CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

WAYNE DOUGLAS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SLH TRANSPORT INC.

Respondent

RULING

MEMBER: Edward P. Lustig

2010 CHRT 25
2010/10/15

[1] This is a Ruling on the request of the Complainant that the Tribunal withhold any determination on costs until the Supreme Court of Canada renders its Decision in *Canadian Human Rights Commission v. Attorney General of Canada, et al.* (Case no. 33507)

[2] The Complaint in this matter was filed by the Complainant on January 11, 2007. It alleged that the Respondent had discriminated against him by terminating his employment as a consequence of a physical disability, contrary to s. 7 of the *Canadian Human Rights Act* ("*CHRA*").

[3] An inquiry into this Complaint was requested by the Canadian Human Rights Commission (the "Commission") as being warranted pursuant to s. 44 (3) (*a*) of the *CHRA* by letter dated August 26, 2008.

[4] The Complainant's Statement of Particulars dated April 1, 2009 invoked various remedial subsections of s. 53 of the *CHRA* seeking, among other things, "costs".

[5] A hearing was held by me in this matter on June 15th to June 19th, 2009 and on June 22nd, 2009. In her summation at the hearing, Ms. Raymond, counsel for the Complainant did not make any submissions with respect to the issue of legal costs.

[6] On October 26th, 2009 the Federal Court of Appeal in *Canada (AG) v. Mowat*, 2009 FCA 309 held that "...the Canadian Human Rights Tribunal has no authority to make an award of costs under the provisions of the *Canadian Human Rights Act*".

[7] My Decision in the matter was rendered on January 27, 2010. In my Decision I determined that the Complaint had been substantiated as the Respondent had engaged in a discriminatory practice as alleged.

[8] In my Decision I ordered the Respondent to compensate the Complainant for pain and suffering in connection with the discriminatory practice pursuant to s. 53 (2) (*e*) of the *CHRA* and I ordered the Respondent to compensate the Complainant for its willful conduct in connection with the discriminatory practice pursuant to s. 53 (3) of the *CHRA*. I did not reserve on any matter.

[9] No application for a judicial review was made with respect to my Decision.

[10] On March 1, 2010 the current request was made by Ms. Raymond, counsel for the Complainant by a letter to the Tribunal. In its response to the letter, the Director, Registry Operations for the Tribunal, wrote to Ms. Raymond on March 5, 2010 drawing her attention to the October 26, 2009 Decision of the Federal Court of Appeal in Mowat, regarding the issue of costs. The Tribunal, in its letter, invited the Complainant to file written submissions, including jurisprudence, in support of his request. The Respondent's counsel was also copied with the letter and given an opportunity to respond with written submissions and the Complainant was given an opportunity to reply.

[11] On April 22, 2010 the Supreme Court of Canada granted leave to appeal the Decision of the Federal Court of Appeal in *Mowat*.

[12] The Complainant's submissions were filed with the Tribunal on May 31, 2010. The Respondent's submissions were filed with the Tribunal on July 19, 2010. The Complainant's reply to the Respondent's submissions were filed with the Tribunal by letter dated August 6, 2010.

[13] The Complainant's submissions, in summary, are as follows:

(1) There is authority for the Canadian Human Rights Tribunal to award legal costs to a successful complainant pursuant to subsection 53 (2) (*c*) of the *CHRA* which states as follows:
53 (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

On multiple occasions, throughout the majority of Canadian jurisdictions, Tribunals and Courts have included legal costs within the meaning of "any expenses".

(2) The Decision of the Federal Court of Appeal in *Mowat* is a narrow interpretation of this section of the CHRA and creates an obstacle which could potentially jeopardize access to justice for many complainants.

(3) This "narrow interpretation" of subsection 53 (2) (*c*) by the Federal Court of Appeal in *Mowat* does not reflect the purpose of the *CHRA*. By excluding legal costs from "any expenses", the most vulnerable and disadvantaged members of Canadian society are having their inherent right to access to justice further infringed. Due to the significance of the outcome of the Supreme Court of Canada's Decision granting leave to appeal *Mowat*, the Complainant requests that the Tribunal reserve its Judgment on costs until the matter is dealt with by the Supreme Court of Canada.

