

In the matter of: The Human Rights Act, R.S.N.S. 1989, c. 214, as amended 1991, c. 12

BETWEEN: KIRK JOHNSON

- Complainant -

and

MICHAEL SANFORD

- Respondent -

HALIFAX REGIONAL POLICE SERVICE

- Respondent -

and

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

DECISION

BEFORE: Philip Girard
Board of Inquiry

DATE OF DECISION: 28 May 2004

COUNSEL: Victor Goldberg and Martha Mann
for Kirk Johnson

Michael Wood and William Katz
for the Nova Scotia Human Rights Commission

Michael Moreash
for the Halifax Regional Police Service and Michael Sanford

My decision in the above matter was rendered on 22 December 2003. At the end of the hearing it was agreed that there would be a further hearing to determine the issue of possible reimbursement of Mr. Johnson's legal costs in view of his separate legal representation throughout this matter. The parties submitted written briefs and an oral hearing was held on 19 April 2004. There are three issues to be decided: do I have jurisdiction to award all or a portion of the legal costs of a complainant who chose to be separately represented? Does anything in my decision of 22 December 2003 render me *functus officio* on this point; i.e., have I already decided the jurisdictional point in Mr. Johnson's favour? And if I do have jurisdiction to make an award of costs, what principles should govern it? I will deal with the second issue first.

1. *Is the board functus officio?*

In my written decision I made the following observation:

Mr. Goldberg requested an award of costs against the respondents on a solicitor-client basis. I find that it was reasonable for Mr. Johnson to have separate counsel, and that Mr. Goldberg's participation in the inquiry was very valuable. There was little repetition as between Commission counsel and Mr. Goldberg, and I find his presence did not unreasonably lengthen the inquiry. Some preliminary research on this question revealed that it was more complex than I had anticipated, however. I believe I have, in general, jurisdiction to award costs on this basis but there seems to be some conflict in the authorities as to what principles govern the award. See for example *Nkwazi v. Correctional Service of Canada* (2001), 41 C.H.R.R. D/109 (C.H.R.T.), where the law is reviewed.

Mr. Goldberg argued on the basis of this passage that I had made a positive finding of jurisdiction to award costs, that I was now *functus officio* on that point, and that the matter of jurisdiction was closed since the Halifax Police had not appealed my ruling on that point. I do not accept this interpretation. My observation about jurisdiction was expressed in a tentative fashion precisely because the tenor of my interchange with counsel at the final hearing on 29 October was that the whole matter of costs was to be addressed at a later date. I do not think that passage contained sufficient warning to the Halifax Police that they would be precluded from raising the issue of jurisdiction if they did not appeal that portion of my decision. My main duty as a board of inquiry is to provide a fair hearing to all parties before me, and I find it would not be fair to preclude the Halifax Regional Police Service from arguing the issue of jurisdiction.

2. *Does a board of inquiry appointed under the N.S. Human Rights Act have jurisdiction to make an award of costs to a separately represented complainant?*

The statutory foundation for an award of costs, if such exists, is to be found in s. 34(7) and (8) of the *Act*:

Jurisdiction of board

- (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

Power of board

- (8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

Complainants in Nova Scotia are seldom represented by independent counsel, and thus I am left to decide this issue without much guidance from previous boards of inquiry or the Nova Scotia courts. In *Gerin v. I.M.P. Group Ltd.*, [1996] N.S.H.R.B.I.D. No. 1, board of inquiry Bruce Wildsmith dismissed a complaint against the respondent, which in turn asked that costs be awarded against the Commission. He rightly (in my view) concluded that s. 34(8) gave him no power to award costs against the Commission in the absence of a complaint against it. That decision is not germane to the issue I have to decide. In *Hill v. Misener*, [1997] N.S.H.R.B.I.D. No. 2, board of inquiry Dawna Ring made an award of costs against the respondent in favour of Commission counsel, with only brief reference to s. 34(8) as the basis of her award. The case was a particularly egregious one where the respondent had failed to pay the amount previously awarded by the board, and Commission counsel was obliged to take steps to enforce the award. The award of costs related to the time spent by Commission counsel on enforcing the original award. In *Blanchard v. L.I.U., Local 1115* (2002), 43 C.H.R.R. D/265 (N.S. Bd.Inq.), where a complainant had retained a lawyer for advice before the hearing, though not for representation at the hearing, board of inquiry Elizabeth Cusack found that s. 34(8) was “broad enough to justify the award of costs.” In the end she dismissed the complaint on the basis of her finding that the employer had accommodated the disabled complainant past the point of undue hardship. Ms. Cusack went on to observe that had she found the complaint substantiated she would have made an award of costs, “but would have required representations of a specific nature, post-hearing, about costs. I would not have awarded full solicitor and client costs and perhaps not more than one-third to one-half percent [sic] of a reasonable amount” [para. 374]. It is not clear that the jurisdictional point was fully argued, nor did Ms. Cusack elaborate on why she would have awarded the amount mentioned.

