Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 15

Date: June 22, 2015

File Nos.: T1111/9205, T1112/9305 & T1113/9405

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Respondent

Implementation Decision on Eligible Work

Member: Matthew D. Garfield

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I. Introduction

[1] The Complainant, Karen McIlroy, has filed a motion challenging the end date of her Eligible Work period as determined by her former employer, Employment and Social Development Canada ("ESDC"), formerly Human Resources and Skills Development Canada ("HRSDC") and Social Development Canada ("SDC"), as part of the implementation of the Memorandum of Agreement of July 3, 2012 between Ruth Walden et al. and the Attorney General of Canada ("MOA"). For the reasons that follow, the motion is dismissed.

II. Main Proceeding: *Walden et al. v. Attorney General of Canada*

[2] The MOA is the result of human rights complaints filed by Ruth Walden and 416 other Complainants between 2004 and 2007, challenging the classification of Medical Adjudicators ("MAs"), a group made up predominantly of female nurses involved in the assessment/adjudication of applications for *Canada Pension Plan* ("CPP") disability benefits, when compared to Medical Advisors, a group made up predominantly of male doctors working alongside the MAs. The Complainants alleged that, as a result of their classification, Medical Advisors received better compensation, benefits, training, professional recognition and opportunities for advancement than MAs despite the fact that both groups performed similar work in the assessment/adjudication of CPP disability benefit applications.

[3] In a decision dated December 13, 2007 (*Walden et al. v. Attorney General*, 2007 CHRT 56 ("Liability Decision")), the Canadian Human Rights Tribunal ("Tribunal") found that while there were some differences in the day-to-day responsibilities of Medical Advisors and MAs, the "core function" of each position was the same and both positions required the application of professional knowledge and expertise in determining applicants' eligibility for CPP disability benefits. The Tribunal concluded that the Government's refusal to recognize the professional nature of the work performed by MAs in a manner proportionate to the professional recognition awarded to the work of Medical Advisors amounted to adverse differentiation on the ground of sex and violated both sections 7 and

10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 as amended ("*CHRA*"). This decision was upheld by the Federal Court on judicial review: *Canada (Attorney General) v. Walden*, 2010 FC 490.

[4] The Tribunal made a separate award on remedies in a decision dated May 25, 2009: *Walden et al. v. Attorney General*, 2009 CHRT 16 ("Remedy Decision"). In this decision, the Tribunal concluded that the creation of a new Nursing (NU) Sub-Group within the SH [Health Services] Occupational Group for the Medical Adjudication position would recognize suitably MAs as health care professionals, thereby acknowledging that they apply their comprehensive knowledge of the professional specialty of nursing to their work. The Tribunal found that this would be the most appropriate way to redress the discriminatory practice identified in the Liability Decision and ordered that work on the creation of the new NU Sub-Group commence within 60 days of the date of the decision. The Tribunal did not otherwise award any compensation for wage loss and ordered compensation for pain and suffering to two individuals only.

[5] On judicial review of the Remedy Decision (see *Walden v. Canada*, 2010 FC 1135), the Federal Court upheld the Tribunal's conclusions regarding the creation of the new Sub-Group, but set aside the Tribunal's conclusions vis-à-vis compensation for lost wages and pain and suffering. The Court remitted both of these matters back to a new panel of the Tribunal for redetermination. The Federal Court of Appeal upheld this decision: *Attorney General v. Walden et al.*, 2011 FCA 202. I was assigned the matter as the new "panel" by the Chair of the Tribunal in December of 2010.

[6] Following these decisions, the Respondent created the MA NU Sub-Group as part of the Public Service Nursing Classification Standard. It is defined as: "Positions responsible for determining the medical eligibility of applicants for a government program or for the provision of expert advice related to medical adjudication" and includes two levels of Medical Adjudication nursing positions: the NU-EMA-01 which involves "the assessment of medical information for the purposes of determining the eligibility of applicants for a federal government program" and the NU-EMA-02 which "accommodates supervisory medical adjudication nursing positions or technical specialist and/or expert positions in headquarters and/or the Regions".

[7] The parties also negotiated settlements on appropriate remedies to redress the discriminatory practice: first dealing with compensation for pain and suffering and expressed in an Order on consent dated October 26, 2011; then on July 3, 2012, concluding the MOA which sought to resolve all remaining issues, including lost wages/benefits. It is the MOA that forms the subject matter of this motion.

[8] The MOA awards $16,500 per year to individuals who are determined to have performed "Eligible Work" during the "Eligibility Period" which spans from December 1, 1999 to September 30, 2011. The MOA also provides for the payment of interest, other compensation for individuals who completed Eligible Work for periods prior to December 1, 1999, as well as additional compensation for pain and suffering as per s. 53(2)(e) of the *CHRA*.

[9] Eligible Work is defined under Section 1, "Definition of Terms" of the MOA:

> **"Eligible Work"** is defined as described in paragraph 4 of the Tribunal's order dated October 26, 2011, that is, the individual was primarily employed in the CPP Disability Program in Human Resources and Skills Development Canada (HRSDC) either conducting adjudications (i.e. assessing medical information for the purposes of determining eligibility for CPP disability benefits and, in doing so, was required to use knowledge associated with being a registered nurse) or providing expert advice to or directly supervising those who did conduct adjudications.

[10] On July 31, 2012, the Tribunal issued a Consent Order implementing the terms of the MOA. The Tribunal retained full jurisdiction to deal with any dispute or controversy surrounding the meaning or interpretation of the MOA upon the application of any party, or individual who may have performed Eligible Work as defined in the MOA. The Tribunal initially retained this jurisdiction until June 30, 2014 but has since extended this date to March 31, 2015, and then on consent to June 30, 2015 with respect to the issue of gross–up payments only.

III. Motion for Redetermination of Eligible Work

[11] On August 21, 2014, the Complainant brought a motion challenging the end date of Eligible Work determined for her by the Respondent pursuant to the MOA. The

Respondent has compensated the Complainant for the Eligible Work she performed as a MA between January 22, 1996 and September 4, 2006. This time period and compensation amount are not in dispute. The Complainant requests that the Tribunal make an Order to have the Respondent recognize her work activities as Eligible Work during the period of December 17, 2007 to September 30, 2011 ("Disputed Period"). The Complainant alleges that from December 17, 2007 until January 23, 2011 when she worked as a PM-05 Program Manager in the AA Division of the CPP Disability ("CPPD") Directorate, as well as from January 24, 2011 until September 30, 2011 when she worked as a PM-06 Senior Policy Advisor in this Division, she was "providing expert advice to" and/or "directly supervising those who did conduct adjudications" as per the MOA Eligible Work definition.

[12] The Respondent opposes this motion.

