

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

SANDY CULIC

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

RULING

MEMBER: Karen A. Jensen 2007 CHRT 30
2007/07/19

[1] On March 18, 2003, Sandy Lipp (née Culic) brought a complaint against Canada Post Corporation alleging that Canada Post had discriminated against her on the basis of her disability. In its decision dated January 24, 2007, the Tribunal considered five allegations. Of the five allegations, the Tribunal found that three were substantiated. With regard to one of the two allegations that were not substantiated, the Tribunal found that Ms. Lipp had established a *prima facie* case. However, the Respondent demonstrated that the requirement was a *bona fide* occupational requirement.

[2] The Tribunal held that it had the authority to award legal costs and ordered that Canada Post pay the reasonable costs to Ms. Lipp of retaining counsel both prior to and during the hearing in relation to the discriminatory practices that were alleged and found to be substantiated in the complaint. The Tribunal directed the parties to attempt to come to an agreement on the quantum. However, jurisdiction was retained on this issue in the event that the parties were unable to reach such an agreement.

[3] The parties notified the Tribunal that they could not come to an agreement. A hearing on this issue was held by videoconference on July 16, 2007.

[4] Counsel for Ms. Lipp argued that s. 53(2)(c) of the *Canadian Human Rights Act* authorizes the Tribunal to provide full indemnity for the legal costs incurred by Ms. Lipp. Section 53(2)(c) stipulates that if the complaint is substantiated, the Tribunal may make an order that the person who engaged in the discriminatory conduct compensate the victim for any expenses incurred by the victim as a result of the discriminatory practice.

[5] Counsel for Ms. Lipp cited *Nkwazi v. Correctional Service Canada* [2001] C.H.R.D. No. 29 in support of her argument. In that case, the Tribunal held that where a complaint is substantiated, the task of the Tribunal is to attempt, insofar as may be possible, to make whole the victim of the discriminatory practice, subject to principles of foreseeability, remoteness and mitigation. The Tribunal stated that a victim of a discriminatory practice could hardly be said to have been made whole if she were unable to seek reimbursement for the legal expenses associated with the pursuit of her complaint.

[6] Counsel for Ms. Lipp argued, therefore, that the Tribunal should award full indemnity for all of the legal costs incurred in preparing for the hearing, representing Ms. Lipp during the hearing and in preparing the final written argument. This amounted to a total of 165 hours and a total legal bill of \$52,197.75. In the alternative, counsel for Ms. Lipp stated that the Tribunal should assess costs on the basis of the degree of success achieved by the Complainant and by the amount of time spent on each allegation was substantiated. She argued that assuming that the discussion of each issue in the decision corresponds roughly with the time spent in preparation for and at the hearing, roughly 84% of the time spent and costs incurred were on the allegations which were substantiated. Therefore, "reasonable legal costs" would amount to 84% of the total expenses incurred.

[7] Counsel for Canada Post argued that according to the *Act*, and the wording of the Order in the present case, the costs for which compensation is to be provided relate only to those allegations of discriminatory conduct that were substantiated. Given that not all of the allegations in the present case were substantiated, compensation for all of the legal expenses incurred cannot be awarded.

[8] Counsel for Canada Post argued that the general rule in civil litigation is that the successful party is awarded costs on a party and party basis, which is assessed according to the tariffs established in the relevant jurisdiction. This usually amounts to 30-50% of the total legal costs incurred. He stated that if a victim of sexual assault can only hope to be reimbursed for 30-50% of his or her legal costs in the civil courts, there is no reason why a victim of discrimination should expect to be reimbursed for the full quantum of his or her legal costs.

[9] Counsel for Canada Post argued that the Tribunal should consider the time spent on the successful allegations and reimburse the Complainant for 30-50% of that time. He stated that, in his view, 50% of the hearing and preparation time was spent on the substantiated allegations. Ms. Lipp should, therefore, be awarded 50% of that, or 25% of the total legal expenses incurred.

[10] There are no hard and fast rules about how to assess "reasonable legal costs" in a human rights complaint.

[11] In *Brooks v. Department of Fisheries and Oceans* 2005 CHRT 26, the Tribunal adopted the practice of the Federal Court on the assessment of costs and stated it was using the *Federal Court Rules* as a guideline in this regard. The respondent in that case applied for judicial review of the Tribunal's award on costs. In its decision on the

application, the Federal Court did not comment on the Tribunal's use of the practice of the Federal Court on the assessment of costs, but held that the Tribunal had erred in failing to properly take into account the offers to settle that were made in that case (*Canada (Attorney General) v. Brooks* 2006 FC 500, at para 25).