Decisions from other jurisdictions are not always directly applicable because of the difference in wording between other Acts and the Nova Scotia Act, but I note that a disagreement between two lines of jurisprudence under the *Canadian Human Rights Act* on the power to award costs seems to have been finally resolved in favour of the power of tribunals appointed under that Act to make such an award. In *Stevenson v. Canada (C.S.I.S.)*, [2003] F.C.J. No. 491, Rouleau J. reviewed the decisions and concluded that a tribunal’s power under s. 53(2)(c) of the Act to order a respondent to “compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice” included a power to award legal costs. In that case the complainant

was not separately represented at the hearing, but had sought the advice of counsel beforehand, and the Tribunal found that “some of the services rendered were in relation to the submissions made to the Canadian Human Rights Commission” [as cited in the Federal Court decision at para. 6]. The complainant received an award of \$2000 for legal costs.

Mr. Moreash argued strongly that the power to award legal costs would have to be given to a board of inquiry by clear and specific wording, and pointed to a number of statutes in Nova Scotia which do so, as well as to some other human rights statutes such as the P.E.I. *Human Rights Act* which confer an express power to award costs. That argument was rejected by Gibson J. in *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38 (T.D.) in interpreting the phrase “expenses incurred” found in the federal Act:

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 [at para. 56].

Rouleau J. in *Stevenson* agreed with this passage in Gibson J.’s decision and also approved of the reasoning of the Canadian Human Rights Tribunal in *Nkwazi v. Correctional Service Canada*, [2001] C.H.R.D. No. 29. The Tribunal referred to “compelling policy considerations relating to access to human rights adjudication process which favour the adoption of the *Thwaites* approach,” expressing the view that a narrow interpretation of the word “expenses” would “deny victims of discriminatory practices the right to recover their reasonable legal expenses associated with the pursuit of their complaints [and] would ... be contrary to the public policy underlying the *Canadian Human Rights Act*” [at para. 14].

It is true that the wording of the *Canadian Human Rights Act* is not identical to that of the Nova Scotia Act, but on this point I am not convinced that the difference in wording is all that significant. The federal Act provides a Canadian Human Rights Tribunal with a long list of remedial powers; one of these requires a person who violates the Act to “compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory practice.” The Nova Scotia Act is much more economical in its drafting; it simply authorizes a board of inquiry to order any party who contravenes the Act “to rectify any injury caused to any person or class of persons or to make compensation therefor.” I can see Mr. Moreash’s argument that the use of the term “injury” suggests a focus on the direct harm suffered by a victim of discrimination, as opposed to ancillary expenses to which the victim might be exposed in trying to pursue a complaint before the Commission. However, the language appears to me to be sufficiently general so as not to exclude the wider interpretation. The usage of the word “rectify,” which signifies “to put right” or “to make whole,” also suggests the wider interpretation. In simple terms, I think the legislation directs the board of inquiry to “make the complainant whole,” and I see nothing in the general language used to prohibit an award of legal costs. The learned editor

of the text *Discrimination and the Law* (Scarborough: Carswell, 2004) takes this approach at 15-125:

Neither the federal Act nor the legislation of the Northwest Territories, New Brunswick or Nova Scotia specifically confers a power on the respective tribunals to award costs. However, it could be plausibly argued that in both cases this power could be inferred from the plenary jurisdiction of the tribunals to bring about *restitutio in integrum* and/or to further the purposes of the enactments.