IV. The CPP and Institutional Structure

[13] In examining the Complainant's work during the Disputed Period, it is helpful to have a clear understanding of the role of the AA Division and how this role falls within the broader allocation of responsibilities with regard to the administration of the CPPD Program as a whole. For this reason, I have provided an overview of the CPP, and in particular its subset CPPD Program and explain how and by whom this program has been developed and delivered. This will provide important context to the MOA and to the role of the MAs which it seeks to compensate in the *Walden* human rights litigation.

A. The CPP and CPPD

[14] The CPP is a contributory, earnings-related social insurance program which seeks to ensure a measure of protection to a contributor and his or her family against the loss of income due to retirement, disability and death. It is a $37 billion program, the Government of Canada's biggest program.

[15] The CPPD is a program within the CPP that is intended to provide protection against loss of earnings due to disability for eligible CPP contributors. CPPD benefits are

paid to claimants with severe and prolonged physical and mental disabilities, who have made sufficient contributions to the CPP. The CPPD program provides $4 billion in benefits to over 330,000 applicants each year, making it the biggest disability benefits insurer by far in the country.

[16] Eligibility for CPPD benefits is determined through a multi-stage process. Both the MAs and Medical Advisors have the primary responsibility and function of determining this eligibility. The Tribunal has previously summarized this process as follows (Liability Decision at para. 36):[1]

a) an individual makes an application for benefits;
b) an initial determination is made about whether to grant the benefits on the basis of the eligibility criteria;
c) if the application is denied, the applicant may apply for a reconsideration of the decision;
d) if benefits are denied at the reconsideration stage, the applicant may appeal the decision to the Review Tribunal (RT) (formerly known as the Review Committee);
e) if benefits are again denied at the RT stage, the applicant may apply for leave to appeal to the Pension Appeals Board (PAB);
f) if the applicant is granted benefits at the RT stage, the Minister in charge of the CPP program may apply for leave to appeal the RT decision;
g) both the applicant and the Minister may apply to the Federal Court of Appeal for judicial review of the PAB decision;
h) at any stage of the process, an applicant may submit additional or new medical or non-medical information. The decision-maker at that particular stage considers the information in determining eligibility for CPP disability benefits.

[17] It is worth mentioning that over ninety percent of all applications for CPP disability benefits are conclusively determined at the initial or reconsideration levels and that

[1] There have been statutory changes since then, including the creation of the Social Security Tribunal thereby replacing the Review Tribunals and the Pension Appeals Board.

relatively few cases are appealed to the RT or PAB. Even fewer numbers of cases are the subject of applications for judicial review: Liability Decision at para. 37.

[18] The CPP and the CPPD are currently administered by ESDC (HRSDC during the Disputed Period) as well as Service Canada ("SC"). ESDC is the department of the Government of Canada responsible for developing, managing and delivering social programs and services. SC was created within HRSDC in 2005 to operate as a primary access point for the general public to many Government of Canada programs and services. It is the delivery arm of ESDC and other federal departments and is a part of ESDC.

[19] Prior to the creation of SC in 2005, the CPPD Program was administered by HRSDC through the CPPD Directorate. The Respondent recognizes that during this period, the Directorate included positions which performed Eligible Work, including the provision of expert advice to those conducting adjudications. Ms. McIlroy was compensated for this type of Eligible Work up to September 2006 for this reason. The Respondent's position, however, is that since SC came into existence, the vast majority of the positions performing Eligible Work (i.e., approximately 400 MAs) fall under the purview of SC and are no longer a part of the CPPD Directorate.

[20] In December 2008, HRSDC and SC signed a Memorandum of Understanding ("MoU") which, among other things, defines the roles and responsibilities of each of the parties vis-à-vis the CPP. According to section 7.4 of the MoU, HRSDC retains the full accountability for the legislation, regulations and policy design of the CPP Account, while SC administers and delivers the CPP to ensure it is efficient, responsive, and economical.

[21] Pursuant to the MoU, the responsibility for the CPPD Program is shared between the Income Security and Social Development Branch ("ISSD") of HRSDC (which houses the CPPD Directorate) and SC. The Operations Branch of SC subsequently became the Processing and Payment Services Branch ("PPSB"). The PPSB is composed of: (i) the National Headquarters ("NHQ") - the "central hub" - which is responsible for, among other things, providing operational direction/guidance to, supervising and supporting, and liaising with, the MAs in the Regions; and (ii) the Regional offices, where the vast majority of MAs

are situated and conduct the adjudications. There is also a small number of MAs situated at NHQ.[2]

[22] In 2006–2007, following the creation of SC, the vast majority of the MA positions responsible for adjudicating disability claims and the positions supervising those MAs who did the adjudications, moved to the SC side of HRSDC. The majority of the PM-04 and PM-05 level positions in PPSB NHQ were subsequently converted to NU-EMA-02 positions. The PM-04 level MA positions were converted to NU-EMA-01 positions. It is undisputed that the vast majority of Complainants and non-Complainants in the *Walden* proceeding are, or were, employed on the SC side of HRSDC (now ESDC).

B. CPPD Directorate

[23] The ISSD Branch of ESDC houses the CPPD Directorate, which is a separate organization from SC's PPSB (NHQ and Regions). Since 2005, the CPPD Directorate has provided national leadership in the development and ongoing management of the CPPD Program. The Directorate develops legislation, regulations and policy, and translates policy intent into functional direction to the PPSB.

[24] During the Disputed Period, the CPPD Directorate had four divisions: the Policy Division; the Program Design Division; the Medical Expertise Division ("ME Division"); and the Adjudication and Appeals Division ("AA Division"). The evidence and argument in this motion focussed on the latter two Divisions.

[25] The ME Division reviewed all RT decisions and prepared recommendations to the Litigation Committee regarding any Minister's appeals to the PAB. It presented the Minister's position before the PAB. It also provided medical expertise to all areas of CPPD including to SC MAs. According to the Respondent, the small number of MAs who remained within the CPPD Directorate worked in this Division to support work on case files

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[2] In the motion-hearing, the witnesses sometimes spoke of "PPSB" and "NHQ" interchangeably. I agree with Ms. McIlroy's explanation for this: "…although PPSB covers both the Regions and NHQ, the Regions are usually referred to by the location of the Region; i.e. the Atlantic Region not the PPSB Atlantic Region, whereas PPSB NHQ may have been referred to as either PPSB or just NHQ depending on the context."

for appeals to the PAB. The Respondent has stated that all of these individuals occupied positions with job titles of either “MA” or “Manager, MA” and performed work that was consistent with the definition of work in the NU classification standard. These positions were converted to NU-EMA positions.

