Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Cecil Brooks

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Department of Fisheries and Oceans

Respondent

Decision

Member: Dr. Paul Groarke
Date: July 12, 2005
Citation: 2005 CHRT 26

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I. Introduction

[1] The question whether the Tribunal has the jurisdiction to award costs is presently before the Federal Court. It will take some time to settle the legalities of the matter, however. The parties have accordingly asked me to assess the costs in the present case, while the details of the litigation are fresh in the minds of the parties. It appears that there is some financial urgency on the Complainant's side.

[2] The parties have agreed upon the methodology and the basic principles that should be followed in conducting an assessment. Since this is the first time that the Tribunal has formally assessed costs, I have tried to limit my comments to the rudiments of the process.

[3] Mr. Bagambiire has presented me with a bill of costs, listing the actual fees and disbursements that were charged to his client. The "grand total" of fees, disbursements and GST that he is seeking under the bill are $372,612. This has become the real issue between the parties on remedy.

II. Basic Principles

A. The Discretion Over Costs is Governed by the Principle of Austerity

[4] As I understand the law, the discretion over costs is governed by the principle of austerity. This is the term used by Mr. Stinson in *Kassam v. Canada*, [2005] F.C.J. No. 799 at para. 8 (F.C.A.), where he says that an assessment officer should exercise his discretion conservatively, with a view to the "sense of austerity" that "should pervade costs, to preclude prejudice relative to the payer of costs."

[5] This is fundamental to the process. The focus of the inquiry in assessing costs is on what the Respondent should pay, rather than what the Complainant should recover. This difference in focus is significant. The Respondent should not be required to pay more than was necessary to prosecute the case.

[6] The process of assessing costs has a peculiar character of its own, which relies heavily on the assessor's judgement. Mr. Stinson quotes Lord Justice Russell, who apparently stated that assessment is "rough justice, in the sense of being compounded of much sensible approximation." This feeling of impreciseness is probably inherent in the process.

B. The Applicable Standard is Fair and Reasonable

[7] It will be apparent that some kind of standard is needed, to assess the proper cost of the services that were rendered. The parties have accepted my suggestion that the applicable standard is what is fair and reasonable. The notion of fairness introduces an additional criterion, which reflects the procedural standard under the *Canadian Human Rights Act.* Fees may be reasonable but not entirely fair.

[8] There is caselaw that supports this approach. In *Smith v. Ontario (Human Rights Commission)*, [2005] O.J. No. 2275 (Ont. Sup. Ct.), the Ontario Divisional Court dealt with an award of costs in an appeal from a hearing before the Ontario Human Rights Tribunal. The court recognized, at para. 2, the principle "that costs must be reasonable, and fair to the losing party, whose reasonable expectations must be taken into account." The Ontario Court of Appeal affirmed the same standard in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634.

[9] The purpose of assessing costs is accordingly to determine the fair and reasonable costs of the litigation. The process of assessment should be governed by the same sense of austerity that guides the exercise of the larger discretion.

III. Methodology

A. The Federal Court Rules Apply

[10] The magnitude of the claim in the present case calls for a new means of assessment. In the past, the Tribunal has awarded costs on the basis that they constitute "expenses" under

section 53(2)(e) of the *Canadian Human Rights Act*. Thus, in *Milano v. Triple K Transport Ltd.* (2003) CHRT 30, and *Premakumar v. Air Canada, No. 2* (26 April 2002), T.D. 03/02 (CHRT), Ms. Mactavish awarded a complainant "reasonable legal expenses". In *Nkwazi v. Correctional Service Canada, No. 3* (29 March 2001), T.D. 1/01 (CHRT), she awarded "reasonable solicitor-client expenses".

[11] The costs that were dealt with in these cases were of a different order of magnitude than the costs claimed in the present case. They were therefore more amenable to this analysis. I went a different way in *Brown v. Royal Canadian Mounted Police* (2004) CHRT 30, where I held that legal fees should not be described as "expenses" under the Act. This would make the mistake of treating them as disbursements.

[12] This is significant because the remedial provisions of the *Canadian Human Rights Act* contemplate full recovery of the expenses incurred by a successful complainant. This is not appropriate on costs. The notion of reasonableness that applies to disbursements is not the same as the notion that applies to costs. The notion that applies to costs is based on what the Respondent should be required to pay, rather than what the Complainant has spent.

[13] This is a more prescriptive standard, which requires some means of assessing the fair and reasonable costs in a given case. Mr. Bagambiire reluctantly agreed that the necessary means of assessment can be found in the *Federal Court Rules*. These Rules provide a set of principles and a methodology for assessing costs. They also have a Tariff, which contains a list of services that can be claimed. This provides the *modus operandi* of the assessment process.

