

CONTROLLING COSTS IN DEFENDING HUMAN RIGHTS COMPLAINTS

Joe Morrison

Employers who are faced with a frivolous or vexatious human rights complaint by a former employee often feel that there is no deterrent for employees in filing such complaints. The employee does not have to retain legal counsel and thus avoids paying legal fees. Additionally, human rights tribunals are typically reluctant, or simply do not have the authority, to issue an award of legal costs against an employee even when there is no merit to the complaint.

Conversely, employees who require assistance in pursuing a human rights complaint and incur legal costs in doing so, may not be able to recover those costs. Such costs may exceed the actual damages awarded.

In light of these realities, the ability for a human rights tribunal to award costs is an issue that impacts the overall effectiveness of human rights legislation. It can deter frivolous complaints and provide for the recovery of legal fees in legitimate complaints.

Recently, the issue of whether the federal human rights tribunal, (that is, the Canadian Human Rights Tribunal) has the authority to award legal costs was addressed by the Supreme Court of Canada. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53*, the Supreme Court held that this human rights tribunal does not have the authority to award legal costs (at least, based upon the legislation at the relevant time). However, it noted that other provincial human rights tribunals may have such authority, as it depends upon the wording of the applicable human rights statute and the interpretation of same.

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Background

The complaint in the recent Supreme Court of Canada case arose from Donna Mowat ("Mowat"), an employee who was formerly employed in the Canadian Armed Forces for fourteen years. During the course of her employment with the military, Mowat had filed numerous complaints and grievances. Many of these were taken to the highest level in Canadian Forces grievance resolution process, and none was substantiated. The Canadian Forces also conducted an internal investigation into comments made by one of Mowat's co-workers which she alleged were sexually harassing. The investigation found that the comments did in fact constitute harassment, and based on the recommendations from several reports on the incidents, the employee responsible was in fact disciplined.

However, approximately three years after Mowat had left the Canadian Forces, she filed a human rights complaint alleging discrimination on the basis of sex contrary to the *Canadian Human Rights Act*. The hearing before the Tribunal took six weeks and the Presiding Tribunal member was highly critical of how Mowat conducted the proceedings. He described it as a "scatter-shot complaint with the allegations all over the place."

However, in the end, the Tribunal concluded that Mowat's complaint was substantiated in part and awarded her \$4,000 plus interest which took the complaint to the maximum statutory limit at the time (*i.e.* \$5,000). The award was to compensate her for "suffering in respect of feelings or self-respect."

Mowat also applied for \$196,000 in legal costs. The Tribunal determined that it did have authority to award expenses, although it only awarded Mowat \$47,000 as many of the allegations advanced in her complaint had not been substantiated.

On appeal, the Federal Court upheld the Tribunal's decision that it had authority to award costs. The Federal Court of Appeal overturned this decision on appeal and Mowat's case was subsequently appealed to the Supreme Court of Canada for a final determination of this issue.

Supreme Court of Canada's Analysis

The Supreme Court of Canada held that, to be upheld, the decision of the Tribunal had to be "reasonable." In other words, its decision should be given some deference, but its findings had to be reasonably justified. . In applying this test, the Court held that the Tribunal's decision was not reasonable based upon the wording of the *Canadian Human Rights Act* and applying proper principles of statutory interpretation.

The key section that the case turned on was the interpretation of section 53(2) which provided that the Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, to compensate a victim for, amongst other things, "any expenses incurred by the victim as a result of the discriminatory practice".

In finding that the Tribunal's decision was unreasonable, the Court noted that the Tribunal had basically adopted a "dictionary definition" of the word "expenses" in finding that "legal costs" should be included in the more general reference to "expenses" in section 53(2). The Court noted that the issue of an administrative tribunal's authority to award legal costs is a very specific one. Parliament and the Legislatures have historically provided very clear language in other statutes to indicate if a tribunal will be empowered to award legal costs. The Court canvassed other human rights legislation and noted the absence or inclusion of such language depending on the intention in each case. The Court held that absent such specific language, it was not reasonable to find that a tribunal had such authority. In the end, the Court dismissed the appeal.

Implications for Employers

There are several practical implications for employers that can be gleaned from this case:

1. Unlike a court, an administrative tribunal such as a human rights tribunal, may or may not have the authority to award legal costs. Determining this issue at the outset of any complaint (with the assistance of your legal counsel) and then factoring this into strategic decisions in defending the claim is an important practical issue.
2. In cases where a tribunal can award legal costs, it is important to understand the basis for such awards and then to utilize this understanding as part of an employer's overall strategy in defending and resolving complaints. In effect, make costs an issue where it can be utilized to help defend or resolve a complaint.
3. Where a tribunal cannot award legal costs but the employee is represented by counsel, settlement offers which include payments to legal costs can help to get the deal.
4. While some tribunals cannot award legal costs, there may be other procedural mechanisms that can be utilized to deal with frivolous complaints in a cost effective manner. For example, a recent amendment to the Ontario *Human Rights Code* provides a summary motion for dismissal which can be used to have frivolous or vexatious claims dismissed without the need for a full hearing.

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