Date: 20060421

Docket: T-1386-05

Citation: 2006 FC 500

Ottawa, Ontario, April 21, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BLAIS

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CECIL BROOKS and
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* R.S.1985, c. F-7 of a decision of the Canadian Human Rights Tribunal (the Tribunal), dated July 12, 2005, which awarded legal costs of $105,000 to Mr. Cecil Brooks (the respondent) pursuant to paragraph 53(2)(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

RELEVANT FACTS

[2] The respondent was employed by the Canadian Coast Guard (Coast Guard) in 1988 on a temporary basis as a steward. He continued to work at various times for the Coast Guard until 1997.

[3] In 1997, the respondent filed a complaint under section 7 of the Act with the Canadian Human Rights Commission (the Commission). Following the investigation by the Commission, the matter was referred to a hearing before the Tribunal.

[4] The respondent's complaint consisted of three allegations of discrimination on the basis of race. The first allegation was that the respondent was treated unfairly in the course of his employment with the Coast Guard commencing in 1988, the second allegation related to a job competition in 1989 and the third allegation related to a job competition in 1992.

DECISION OF THE TRIBUNAL

[5] On December 3, 2004, the Tribunal dismissed the respondent's first two allegations. The Tribunal found the respondent partially substantiated his claim of discrimination regarding his third allegation. The Tribunal limited its award to damages for hurt feelings and legal costs.

[6] The applicant challenged the Tribunal's jurisdiction to award costs. On March 10, 2005, the Tribunal released its interim ruling on the issue of jurisdiction to award legal costs. In this decision,

the Tribunal confirmed it had the jurisdiction to award legal costs. During the hearing, the applicant sought to introduce evidence of two written offers to settle that it had communicated to the respondent prior to the Tribunal hearing. The Tribunal heard arguments from the parties on the admissibility of these offers and reserved its decision on this issue.

[7] On July 12, 2005, the Tribunal issued decision 2005 CHRT 26, awarding the respondent legal costs in the amount of $105, 000. Further, the Tribunal rejected the applicant's written offers to settle as evidence in the assessment of costs.

ISSUES

[8] 1. Did the Tribunal err in concluding that it had jurisdiction to award legal costs?

2. Did the Tribunal err in rejecting the two written offers to settle?

3. Did the Tribunal err in principle in the assessment of the legal costs?

ANALYSIS

[9] The standard of review of decisions of the Tribunal regarding questions of law is correctness and with respect to questions of mixed fact and law is reasonableness simpliciter. (See *Brown v. Royal Canadian Mounted Police*, 2005 FC 1683, [2005] F.C.J. No 2124 at paragraph 17.)

1. Did the Tribunal err in concluding that it had jurisdiction to award legal costs?

[10] The Tribunal recognized that it did not have express jurisdiction to award costs. However, it did conclude that it had a residual or implied jurisdiction to do so:

> I naturally accept this assertion. I agree that the Canadian Human Rights Act does not give the Tribunal the "express jurisdiction" to award costs.
>
> I think the Tribunal has an obligation to protect the efficacy and integrity of the Canadian Human Rights Act. The entire purpose of the Act is to provide a meaningful remedy for those who have suffered discrimination. I do not see how this is possible, at least in a case where the Commission decides not to appear, without an award of costs. The idea that a complainant who has been discriminated against should be required to pay something in the order of a hundred thousand dollars, for a five thousand dollar claim, and the full gamut of hardship that comes with litigation, is untenable. The cure is worse than the disease.
>
> (See decision of the Tribunal, March 10, 2005 at paragraph 3, applicant's record, volume 1, Tab 4.)

[11] Subsection 53(2) of the Act outlines several possible remedies the Tribunal can invoke should it decide that a complaint is substantiated. The aforementioned subsection specifically states the following:

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	53. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

include in the order any of the following terms that the member or panel considers appropriate:

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

incurred by the victim as a result of the discriminatory practice;	*d*) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;
(*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; and	
(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	*e*) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

[12] The applicant submits that the Tribunal erred in concluding it had implied jurisdiction to award costs for legal expenses.