[14] It makes sense that the *Federal Court Rules* would apply. Costs are costs. Mr. Brooks is entitled to the same costs as other litigants in the Federal System. There is no premium for filing a complaint under the *Canadian Human Rights Act.* Indeed, I was informed that the Complainant has a constitutional action proceeding in the Federal Court. I see no reason why he should do better here.

[15] The parties agreed that it may be necessary to modify the *Tariff* to reflect any differences in the procedures before the Tribunal. As Mr. Bagambiire put it, the Tariff should not be a "strait jacket". I think a certain amount of improvisation is an inevitable part of the process. There is also room for adjustments, at the beginning and end of the process.

B. Tariff B

[16] The *Federal Court Rules* contain two tariffs. The first, Tariff A, deals with court fees. The parties did not refer to it. There is also a second Tariff, Tariff B, which deals with "counsel fees and disbursements allowable on assessment." This Tariff contains a table assigning a range of units that may be awarded for the services covered by the Tariff. The parties agreed that this provides the basic methodology for any assessment by the Tribunal.

(i) The Tribunal Must Determine What Services Were Necessary and Assess Their Cost

[17] The task of a Tribunal applying the Tariff is twofold. The Tribunal must determine what services were necessary. In most cases, this is a relatively simple task. The Complainant simply submits a bill of costs, setting out the services that were rendered, in accordance with the Tariff.

[18] The word "necessary" should not be interpreted too strictly in this context. There may be different views as to what is necessary and the Complainant and his counsel are entitled to exercise a certain judgement in the matter.

[19] The Tribunal must then determine the cost of these services under the applicable standard. This requires some rating of the value to be attributed to different services. This is supplied by the Tariff, supplemented by the submissions of counsel and the experience of the Tribunal. It is for the party seeking costs to establish the necessity and value of the services.

C. The Appropriate Column is Column 3

[20] The first step under Tariff B is to decide on the column that should be used in the assessment. Mr. McCrossin submitted that the appropriate column is column 3. This is the default column under Rule 407. Mr. Bagambiire argued for costs under column 5, the highest column.

[21] The issue is whether the Complainant is entitled to party-and-party or solicitor-client costs. The Respondent cited the Federal Court of Appeal in *Banca Nazionale Del Lavoro of Canada Ltd. v. Lee-Shanok,* [1988], F.C.J. No. 594 at para. 27, where it said:

> ... a judge must be `extremely cautious in departing from the general rule' that only party and party costs should be allowed a successful litigant .... An extraordinary award of this kind [i.e., of solicitor-client costs] ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wished thereby to mark his disapproval of a party's conduct in a proceeding.

I see nothing that could be characterized as exceptional in this context.

[22] The hearing was occasionally turbulent. The parties had strong views, and exchanged emotional and even angry allegations. This is a regular part of the human rights process, however, which often raises provocative issues for the parties. I do not see anything that would take the present case out of the usual range of cases that come before the Tribunal.

[23] I have already said that there is no premium for filing a human rights complaint. I nevertheless think that a certain premium may apply, in cases that raise social, historical, or institutional issues that need to be addressed. I think it is better to let other Tribunals decide the matter. The present case falls below whatever threshold may apply, in such cases.

[24] The Respondent should not be penalized for contesting a case that it legitimately disputes. The appropriate column is clearly column 3. There was a real dispute between the parties. There were successes on both sides.

D. Assessment

[25] The parties agreed to proceed through Tariff B, item by item, in a relatively informal manner. I gave each side an opportunity to make submissions and then awarded a specific number of units for the service. The value of each unit at the time of the assessment hearing was 110 dollars. This value changed to 120 dollars on April 1, 2005.

[26] The parties have taken a different view as to which value should apply to the present award. Mr. Bagambiire submits that the matter was remained unresolved as of April 1, when the unit value was adjusted. He has referred me to the decision of the Federal Court in *AIC Ltd. v. Infinity Investment Counsel Ltd.*, [1998] F.C.J. No. 904, where Justice Rothstein held that a new Rule relating to costs should apply to an award of costs that takes place after the Rule comes into effect.

[27] The parties essentially agree that the issue is whether the rights under the award have already accrued. Ms. Cameron, for the Respondent, argues that the line by line costs were fixed during the assessment, which took place before April 1. The matters that were dealt with after April 1 related to legal issues and the global question whether I should exercise the discretion under the rules to increase or decrease the assessed costs.

[28] I think both sides would agree that the number of units to be awarded for each service was fixed at the time of the assessment hearing. There were submissions and a decision from the Tribunal on each item, and other than errors or discrepancies, I would think that the jurisdiction of the Tribunal to assess these costs has been exhausted. This does not mean that the monetary value of the award has been fixed, however.