[14] The Respondent's submissions, in summary, are as follows:

(1) The Tribunal is bound to follow *Mowat* as an incident of stare decisis and as a matter of its own jurisdiction.
(2) The Tribunal is *functus officio*.
(3) The Decision of the Tribunal, even were there now jurisdiction to order costs, which there is not, does not necessarily support a claim for costs on its merits since success was divided in the case, as the Tribunal determined not to make Orders for a number of the remedies sought by the Complainant.
(4) The request in these circumstances is to be tested as though it were a motion for a stay of proceedings. In this case there is no evidence that any of the criteria for a stay order is met, including no evidence of irreparable harm or a balance of convenience ("inconvenience") favouring the Complainant, nor is there a foundation for such a conclusion otherwise available.

[15] The Complainant's submissions in reply, in summary, are as follows:

(1) This case involves a special circumstance due to the Decision of the Supreme Court of Canada that renders *stare decisis* inoperative in this case. Despite the principle of *functus officio*, since the Complainant raised the issue of costs in his Statement of Particulars and the issue was not addressed in the Decision, the Tribunal has the power to dispose of this issue since there is authority in subsection 53 (2) (*c*) of the *CHRA* to do so.
(2) An award of costs is justified on its merits by virtue of the result in the Decision.
(3) The Complainant has not requested a stay of proceedings, rather the Complainant has requested that, for practical reasons, the Decision be withheld until the Supreme Court of Canada has rendered its Judgment in *Mowat*.

[16] When I rendered my Decision in this matter I considered the remedies requested by the Complainant. I did not reserve on any issue. I determined that I was bound to follow the Decision of the Federal Court of Appeal in *Mowat* on the basis of the fundamental legal principle of *stare decisis* - the translation of which means "to stay with what has been decided." In this regard, I accept the submissions of the Respondent, including the following:

"The Inquiry is bound by the principles that it is bound to correctly interpret and apply the law pertaining to its jurisdiction."

"A mechanism to achieve that correctness and associated stability and finality is *stare decisis*:

The Trial Judge correctly found himself to be bound by the jurisprudence as am I. Stare decisis is the normal rule and is itself one of the "basic tenets" of our legal system (thus an element of "fundamental justice") <u>*allowing Canadians some certainty and*</u>

predictability in the law as well as some efficiency in the administration of their system of justice.

Canada (Minister of Citizenship and Immigration)

v. Fast, 2001 FCA 373, para 2."

"In not making an award of costs in this case, the Tribunal correctly exercised its jurisdiction in compliance with that authority and in accordance with the principle of *stare decisis*."

[17] Having made my Decision in this matter without reservation, and being bound, as previously noted, by the law as it then was (and still is) respecting legal costs, I am now *functus officio*. Again, in this regard, I accept the submissions of the Respondent, including the following:

"The Decision discharged the jurisdiction of the Tribunal in those matters effectively put before it.

Having spent its jurisdiction, in the circumstances of this case, the Tribunal has discharged its legal responsibilities in the dispute. It is *functus officio*.

The Supreme Court of Canada has explained the concept as follows:

Functus Officio

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in In re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. V. J.O. Ross Engineering Corp., 1934 CanLII 1 (S.C.C.), [1934] S.C.R. 186.

I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. V. J.O. Ross Engineering Corp., supra.

To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that is application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.)

Chandler v. Alberta Association of Architects [1989]

S.C.J. No. 102

In this case ... there is no foundation for the proposition that there is some error or oversight or other compelling policy objective warranting the conclusion that the inquiry continues to have jurisdiction which it si capable of exercising."

[18] In the result, the request of the Complainant is denied.

"Signed by"

Edward P. Lustig

OTTAWA, Ontario

October 15, 2010

PARTIES OF RECORD

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RULING OF THE TRIBUNAL DATED:	October 15, 2010
APPEARANCES:	
Kathryn A. Raymond	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
Blair Mitchell	For the Respondent