

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Heather Lynn Grant

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Decision

Member: Sophie Marchildon

Date: September 20, 2012

Citation: 2012 CHRT 20

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I. Background

[1] In *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 [*Grant*], the Canadian Human Rights Tribunal (the Tribunal) found the complaint of Ms. Grant, the Complainant, against Manitoba Telecom Services Inc. (the Respondent or MTS), pursuant to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], to be substantiated. Pursuant to section 53(2) of the *Act*, the Tribunal ordered the Respondent to compensate the Complainant in the amount of \$10,000 for the pain and suffering she experienced as a result of the discriminatory practice; and, to compensate the Complainant in the amount of \$10,000 for having engaged in the discriminatory practice wilfully or recklessly (see *Grant* at paras. 132-133). The Tribunal also ordered the Respondent to work with the Canadian Human Rights Commission (the Commission) to train high level management on the duty to accommodate and to develop appropriate policies in this regard (see *Grant* at paras.130 and 134).

[2] The Complainant has also requested remedies with regards to the reinstatement of her employment with the Respondent, lost wages, lost pension contributions, the loss of other benefits, expenses and costs she incurred, and interest. In *Grant*, the Tribunal requested further submissions and clarifications from the parties on these remedies and remained seized of the matter pending those additional submissions and clarifications (see *Grant* at paras. 135-136).

[3] On July 10, 2012 a hearing was held by way of conference call to receive additional clarification from the parties regarding their submissions on the outstanding remedies.

[4] The following is the Tribunal's decision with regards to the outstanding remedies from *Grant*.

II. Outstanding Remedies

A. Reinstatement

[5] The Complainant seeks reinstatement in her position in the same location or to an equivalently rated position in the same location.

[6] Pursuant to the reasoning in *McAvinn v. Strait Crossing Bridge Ltd.* T.D. 13/01 (CHRT), the Complainant suggests that if there exists a serious possibility that she would have retained her job, then the Tribunal should order that she be reinstated. However, while the “serious possibility” of the Complainant retaining her job may be a consideration in determining the appropriate remedy in this case, it is not the only one. Such a narrow approach would remove the Tribunal’s remedial discretion to fashion appropriate remedies under section 53(2) of the *Act*. Having found the complaint to be substantiated, the objective in making an order under section 53(2) of the *Act* is to, as much as possible, make the Complainant whole. To accomplish this, the Tribunal’s remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37 [*Chopra*]). In other words, the Tribunal’s remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para.50).

[7] In *Grant*, the Tribunal found that the Complainant’s performance at work was evaluated without seriously considering the effects of her disability on her performance. The Complainant’s Performance Appraisals were used by the Respondent to compare the Complainant with another employee, Sharon Horner, for the purpose of determining which of the two employees would be laid off. On this basis, the Tribunal found that the Complainant’s disability factored into the Respondent’s decision to no longer employ her. However, while the Tribunal found that there was a link between the Complainant’s negatively assessed performance, her disability, and her lay off, sufficient evidence was not led upon which the

Tribunal can now go back and assess what the Complainant's performance actually would have been had her disability been taken into account. Nor was sufficient evidence led before the Tribunal regarding the performance of Sharon Horner. In comparing the two employees prior to lay-off, the Respondent not only used the performance appraisals but also interviewed the employee's managers. Sharon Horner's manager did not testify before the Tribunal neither did Sharon Horner. Without this information, the Tribunal is also not in a position to reassess the two candidates for layoff and determine who should have been laid off; nor would this be appropriate given section 54(2)(a) of the *Act* and the Tribunal's finding that there was no *prima facie* case of a discriminatory animus in the Respondent's decision to lay off employees (see *Grant* at paras. 44-47). Rather, in my view, what the Tribunal is attempting to remedy in the circumstances of this case is the opportunity the Complainant lost to have her performance assessed in a non-discriminatory manner and, consequently, the possibility she shared with one other candidate of retaining her job with the Respondent. The difficulty in fashioning an appropriate remedy in this case lies in the fact that, regardless of the discriminatory practice, there was at least a 50% possibility that the Complainant would have been laid off anyways. This is an important consideration in determining whether reinstatement is appropriate in the circumstances of this case; and, along with the other reasons stated above, leads me to believe that it is not reasonable to order reinstatement in this case.

B. Wage Loss

[8] The Complainant seeks compensation for lost wages. The Complainant received severance pay at the time of her lay off. She received two weeks pay for every year of service with the Respondent, totalling \$62,000.00. After having been laid off in February 2007, the Complainant was off work for a few months. She started a new job in October of 2007, and has had regular employment ever since. The Tribunal was provided with the Complainant's income tax statements for 2006 to 2009. Those statements indicate that the Complainant's income increased for the years after she was laid off by the Respondent.