[29] The real issue on the monetary figure is collection. The Complainant's right to collect a particular unit value, and a specific monetary entitlement, does not accrue until the ruling has been issued. I think that this is the effective date. The idea behind the Tariff is to establish the value of past services, at the time that the costs become due. This value must be assessed at the standard that exists on the day the ruling has been signed.

[30] There is an additional problem. I do not see how a person conducting an assessment can conduct one part of the assessment under one unit value, and complete it under another. If there is a certain element of good fortune in this, which must be awarded to one side or the other, I think it must go to the Complainant. The Respondent already has the benefit of the principle of austerity. I have accordingly readjusted the figures under Tarriff B to reflect a unit value of 120 dollars.

[31] The Tariff gives the person assessing the costs a discretion to determine the number of units that should be awarded for each service. The assessor may, for example, award 3 to 7 units for the preparation and filing of a contested motion. The parties agreed that there were four distinct matters, all argued separately, which can be conveniently described as contested motions. After hearing from the parties, I accordingly awarded from 3 to 5 units for each of these matters.

[32] The Registry Officer prepared a table, as we went through the assessment, containing a list of the units assigned for each service. After we had gone through the costs, a similar procedure was followed for the disbursements. There is a list of general factors in Rule 420 of the *Federal Court Rules*, which may be considered in assessing costs. These kinds of factors naturally come into play, in proceeding through the exercise.

(i) Choice of Counsel

[33] The major issues that arose in going through the assessment deserve further comment. The first is that the Complainant retained counsel outside Halifax. The Respondent argued that any costs that flow from this decision should be borne by the Complainant.

[34] The matter is more complicated than it appears. As it turns out, the Commission's investigator was in Toronto. Mr. Bagambiire was originally hired because he was in the same city. There were extensive discussions with respect to the details of the file. As a result of these discussions, Mr. Bagambiire was the logical choice, when it came to choosing counsel for the hearing.

[35] There is more, however. Mr. Bagambiire comes from the Halifax area. He is known as an advocate in the black community and has a particular expertise in human rights. It was apparent that Mr. Brooks feels a more general weight of prejudice, which goes beyond the confines of the present complaint. The evidence before me suggested that there has been a bitter divide between the black and white communities in the Halifax area.

[36] I do not want to suggest that members of minorities are entitled as a matter of course to choose lawyers from their own community. I nevertheless think that this is one of those areas where special considerations may apply in the human rights process. Mr. Brooks has had psychological issues in the past. I think he took some legitimate comfort from the fact that his senior counsel could represent him, with all the insight and knowledge that come from living one's life as a member of the same minority.

(ii) Junior Counsel

[37] The case was hard fought on both sides. The Respondent was served by two counsel, who had the assistance of the representatives and officers in the department. In the circumstances, I think Mr. Brooks was entitled to a second lawyer. I do not see why he needed another lawyer

from Toronto. I accordingly allowed the costs for junior counsel but disallowed the disbursements for his travel.

(iii) Services Before the Referral

[38] I have to say that the Respondent misstates the situation when it says, in its written submissions, that I have "assessed costs in favour of Complainant's counsel for the Commission stage of the complaint". Counsel may be responding to the fact that I allowed some recovery for the services that Mr. Bagambiire provided at a mediation in Halifax. This was a mediation held by the Tribunal, however, after the case was referred, and should be construed as part of the inquiry process.

[39] The Tribunal's jurisdiction is limited to its own process. Any award for costs should be restricted to the costs that were incurred in prosecuting the case before the Tribunal. The costs that I have allowed are basically for services rendered by counsel for the Complainant in the hearing process. The attached tables speak for themselves.

[40] The matter is not capable of precise limits. The Complainant is also entitled to something, on the basis that some of the services provided before the matter was referred can be construed as a natural and inevitable part of the Tribunal process. I have accordingly allowed a few disbursements for the services before the Commission. I have also taken this into account in making the final adjustments to the global figure.

[41] The caselaw recognizes that a complainant is entitled to remuneration for consulting a lawyer and initiating the discussions with the Commission, even if costs are not awarded. This only goes so far. In the immediate case, there was an extensive and prolonged dialogue between counsel for the Complainant and the Commission. This kind of service goes well beyond the kinds of costs that can be recovered from the Respondent.

(iv) Unnecessary Motion

[42] The Respondent also took the position that a motion to clarify the decision was unnecessary. Although my sympathies are primarily with the Respondent on the issue, I think the Complainant was entitled to recover something for the motion. I accordingly awarded the minimum number of units for the motion.

