle of a sentence, in a paragraph, on a single occasion. This is not what I would describe as a complete written argument explaining why the Tribunal should make an exception and deviate from the usual rule 9(12).

[30] Additionally, the audio tapes of the pleadings do not indicate any oral argument raised by the Complainant to the Tribunal to justify setting aside the application of rule 9(12). In fact, the issue of interest and calculating the interest was not at all addressed during the pleadings. It did not seem important at that time. However, in my opinion, it was at that time that such arguments should have been made.

[31] To now allege, through her additional submissions to the original motion, that the rate in force in Quebec should be used for calculating the interest, seems to me to be a last-minute argument.

[32] So, despite the Complainant's written arguments, I reiterate that my decision was clear and that interest should be calculated according to rule 9(12) of our Rules.

[33] My decision, at paragraph 107, clearly incorporates rule 9(12), which sets the applicable rate in the case. There is no "legal void'" here. Moreover, the Tribunal's practice is that interest is awarded according to rule 9(12) when there are no special arguments explaining why the rule is not appropriate in that case. These special arguments by the Complainant were not presented in her argument or during her pleading.

III. Conclusion

[34] The calculation proposed by the Respondent corresponds to the Tribunal's intention in its February 2017 decision and respects the spirit and letter of rule 9(12) of the Rules, which clearly indicates that simple interest is to be calculated on a yearly basis. (emphasis added)

[35] Moreover, the Tribunal cannot retroactively order the payment of compound interest to the Complainant. It does not have the jurisdiction to do so, unless it had ordered the payment in its original decision following the arguments made by one of the parties, based on the evidence or specific circumstances of the case, which was not done here. *(Hicks v. Human Resources and Skills Development Canada,* 2013 CHRT 20, at paragraphs 107 to 112*)*

[36] Counsel for the Complainant did not make any representations during the pleadings that would justify awarding compound interest to the Complainant. In fact, no oral argument about the calculation of interest to be paid to the Complainant was made.

[37] The Complainant's Statement of Particulars indicates, very summarily in one paragraph, that the interest to be paid should be [TRANSLATION] "…interest at the legal rate, as in force in the province of Quebec". Aside from these few words, no serious or

complete argument was made to the Tribunal during the pleadings asking for a deviation from rule 9(12) of the Rules and justifying such a deviation.

[38] The Complainant cannot do this now, *a postiori*, through additional submissions to a motion she herself filed more than 16 months after the publication of the original decision.

[39] An order to pay compound interest or pay interest other than that set out in rule 9(12), for example, interest set out in a provincial regime, is the exception. The general rule is to apply rule 9(12), namely the payment of simple interest calculated on a yearly basis, at the Bank Rate established by the Bank.

[40] On this, I cite another decision of this Tribunal, *Dawson v. Eskasoni Indian Band*, 2003 CHRT 22 :

> [13] Under Rule 9(12) of the Tribunal *Interim Rules of Procedure*, unless ordered otherwise, interest is to be calculated according to the formula set out in the Rule. No submissions were made by either party that this Tribunal should order otherwise. Accordingly, interest shall be payable by Eskasoni on the net amount of social assistance payments to which Mr. Dawson is entitled to from July 1988 to June 2, 2003, in accordance with Rule 9(12).

[41] As the Tribunal member in *Dawson*, I did not hear any argument during the hearing that would justify an order to the contrary. Since my February 17, 2017, decision, the issue has been settled.

[42] Lastly, I disagree with the arguments raised by the CHRC in its written arguments. The orders I had issued in my February 2017 judgment are clear and can be executed under s. 57 of the CHRA.

[43] The *functus officio* principle prevents a tribunal from revisiting its decisions when the issue has been decided and in the absence of a slip in drafting or an error in expressing the manifest intention of the tribunal, the tribunal will not revisit its decision: *Chandler v. Alberta Association of Architects* 1989 CanLII 41.

[44] In this case, I did not neglect to make a decision on the applicable rate. I indicated it clearly. I did not commit any slip either.

[45] I also clearly did not reserve jurisdiction on the method for calculating interest. On the contrary, I clearly considered it in my order as final and definitive: *Canada v. Moore* 1998 CanLII 9085 (F.C).

[46] For all these reasons, I do not see how rule 9(12) would not apply in this case and why I should set it aside to refer to sections 36 and 37 of the Federal Courts Rules, as suggested by the CHRC. These provisions clearly indicate that they govern cases before the Federal Court of Appeal or the Federal Court. Moreover, they apply "[E]xcept as otherwise provided in any other Act of Parliament". Relying on these provisions would constitute a significant departure from the application of subs. 53(4) of the CHRA and rule 9(12) of the Rules.

[47] In conclusion, I feel that the calculation of interest made by the Respondent is correct, that it respects paragraph 107 and the order I rendered at paragraph 108 of my original February 17, 2017, decision and that an amount of $2,249.52 in interest must be paid to the Complainant.

[48] I understand that a check was issued in trust to counsel for the Complainant for a total of $43,499.44, representing $38,154.43 in principal, $2,414.48 in costs and $2,249.52 in interest.

[49] I therefore conclude that the Respondent does not owe the Complainant any other amount.

Signed by

Anie Perrault
Tribunal Member

Ottawa, Ontario
August 31, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2111/2715

Style of Cause: Nahame O'Bomsawin v. Abenakis of Odanak Council

Decision of Tribunal Dated: August 31, 2018

Motion processed in writing without the appearance of the parties

Written submissions by:

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