[9] The Complainant claims she had to work more hours to earn the same income she would have made at MTS. In this regard, the Complainant did not retain her pay studs, but presented the Tribunal with a table she prepared with her union outlining the difference, on an hourly basis, between what she earned at her new jobs and what she would have earned at MTS for the years 2007 to 2010. The table does not indicate dates, nor does it document her hours of work, but generalizes her earnings on a yearly basis. In her testimony, the Complainant attempted to explain the reasoning behind the calculations contained in the table, but had no other evidence to support those calculations. On the basis of the table, and her statement that she worked more hours, the Complainant asks the Tribunal to conclude that she suffered a wage loss. At the July 10, 2012 hearing, the Tribunal asked the Complainant to clarify her claim to wage loss on the basis that she worked more hours to earn the same pay, and to support her claim with authorities, and the terms of the Act. The Complainant's response was that, while the usual practice is to determine wage loss based on gross annual income, rather than on an hourly basis, the Tribunal should accept the Complainant's calculations of her wage loss based upon a broad and liberal approach to the interpretation of the *Act* and even within the parameters of a literal approach to interpreting the terms of section 53(2)(c). While I accept that section 53(2)(c) does not specify how wage loss is to be calculated, this does not change the fact that the Tribunal must make this determination to the best of its ability based on the evidence presented. The Complainant's hourly based calculations of wage loss, and explanation thereof, were vague and not supported by sufficient evidence to allow the Tribunal to conclude that she suffered a wage loss or was not able to mitigate her damages in this regard. I would add that the doctrine of mitigation is based on the premise that

“Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss as it is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those others are the authors of the loss”.

(See *Chopra* at para. 40).

[10] When weighed against her official tax returns, and the doctrine of mitigation, it is difficult to accept the Complainant's argument that she suffered a wage loss. As a result, I find that the severance pay the Complainant received from the Respondent more than covers the wages she lost during her period of her unemployment, and her tax returns for the years after she was laid off from MTS indicate that she did not suffer a loss in her earnings compared to what she may have been earning with MTS. For these reasons, I do not think it is reasonable to order compensation for lost wages in this case.

[11] The Complainant also claims losses with regards to the Respondent's Variable Pay Plan and Groups Sales Bonus. However, after having examined the information provided by the parties regarding these plans, I agree with the Respondent that the Variable Pay Plan and the Group Sales Bonus fall under the Complainant's lost wages. They are bonus payments that would be included in the Complainant's income. Having found the Complainant to have mitigated her wage losses, I do not award compensation for the Variable Pay Plan or the Group Sales Bonus.

C. Pension

[12] The Complainant seeks compensation for missed pension contributions. Given her age and years of service at the time of her lay off, the Complainant contends that the loss of her pension was of great consequence to her. The parties acknowledged that the Complainant no longer receives the benefit of a pension plan with her new employer. According to the Complainant, she will now have to work many more years than she would have at MTS to support herself going forward and in retirement.

[13] The Respondent suggests that any loss claimed with regards to her pension should be viewed together with her wage loss. I disagree. Section 53(2)(c) provides the Tribunal with the authority to compensate victims of discrimination for any wage loss. Section 53(2)(b) provides the Tribunal with the authority to make available to the victim of discrimination any "privileges"

that are being or were denied the victim as a result of the discriminatory practice. A pension is a retirement benefit that, while often times calculated or contributed to based on an employee's salary, does not form part of an employee's wages. A pension program is not offered by every employer and can be a significant incentive to employment. In this sense, I believe it is more appropriately categorized as a "privilege" as opposed to being included in an employee's wages. The Tribunal has taken a similar approach to determining pension remedies in *Levac v. Canadian Armed Forces*, T.D.2/95 (CHRT), where wage loss was also not awarded.

[14] As mentioned above, the discriminatory practice of the Respondent resulted in the Complainant losing at least a 50% possibility of her retaining her job with the Respondent and her resulting pension benefits. Pursuant to section 53(2)(b) of the *Act*, the Complainant was denied a possibility of retaining the privilege of her pension benefits as result of the discriminatory practice. On this basis, some of the Complainant's lost pension benefits should now be made available to her. Similar to the reasoning in *Shiv Chopra v. Health Canada*, 2004 CHRT 27, where the compensation for wage loss was divided by three to reflect the number of interested candidates for the position that the Tribunal found was denied to the victim of discrimination, I believe it is also appropriate in this case to reduce the lost pension contributions in the period following her lay off by 50% to reflect the fact that the Complainant did not lose her job as a result of discrimination, but lost a possibility of retaining her job against one other candidate.