(v) GST

[43] The total fees are $70,800. There was a dispute as to whether the Complainant was entitled to GST on the costs and disbursements. I held that these taxes are an inevitable cost, in the nature of disbursements, and should be borne by the Respondent. They should not be used to artificially reduce the Complainant's recovery, which is well below his actual costs.

(vi) Total

[44] The table of assessed costs prepared by the officer in the case is attached. The total of assessed costs, with GST, is $75,756.

(vii) Disbursements

[45] The parties then proceeded through the Complainant's list of disbursements, item by item, in much the same manner. There were general submissions from the Respondent that the disbursements were excessive. There were also submissions on an item by item basis.

[46] I disallowed most of the disbursements related to services that were provided before the complaint was referred. There were exceptions. The main item in this regard was a rather general claim for:

> Copying, fax, courier, QL & misc. expenses, 2001 to present: $13,643.62.

[47] After hearing submissions from the parties, I allowed $9,000 for this item. This allows some recovery of the expenses before the Commission.

[48] There was also a dispute about two expert's reports. The first was for an actuarial report. This report was prepared for settlement purposes, before the referral. I do not think it would be fair to ask the Respondent to cover the costs associated with this report, since it was not needed for the hearing.

[49] There was a second report from Dr. Henry, an expert in race relations. The Complainant was within his rights to purchase this kind of report, which is commonly relied upon in cases of discrimination. The Respondent objected that the report was not a proper expert's report and was ruled inadmissible as a result. There is merit in this submission. After hearing from both sides, I allowed $1,800 for the preparation of this report, a reduction of $1,000.

[50] The Complainant claimed $8,997.63 for transcripts of that part of the hearing that dealt with liability. Mr. Bagambiire argued that the hearing took place over a long period of time. He accordingly needed the transcripts to prepare his final submissions. I allowed $5,350, including GST.

[51] Mr. Bagambiire said that it was impossible to provide a line by line accounting of long distance charges. I accordingly allowed an additional charge, without receipts, for $300.

[52] The disbursements claimed by Mr. Bagambiire are included in his original bill of costs. The total of assessed disbursements is $22,590. Since the GST was already included in the individual disbursements, there was no adjustment for the GST. The table of assessed disbursements prepared by the officer in the case is attached.

(viii) Total of Fees, GST and Disbursements

[53] The total of assessed fees, GST, and disbursements is **$98,346.**

IV. Final Adjustments

[54] The parties agreed that the Tribunal should make final adjustments, after the fees allowable under the Tariff have been calculated. The Respondent submitted that the Tribunal "must not fetter its discretion by simply deferring to the amount calculated under the Tariff." The assessing officer has a discretion and must exercise it.

[55] I have rejected some of the submissions from the Complainant. Mr. Bagambiire argued, for example, that the costs should be increased to reflect the fact that the Federal Court Tariff no longer captures the real cost of legal services in the marketplace. This is a common complaint, with any Tariff, and must be dealt with in another forum.

[56] Mr. Bagambiire also argued that many of the services that he rendered are not covered by the Tariff. My response is that Mr. Brooks is generally entitled to his costs for the inquiry. These are covered by the Tariff. If he wants to obtain extra services, that is his prerogative. But he cannot expect the Respondent to pay for them.

[57] I would go further. If the Complainant wanted to recover additional costs, I think he was obliged to justify them on a case by case basis. Item 27 in Tariff B allows a party to claim costs for "such other services as may be allowed by the assessment officer or ordered by the Court." This does not prevent him from asking for a more general increase on the basis that the file required an unusual amount of work.

A. Statutory Factors

[58] The list of factors in Rule 420 move into the foreground, in making the final adjustments.

(i) Rule 400(2)(a)- Results

[59] Rule 420(a) states that a court may consider "the result of the proceeding". The Respondent argues that Mr. Brooks only succeeded in proving one of the three allegations before

me. He did not obtain employment. He did not obtain the kind of compensation that he was seeking. It follows that he was largely unsuccessful.

[60] Mr. Bagambiire looked at the matter in a different way. He stated that Mr. Brooks was seeking a finding of discrimination. It follows that he was "a hundred percent successful". There is something to be said for both views. I prefer the middle path. Mr. Brooks was successful, but the results were mixed.

[61] There is a good deal of hindsight in the Respondent's submissions. Although there is room for debate on the matter, I think both sides were entitled to litigate the full range of issues before me. The issue that arises in considering the results of the litigation is whether it was reasonable for the Complainant to prosecute the case, not whether he succeeded.

[62] At the end of the day, the most important fact in this context is the finding that the Respondent discriminated against Mr. Brooks. The significance of this result should not be discounted. The Complainant established that the competition that was held in 1992 was manifestly unfair.

