

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

**CECIL BROOKS**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**DEPARTMENT OF FISHERIES AND OCEANS**

**Respondent**

**RULING ON THE QUESTION WHETHER THE TRIBUNAL  
HAS THE POWER TO AWARD COSTS**

MEMBER: Dr. Paul Groarke

2005 CHRT 14  
2005/03/10

[1] The following ruling deals with the question whether the Tribunal has the power to award costs. I have already ruled on the matter in *Brown v. RCMP*, 2004 CHRT 30, where I found that the Tribunal had a residual power to award costs. After reviewing the submissions on both sides, I find myself in the same position in the present case.

[2] The Respondent has relied principally on *Digby Municipal School Board v. CUPE, Local 118* (1982), 135 D.L.R. (3d) 582 (N.S.C.A.), which was upheld by the Supreme Court at (1983), 1 D.L.R. (4<sup>th</sup>) 1. Although the *Digby* decision dealt with the jurisdiction of the Labour Relations Board, it contains a convincing account of the older law. This body of law stipulates that an adjudicative body with statutory authority has no power to award costs unless the legislation bestows it with that power.

[3] I am familiar with this jurisprudence. As it turns out, the Respondent has also relied on my decision in *Brown*, at para. 70, where I said:

The power to award costs cannot be found in the *Act*. It is simply not there . . . If Parliament had intended to give the Tribunal the power to award costs, it would have done so, in accordance with the rules and conventions governing the matter.

I naturally accept this assertion. I agree that the *Canadian Human Rights Act* does not give the Tribunal the "express jurisdiction" to award costs.

[4] That is not the end of the matter. I have to take issue with the position taken by the Respondent in paragraph 12 of its submissions, where it states:

Human rights legislation in most provinces contains express provisions with respect to costs. This confirms that when the legislature intends to grant a human rights tribunal the

jurisdiction to award costs, it does so expressly. In the absence of an express provision, Parliament must not have intended the Tribunal to have jurisdiction to award costs.

I do not agree that the second proposition follows from the first.

[5] The point is that I limited my remarks, in *Brown*, to the assertion that Parliament did not intend to give the Tribunal a power to award costs in the circumstances that existed at the time the legislation was drafted. It may be a fine point, but this does not mean that it intended to deprive the Tribunal of such a power in the circumstances that exist in *Brown* and the present case. The practice of the Human Rights Commission has evolved over time and the situation is not the same as it was, when the legislation was passed.

[6] It will be apparent that my ruling is restricted to those cases in which the Commission does not appear. Although Parliament did not give the Tribunal an express power to award costs, I think there is a negative thought in the *Act* that suffices to demonstrate its intentions. One of those intentions, at least in those cases where the Commission appears, is that a successful Complainant will not be burdened by legal fees. I think it is somewhat arbitrary to make a distinction between Complainants who have the benefit of the Commission's presence and those who are required, by force of circumstances, to retain their own lawyer.

[7] It comes down to a matter of representation. The law of human rights has become relatively complex, and the experience of the Tribunal in dealing with lay litigants has demonstrated that the efficacy of the process depends to some extent on the assistance of counsel. This is particularly true in the circumstances of the present case, which involved a detailed review of Mr. Brooks' employment history. In a case where the Commission decides not to appear, it seems to me that a Complainant is entitled to legal representation. It follows that someone must pay for that representation.

[8] Mr. Bagambiire is reluctant about the public release of his accounts. I think it is important however that the reality of the situation be put squarely before the Federal Court, should the matter be reviewed. Mr. Brooks has been awarded five thousand dollars for hurt feelings, the maximum under the old *Act*, on the consent of the parties. I do not know what the costs would be, after taxation, but the accounts that have been entered into evidence certainly suggest that the Complainant's legal fees could reach a hundred thousand dollars.

[9] I think this is enough to make anyone pause. The failure of the Tribunal to award costs in the present case would not only penalize a successful Complainant. It would also discourage complainants from coming forward in the future. It seems to me that this runs counter to both the plan of the *Act* and the existing jurisprudence. I cannot see how the Tribunal can endorse a situation where a successful Complainant incurs a loss, as a result of legal fees that must be paid to bring a matter to a successful conclusion. This would defeat the purposes of the legislation.

[10] The caselaw establishes that the principle of recovery under the *Act* is *restitutio in integrum*. The provisions of the *Canadian Human Rights Act* relating to remedy are extremely broad and contemplate that a successful complainant will recover any and all expenses related to the litigation. I cannot bring myself, as a point of law, to interpret the word "expenses" in a way that includes legal fees. It nevertheless strikes me as rather strained to suggest that Parliament went out of its way to ensure that a Complainant would recover all of his expenses but none of his legal fees, in a case where he clearly needs a lawyer.

[11] I should note that the Respondent also raises a more technical issue. It is evident, from *Banca Nazionale v. Lee-Shanok*, [1988] F.C.J. No. 594 (QL) and *Oasis Hotel Ltd. v. Zurich Insurance Co.* [1981] B.C.J. No. 690 (QL), both of which I cite in *Brown*, that there is another source of the power to award costs. This comes from equity. The question is whether the remedies available to a successful Complainant under the *Canadian Human Rights Act* can be described as equitable. The Respondent says no.

[12] It is true that the Tribunal is a statutory body, which only has the powers granted to it under the *Canadian Human Rights Act*. The *Act* is remedial, however. It deals with human rights, which are also known as the rights of the person. This law is not part of the ordinary law. It is fundamental. The significance of this law has been recognized in the domestic and international arena. It forms part of the *jus cogens*.

[13] This is where the Respondent's analysis founders. The principal decision cited by the Respondent, *Digby Municipal School Board v. CUPE*, *supra*, falls outside the law of human rights. Although the courts are in a better position to decide the equitable issue, it seems to me that the subject matter of the *Canadian Human Rights Act* distinguishes it from other pieces of legislation. It is well settled law that a literal approach is out of place in the context of the *Act*. I do not think that Parliament intended that the law of equality would be frustrated by an overly fastidious reading of the niceties of the legislation.

[14] I think the Tribunal has an obligation to protect the efficacy and integrity of the *Canadian Human Rights Act*. The entire purpose of the *Act* is to provide a meaningful remedy for those who have suffered discrimination. I do not see how this is possible, at least in a case where the Commission decides not to appear, without an award of costs. The idea that a complainant who has been discriminated against should be required to pay something in the order of a hundred thousand dollars, for a five thousand dollar claim, and the full gamut of hardship that comes with litigation, is untenable. The cure is worse than the disease.

[15] Although the provisions of the *Charter of Rights and Freedoms* might have some bearing on the question before me, this was never raised by the parties. I will accordingly leave it for others to investigate this aspect of the matter.

\_\_\_\_\_ "Signed by" \_\_\_\_\_  
Dr. Paul Groarke

OTTAWA, Ontario  
March

10,  
PARTIES OF RECORD

2005

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APPEARANCES:

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For the Complainant

Scott McCrossin

Melissa Cameron

For the Respondent