[13] In *Stevenson v. Canada (Canadian Security Intelligence Service)* [2003] F.C.J. No 491, Justice Paul Rouleau mentions that the question of whether or not the Act allows the Tribunal to order compensation for legal expenses has been the subject of three decisions of this Court. Further, he acknowledges that there are inconsistencies with regards to the findings in those decisions. As such, he conducts a review of all three decisions in order to clarify the state of the law and says the following at paragraphs 20 to 26:

In Canada (Attorney General) v. Green (2000), 183 F.T.R. 161 (F.C.T.D.), Lemieux J. relied on the decision in Lambie, supra, in support of his conclusion that the Tribunal has no jurisdiction to make an award of legal costs to a complainant. More specifically, he stated the following at page 210:

> The Tribunal ordered the payment of legal costs of $4,057.22. There was evidence in the record that Nancy Green had retained professional services in October 1995 until the end of June 1996 to help in the preparation of her submissions to the Commission for its deliberation in its decision-making process.
>
> The Attorney General argues the Act is silent as to the awarding of legal costs and the only possible reference to any power which may be analogous to that of granting legal costs is the reference to expenses in paragraph 53(2)(c). The Attorney General cites Canada (Attorney General) v. Lambie (1996), 124 F.T.R. 303 (F.C.T.D.), where my colleague Nadon J. said at page 315 that the Act does not confer jurisdiction to award costs although Parliament could easily have included such a power.
>
> I agree with my colleague that if Parliament had intended the Tribunal to award legal costs, it would have said so. Reference is had to paragraph 53(2)(d) which refers to compensation to the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation. There is no mention of legal costs, an indication Parliament did not intend the Tribunal have the power to order the payment of legal costs.
>
> I accept the submission of the Attorney General. The Tribunal's award is struck.

However, in Canada (Attorney General) v. Thwaites, [1994] 3 F.C. 38 (F.C.T.D.), a case that predates the other two decisions, this Court came to the opposite conclusion. Gibson J. was confronted with the issue of whether the Tribunal erred in law in awarding reasonable costs for counsel and costs for actuarial services retained by the complainant in that case. He examined paragraph 53(2)(c) of the Act and found no reason to restrict the ordinary meaning of the expression "any expenses incurred". At para. 56 of his reasons, he stated the following:

> I refer to the authority under paragraph 53(2)(c) of the Canadian Human Rights Act quoted above to award compensation for expenses incurred by a victim, in this case Thwaites. I find no reason to restrict the ordinary meaning of the expression "expenses incurred". Costs of counsel and actuarial services incurred by Thwaites are, in the ordinary usage of the english language, expenses incurred by Thwaites. The fact that lawyers and judges attach a particular significance to the term "costs" or the expression "costs of counsel" provides no basis of support for the argument that "expenses incurred" does not include those costs unless they are specifically identified in the legislation. On the basis of the principle that the words of legislation should be given their ordinary meaning unless the context otherwise requires, and finding nothing in the relevant context that here otherwise requires, I conclude that the Tribunal did not err in law in awarding Thwaites reasonable costs of his counsel including the cost of actuarial services.

In my view, Nadon J.'s finding on jurisdiction in Lambie, is distinguishable from the case at bar. First, he found the word "expense" in paragraph 53(2)(d) of the Act not to be broad enough to cover time spent in preparation "except in exceptional circumstances". I interpret this to mean that the Tribunal has jurisdiction to award legal costs but in very exceptional cases. Indeed, he emphasized that in the case before him, there was no evidence that the leave and time compensated for in the Tribunal's order were exceptional, and nothing indicated that the respondent was required to make any preparations beyond what would

ordinarily be expected in such a case. Furthermore, the respondent's case was prepared entirely by Commission counsel. In Green, Lemieux J. does not make any finding regarding whether the complainant spent considerable or "exceptional" time and money in bringing his complaint.

I am satisfied that the reasoning in Thwaites is applicable to the situation here. The case law of the Tribunal abounds with awards of legal costs to the successful complainant, and the Tribunal has taken the position that paragraph 53(2)(c) contemplates such an award. For example, in Nkwazi v. Correctional Service Canada, [2001] C.H.R.D. No. 29. (QL) (Cdn. Human Rights Trib.), the Tribunal concluded that "there are compelling policy considerations relating to access to the human rights adjudication process which favour the adoption of the Thwaites approach". It went on to state that "Interpreting the term 'expenses' in the narrow and restricted way that Lemieux J. did in Green, so as to deny victims of discriminatory practices the right to recover their reasonable legal expenses associated with the pursuit of their complaints would [...] be contrary to the public policy underlying the Canadian Human Rights Act".

I agree with the Tribunal and with Gibson J. in Thwaites that the language of paragraph 53(2)(c) is broad enough to encompass the power to make an award of legal costs. [See Note 3 below] I find support for this position in subsection 50(1) of the Act which states that a complainant, as a party before the Tribunal, must be given "full and ample opportunity, in person or through counsel to appear at the inquiry, present evidence and make representations". Thus, Parliament clearly intended that a complainant be given the opportunity to retain the services of counsel in order to obtain some direction and advice.