(ii) Rule 400(2)(b)- Quantum

[63] Rule 400(2)(b) states that a court may consider "the amounts claimed and the amounts recovered". The Respondent asserted that there was a disparity between the magnitude of the claim and the amount recovered.

[64] There are two sides to this. I cannot accept the Respondent's submission in the context of the award for pain and suffering. The modest nature of the award that was given under this head of compensation for pain and suffering was based on statutory limits. I think it is clear that, without the statutory limit, Mr. Brooks would have received much more.

[65] The Respondent's submission is well-founded, however, with respect to the claim for lost income. It is clear that Mr. Brooks was seeking substantial damages for lost income. He did not obtain these. This is a factor, on costs.

(iii) Rule 400(c)- Importance and Complexity

[66] Rule 420(c) refers to the "importance and complexity of the issues". I have to say, in all candour, that in my opinion counsel made the facts more complicated than they had to be. I am speaking in particular of the Complainant's side.

[67] From a legal perspective, the case was not particularly complex. It nevertheless raised some difficult probative issues, which required careful analysis of the law. There were a number of side issues. My own view is that the importance of the case lies in the weight to be accorded to the perceptions of various witnesses.

[68] The issues raised on costs are also significant. This is new territory.

(iv) Rule 400(3)(e)- Any Written Offer to Settle

[69] Rule 400(3)(e) states that a court may consider "any written offer to settle". The Respondent tendered two letters under this rule, which were marked for identification. These letters contain offers to settle the complaint for a greater sum of money than the Complainant received in the Tribunal process.

[70] Rule 400(3)(e) refers to "any written offer to settle". The Respondent underscores the word "any". There may be a difference of interpretation here. I do not think, for myself, that the word "any" in Rule 400(3)(e) was ever intended to supplant the common law on without prejudice communications.

[71] The Respondent has also given me the decision of the Federal Court of Appeal in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, [2001] F.C.J. No. 727. This decision merely says that a written offer cannot be introduced on the question costs unless it contains "a clear and unequivocal offer". A conditional offer does not meet the requirements of the Rule.

(a) The Law Requires Notice

[72] The caselaw from the Complainant establishes that a "without prejudice" offer of settlement is only admissible in assessing costs if the party making the offer has given notice that it intends to introduce the offer on the issue of costs. Orkin adopts the same position. The leading case in Canada appears to be *Graham v. Dillon* (1986), 5 B.C.L.R. (2d) 218 (B.C.S.C.).

[73] It is important to be clear on terminology. In its written submissions, the Respondent discusses the meaning of the term "without prejudice":

> The term ["without prejudice"] conveys that the sending party is writing the letter without prejudice to its position in the litigation, and in particular, without an admission that could be used against it to establish liability.

I think this is too restrictive.

[74] The concept of "without prejudice" simply means that a party preparing a document has provided it, for settlement purposes, on the understanding that the document will not be used against it. A party may specify that a document is without prejudice for one purpose and with prejudice for another. A letter may be without prejudice on the substantive question of liability, for example, and with prejudice on remedy or costs.

[75] There are two competing legal principles that come into play in this context. The first is that the parties should be given the freedom to negotiate a settlement, without fear that their negotiations will be used against them. The second is that a party who rejects a reasonable offer is not entitled to recover the full costs of the litigation. The Respondent submits that the latter principle is one of the "primary considerations" in assessing costs.

[76] It is the first principle that is primary, however. The second principle merely allows a party to place limits on the "without prejudice" nature of the document. It is ultimately a question of waiver. A party that intends to introduce these kinds of documents, on costs, needs to send a clear message to the other side that it waives the protections afforded to without prejudice documents on the narrow question of costs. The waiver must be express.

[77] It is wrong to think that the law allows the introduction of a "without prejudice" offer into evidence, in spite of the fact that it is without prejudice. There are merely different cases. The kinds of offers that are contemplated in the caselaw are "without prejudice" to the position taken by the party on the main issue. This does not prevent them from being "with prejudice" on the question of costs.

(b) The First Offer

[78] The first letter can be dealt with summarily. I agree with the Complainant that Rule 400(3)(e) envisages a complete offer. The *Apotex* decision would support such a position.

[79] The first letter tendered by the Respondent does not meet this requirement. It refers to other communications and is inconclusive. It also fails to meet the requirements of notice. The letter is inadmissible.

(c) The Second Offer

[80] The second letter raises more serious concerns. It contains a formal offer, in the following terms:

> Without any admission of liability whatsoever, our client hereby offers to settle this matter for the all-inclusive sum of $125,000.