Mr. Moreash's argument would exclude not only an award of legal costs, but of the costs of expert evidence that might be required (assuming the Commission declined to pay), or indeed any out of pocket expenses to which the complainant might be put in trying to establish his or her case. The prospect of incurring such expenses without any prospect of reimbursement could well deter a complainant from pursuing a complaint under the Act to the point of adjudication. The whole point of the Nova Scotia *Human Rights Act* is to try and facilitate redress for victims of discrimination, and its provisions should be interpreted so as to try and achieve that end. Ultimately, I find that the reference to compensation for injury in the Nova Scotia Act is meant to include compensation both for direct harm as well as "compensation for expenses incurred" as those words are used in the federal Act. Mr. Moreash was understandably critical of the decision in *Stevenson* but until reversed by a higher court it stands as the latest word by the Federal Court on this issue. I find its reasoning persuasive in the Nova Scotia context for the reasons I have stated, and conclude that I have jurisdiction to make an award of costs against the respondents.

3. *On what principles should an award of costs be made?*

This is the most difficult aspect of the case. In previous cases where costs awards have been made in human rights proceedings, the amounts have either been relatively small – e.g., \$2000 in *Stevenson*, or the tribunal has simply ordered the respondent to pay the complainant's "reasonable costs" without further elaboration. Decisions by federal tribunals sometimes award costs on the Federal Court scale. If I am to follow the policy of "making the complainant whole" which I have found implicit in s. 34(8) of the *Human Rights Act*, then there is an argument that I should simply award full solicitor and client costs (or, as sometimes referred to in Nova Scotia, "solicitor and own client" costs) to Mr. Johnson. In this case Mr. Goldberg submitted an itemized bill of costs, including disbursements, amounting to nearly \$90,000 (including nearly \$11,000 in G.S.T.), beginning with a 50-minute phone call from Mr. Johnson on 12 April 1998, the night of the seizure of Mr. Johnson's car, and ending with his work on preparing the submission for this hearing, on 2 April 2004. The bill runs to some twelve pages, and shows very few months over that six-year period when there was not some activity on this file. Mr. Goldberg advised that he had removed from the bill those items relating to advice on a possible civil suit, which would not be properly recoverable in this proceeding.

One difficulty with the seemingly straightforward application of the full compensation principle to an award of legal costs is that it flies in the face of established principles on which costs are awarded in the civil litigation context. While the underlying rationale of costs awards has been the subject of remarkably little analysis, it is clear that they are not ordinarily meant to cover a successful plaintiff's entire legal bill. Only an award of solicitor and client costs approaches full compensation. Such an award "represent[s] an expression of censure or chastisement and will engender a certain element of opprobrium" and for that reason the courts are "loath to expand the restricted criteria for them": *House of Haynes (Restaurant) Ltd. v. Snook et al.* (1995), 417 A.P.R. 23 at 34-5 (Nfld. C.A.). The Supreme Court of Canada affirmed in *Young v. Young et al.*, (108), D.L.R. (4th) 193 that "solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties" [per McLachlin J. at 283].

It is true that the principles governing costs in the civil litigation context need not be applied automatically in the context of human rights tribunals, and Mr. Moreash conceded that the tariffs under the Civil Procedure Rules were not binding on me. Some difference in approach is probably warranted by the rather different interests protected. By and large civil litigation is about redressing harm that can be quantified fairly easily in monetary terms. Human rights proceedings typically relate to affronts to dignity and self-worth that are very difficult to evaluate monetarily, and that are commonly thought to be under-compensated under existing law. For this reason, it would not normally be appropriate to use as a guideline Nova Scotia Tariff A, which allows costs based on the amount awarded in the proceeding, e.g., \$2450 for a \$10,000 damages award based on Scale 5. However, I do not see any compelling policy reason for costs principles in the two contexts to diverge sharply from one another. In other words, I see no justification for taking as a starting point the full indemnity for solicitor's costs incurred by a separately represented and successful complainant in a human rights proceeding. Here I would agree with Mr. Moreash's argument at least in part. If boards of inquiry were to be authorized to award costs on an entirely different scale from that obtaining in civil litigation, I would expect to see some express reference to that in the governing legislation. The basic rule governing costs in Nova Scotia is that of "substantial but partial indemnification" (see *Campbell v. Jones*, [2001] N.S.J. No. 373 (S.C.) at paras. 54-72), and I intend to use that as my starting point in awarding costs. I also intend to apply a standard analogous to that enunciated in *Young* as a yardstick for deciding when solicitor and client costs should be awarded.