[26] The AA Division, where the Complainant worked during the Disputed Period, performed the following role and function:

a) Provides functional support, national direction and development of process related to Review Tribunal appeals;
b) Serves as the branch liaison with the Office of the Commissioner of Review Tribunals;
c) Supports strategic management of CPPD appeals; and
d) Provides expert advice and functional direction related to CPPD adjudication.

[27] The above role includes providing expert advice to SC relating to complex CPPD adjudication and appeals. More specifically, it incorporates the following tasks:

(1) Responding to Regional inquiries relating to adjudication, including with regard to initial applications and reconsiderations as well as relating to appeals;

(2) Consulting with medical, legal and other experts relating to CPPD adjudication and appeal cases;

(3) Providing functional direction and expert advice on complex appeal cases to SC; and

(4) Reviewing for policy consistency SC training materials, procedures and tools.

[28] In this motion, the Complainant has argued that the work that she completed as a PM-05 and PM-06 in the AA Division constitutes Eligible Work pursuant to the MOA as a primary portion of her work involved “providing expert advice to or directly supervising those who did conduct adjudications” as per the MOA Eligible Work definition.

V. Parties' Positions

A. Complainant's Work Tasks as a PM-05 in the AA Division

[29] On September 5, 2006, the Complainant left the CPPD Directorate where she had been working as a PM-04 to take a job promotion as a PM-05 in another Department. On December 17, 2007, at the beginning of the Disputed Period, the Complainant returned to HRSDC to work in the CPPD Directorate in the AA Division, as a PM-05, with a job title of Program Manager (listed as Senior Project Officer in the AA Division Chart).

[30] The Complainant alleges that during this time, a primary portion of her work involved the provision of expert advice to MAs working in the PPSB Regional offices, PPSB NHQ and also within the AA Division itself. The Complainant alleges that part of her work activities involved answering and assisting her PM-05 colleagues in responding to case-specific inquiries that the Division would receive from MAs working in the Regional offices and at NHQ. In so doing, the Complainant would review the details of the file and use her policy and programming knowledge as well as her expertise as a former nurse and MA to provide a response. While the MAs made the final decision on the files, the Complainant argued that they did so with the benefit of the expert advice that she provided.

[31] In addition to providing this type of case-specific expert advice, the Complainant averred that she also provided general policy advice to the MAs in her Division - Ms. Boland and Ms. McGuire - as well as to the MAs working at SC, mainly in the Regions, and to the PM-05s at NHQ. The Complainant argues that in her development of policies and in providing guidelines to the MAs to support them in their role of adjudicating files, she was also providing expert advice pursuant to the MOA. In order for MAs to make disability determinations, the Complainant submits that they must have knowledge of both nursing and CPPD policies as both of these areas are interlinked and necessary to ensure the consistent and fair application of CPP legislation in the adjudication of CPPD claims.

[32] The Complainant argues that this is supported by the overall role of the AA Division which is to provide expert advice to MAs on issues related to medical adjudication. The

Complainant disputes the contention that the expert advice envisaged under the MOA excludes general policy advice. The Complainant relies in this regard on the Tribunal's Liability Decision where, at para. 65, the Tribunal recognized that :

> Both medical advisors and adjudicators may be involved in outreach and policy development work. Dr. Gregory works with other medical advisors on policy development and analysis. Ruth Walden testified that she knew of at least one MA who is working in the policy development area. The MA's job description stipulates that adjudicators may participate in or lead teams engaged in training and policy development.

[33] The Complainant further notes that there is no mention of the type of "expert advice" that must be provided in the MOA. According to the *Oxford Dictionary*, an expert is defined as someone trained by practice, who possesses special skill or knowledge. There is no question that with her 20 years of nursing experience, 10 years of experience as a MA as well as her policy experience, the Complainant qualifies as possessing special skill and knowledge. She argues that in advising the MAs on policy and on specific cases, she was applying this knowledge to their benefit.

[34] The Complainant maintains that she continued to provide both case-specific and general expert policy advice to Ms. Boland and Ms. McGuire, as well as to the MAs at the NHQ and in the Regional offices of SC when she became a PM-06 in January 2011. She argues that as a result, she provided expert advice pursuant to the MOA during the entirety of the Disputed Period.

[35] The Respondent roots its opposing position in two main arguments. First, the Respondent advocates for a narrower interpretation of "expert advice" pursuant to the MOA, arguing that its definition is limited to the provision of *direct* advice to MAs in adjudicating specific cases and does not extend to policy work or expert advice that is "twice-removed". Second, according to this interpretation, the Respondent submits that while the Complainant may have performed some Eligible Work in responding to case-specific inquiries by MAs, the Complainant did not provide expert advice as a *primary* part of her work, as the definition requires.

[36] With respect to the Respondent's first argument, it submits that the Complainant's main or primary role was to develop and provide national policy direction for the CPPD program, with a focus on adjudication and appeal policy issues. The purpose of the Complainant's advice was to ensure the development and consistent application of CPPD policies so as to create a framework for the nationally consistent delivery of the CPPD program, including adjudication of applications and review of cases on appeal. This included offering advice on how, for example, to interpret the legislation, regulations and policy in the case of complex disability claims.

[37] The type of expert advice the Complainant provided dealt with program policy advice that was in line with the CPPD Directorate's role to ensure that the legislation and policy was sufficiently clear and properly applied. This is not, according to the Respondent, the same as the expert medical adjudication advice intended in the MOA. Indeed, with the exception of the one example in the footnote below, ESDC has not paid compensation for Eligible Work during the Disputed Period in which an individual occupied a substantive program manager/project officer position in the CPPD Directorate's AA Division.[3]

[38] The Respondent also argues that most of the expert medical adjudication advice that the Complainant did perform was not provided *directly* to the MAs, but was provided to their supervisors or to Business Experts (formerly called Team Leads), who were providing expert advice to the MAs directly. The majority of the MAs worked in the SC Regional offices and generally went through NHQ to obtain any expert advice not available in their respective Regions. The Complainant's primary function was to provide overall policy advice to NHQ and in this respect, her advice was rarely directly provided to the Regional MAs. The Respondent is of the view that this type of indirect or twice-removed expert advice falls outside the MOA definition of Eligible Work.

[39] Turning to the Respondent's second argument, while the Respondent recognizes that the Complainant occasionally directly provided expert advice to individuals conducting

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[3] Ms. Pichette testified that only one individual in the AA Division, a senior project officer, received compensation for providing "expert advice" under the MOA during the Disputed Period and for only two months due to "specific circumstances" which she explained.

adjudications, the Respondent argues that this did not constitute a *primary* part of her job. According to the Respondent, primary is defined as more than fifty percent. Even if we accept the Complainant's description of her own work activities, the few activities where she provided expert advice on specific case files and met the Eligible Work definition did not amount to more than fifty percent of her overall workload.