[81] This may be rhetorical excess. The Respondent is willing to pay the Complainant the sum, but without any acknowledgement of liability whatsoever. This assertion cannot be

restricted to the litigation. It applies to remedy and costs, as well as the substantive question of liability.

[82] The second offer does not qualify as an offer of settlement within the meaning of Rule 400. It is one thing for the Respondent to say that the letter is without prejudice "to its position in the litigation" and another thing to say that it is without prejudice, *simpliciter*. This is tantamount to saying that it does not exist, for the purposes of the litigation.

[83] I cannot see how a statement made without any prejudice whatsoever meets the requirements of Rule 400. The reference to "any written offer" in the Rule is to written offers made with prejudice, at least on the issue of costs. It is easy to forget the point of the rule, which is that a document written with prejudice is not protected by the law. If the Respondent is entitled to introduce the offer on costs, it is only because the other side is entitled to introduce it.

[84] I think this is revealing. It may be to the Respondent's advantage to introduce the second letter, in the present circumstances. But the case could have gone some other way. If it was the Complainant that had applied to introduce the letter, there is little doubt that the Respondent would be within its rights to object, on the basis that the letter was written "without any prejudice whatsoever".

[85] The Respondent cannot have it both ways. Either it has waived the protections afforded to without prejudice documents, or it has not. I think it is clear that the Respondent has not done so. The second letter is therefore inadmissible. It follows that I have no evidence before me of any offer to settle that may be considered under Rule 400(3)(e).

1. The Complainant was Entitled to Reject the Second Offer

[86] I should add, if only for the sake of clarity, that I do not agree with the suggestion that the Complainant should have accepted the second offer. It is not for me to say.

[87] There is a point of principle here, however. The rights protected by the *Canadian Human Rights Act* are fundamental. A finding that these rights have been infringed has a symbolic value that extends beyond the financial award that a successful complainant may obtain. It cannot be said, without an admission of liability, that Mr. Brooks obtained less in the litigation than he would have obtained by accepting the settlement.

[88] Human rights litigation has its private aspects. It is not private litigation, however. There is more than compensation to deal with, in the process. A Respondent cannot escape a finding of discrimination and the costs that go with such a finding, merely by offering a complainant the maximum that is available under the Act.

(v) Rule 400(3)(g)- Amount of Work

[89] Rule 400(3)(g) states that a court may consider "the amount of work". Mr. Bagambiire says that the work on the file was unusually onerous, as a result of the complexities in the employment records. He attributes some of this to the Respondent's failure to disclose all of the relevant records.

[90] This cuts both ways, however, since counsel for the Complainant went further than was necessary, in their examinations on the employment records.

[91] The Respondent for its part argues that the Complainant was overly litigious. Although I have concerns about the attitude adopted by counsel, the parties were entitled to insist on their rights. Litigation is an exhausting game and the ordinary public does not appreciate the effort that goes into taking a complaint to a hearing.

[92] I do not accept that the present case called for any extraordinary efforts on the part of counsel, on either side. I nevertheless accept that there was a good deal of work in marshalling the facts. Some of this can be attributed to the long delay in prosecuting the case.

(vi) Rule 400(3)(h)- Public Interest

[93] Rule 400(3)(h) states that a court may consider "whether the public interest in having the proceeding litigated justifies a particular award of costs". This is an area where special considerations apply in the human rights process.

[94] I say this because the human rights process is not private litigation. It has a more fundamental character. The best analogy in the present case is probably with a constitutional tort: the remedy may be a private remedy, but the cause of action has its origins in the broader public interest. This component in the process is primary, even in a case where a complaint concerns a dispute between private parties.

(a) Hearings Serve the Public Interest

[95] The point in the present context is that hearings serve the public interest. The human rights process was designed to bring the problem of discrimination into the open and subject it to public scrutiny. The public policy enshrined in human rights legislation places real value in the fact that a complaint has been heard. This is all the more true when the complaint is substantiated.

[96] The human rights process has larger aims than the ordinary legal process. These aims include education and the symbolic redress of long standing social or historical grievances. I think that hearings also give individuals an opportunity to express their frustration and disappointment in the face of prejudice and discrimination. These aspects of a hearing are difficult to assess and are not translatable, in strict financial terms.

[97] The filing of a complaint and the holding of an inquiry provides a process by which society determines what is appropriate and proper, in the employment context. The public benefits from litigation, which helps in the development of the body of law and principle that is needed to resolve social conflicts. This promotes justice and contributes to the common good.

[98] Although the present case dealt with a complaint from a private party, it dealt with issues that went well beyond the strict parameters of the complaint. I believe that Mr. Brooks' complaint had, in the context of his community, a certain historical significance. This factor must weigh on his side, in the final calculation of costs.