[12] In *Mowat v. Canadian Armed Forces* 2006 CHRT 49, the Tribunal stated that there was nothing in the Federal Court's decision in *Brooks* that required the Tribunal to apply or even to refer to the Federal Court Rules when making an award of costs. In *Mowat*, the Tribunal decided not to refer to the Federal Court Rules. Rather, three sources were considered: the description of the legal services set out in the legal accounts submitted for Ms. Mowat; the quantity of evidence and number of exhibits submitted at the hearing relating to the sexual harassment allegation which was found to be substantiated, relative to the total evidence and exhibits for the dismissed allegations; and the Bill of Costs submitted by each party calculated on a party and party basis.

[13] In the *Nkwazi* case, the Tribunal ordered that the Complainant be reimbursed for reasonable legal costs incurred on a solicitor and client basis, since the Respondent's conduct that gave rise to the litigation, as well as its conduct during the litigation, was so reprehensible, scandalous and outrageous, that such an order was warranted.

[14] In my previous decision in the present case, I stated that I did not think that the Tribunal had the statutory authority to order costs on a solicitor and client basis (*Culic v. Canada Post Corporation* 2007 CHRT 01, at para. 318). Moreover, I would now add that even assuming the Tribunal had the jurisdiction to order solicitor client costs, the Respondent's conduct in the present case does not come close to the scandalous nature of the Respondent's conduct in *Nkwazi*. Therefore, such an order would not be appropriate in the circumstances.

[15] In my view, the Tribunal's authority under s. 53(2)(c) to award compensation for expenses incurred as a result of the discriminatory practice means that compensation must be limited to that portion of the costs that may be allocated to the preparation for and litigation of the substantiated allegations.

[16] While I agree, in general, with the approach of the Tribunal in *Mowat*, I see nothing in the statute that requires the Tribunal to assess those costs on a party and party basis. On the contrary, depending upon the facts of the case, such an award might well be inappropriate. As the Tribunal noted in *Nkwazi, supra*, not every human rights complaint involves monetary issues. Individuals with complaints relating to the denial of access to services, for example, may not have sustained any financial loss, and thus will have no prospect of a monetary remedy beyond, perhaps, a nominal award for their pain and suffering. Most complainants in human rights cases are people of very modest means. Therefore, they might well be discouraged from bringing complaints if faced with the likelihood of paying large legal bills for which they will receive only very modest indemnification.

[17] This is particularly so in light of the fact that in recent years the Canadian Human Rights Commission has chosen not to participate in many hearings before the Tribunal. Complainants, most of whom have no legal training whatsoever, often now find themselves facing off against very experienced legal counsel for the Respondent. It is not surprising that many choose to retain legal counsel.

[18] In the present case, Ms. Lipp chose to retain legal counsel on the eve of the hearing. Therefore, the legal costs incurred were limited to a modest amount of preliminary

preparation, representation during the hearing and work on the written submissions that were provided to the Tribunal on August 21, 2006.

[19] Ms. Lipp was successful in substantiating three of the five allegations raised in her complaint. While I do not agree that 84% of the time spent during the hearing and in closing submissions was devoted to dealing with the substantiated allegations, I also do not agree with the Respondent that it was only 50%. The three substantiated allegations involved complex factual circumstances and required careful analysis and presentation. However, I agree with counsel for the Respondent that the first allegation, which involved an issue of systemic discrimination in the scheduling process at Canada Post and which was not substantiated, occupied a good deal more time in the hearing and the closing submissions than counsel for Ms. Lipp allowed.

[20] Based on my review of the evidence and the submissions of the party, my estimation of the time and resources devoted to dealing with the substantiated allegations is 65%. This is the percentage of the costs that I think were incurred as a result of the discriminatory practices. Ms. Lipp is therefore entitled to 65% of the legal costs that she incurred. That sum is \$33,928.54.

[21] Pursuant to s. 53(1)(c), Canada Post is ordered to pay Ms. Lipp the sum of \$33,928.54 in compensation for reasonable legal costs incurred as a result of the discriminatory conduct.

"Signed by"

Karen A. Jensen

OTTAWA, Ontario
July 19, 2007

PARTIES OF RECORD

TRIBUNAL FILE:	T1083/6405
STYLE OF CAUSE:	Sandy Culic v. Canada Post Corporation
DATE AND PLACE OF HEARING:	July 16, 2007 Regina, Saskatchewan Ottawa, Ontario (by videoconference)

RULING OF THE TRIBUNAL DATED:	July 19, 2007
APPEARANCES:	
Merrilee Rasmussen, Q.C.	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Daniel P. Kwochka	For the Respondent