> Note 3: This is also the conclusion reached by the authors of Discrimination and the Law (loose-leaf ed.), vol. 2, Carswell: Ontario at page 15-153. Further, in a Background paper published in 1994 by the Law and Government Division -- Research Branch of the Library of Parliament and entitled The Canadian Human Rights Act: Processing Complaints of Discrimination, the author indicates that "A Tribunal may make orders compensating the victim for any lost wages, for the costs obtaining alternative services or accommodations or for any other losses occasioned by the discrimination". By an ordinary English language understanding, legal expenses incurred by a complainant as a

> result of the discriminatory conduct of an employer result in a pecuniary loss occasioned by the discrimination.
>
> I agree with Gibson J. in Thwaites, that there is no reason to restrict the ordinary meaning of the expression "any expenses incurred by the victim as a result of the discriminatory practice" such as to exclude "expenses of litigation, prosecution, or other legal transaction". The fact that the words "legal costs" or "costs of counsel" are not expressly mentioned in either paragraphs 53(2)(c) or (d) does not support the argument that "expenses incurred as a result of the discriminatory practice" excludes "legal expenses" incurred by a complainant in bringing a complaint for discrimination. In a case such as this, where a complainant consults a lawyer regarding the well-foundedness of his complaint, an expense of that nature is entirely justifiable.
>
> In my view therefore, costs of counsel or any legal costs incurred in the course of filing a complaint for discrimination constitute "expenses incurred by the victim as a result of the discriminatory practice" as referred to in the legislation and the Tribunal has accordingly acted within its jurisdiction in awarding legal expenses to the respondent. [emphasis added]

[14] Justice Rouleau recognized that the jurisprudence was inconsistent regarding whether or not the Tribunal has implied jurisdiction to award costs for legal expenses. As such, he undertakes an extensive analysis of the case law in order to clarify the state of the law. He concludes by recognizing that pursuant to subsection 53(2) of the Act, costs of counsel or any legal costs incurred in the course of filing a complaint for discrimination constitute “expenses incurred by the victim as a result of the discriminatory practice”. As such, he determined that the Tribunal did have implied jurisdiction to award costs for legal expenses.

[15] The applicant attempts to distinguish the findings of Justice Rouleau by emphasizing that in *Stevenson*, above, the Court was only considering the entitlement of the complainant to recover legal costs incurred in the course of filing a complaint and not with costs of ongoing legal representation. Because the present matter deals with the jurisdiction to award costs for ongoing legal representation, the applicant suggests Justice Rouleau's decision to award costs should not apply.

[16] I disagree with the applicant's assertions. After reading Justice Rouleau's decision, it is clear that it was not his intention to recognize the Tribunal's jurisdiction to award legal costs solely for the expenses incurred leading up to legal action. He states that "there is no reason to restrict the ordinary meaning of the expression "any expenses incurred by the victim as a result of the discriminatory practice" as found at paragraph 53(2)(c) of the Act, such as to exclude "expenses of litigation, prosecution, or other legal transaction". Because the present matter deals with expenses of litigation, I find that the Tribunal did have implied jurisdiction to award costs for the applicant's ongoing legal expenses.

2. Did the Tribunal err in rejecting the two written offers to settle?

[17] The applicant mentions that the Tribunal adopted the practice of the Federal Court on the assessment of costs and stated it was using the *Federal Courts Rules* as a guideline in this regard. The pertinent Rule in the present matter is 400(3) which deals with factors in awarding costs:

400. (3) In exercising its discretion under subsection (1), the Court may consider

(*a*) the result of the proceeding;

(*b*) the amounts claimed and the amounts recovered;

(*c*) the importance and complexity of the issues;

(*d*) the apportionment of liability;

(*e*) any written offer to settle;

(*f*) any offer to contribute made under rule 421;

(*g*) the amount of work;

(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(*k*) whether any step in the proceeding was

400. (3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;

b) les sommes réclamées et les sommes recouvrées;

c) l'importance et la complexité des questions en litige;

d) le partage de la responsabilité;

e) toute offre écrite de règlement;

f) toute offre de contribution faite en vertu de la règle 421;

g) la charge de travail;

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

(*o*) any other matter that it considers relevant.

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

o) toute autre question qu'elle juge pertinente.

[18] Rule 400(3)(e) specifically provides that in exercising its discretion to award costs, the Court may consider "any written offer to settle." The applicant also asserts that it made two clear and unequivocal written offers to settle dated September 28, 2000 and March 4, 2004. The applicant submits that the Tribunal erred in rejecting the aforementioned written offers to settle as evidence in the assessment of costs.