[40] It is for these reasons that the Respondent determined that the Complainant was not performing Eligible Work during her work as a PM-05 in the AA Division during the Disputed Period and decided not to compensate her as a result.

B. Complainant's Work Tasks as a PM-06 in the AA Division

[41] On January 24, 2011, the Complainant was offered a PM-06 position, with the job title of Senior Policy Advisor (the Respondent also termed it Senior Policy Analyst). The Complainant alleges that this title did not accurately reflect her actual work activities because rather than create a new position, the Respondent transferred this position from another Division of the CPPD Directorate. The Complainant submits that notwithstanding this job title, she continued to provide expert advice to MAs in the Regions, NHQ and the AA Division. She alleges that in this capacity, she also frequently supervised the MAs in the AA Division as well as the other PM-05s in the absence of the Director, thereby "directly supervising those who did conduct adjudications" as per the MOA definition.

[42] According to the Complainant, the two MAs in the AA Division, Ms. Boland and Ms. McGuire, did not work on first level, initial applications or files at the reconsideration stage, but did work on files appealed to the Review Tribunal. In so doing, the Complainant alleges that Ms. Boland and Ms. McGuire had to review all of the medical files so as to provide an explanation for the denial of the application at the reconsideration stage. The Complainant argues that this work is akin to the work of medical adjudication and therefore, Ms. Boland and Ms. McGuire conducted similar work to the MAs in the Regions. She notes that Ms. Boland and Ms. McGuire were recognized as nurses and classified as MAs. In 2012, they were converted to the NU-EMA classification. Both Ms. Boland and

Ms. McGuire were compensated for having performed Eligible Work during the time that they worked in the AA Division.

[43] The Respondent argues on the contrary, that Ms. Boland and Ms. McGuire did not perform MA work in their positions at the AA Division. They performed work that included putting together reports and providing evaluations for Review Tribunal cases. They also made recommendations to the MAs in the Regions. However, unlike the MAs working in the Regions, they possessed no authority to settle and did not conduct adjudications. Nevertheless, the Respondent took a liberal approach to the MOA and chose to compensate both Ms. Boland and Ms. McGuire because their substantive or "home" positions were as MAs in the ME Division.

[44] In the event that the Tribunal accepts that the work of Ms. Boland and Ms. McGuire was medical adjudication work as per the MOA, the Respondent also argues that the Complainant's supervision of these employees did not constitute the *primary* part of her job. As a PM-06 she would have supervised a number of other PM-04 and PM-05 positions too. In the periods that she replaced the Division Director, she would have been supervising the entire AA Division which, during the Disputed Period, would have amounted to approximately fifteen individuals in addition to Ms. Boland and Ms. McGuire. The Respondent also notes that, much like the Complainant, Mr. Dubé, the Senior Manager PM-06, also replaced the Division Director but did not receive any compensation under the MOA for having supervised MAs.

[45] The Respondent argues that for these reasons, the Complainant cannot be said to have performed Eligible Work during her time as a PM-06.

C. Eligible Work of Other PM-05s at PPSB NHQ

[46] The Complainant alleges that, the fact the Respondent concluded that other individuals who worked at SC's PPSB NHQ (like Marjorie Martin, a Project Manager with whom the Complainant worked closely) and who performed similar work to the Complainant were providing expert advice to those who conducted adjudications, further supports her claim. The Complainant notes that she possessed a similar background and

conducted work that was comparable to that of the other PM-05 employees working at NHQ who were classified as NU-EMA-02 and were considered to be performing Eligible Work. She argues that the PM-05 employees at NHQ often came to her or her colleagues with inquiries related to medical adjudication from the Regional MAs because they required her expert advice. The Complainant describes their relationship as “collaborative”, and one of “shared expertise”.

[47] The Respondent disagrees with the Complainant’s contention that her work was the same as her PM-05 counterparts working at NHQ. As reflected in the MoU, there were important differences between the nature of the work conducted by the ISSD Branch, including the AA Division, and SC’s PPSB. The individuals occupying PM-05 positions at PPSB who received compensation under the MOA performed as either Program Managers/Project Officers, Business Experts (formerly Team Leads) or senior MAs. Unlike the Complainant’s position, they were the MAs’ first point-of-contact, either providing them with expert advice on medical adjudications or directly supervising them. These positions also all *required* nursing knowledge and experience as an essential qualification and were subsequently converted to NU-EMA-02 positions on this basis.

D. Complainant’s Job Description

[48] The Complainant submits that she did not possess an accurate job description for either the PM-05 or the PM-06 position that she occupied during the Disputed Period. Both the job offer and the position number listed on the job description that were initially provided to the Complainant in September 2014 were inaccurate. While she subsequently obtained a job description for the PM-05 position in November 2014 which contained the correct position number, the list of duties did not accurately reflect the work she performed. Furthermore, the Complainant alleges that the PM-06 position she occupied was transferred from another Division and she never obtained a job description. She also notes that none was filed during this motion-hearing. The Complainant maintains that as a result, in examining her work activities so as to determine whether she was in fact performing Eligible Work, the Tribunal should place no weight on the job descriptions entered into evidence.

[49] The Respondent concedes that there were "issues" regarding the accuracy of job descriptions during the Disputed Period, but notes that these are typically customized with Addendums that provide greater precision. Having said this, while the three generic job descriptions ("minus the Addendums" which were incorrect) that were entered into evidence may not precisely reflect the Complainant's work, they do provide an overview of the work that her and her colleagues in the AA Division were undertaking. Furthermore, the Respondent notes that while reference was made to the work descriptions in determining who performed Eligible Work, they were not the *sole* basis upon which these determinations were made. The Respondent also considered the overall role of the Division as well as the actual work performed by the employees, as communicated by the Division Directors and detailed in ongoing work reports.

E. Complainant's Status as a Registered Nurse

[50] The Respondent notes that the definition of Eligible Work under the MOA requires those conducting adjudications to employ "the use of knowledge associated with being a registered nurse" and submits that this requirement also applies to those providing expert advice and directly supervising those who conduct adjudications. Being a Registered Nurse must, according to the Respondent, constitute an essential or "required" qualification of the individual's position if he or she is to be found to have performed Eligible Work.