[15] Given the above reasons, and in an effort not to punish the Respondent but to, as much as possible, make the Complainant whole pursuant to section 53(2)(b) of the *Act*, I order the Respondent to restore the Complainant's pension benefits to the position they were in at the time of her layoff. For the period from her lay off to the date when the terms of this order are implemented, the Respondent is to contribute to her pension plan half of the pension contributions it would have made during this period had the Complainant remained in its employ. If it is not possible to restore the previous pension plan, arrangements should be made to restore the lost pension benefits as described above in a comparable plan or arrangement,

ensuring that the Complainant can receive retirement benefits comparable to those she would have received through MTS. Given the complexities and considerations that may be involved in determining the functionality of this order; given the lack of evidence permitting the Tribunal to best determine the functionality of this order; given the parties' acknowledgement that an actuary may need to be involved in making these pension calculations; and given that insufficient evidence was led before me to make such calculations, therefore, I will first leave it to the parties to work out the details of the Complainant's lost pension benefits pursuant to the parameters outlined above. I will retain jurisdiction in the event the parties are unable to reach an agreement in this regard.

D. Employee Share Ownership Plan

[16] The Complainant testified that she participated in the Employee Share Ownership Plan. MTS is a publicly owned company and provided a plan in which employees could contribute 4 to 6% of their income in investing in shares of the company. The Complainant testified that she would contribute 4% of her income and MTS would match this with an equivalent 1% of her income. If the Complainant had continued to work with the Respondent, the Complainant estimates that the Respondent's contributions would have been approximately \$2,441.06. The Respondent does not dispute this calculation, but again argues that this amount is more properly classified as earnings and that the Complainant has mitigated her lost earnings. Like a pension, I believe the share ownership plan is more appropriately categorized as a "privilege" pursuant to section 53(2)(b) of the *Act* as opposed to being included in an employee's wages. It is an investment fund, provided by the employer, that the employees contribute to during their employment and benefit from at some later point. Applying the same reasoning that I followed for calculating the Complainant's pension losses, that she had a 50% chance of retaining her position, I order the Respondent to restore the Complainant's share ownership plan to the position it was in at the time of her layoff. For the period from her lay off to the date when the terms of this order are implemented, the Respondent is to contribute to her share ownership plan half of the contributions it would have made during this period had the Complainant remained in

its employ. If it is not possible to restore the previous share ownership plan, arrangements should be made to restore the lost benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive the benefits of the plan in a fashion comparable to what she would have received through MTS. Given the complexities and considerations that may be involved in determining the functionality of this order; given the lack of evidence permitting the Tribunal to best determine the functionality of this order, therefore, I will first leave it to the parties to work out the details of the Complainant's lost share ownership plan benefits pursuant to the parameters outlined above. I will retain jurisdiction in the event the parties are unable to reach an agreement in this regard.

E. Other Expenses

[17] According to MTS' benefits plan, the Complainant seeks to be reimbursed for various expenses that she was not able to recover following her lay off and during the time that this complaint was being adjudicated. The Complainant incurred drug costs in the amount of \$282.61; dental work in the amount of \$147.40; and, orthodontic work of \$4,500.00. Under MTS' dental plan, routine dental treatment is covered at 100% to a maximum of \$1,250.00, on an annual basis, and orthodontic treatment is covered at 50% to a maximum of \$1,000, on an annual basis. The Complainant claims she would have claimed the orthodontic work expense over a period of two years, for a total claim of \$1,000.00 each year. The Respondent did not dispute this amount. Applying the same reasoning that I followed for calculating the Complainant's pension benefits, that she had a 50% chance of retaining her position, I order the Respondent to pay \$1000.00 for reimbursement of half of the orthodontic work expense and \$73.70 for half of the dental work expense. I was not presented with sufficient evidence to determine what the insurance coverage would have been for the drug costs, however, the Respondent also did not dispute the amount claimed. Therefore, I order the Respondent to pay \$141.31 for half of the drug costs.

[18] The Complainant also seeks compensation for incurring the expense of having to take a class 1 truck driving training course. While the course cost \$4,800.00, she is only claiming \$1,200.00, as the balance was paid by a governmental program. I am satisfied that this expense was incurred as a result of the discriminatory practice. Following her lay off, the Complainant took this class in order to gain the skills necessary for employment in another field. Applying the same reasoning that I followed for calculating the Complainant's pension losses, that she had a 50% chance of retaining her position, I order the Respondent to pay \$600.00 to reimburse half of the training course expense.

[19] In sum, pursuant to section 53(2)(c), I order the Respondent to compensate the Complainant a total of \$1815.01 for expenses she incurred as a result of the discriminatory practice.

