

Supreme Court Rejects Canadian Human Rights Tribunal's Authority to Award Costs

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Overview

In a recent decision, the Supreme Court of Canada (“SCC”) confirmed that the Canadian Human Rights Tribunal (“Tribunal”) does not have the authority to award legal costs to a successful complainant, settling a series of a contradictory lower court decisions of significant concern to federally-regulated employers and other respondents.

Background

In 1998, Donna Mowat filed an application under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“Act”) against her former employer, the Canadian Forces, alleging that she had been sexually harassed and her employment not continued on account of her sex. The Tribunal dismissed the majority of the allegations, but held that Ms. Mowat had been sexually harassed through three comments made by a male co-worker and that the Canadian Forces’ response had been inadequate.

Ms. Mowat was awarded \$4,000.00 in compensation for “suffering in respect of feelings or self respect”, which, when interest was added, amounted to \$5,000.00 (the statutory limit at the time the award was made). In addition, Ms. Mowat was awarded a further amount of \$47,000.00 as partial satisfaction for Ms. Mowat’s legal costs as the Tribunal found that its authority to award a complainant “any expenses incurred by the victim as a result of the discriminatory practice” under sections 52(2)(c) and (d) of the Act included the ability to award legal costs.

The Tribunal’s decision on the legal costs issue was upheld by the Federal Court, but overturned by the Federal Court of Appeal which found that the Tribunal did not have the authority to make a costs award. The Federal Court of Appeal decision was subsequently appealed to the SCC.

Decision

On October 28, 2011, the SCC dismissed the appeal and confirmed that the Tribunal did not have the authority to award legal costs as “expenses” incurred by successful applicants under sections 52(2)(c) and (d) of the Act.¹ The SCC held that while the term “expenses” read in isolation was extremely broad, it could not reasonably include legal costs when read in its full statutory context. In particular, the SCC noted that “expenses” appears in both sections 52(2)(c) and (d), which would be redundant if such a broad interpretation were granted to this term, and that several attempts were made to amend the Act to specifically include a limited authority to award costs, but that none of these proposed amendments became law.

¹ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII).

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Significance

The SCC's decision should bring a fair degree of relief to federally-regulated employers and other potential respondents governed by the Act. While a costs regime would not necessarily be a negative thing, the issue before the SCC was not whether the Tribunal had the authority to award legal costs in general, but solely whether the successful complainant could be awarded its legal costs. The Act clearly does not grant authority to the Tribunal to award legal costs to a successful respondent.

In other words, a successful appeal to the SCC would have confirmed the existence of a one-way costs regime, whereby complainants could pursue human rights complaints and recover their legal costs without the normally accompanying risk of an adverse costs award. This would have posed a significant problem for federally-regulated employers and other respondents as their risk of responding to a human rights complaint would be increased, even if the complaint was deemed to be without merit. In addition, a one-way costs regime would provide little incentive for a complainant to settle the complaint before a hearing without a significant payment from the respondent.

The SCC's decision confirming that the Act does not include this type of one-way cost regime is a positive development as it removes a degree of uncertainty from Tribunal proceedings and levels the playing field for the resolution of human rights complaints under the Act, both prior to and at a hearing. While the Act still provides authority for the Tribunal to compensate a successful complainant for a wide-range of expenses incurred as a result of a discriminatory practice, the SCC confirmed that the current Act was not intended to also allow an award for legal costs. Any change to the Act to permit such an award should be made by Parliament, not the courts, and would hopefully take a balanced approach to this important issue.