[51] The Respondent submits that the MOA, in this regard, must be interpreted in light of the broader litigation context from which it emanated. The MOA sought to compensate the Complainants and non-Complainant "victims" (per the language of the *CHRA*)[4] for their losses from the adverse differential treatment that they suffered in relation to their Medical Advisor counterparts. Almost all of those compensated were Registered Nurses. This requirement is also reflected in the fact that the NU-EMA Sub-Group definitions, which are

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[4] Although not ordered in this case, such Orders for non-Complainant "victims" have been made by the Tribunal in other cases: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995; and *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39.

the result of the Tribunal's Liability Decision, require the qualification of being a Registered Nurse.[5] The development of the NU-EMA work descriptions and the determinations of the positions which were converted to NU-EMA positions were carefully considered, following numerous consultations and discussions among human resources professionals. The Respondent argues that in concluding the MOA, the parties' underlying intent was to compensate individuals who were required to be Registered Nurses as part of their positions. This includes those providing expert advice and supervising those conducting adjudications. The Respondent argues that this requirement should be read into the MOA Eligible Work definition for the individuals in those two categories.

[52] The Respondent recognizes that the Complainant's nursing and medical adjudication knowledge, skills and expertise were certainly an asset to her position, but argues that this did not constitute an essential qualification of her position. The majority of the Complainant's tasks involved the provision of legal, analytical or generic policy advice, none of which *required* a Registered Nurse background. If such expertise was required, employees within the AA Division could consult the ME Division. The Respondent argues that this further supports its position that the Complainant was not performing Eligible Work during the Disputed Period.

[53] The Complainant disagrees with the Respondent's assessment of her position and alleges that her numerous years of prior experience as a nurse and as a MA were key in her ability to perform her work, both as a PM-05 and PM-06. The fact that all of the PM-05 project officers in the AA Division had nursing and medical adjudication backgrounds supports her argument that this was a requirement of her position. The Complainant argues that the Respondent implicitly acknowledged that this experience was a requirement when it agreed to reimburse her for her Registered Nurse licensing and registration fees. The decision to make this reimbursement was made as part of the Programs and Administrative Services (PA) Collective Agreement to those "who as a

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[5] The Statement of Merit Criteria and Conditions of Employment for the Medical Consultant NU-EMA-02 position contains a "grandparent" provision regarding the requirement of a Nursing qualification for any incumbent PM who became a NU-EMA on October 1, 2011.

regular part of their work, rely on the medical knowledge obtained through education and training and/or registration as a Registered Nurse". Therefore, in agreeing to reimburse these fees, the Respondent recognized that the Complainant was applying her nursing knowledge in performing her work activities. The Complainant argues that this same fact should be considered in determining her dates for Eligible Work.

[54] The Complainant also objects to the Respondent's submission that it is implicit in the definition of Eligible Work that a Complainant must be a Registered Nurse as part of the requirements for his or her position. In fact, the Complainant challenges the relevance of possessing the status of Registered Nurse in the interpretation of the MOA. The Tribunal first ordered the creation of the NU Sub-Group in the Remedy Decision in 2009. The parties subsequently took active steps to implement the Tribunal's Order in this regard and created the NU-EMA categories as a result. Despite this, the MOA, which was concluded in 2012, makes no mention of the new categories, their definitions, or the requirement of being a Registered Nurse. In light of this, the Complainant argues that it is difficult to accept the Respondent's submission that adding this requirement to the Eligible Work definition was part of the parties' underlying intent in drafting the MOA.

VI. Analysis

[55] In determining this motion, I must look at the MOA, including the plain, ordinary meaning of the words therein, the parties' intentions, and by way of contextual analysis, the broader litigation at hand. The "broader litigation" encompasses the actual Complaints filed, the Liability and Remedy Decisions of the Tribunal and any relevant findings/comments from the Courts on judicial review/appeal. The MOA is rooted in the discrimination Complaints filed by over 400 MAs and states that the MOA's aim is to "settle all outstanding issues arising out of the Complaint[s]". It was not negotiated and agreed to in a vacuum.

[56] Having said this, in defining Eligible Work, the MOA effectively also extends the remedy as it was initially constructed by the Tribunal in the Liability and Remedy Decisions. Member Jensen found that the MAs had been adversely differentiated when

compared to their Medical Advisor counterparts. The Tribunal did not, however, conclude that those providing expert advice to or supervising the MAs equally suffered the same differential treatment. In agreeing to include these additional individuals as part of those eligible for compensation under the MOA, the parties went beyond the Tribunal's initial Order.

[57] While the jurisdiction-retention provisions of the MOA and subsequent Consent Order are broad, they cannot confer jurisdiction that does not find a basis in the *CHRA*. The two Consent Orders contain a preamble that acknowledges that the Complaints have been "substantiated" (mirroring language from the *CHRA*), per the Liability Decision. Any remedy flowing from those findings, including in the Remedy Decision itself, agreements between the parties like the MOA, or further Orders by the Tribunal, must be connected to the Liability Decision and have a nexus with the subject-matter of the Complaints. Motions like the instant one are not to be construed as simply and only an exercise of contractual interpretation.

[58] Ms. McIlroy has the legal burden to prove her remedy on a balance of probabilities. Although she is a named Complainant in the *Walden et al.* matter and received compensation as such for a 10-year-period (1996-2006) as a MA and is identified as a "Complainant" in this Decision, in reality, her claim for compensation in the present motion for the 4-year Disputed Period is as a non-Complainant "victim" seeking to fall within the second and third category or "class" of individuals in the MOA's definition of "Eligible Work".

A. What Did the Parties Intend in Extending the Remedy?

[59] A central question becomes: What did the parties to the MOA (i.e., the Complainants, as represented by the law firm of Armstrong Wellman, and the Respondent)[6] intend in extending the remedy to the two additional groups of individuals?

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[6] After seeking the position of other Complainants not represented by Armstrong Wellman, the MOA was adopted in a Consent Order to include all Complainants and non-Complainant "victims". No non-Armstrong-represented Complainants voiced opposition to the MOA and the issuing of a Consent Order by the Tribunal.

[60] The parties made submissions on this point. I note that the only witness heard by the Tribunal in this regard was the Respondent's sole witness, Mary Pichette, Acting Senior Assistant Deputy Minister, ESDC, ISSD Branch. She joined the CPPD Directorate in 2009. By May 2010 she was the Acting Director-General and made permanent in the position in August 2010. While Ms. Pichette did not directly negotiate the MOA (counsel to the Respondent did that), she was involved in the negotiations and was present during discussions regarding its implementation. She was also one of the key management executives involved with the review of all relevant jobs in the CPPD Directorate and SC as a result of the *Walden* litigation, the resulting Tribunal Orders, including the new classification and which jobs would be reclassified in the NU-EMA-01 and -02 categories. I find that Ms. Pichette was quite credible as a witness and her evidence reliable, particularly on the issue of the parties' intention in creating the second and third categories of Eligible Work individuals under the MOA. I have considered the evidence and submissions on this topic and am mindful that the Complainant bears the onus of demonstrating on a balance of probabilities that she performed Eligible Work during the Disputed Period.