F. Costs

[20] The Complainant seeks compensation with regards to the expenses she incurred related to the hearing of this matter, and filed an expense chart in this regard at the July 10, 2012 hearing. The Complainant seeks \$2,000.00 for lodging, meals, parking, and travel. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 [*Mowat*], the Supreme Court of Canada found that the text, context and purpose of the *Act* clearly showed that there was no authority in the Tribunal to award legal costs. According to the same reasoning in *Mowat*, and considering there is no link between the particular types of compensation described in section 53 and the costs claimed by the Complainant here, I fail to see any authority in the *Act* that would allow the Tribunal to award compensation for the expenses that the Complainant incurred in relation to the hearing of this matter. Therefore, no compensation can be provided for these costs.

G. Interest

[21] Pursuant to section 53(4) of the *Act*, the Complainant seeks interest on any award of compensation made by the Tribunal. As such, I grant interest on the compensation awarded, at the current Bank of Canada rate, as follows:

- The compensation for pain and suffering and special compensation will include an award of interest from the date of the Complainant's lay off, to the date of this decision.
- The compensation for the orthodontic work will include an award of interest from October 2010, the date the Complainant made the last payment for this expense, to the date of this decision.
- The compensation for the dental work will include an award of interest from February 2008, the date the Complainant made the last payment for this expense, to the date of this decision.
- The compensation for drug expenses will include an award of interest from April 2008, the date the Complainant made the last payment for this expense, to the date of this decision.
- The compensation for the training course will include an award of interest from July 2007, the date the Complainant paid the expense, to the date of this decision.

I note that the remedies related to the Complainant's pension and share ownership plan were not awards of compensation, as they were made to restore a privilege pursuant to section 53(2)(b) of the *Act*.

III. Order

[22] Having found the complaint in *Grant* to be substantiated, and given the Tribunal's reasons on the outstanding remedies as indicated above, pursuant to section 53(2) of the *Act* the Tribunal's order against the Respondent includes all of the following:

- The Respondent shall restore the Complainant's pension benefits to the position they were in at the time of her layoff. For the period from her lay off to the date when the terms of this order are implemented, the Respondent is to contribute to her pension plan half of the pension contributions it would have made during this period had the Complainant remained in its employ. If it is not possible to restore the previous pension plan, arrangements should be made to restore the lost pension benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive retirement benefits comparable to those she would have received through MTS. I will first leave it to the parties to work out the details of the Complainant's lost pension benefits pursuant to the parameters outlined in my reasons.
- The Respondent shall restore the Complainant's share ownership plan to the position it was in at the time of her layoff. For the period from her lay off to the date when the terms of this order are implemented, the Respondent is to contribute to her share ownership plan half of the contributions it would have made during this period had the Complainant remained in its employ. If it is not possible to restore the previous share ownership plan, arrangements should be made to restore the lost benefits as described above in a comparable plan or arrangement, ensuring that the Complainant can receive the benefits of the plan in a fashion comparable to what she would have received through MTS. I will first leave it to the parties to work out the details of the Complainant's lost employee ownership plan benefits pursuant to the parameters outlined in my reasons.
- The Respondent shall compensate the Complainant a total of \$1815.01 for expenses she incurred as a result of the discriminatory practice. The Respondent shall pay interest on this amount pursuant to the terms outlined in the reasons above.
- The Respondent shall compensate the Complainant in the amount of \$10,000 for the pain and suffering she experienced as a result of the discrimination practice.

The Respondent shall pay interest on this amount from the date of the Complainant's lay off to the date of this decision.

- The Respondent shall compensate the Complainant in the amount of \$10,000 for having engaged in the discriminatory practice wilfully or recklessly. The Respondent shall pay interest on this amount from the date of the Complainant's lay off to the date of this decision.
- The Respondent shall work with the Commission to train high level management such as directors and heads of the labour relations department on the duty to accommodate and the CHRA. The Respondent will work with the Commission to ensure they have an appropriate policy on the duty to accommodate and if not, the Respondent is to elaborate one or amend their existing policy. The Respondent will consult with the Unions in this process to consider the point of view of employees. This remedy shall be completed within a year of this decision.

[23] I retain jurisdiction should the parties not be able to reach an agreement with regards to restoring the Complainant's pension plan and share ownership plan, and should the parties require any further clarification with regards to the training and policy development remedy. Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
September 20, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1452/7809

Style of Cause: Heather Lynn Grant v. Manitoba Telecom Services Inc.

Decision of the Tribunal Dated: September 20, 2012

Place of Hearing: Winnipeg, Manitoba

Appearances:

R. Ivan Holloway, for the Complainant

Scott Whitelaw, for the Canadian Human Rights Commission

Paul A. McDonald, for the Respondent