

**THE SUPREME COURT OF CANADA HOLDS THAT THE
CANADIAN HUMAN RIGHTS TRIBUNAL CANNOT AWARD COSTS**

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53

The Supreme Court of Canada recently upheld a ruling that the Canadian Human Rights Tribunal does not have jurisdiction to award legal costs.

Background

Ms Mowat was employed with the Canadian Forces for 14 years. She was released in 1995. Over the course of her employment, Ms Mowat made several complaints against her superiors. The Canadian Forces conducted an internal investigation into comments made by one of Ms Mowat's co-workers. The investigation confirmed Ms Mowat's claims that the comments constituted sexual harassment. Recommendations on addressing the incident were implemented and Ms Mowat's Commanding Officer, the alleged harasser, was disciplined. Three years after her release from the Forces, Ms Mowat filed a complaint with the Canadian Human Rights Commission (the "Commission") alleging discrimination on the ground of sex, contrary to the provisions of the *Canadian Human Rights Act* ("CHRA").

The case was heard by the Canadian Human Rights Tribunal (the "Tribunal"). The Tribunal found that part of the sexual harassment complaint was substantiated and awarded Ms Mowat \$4,000 plus interest (to a maximum of \$5,000, the statutory limit at the time of the complaint) as compensation for "suffering in respect of feelings or self respect". Ms Mowat also sought compensation for legal costs, which she submitted totalled more than \$196,000. The Tribunal found that it was empowered to award costs and awarded \$47,000 in legal costs.

The Attorney General of Canada applied to the Federal Court for judicial review of the Tribunal's decision with respect to the Tribunal's jurisdiction to award legal costs. The Federal Court determined that the human rights policy approach to statutory interpretation of the applicable CHRA provisions justified an award of legal costs. The Federal Court found, however, that the Tribunal failed to provide adequate reasons for its award and referred the matter back to the Tribunal. The Attorney General of Canada appealed to the Federal Court of Appeal. The Federal Court of Appeal allowed the appeal and set aside the judgment of the Federal Court. The Federal Court held that the Tribunal has no authority to make an award of costs under the provisions of the CHRA. The Supreme Court of Canada unanimously dismissed the appeal by Ms Mowat and the Commission.

The Supreme Court of Canada's Analysis

The Supreme Court of Canada considered the following two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under sections 53(2)(c) and (d) of the CHRA?

2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

Standard of Review

The Supreme Court of Canada held that the question of costs is one of law that is within the core function and expertise of the Tribunal relating to the interpretation and the application of the *CHRA*. Accordingly, the Tribunal's decision to award legal costs to the successful complainant was found to be reviewable on the standard of reasonableness.

Reasonableness of the Tribunal's Finding on Costs

The Supreme Court of Canada found, however, that the Tribunal's decision to award legal costs was unreasonable and not supported by an appropriate interpretation of the *CHRA*.

Subsections 53(2)(c) and (d) of the *CHRA* provide as follows:

53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

...

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; [Emphasis added]

The Tribunal had determined that it had the authority to award legal costs for two reasons. First, the Tribunal found that the term "expenses incurred" in subsections 53(2)(c) and (d) was wide enough to include legal costs. Second, the Tribunal determined that there were compelling policy considerations relating to access to the human rights adjudication process and observed that without recovery of legal costs, any victory would be "pyrrhic".

The Supreme Court of Canada disagreed for three reasons. First, it found that a review of the legislative history of the *CHRA* suggested that if Parliament had intended to confer the authority to order costs, it would have used the term "costs". Second, it observed that the Commission itself had understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the *Act* in this respect. Third, it determined that a review of parallel provincial and territorial human rights legislation indicates that the jurisdiction to award costs was in addition to broad compensatory powers for awarding expenses.

Conclusion

The Supreme Court of Canada ultimately held that the text, context and purpose of the *CHRA* do not give the Tribunal the authority to award legal costs.

It is noteworthy that in its analysis of parallel provincial legislation, the Supreme Court of Canada observed that in “Ontario, the offending party’s conduct must be “unreasonable, frivolous[,] or vexatious or ... in bad faith” and the [Human Rights Tribunal of Ontario (“HRTO”)] can make its own rules pertaining to costs awards” pursuant to the *Statutory Powers Procedure Act*. While this affirms the current statutory scheme on the issue of costs in Ontario, it will be interesting to observe what impact, if any, the Supreme Court of Canada’s decision in *Mowat* will have on decisions of the HRTO, which has held in a number of cases that it does not have the statutory authority to award costs.

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