[61] Ms. Pichette testified that the MAs' "first line of defence" if they had a complex question/issue was to go to their supervisor within their own Region (i.e., manager, Team Lead). If the issue was unresolved, it would be bumped to NHQ and then through the electronic inquiry box that was managed by the Program Design Division of CPPD Directorate. They would decide who best to deal with the question/issue (e.g., ME Division, Policy Division, AA Division, etc.). Ms. McIlroy testified that the AA Division received the majority of such inquiries. Ms. Pichette averred:

> These inquiries were not specifically about medical adjudication, they were about "How do I apply the policy? When it's a late applicant, how do I know whether it's a new fact?" They [the inquiries] would be case-specific, but it would be about "How do we apply the policy in this case?"…These cases never came to our division to say, "Please adjudicate this case for us", it was "We have a question". Often cases are the best way to demonstrate the gaps in the policies.

[62] Ms. Pichette stated that "adjudication" is just one part of the overall CPPD Program; it deals with various elements of eligibility. She remarked that the AA Division's role was to

apply the jurisprudence and legislation/regulations in the "evolution of policies" in relation to adjudication and appeals. An "additional part", but not the main part or primary role, was providing expert advice to individual cases in the medical adjudication of CPPD applications derived from the electronic inquiry box.

[63] Ms. Pichette also indicated that she looked at 110 positions in the exercise of job-conversion to the NU-EMA categories in 2011 discussed earlier in this Decision. She worked with Nancy Lawand, her predecessor as Director-General. She disagrees with Ms. McIlroy's characterization of the expert advice that she provided:

> We were program policy experts providing that expertise to program experts in PPSB [NHQ] who then translated that into tools and guidelines and training materials for the front lines…Regional Medical Adjudicators [under Service Canada]…Ms. McIlroy yesterday indicated that it was her view that the work she did was essentially the same as the work of her counterpart Marjorie Martin in PPSB. And she indicated that Ms. Martin's position was converted from being a PM-5 to an NU-EMA[-02]…I disagree with that and importantly my predecessor Nancy Lawand who was very familiar with the work disagreed with that and Sharon Shanks, who was the Director-General responsible for PPSB, disagreed with that. There were important differences between the work that was done in PPSB and the work that was done in our branch [ISSD, which includes the CPPD Directorate] and we were careful to make sure that the roles reflected the roles that were set out in the Memorandum of Understanding.

Ms. Pichette later testified similarly:

> It was expert advice to the experts who then provided it to the Medical Adjudicators. And on occasion, through the inquiry box, inquiries would be filtered up through PPSB. Program Design Division fed out to various individuals across, and in those cases was expertise provided directly to Medical Adjudicators? We heard yesterday it was and I don't dispute that.

[64] I asked Ms. Pichette whether they contemplated that the MOA definition of "expert advice" would include that the advice be given directly to MAs, or if it would be "filtered" to them or "trickle down" to the Regional MAs eventually. The witness replied:

> In my view, as someone who worked on the Memorandum of Agreement, that's not what was contemplated and in fact it was very much not contemplated. There are what's called Business Experts in Service Canada in PPSB [NHQ] and in the Regions who were subsequently converted to NU-EMA-2 positions and that reference was in respect to those positions…In the

> Memorandum of Agreement when we talk about expert advice and then we talk about those that are directly supervising, the reason for that is because in Service Canada there were two types of positions that ultimately could be converted.…The twice removed expert advice was not considered to be within the scope of the Memorandum of Agreement…Two types of expert advice were foreseen at that time, one was the Business Experts in the Regions, so the "go-to" persons that the Regional Medical Adjudicators would go to for complex issues as well as people like Marjorie Martin who were their first point-of-contact if they couldn't resolve the issue…Sometimes they weren't supervisors and that's why you have the distinction of those providing expert advice and those directly supervising. Because in some Regions the supervisors were the experts and in some cases they were outside of the supervision duties.

[65] As for the category of those "directly supervising and providing expert advice to those conducting adjudications", Ms. Pichette testified that the Government had in mind to include for *Walden* compensation Business Experts and senior MAs (PM-05) supervising MAs (PM-04). She later stated:

> And we specifically excluded the policy expertise because there were PM-05s who were not Medical Adjudicators who were giving policy advice to Service Canada…I was very much involved in looking at what was the intent of those words…The intent [behind the "Eligible Work" definition] was to encapsulate the Business Experts and Team Leads within Service Canada at the Regional level and at NHQ...It was not to include the policy expertise that resided in my Directorate [CPPD]. It was not intended to encompass that. Had it been intended to encompass that, we would have ended up with individuals who were in PM-5 positions who were not nurses who would have been compensated…

[66] She said that even if being a registered nurse was an asset, it was not a requirement of the position. The witness remarked: "The context of this was for the Medical Adjudicators, and the Complainants and non-Complainants who were Registered Nurses. It wasn't contemplated that expert advice would include broader policy or legislative expertise." Interpreting the MOA otherwise, she opined, would result in other employees in the CPPD Directorate and potentially in other sections of the Department, such as human resources professionals or legal counsel, being able to claim compensation as they too were providing "expert advice" to the MAs.

[67] Further on this topic, Ms. Pichette stated that the above determination was made after careful thought and "discussions" with several people, including management

personnel in PPSB, Ms. Shanks and herself. They determined that the advice of PM-05s in the AA Division (like Ms. McIlroy and her three PM-05 colleagues) was "policy advice at least one, more often two, steps removed from medical adjudication."

[68] I accept Ms. Pichette's evidence on this point. While Ms. McIlroy was certainly a credible witness in the motion-hearing in general, she had no evidence to provide on the intent of the parties to the MOA. She could have summonsed Mr. Armstrong or Ms. Wellman, who were counsel to, and negotiated the MOA on behalf of, the vast majority of Complainants in the *Walden* proceeding, or for that matter, counsel to the Respondent who negotiated the MOA on behalf of their client. It seems clear to me that the parties to the MOA did not intend to include the work of PM-05s in the AA Division, like Ms. McIlroy, in the two extended categories of "Eligible Work" in the MOA.

B. Was the Complainant Providing Expert Advice to MAs?

[69] The contention on this point lies essentially in the interpretation of the term "expert advice", which the MOA has not defined. In examining the broader litigation context which underlies the MOA, I agree with the Respondent that the interpretation of "expert advice" must be linked to the medical adjudication of cases and does not extend to general policy advice.