The most substantial discussion of costs in human rights proceedings occurs in two recent decisions by Canadian Human Rights Tribunal member Anne Mactavish, *Nkwazi v. Canada (Correctional Service)*, *supra*, and *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 17. In the latter she observed that those tribunal decisions which have awarded costs have usually done so on the basis that "special circumstances" were involved. In *Nkwazi v. Canada (Correctional Service)*, for example, the lawyer for the Canadian Human Rights Commission withdrew at the last minute before the hearing, leaving the complainant to represent herself. After an adjournment she arranged for her own counsel, and the tribunal found that she was unlikely to have been successful had she not done so. In other cases costs awards were justified on the basis

that there was a conflict between the position of the Commission and that of the complainant. In *Premakumar*, the Tribunal was faced with the same situation as I am here: “I am therefore left to decide whether a successful complainant should be able to recover his reasonable legal expenses, in the absence of most of the exceptional circumstances that have previously been found to support such an order, but where counsel has nonetheless made a valuable contribution to the process” [at para 21].

The Tribunal rejected Air Canada’s argument that there was “no reason why the company should be liable for a personal expense incurred by Mr. Premakumar as a result of what was a personal decision to hire his own lawyer” [at para. 21]. Mr. Moreash urged a similar argument on me, suggesting that “to allow a Complainant costs for his own private counsel is an affront to the system and procedure when his interests are already being represented by Commission lawyers” (at 9 of respondents’ factum). I reject this argument for the same reasons as the Tribunal did. As under the *Canadian Human Rights Act*, it is clear that the Nova Scotia Human Rights Commission and the complainant have distinct roles. As the Tribunal observed in *Premakumar* at para. 28, “the role of the Commission is to represent what it considers to be the public interest, whereas the role of the complainant is simply to advance his or her own interests. Commission counsel does not represent the complainant.” In a given proceeding it may appear that the public interest represented by the Commission and the private interest of the complainant are virtually identical, but that can change at any moment.

A good example occurred in *Nkwazi*, where prior to the hearing the respondent tendered an apology that Commission counsel thought satisfied the public interest. Ms. Nkwazi did not find the apology satisfactory to her and wished to proceed to the hearing. At that point Commission counsel withdrew, leaving Ms. Nkwazi to represent herself or find her own counsel. Something similar occurred in pre-hearing settlement discussions in this case, as revealed during the costs hearing (such information being privileged and unknown to the board during the hearing on the complaint itself). The Commission’s investigator recommended to the Commission that the complaint against Constable Sanford be discontinued and he made no recommendation regarding the Halifax Regional Police Service. He found reasonable the Halifax Regional Police’s offer to settle Mr. Johnson’s complaint on the basis of an apology and compensation of \$7500, but Mr. Johnson did not find the terms of the apology acceptable because it did not refer to racism or racial profiling as being part of the incident. Mr. Goldberg was obliged to urge the Commission repeatedly to proceed to a board of inquiry, as it seemed likely at a number of points that the Commission would dismiss the complaint without requesting the appointment of a board. In the end, of course, it did override the investigator’s lack of enthusiasm and requested the appointment of a board of inquiry to adjudicate on Mr. Johnson’s complaint. In other words, if Mr. Johnson had not been represented by a counsel who acted as a zealous advocate of his interests, it is unlikely that the complaint would have proceeded to adjudication. Even once the hearing started, there was no way of knowing whether the Police might make a new settlement offer that would have satisfied the Commission but not Mr. Johnson. Given his previous experience to that point, and his residence in Texas, which made it

difficult for him to follow developments in the case, it is not surprising that Mr. Johnson decided to continue to retain counsel rather than permit Commission counsel to carry the case alone.

