

## **The Cost of Reprisal: The Human Rights Tribunal Of Alberta Awards Former Mobil Oil Canada Employee \$650,000**

**By: Kelly McDermott**

After 19 years of protracted litigation, the Human Rights Tribunal of Alberta has now awarded a former employee of Mobil Oil Canada \$650,000 in damages.

This case is a cautionary tale for employers about the potential cost of human rights complaints. The case also provides insight on: 1) the assessment of loss of earnings damages where a violation of human rights is found to have occurred; and 2) determining when an employer will be found to have retaliated or committed a reprisal against an employee.

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### **Background Facts**

In August of 1991, Walsh filed a human rights complaint against Mobil alleging that she was discriminated against based on her gender in contravention of the Alberta Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14 ("Act"). The basis for her claim was twofold: 1) she encountered a number of gender related obstacles in seeking to become a field worker; and 2) she did not receive employment designations and compensation equal to her male co-workers doing similar work.

In November of 1993, Walsh met with Mobil to discuss the human rights complaint. Prior to this meeting, Walsh had received consistently good performance reviews. However, after this meeting Walsh began to receive poor performance reviews and was put on an aggressive action plan to address performance concerns. On February 21, 1995, Walsh was terminated as a result of these stated performance concerns. In response to her termination, Walsh filed a second human rights complaint in August of 1995 alleging that her dismissal was retaliation/reprisal for pursuing her first human rights complaint against Mobil.

The Alberta Human Rights Tribunal determined that: 1) Walsh was discriminated against with respect to her salary and promotion, but her claims for damages were statutorily time limited; 2) Walsh was not discriminated against with respect to her efforts to become a field worker; and 3) Mobil did not retaliate against Walsh for filing a human rights complaint.

Walsh appealed this decision to the Court of Queen's Bench. The reviewing judge reversed the Tribunal's decisions and found that: 1) Walsh's claim for damages with respect to salary and promotions were not statutorily time limited; 2) Walsh was discriminated against with respect to her efforts to become a field worker; and 3) Mobil had retaliated against Walsh for filing a human rights complaint. Mobil appealed the reviewing judge's decision to the Court of Appeal. The Alberta Court of Appeal affirmed the reviewing judge's decision in principle and the matter was referred back to the Human Rights Tribunal of Alberta to assess damages.

## **Damages for Lost Earnings**

The Mobil Oil case provides some insight into how human rights tribunals will assess damages for lost earnings in a protracted legal battle.

The Mobil Oil case is the oldest case in Canadian human rights history even though the delay was not found to be attributable to the misconduct of either party. Nonetheless, a large portion of Walsh's \$4 million damage claim was for lost earnings and benefits that accrued during this delay.

There are no limits on the amount of lost earnings a human rights tribunal can award. Further, there is no consistent practice among human rights tribunals in assessing when lost earnings stop accruing. In many cases, lost earnings have been awarded from the date of the incident right through to the decision date.

In Mobil Oil, the Alberta Human Rights Tribunal determined that common sense and reasonableness dictates that there has to be a cut off point to liability where considerable time has lapsed between the discriminatory act and the damages to be awarded. The Tribunal emphasized the need for a causal link between the discriminatory practices and the loss claimed. In the instant case, the Tribunal found that the reasonable cut off date was 2000, because after 2000 there was no causal link between the acts of discrimination and Walsh's inability to work.

Even though this case is from Alberta, this decision is a useful precedent for all Canadian employers embroiled in lengthy human rights litigation. This case makes clear that there should be a causal link between lost earnings and the alleged human rights breach as opposed to simply awarding an arbitrary number for lost earnings or awarding lost earnings all the way to retirement.

## **What Constitutes a Reprisal/Retaliation?**

In addition to providing a good precedent for limiting loss of earning claims, the Mobil Oil case clarifies the test for whether an employer has retaliated or committed a reprisal against an employee contrary to human rights legislation.

The Court of Queen's Bench suggested that the proper test for retaliation/reprisal is whether the employee can establish that a reasonable person in his or her position would "perceive" that his/her dismissal was, at least in part, motivated by retaliation. The test focused on the employee's perception- not the employer's actual intent. The Court of Appeal found that the reviewing judge erred in his articulation of this test.

The Court found that whether proven directly or inferentially, intent is a necessary aspect of the test. The Court set out a two-part test for establishing such intent:

- 1) Is there a link between the employer's alleged conduct and the filing of the complaint?
- 2) Was the employer's alleged conduct, at least in part, a deliberate response to the complaint?

The good news for employers is that intent matters and an employee's perception of events will not factor into the equation. The bad news for employers is that establishing intent is relatively easy.

First, the employer's conduct does not have to be wholly attributable to retribution/reprisal- it only needs to form part of the reason for the conduct. Second, intent can be established inferentially through facts and timing of events. In the Mobil Oil case, the Court of Appeal found that: the aggressive monitoring of work performance, the unreasonable terms and implementation of the work improvement plan and the timing of the events created an inference of retaliation/reprisal.

## **Practical Tips For Employers**

The Mobil Oil case provides some practical tips for employers on how to avoid a finding that they have committed a reprisal or have retaliated against an active employee who has filed a human rights complaint:

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- 1) Ensure that any employees named as individual respondents or key witnesses in a human rights complaint are not responsible for key decisions with respect to the complainant's employment status;
- 2) Any decision that may negatively impact the complainant should be carefully considered and well documented. Once a human rights complaint is filed, the employer's conduct will be under close scrutiny by the Tribunal; and
- 3) Don't assume that a settlement, disposition or dismissal of a human rights complaint necessarily ends the matter. An employee can bring a retaliation/reprisal complaint even if the original complaint in question was resolved or disposed of. Therefore, an employer's actions following the disposition of a human rights complaint will remain under scrutiny.

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