[70] As previously stated, the Complaints were filed by MAs and pertained to the recognition of their work in relation to the work undertaken by the Medical Advisors. In examining the similarity of the work between the two groups, the Tribunal found that "the primary responsibility and function of both the medical advisors and the medical adjudicators has been to use their professional expertise and knowledge to determine eligibility for CPP disability benefits at all stages of the process, and/or to prepare for, and represent the Minister in appeals": Liability Decision at para. 68.

[71] The Tribunal then examined the functions of both groups more specifically, and concluded the following at paras. 69-72:

> Specifically, both advisors and adjudicators have performed the following functions at various points throughout the three time periods in this complaint:

i. making recommendations and decisions on initial applications involving varying degrees of complexity and difficulty in terms of the medical and legal issues involved;
ii. making recommendations and decisions on reconsideration applications that were also varied in terms of their level of complexity and difficulty;
iii. preparing case summaries for the Review Committee, or as it was later called, the Review Tribunal;
iv. requesting additional medical and non-medical information from applicants and others on an application for CPP disability benefits;
v. preparing a file for the Pension Appeals Board;
vi. making an offer to settle or a recommendation to settle (without prior approval);
vii. working on policy and outreach.

> Over the three time periods, the amount of time spent by the advisors and the adjudicators performing the overlapping functions has shifted. However, the evidence established that *from 1972 until 1999, there were medical advisors and medical adjudicators whose primary function was to make recommendations or final determinations on initial and reconsideration applications and to prepare case summaries for the Review Committee. The work on initial applications and reconsiderations represented a considerable amount of the advisors' and adjudicators' workloads since over 90% of all applications are conclusively determined at one of those two levels*...
>
> *Since 1999, medical adjudicators in the Regions have been doing substantially the same work that advisors performed from 1972-1999: the final determination of eligibility for CPP disability benefits at the initial and reconsideration levels.*
>
> [Italics added.]

[72] I agree with the Complainant that the Tribunal recognized at sub-para. 69(vii) that policy work was one of the tasks undertaken by MAs. However, when read alongside the remainder of the Tribunal's conclusions regarding the functions performed by the Medical Advisors and MAs which are at the root of the discrimination, it becomes clear that the tasks *primarily* at issue pertained to the MAs' work on initial and reconsideration applications. This view is further supported by the wording of the Eligible Work definition in the MOA which does not use the term "Medical Adjudicators", but rather, refers to individuals who are "conducting adjudications (i.e. assessing medical information for the purposes of determining eligibility for CPP disability benefits…)". The act of adjudicating, paired with the assessment of medical information, is therefore at the core of the definition

of “Eligible Work” and thus, central to the awarding of compensation flowing from Member Jensen’s Order and the subsequent MOA and Orders signed by me. In my view, individuals seeking compensation for either “providing expert advice to” or “directly supervising” MAs must demonstrate that their tasks are closely tied to the performance of these medical adjudicative functions.

[73] In light of this, I accept the Respondent’s submission that expert advice was meant to cover the Business Experts/Team Leads and the supervisors of the MAs who were the MAs’ first point-of-contact and who directly provided advice to them as they conducted the adjudications, as well as the individuals working at SC NHQ who “translated” the advice provided by the AA Division directly to the MAs. The Complainant’s main or *primary* role in the AA Division was as a program policy expert, providing expert advice to program experts at PPSB. I also agree with Ms. Pichette’s statement that many of the Complainant’s examples illustrated “program policy work” geared to a broad range of audiences, such as senior management, legal services, other colleagues within HRSDC (including CPPD Directorate), etc. and not *primarily* to MAs. For example, Ms. McIlroy filed written materials and testified about her work (“more in the nature of general expert advice”) for the Litigation Committee Secretariat. She prepared agendas, background and records of decision, in collaboration with Legal Services and the ME Division. This type of task, while important, does not fall within the MOA’s Eligible Work definition category of “providing expert advice…to those conducting adjudications”. I say this in terms of the nature of the task and the audiences to which it is directed.

[74] I do not dispute that the Complainant possessed expertise, or that she was providing advice. I do not doubt that she was an exemplary public servant. I also do not dispute that policy informed the work of those conducting adjudications. However, I find that the general policy expert advice described by the Complainant, for the most part, does not contain a sufficiently strong *nexus* to the case-specific medical adjudicative work of the MAs. It is not, in my view, what the parties to the MOA intended to include as “Eligible Work” for compensation.

[75] Were I to extend the interpretation of expert advice in the manner sought by the Complainant, the Respondent argues that I would be opening the door to compensation to

a large number of other individuals working in various parts of the CPPD Directorate and SC, something which was not intended by the parties to the MOA. Human resources or legal advisors, for example, could come forward and claim that they too were "providing expert advice to those conducting adjudications." I agree that this would not reflect the parties' intention in concluding the MOA.

[76] Bearing in mind this interpretation of expert advice, I note that the Respondent has recognized, and I agree, that the Complainant did provide *some* expert advice (i.e., to MAs on case-specific files) as per the MOA in her positions as a PM-05 and PM-06 in the AA Division. However, the Respondent argues that while the Complainant provided this expert advice to MAs, she did not do so as the *primary* portion of her positions as the MOA requires. Consequently, said expert advice is not compensable under the MOA.

[77] In examining the specific nature of the Complainant's tasks to determine if this Eligible Work may have constituted the primary portion of her work, I take note of the Commission's position. It did not participate in the motion-hearing, but did file written submissions that warned against "reliance solely on job titles, information on jobs' current position in the hierarchy, and salary data which may themselves reflect gender-based stereotypes." It took no position as to whether the Complainant had made out her case for compensation. I agree with the principles enunciated by the Commission. While the above elements listed are factors to consider individually and in the aggregate, they should not be used *solely* or too much emphasis placed on them. Rather, the actual duties performed by the employee should be given significant consideration. I find that HRSDC did so and I have placed paramount importance on this factor of actual duties performed in my findings.

[78] In this regard, I also note the Complainant's challenge of the Respondent's use of job descriptions in determining an individual's Eligible Work. Combined with the Respondent's own admission that these often did not provide an accurate or up-to-date depiction of the work performed and that there were "issues" with the ones for McIlroy's positions (the Addendums in particular), I have accorded little weight to these documents that were entered into evidence which purportedly correspond to the Complainant's PM-05 and PM-06 positions. My conclusions regarding the Complainant's tasks, and whether or

not she provided expert advice as the *primary* portion of her positions, are chiefly founded on the Complainant's own description of her work tasks, which the Respondent did not dispute generally.

[79] On the basis of the Complainant's description of her work tasks, I asked the Complainant to provide an estimate of the percentage of her work that constituted case-specific expert advice versus the more general policy expert advice. The Complainant estimated that during her time as a PM-05, sixty percent of her work was policy-related and forty percent was case-specific. As for her time as a PM-06, she estimated that forty percent was policy-related and twenty percent was case-specific (and forty percent "directly supervising"). I have reviewed the list of tasks enumerated in the Complainant's Motion Record and Joint Book of Documents (exhibits filed) and described during her testimony, and conclude that the estimate she provided is a reasonably accurate reflection of her work during the Disputed Period.