I turn now to the question of quantum. *Premakumar* is of only indirect assistance on this point, as the Tribunal ordered the complainant to be reimbursed for his “reasonable legal expenses” but encouraged the parties to agree on an amount. More guidance is found in *Nkwazi*. In this case the Tribunal specifically awarded “reasonable solicitor and client legal expenses.” The treatment of the complainant by some employees and managers at the Correctional Service of Canada was truly “appalling” in that case, and the Tribunal found that prior to the commencement of the hearing, an employee of the respondent also attempted to intimidate a witness whose evidence supported Ms. Nkwazi’s complaint. Accordingly, the Tribunal found the respondent’s conduct met the high threshold established by the Supreme Court of Canada in *Young* for an award of solicitor and client legal expenses. The difference in wording between “reasonable legal expenses” in *Premakumar* and “reasonable solicitor and client expenses” in *Nkwazi* suggests that the Tribunal in the former case had in mind something more akin to party and party costs.

I find that the current case falls somewhere between *Nkwazi* and *Premakumar*. I do not find the conduct of Constable Sanford or the Halifax Police Service to meet the “reprehensible, scandalous and outrageous” standard of *Young* which is required for an award of solicitor and client costs. The incident in question did not reflect credit on either Constable Sanford or the Police Service, but it was essentially one incident, limited in its temporal scope. Mr. Johnson’s car was returned within less than 24 hours. There was no ongoing course of harassment (though of course Mr. Johnson continued to feel humiliated and upset by the incident for a long time), and no attempt to interfere with the course of justice as in *Nkwazi*. The police cooperated with the Human Rights Commission in its investigation, and made a settlement offer that the Commission’s own investigator found to be reasonable. It is surprising neither that the Police Service did not wish to admit racist overtones to the incident, nor that Mr. Johnson found an apology lacking such an admission to be insufficient. The fact that they could not agree on this central facet of the case does not mean either one was being unreasonable.

I feel nonetheless that an award of party and party costs would not achieve justice in this case. Ultimately it was the actions of Constable Sanford and the Halifax Police Service that obliged Mr. Johnson to hire a lawyer. With minimal legal assistance, he first tried to get what he sought from the police complaints process, and failed. Given his residence in Texas, he was not in a position to pursue aggressively his complaint with Human Rights Commission. Even with legal assistance, it became increasingly clear that the mediation and conciliation process undertaken by the Commission was not going to produce what he wanted, which was an express acknowledgement that the seizure of his car was motivated by racist attitudes. I pause to observe here that one may infer from the small number of complaints that proceed to a board of inquiry, that the Commission has a strong preference for settling complaints. According to the Commission’s *Annual Report 2001-02*, for example, 66 complaints were settled in that year, while according to the Commission’s website only three boards of inquiry rendered decisions in

2002 and only five in 2003. This profile is similar to that of civil litigation, where only a very small percentage of litigation commenced actually proceeds to final judgment. There are good reasons why this should be so even with complaints that are found by the Commission to be prima facie valid, but it means that only a very determined complainant is likely to be able to proceed to full adjudication of his or her complaint. Such a complainant is likely to experience the Commission as in some sense an obstacle rather than an ally in this regard, and is understandably going to seek separate representation if economically feasible. While the complainant should not be able to transfer his or her costs of counsel automatically to the respondent in case of success, neither should the ability to recover costs be set at such a low level that complainants are discouraged from seeking independent counsel.

Mr. Goldberg was not called in simply to represent Mr. Johnson before the hearing, after the complainant had been through the Commission's internal process on his own. Had that been the case, I probably would have ordered costs more in the party and party range. Mr. Goldberg represented his client's interests from the very day in 1998 when Mr. Johnson's car was seized, and continued to do so during the long process of mediation, conciliation and investigation that followed that event. I feel confident in saying that without Mr. Goldberg's zealous advocacy, Mr. Johnson's complaint would not have proceeded to a board of inquiry. This factor deserves some weight in assessing the quantum of the award.

Weighing these various factors, I conclude that Mr. Johnson should be awarded two-thirds of those costs in Mr. Goldberg's bill which are found to be reasonable after taxation. Mr. Goldberg is allowed to add to his bill as submitted at the hearing a reasonable amount for his appearance at the hearing on 19 April. In summary, Mr. Goldberg is to submit his bill to the taxing master at Halifax for taxation, as if this were a solicitor and own client award. The master will then tax the bill and once the final amount is arrived at, I order the Halifax Regional Police Service to pay two-thirds of that amount to Mr. Johnson. Interest at 5% will run on that amount once it is determined by the master, until the date of payment.

28 May 2004

Philip Girard
Board of Inquiry