(vii) Rule 400(3)(k)- Unnecessary Step

[99] Rule 400(3)(k)(i) states that a court may consider whether any step in the proceeding was "unnecessary". I have already said that I have some sympathy with the Respondent's position that the Complainant's request for a clarification of my decision was unnecessary. This is not a significant factor in the final adjustments. There is a more general question with respect to the attitude exhibited on the Complainant's side, which was stubborn and bellicose. This contributed to the length and difficulty of the hearing.

B. Other Factors

[100] I have considered the factors set out above. Some of these factors militate in favour of an increase in the final costs; some in favour of a reduction. The primary consideration in deciding the final figure, however, is that Mr. Brooks has obtained a finding of discrimination. In my view, this was all that was realistically available to him.

[101] The job competition that gave rise to the finding of discrimination was held in 1992. It took a long time for the situation to sort itself out. Mr. Brooks apparently had a break-down in the process. This helps to explain why the complaint was not filed until August of 1997.

[102] There were additional delays at the Commission. The complaint was not referred to the Tribunal until July of 2003. It is now 2005. There is no point in laying blame. It was already late in the game, by the time that Mr. Brooks filed the complaint. The reality is that the complaint came before the Tribunal at such a late stage that it was impossible to rectify the problems in the process.

[103] Nothing can be done about what happened in 1992. The real solution was to hold another competition. This would have had real consequences for the participants in the process. The winning candidates would have lost their positions. It seems plain that Lisa Howe would have won one of the positions. She would not have had to wait 14 years for a permanent position. Mr. Brooks would have ranked higher in the eligibility list.

[104] There would have been other benefits on the policy side. Education is one of the goals of the human rights process. A decision to hold a new competition, under the watchful eye of the Canadian Human Rights Commission, would have alerted managers and staff to the issues in the area. It would inevitably have had a ripple effect in improving the hiring and employment practices of the department.

[105] All of these benefits were lost. The Tribunal cannot order a new competition thirteen years after the original competition was held. The practicalities of the situation do not permit it. There are equitable issues that prevent it. This takes me to the litigation. My reading of the current situation is that Mr. Brooks feels that the Respondent got away with something. There is much to be said for such a view.

[106] Mr. Brooks can be faulted for overstating his chances of success in a fair competition. I have made it clear that there is no reason to believe that he would have won a second competition. Having said that, I think that his feelings are justified. They deserve affirmation. The entire process was manipulated by Mr. Savoury. The winning candidates were not entitled to their positions.

[107] It is too late to order a new competition. The question on costs is whether Mr. Brooks was justified in pursuing the litigation so long after the fact, when the natural remedy in the case was unavailable. I think the answer must be yes. The only correction that was possible, it seems to me, was a legal finding that the competition was unfair. This at least corrects the public record and establishes what was right.

[108] One of the purposes of the adjudicative process is to declare the rights of the parties. This serves an important purpose, even when it is done long after the fact, at a time when more concrete remedies are no longer available. I think the importance of this exercise, in the present circumstances, is enough to justify the litigation. This should be reflected in the costs.

[109] There is no perfection here. I think the posture adopted by the Complainant has its willful side. It was evident that Mr. Brooks was unhappy with my decision in the case and, in my estimation, the parties have adopted an adversarial approach. This was apparent in the contest over costs and the correspondence between counsel. There are still proceedings in the Federal Court, which apparently concern the more systemic aspects of the matter.

[110] It has been said that there is a therapeutic element in the inquiry process, which distinguishes it from the process in the civil courts. This has a role to play in restoring the dignity of both sides and promoting harmonious relationships between employers and their employees. I regret to say, in the immediate case, that I see none of the reconciliation that one would hope for in such a process.

V. Ruling

[111] I think the Complainant is entitled to an increase in the global figure. The assessed costs, all inclusive, will be set at one hundred and five thousand dollars ($105,000). This increase in the total reflects an increase in the fees. I consider it a modest increase, in keeping with the austerity that characterizes the assessment process. There is no reason to increase or discount the disbursements.

[112] Since this is the first time the Tribunal has done an assessment, and the issue of the Tribunal's jurisdiction is in the Federal Court, I think the Respondent is entitled to some time to consider its options in the matter. The costs are therefore payable within sixty days of the date of this order.

[113] There is one incidental matter. The general practice of the Tribunal is to provide simple interest on financial awards. Simple interest will accordingly be payable on the full amount of the costs. This interest will be calculated on a yearly basis at a rate equivalent to the Bank Rate (monthly series) set by the Bank of Canada. It will accumulate from the day after the sixty days have elapsed. I will reserve my jurisdiction to deal with any outstanding matters for two weeks.