[80] In light of the fact that expert advice pursuant to the MOA does not include general policy advice, the Respondent argues that the Complainant's estimate confirms that she did not provide expert advice as the primary part of her work. However, the meaning of the term "primary", which is also not defined in the MOA, is at issue in this motion too. Whereas the Respondent defines it as meaning fifty percent or more, the Complainant argues that the term is not limited to the percentage of work, but rather, should be associated with the importance of the work or task undertaken.

[81] The *Oxford Dictionary* defines "Primary" as "Of chief importance; principal". Other dictionaries attach similar meanings to "primary" and "primarily" as Oxford's. Both of the parties' interpretations are consistent with this definition in this regard. I am therefore of the view that both the importance of the work undertaken, as a reflection of an individual's overall job and importance of the task to the particular organization, as well as the percentage of the work to which he or she devotes his or her time to that task, help to determine whether a task qualifying as Eligible Work under the MOA can be said to constitute the *primary* portion of their work.

[82] In this instance however, the Complainant fails to meet this test on both levels. She did not perform Eligible Work for more than fifty percent of her job and the evidence surrounding the role of the CPPD Directorate (and the AA Division in particular) and SC with regard to the administration of the CPPD Program under the MoU does not support the Complainant's contention that this case-specific work was the most important part of her job. As indicated earlier and defined clearly in the MoU, there are important differences between the ISSD and SC's PPSB and while it is possible that individuals working in ISSD performed Eligible Work as the primary portion of their positions, the nature of these distinctions renders these types of cases exceptional. It is because of these differences that I did not find examining the work of the other PM-05s working at PPSB NHQ, like Ms. Martin, which the Complainant argued was similar to her own, helpful to the Complainant's case. Ms. Pichette testified that contrary to Ms. McIlroy's evidence and submission, Ms. Pichette and Ms. Lawand determined that Ms. McIlroy and Ms. Martin did not do the same work: They did "different things". In this regard, I have accepted the Respondent's evidence that the nature of the work of these individuals, who worked directly with the MAs as the primary portion of their positions, was different from the Complainant's.

[83] For the foregoing reasons, I find that the Complainant was not providing expert advice pursuant to the MOA during the Disputed Period.

[84] The parties also made submissions on the requirement of possessing the status of Registered Nurse for an individual's position to meet the definition of Eligible Work. The Respondent requested, more generally, that I read this requirement into the Eligible Work definition so as to ensure its application to the individuals who provide expert advice to and who supervise those conducting adjudications. Since I have already determined that the Complainant was not providing case-specific expert advice as the primary portion of her work and that the policy advice of general application that she provided did not qualify as "expert advice" under the MOA, it is unnecessary that I make a finding as to whether or not using "knowledge associated with being a registered nurse" was a requirement of her position and the second and third categories of Eligible Work under the MOA.

C. Was the Complainant Directly Supervising MAs?

[85] The Complainant alleged that in supervising Ms. Boland and Ms. McGuire as part of her role as a PM-06, she was directly supervising MAs pursuant to the MOA and therefore performing MOA-compensable Eligible Work.

[86] The Respondent compensated both Ms. Boland and Ms. McGuire for their work in the AA Division during the Disputed Period. Why were they compensated? The Respondent explained that despite the fact that these individuals were not conducting work that met the Eligible Work definition, their job titles and descriptions included medical adjudication and their substantive positions were as MAs in the ME Division. As stated earlier, the ME Division is, according to the Respondent, the only Division within the CPPD Directorate where there remained a small number of MAs who supported work on case files for appeals to the PAB. This was in keeping with the Respondent's practice, for administrative/logistical reasons, to compensate substantive "home-positioned" MAs even if they in fact were not conducting medical adjudications.

[87] I note that the MOA does not require that an individual possess the title of MA for his or her work to qualify as Eligible Work. Rather, an individual must demonstrate that he or she is conducting adjudications which the MOA describes as "assessing medical information for the purposes of determining eligibility for CPP disability benefits and, in doing so, was required to use knowledge associated with being a registered nurse". When applied to the work of Ms. Boland and Ms. McGuire in the AA Division during the Disputed Period, it does not appear that these individuals were performing Eligible Work. As the Complainant recognized, neither Ms. Boland nor Ms. McGuire was conducting adjudications, the *primary* work tasks of MAs. Rather, their work consisted of providing explanations for cases at the Review Tribunal stage and to make *recommendations* to Regional MAs. They possessed no authority to decide or settle cases.

[88] The Respondent's approach to compensating individuals who held a substantive or "home" MA position, regardless of whether they performed any actual "medical adjudication" work, resulted in individuals, like Ms. Boland and Ms. McGuire, receiving such compensation. I note that this is not provided for in the MOA and that it does not

appear that the parties intended for this to be applied outside of these exceptions. Since I have been tasked with interpreting the MOA, in light of the parties' intent, I do not feel that it is appropriate to extend the Respondent's approach to compensation to individuals, like the Complainant, who supervised Ms. Boland and Ms. McGuire. The Respondent is, of course, free to do so on its own accord.

[89] Furthermore, when asked how much of her time was allocated to this supervisory responsibility, the Complainant estimated that as a PM-06, she would spend approximately forty percent of her time directly supervising the two MAs, even though she was also supervising other employees during those times that her Director was absent. The other forty percent of her time was spent providing more general policy advice, and roughly twenty percent was spent responding to case-specific inquiries or assisting the PM-05s in her Division in responding to these inquiries. Combined with the overarching role of the AA Division and the nature of the tasks of the PM-04s and PM-05s that she was supervising, this estimate once again demonstrates that the Complainant did not directly supervise (or indeed provide expert advice to) those conducting adjudications as the *primary* part of her job.

[90] For these reasons, I find that the Complainant was not directly supervising MAs as required in the MOA's definition of Eligible Work.

VII. Conclusion

[91] I know that Ms. McIlroy will be disappointed with this Decision. My findings and comments are not to be construed as a denigration or diminution of her dedication and work as an erstwhile public servant.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
June 22, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1111/9205, T1112/9305 & T1113/9405

Style of Cause: Ruth Walden et al. v. Attorney General of Canada

Decision of the Tribunal Dated: June 22, 2015

Date and Place of Hearing: January 15 and 16, 2015

Ottawa, Ontario

Appearances:

Karen McIlroy, for herself

No one appearing, for the Canadian Human Rights Commission

Lynn Marchildon, for the Respondent