[19] The applicant submits that there is applicable jurisprudence that sheds some light on the criteria of a valid offer to settle. In *Apotex Inc. v. Syntex Pharmaceutical*, [2001] F.C.J. No 727, the Federal Court of Appeal stated the following regarding an offer to settle at paragraph 10:

> …the offer to settle must be clear and unequivocal in the sense it leaves the opposite party to decide whether to accept it or reject it.

[20] The September 28, 2000 letter was addressed to Mr. Gerhard of the Commission, from K. Banfield, a Human Resources employee of the applicant. The letter stated the following:

> Further to our telephone conversation this date, I am confirming that the previous offer to Mr. Brooks can be reactivated. For your information, the offer included the following:
>
> | | |
> |---|---|
> | Lost Wages - 176 days | $ 21,582.88 |
> | Career Counseling | 1,000.00 |
> | Entry Level Seaman (tuition, travel, salary) | 2,310.00 |
> | Marine Emergency Duties (tuition, travel, salary) | 5,669.00 |
> | Hurt Feelings | 5,000.00 |
> | Total | $ 35,561.88 |

[21] The applicant claims that the aforementioned letter meets the requirements of a valid offer to settle as laid out by the Court of Appeal in *Apotex*, above. That is, the written offer is

clear and unequivocal and the only decision the respondent had to make was whether or not to accept or reject it. However, the Tribunal disagreed and stated the following:

> 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.
>
> The first letter tendered by the respondent does not meet this requirement. It refers to other communication and is inclusive. It also fails to meet the requirement of notice. The letter is inadmissible.
>
> (See decision of the Tribunal, July 12, 2005, at paragraphs 78-79, applicant's record volume 1, Tab B.)

[22] The applicant suggests that the Tribunal erred in implying that *Apotex,* above, imposed a condition that any previous communication cannot be referred to in the written offer. Further, the applicant suggests that the Tribunal also erred in finding the breakdown of the offer and the use of the word included in describing the breakdown, somehow operates to make the letter inadmissible.

[23] The respondent was offered a second written settlement offer of $125,000 approximately two weeks before the Tribunal hearing began. The March 4, 2004, letter stated the following:

> Without any admission of liability whatsoever, our client hereby offers to settle this matter for the all-inclusive sum of $125,000. Our client makes this offer in order to avoid the further expenses associated with a hearing before the Canadian Human Rights Tribunal, and also in the hope that it will bring the matter to a satisfactory conclusion.

> (See letter of March 4, 2004, exhibit 9 to the affidavit of Sabina Cameron, applicant's record, volume 3, Tab 9.)

[24] The applicant claims that this written offer meets the requirements set out by the Court of Appeal in *Apotex,* above. That is, it is clear and unequivocal, leaving the respondent only with the decision of whether to accept or reject the offer. However, the Tribunal disagreed and stated the following:

> 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.
>
> 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.
>
> (See decision of the Tribunal, July 12, 2005, at paragraph 83, applicant's record, volume 1, Tab B.)

[25] The applicant claims that there is no requirement on the face of Rule 400(3)(e) that states a written offer must include an admission of liability in order to be considered in costs assessment. The applicant claims, and I agree, that the Tribunal erred in imposing a condition on a provision that did not exist. Further, the Tribunal failed to support its position with any jurisprudence. Further, the Rules regarding offers to settle do not state that there is a requirement that the party making an offer provide notice that the letter of offer could have costs consequences.

[26] I find that both written offers to settle were valid and that the Tribunal erred in dismissing them as evidence. Because both written offers to settle were more favourable than the judgment obtained, Rule 420(2)(a) must be applied. The aforementioned Rule states the following:

420 (2) Unless otherwise ordered by the Court, where a defendant makes a written offer to settle that is not revoked,	420 (2) Sauf ordonnance contraire de la Cour, lorsque le défendeur présente par écrit une offre de règlement qui n'est pas révoquée et que le demandeur :
(*a*) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment;	(*a*) obtient un jugement moins avantageux que les conditions de l'offre, le demandeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit au double de ces dépens, à l'exclusion des débours, à compter du lendemain de cette date jusqu'à la date du jugement

[27] In light of the provisions of Rule 420(2)(a), the Tribunal's decision regarding the awarding of legal costs is quashed. As a result, I do not need to address the applicant's further submissions that the Tribunal made other errors in the assessment of costs pursuant to Rules; 400(3)(a), 400(3)(b), 400(3)(c), 400(3)(g), 400(3)(h) or 400(3)(k).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

- The decision of the Canadian Human Rights Tribunal be quashed;

- The case shall be returned to another member of the Canadian Human Rights Tribunal for reconsideration under Rule 400(3) taking into consideration that the two offers to settle are valid under rule 420(2)(a).

"Pierre Blais"

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

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Daniel Pagowski	FOR THE RESPONDENT (CHRC)

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