Signed by

Dr. Paul Groarke
Tribunal Member

Ottawa, Ontario
July 12, 2005

Table A- Fees from Tariff B of the Federal Court Rules

		Units
A. Originating Documents and Other Pleadings		
1. Preparation and filing of originating documents, other than a notice of appeal to the Court of Appeal, and application records	Statement of Particulars	6
B. Motions		
5. Preparation and filing of a contested motion, including materials and responses thereto.	Expert's report	4
	Clarification of Decision	3
	Jurisdiction to award cost	3
	Admissibility of purported letter of offer	5
6. Appearance on a motion, per hour	Appearances on Motion re Expert's report: 1 hour	2
	Appearances on Motion re Clarification of Decision: 1 hour	2
C. Discovery and Examinations		
7. Discovery of documents, including listing, affidavit and inspection.	Disclosure	5
D. Pre-Trial and Pre-Hearing Procedures		
13. Counsel fee: a) Preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff; and	General preparation for Tribunal	5

b) Preparation for trial or hearing, per day in Court after the first day.	Daily Preparation 18 days at 3 units a day	54
14. Counsel fee: a) To first counsel, per hour in Court; and	Counsel fee 5.5 hour/day x 19 days at 3 units	314
b) To second counsel, where Court directs, 50% of the amount calculated under paragraph (a).	Fees for second Counsel 50% of 14 a)	157
15. Preparation and filing of written argument, where requested or permitted by the Court	Preparation of final arguments	5
G. Miscellaneous		
24. Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court.	By Counsel to attend hearing	5
25. Services after judgment not otherwise specified	Services after judgment not otherwise specified	1
26. Assessment of costs	Assessment of costs	6
27. Such other services as may be allowed by the assessment officer or ordered by the Court	27.1 Communications and correspondence with Commission	3
	27.2 Attendance at Tribunal Mediation	3
	27.3 Preparation of Briefs for Mediation	2
	27.4 Travel for Mediation	5

Table B - Disbursements

	Requested	Allowed
Air fare for 2, Toronto – Halifax return (re: conciliation meeting October 2002)	$998	$0
Hotel expenses for two (re: conciliation meeting October 2002)	$1,069.48	$0
Air fare for 2, Toronto – Halifax return (re: mediation meeting December 2003)	$763.62	$380
Hotel expenses for 2 (re: mediation meeting December 2003)	$620.69	$250
Air travel / hotel expenses / Flaherty, March 11, 2004 (interview witnesses)	$367.90	$0
Ground travel Steven Flaherty, March 11, 2004	$130.02	$0
One way air fare for 2, Toronto – Halifax, March 20, 2004 (re: hearing)	$593.94	$290
Ground travel, Toronto – Halifax, March 20, 2004	$30	$20
One way air travel for 2, Halifax – Toronto, April 2004	$323.90	$160
Shipping charges (files to Toronto from Halifax, April 01, 2004)	$79.72	$80
Hotel expenses for 2, March 20 to 31, 2004	$3,446.57	$1,950
Return air travel for 2, June 6 to 15, 2004	$801.21	$400
Ground travel, June 6 to 15, 2004	$41	$30
Hotel expenses for two, June 6 to 15, 2004	$2,860.24	$1,370
Shipping charges (files to and from Halifax, June 6 to 15, 2004)	$177.44	$170
Davies Bagambiire air fare to Halifax, July 2004	$493.22	$490

Davies Bagambiire hotel expenses, July 2004	$551.34	$550
Steven Flaherty air fare, ground travel, etc, July 2004	$439.72	$0
Charges for transcripts for hearing on liability	$8,997.63	$5,350
Copying, fax, courier, QL & misc. expenses, 2001 to present	$13,643.62	$9,000
Expert reports (Actuary: $3,290.25 – Dr. Henry: $2,800.00)	$6,090.25	$1,800
Long distance calls		$300
Total	**$42,519.51**	**$22,590**

Table C – Summary

Legal Fees		
	Total Number of Units	590
	Unit Value	$120
	Total Number of Units x Unit Value	$70,800
GST		$4,956
Legal Fees, with GST		$75,756
Disbursements		$22,590
Total of Fees and disbursements		**$98,346**
Final Adjustment		$6,654
Total of Fees and Disbursements, with increase		**$105,000**

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T838/8803

Style of Cause: Cecil Brooks v. Department of Fisheries and Oceans

Decision of the Tribunal Dated: July 12, 2005

Date and Place of Hearing: March 10-11, 2005

Ottawa, Ontario

Appearances:

Davies Bagambiire and Stephen Flaherty, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Scott McCrossin and Melissa Cameron, for the Respondent

References: 2004 CHRT 36
December 3, 2003