RUTH WALDEN ET AL.

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SOCIAL DEVELOPMENT CANADA,
TREASURY BOARD OF CANADA, AND
PUBLIC SERVICE HUMAN RESOURCES MANAGEMENT AGENCY OF CANADA

Respondents

RULING

MEMBER: Karen A. Jensen

2008 CHRT 21
2008/06/06

[1] On December 13, 2007, the Tribunal issued a decision in which it found that the Respondents have been discriminating against the Complainants by treating them differently from the male-dominated group of medical advisors working in the CPP Disability Benefit Program, who perform substantially similar work to that of the Complainants. In particular, the Tribunal held that the Respondents' refusal, since March of 1978, to recognize the professional nature of the work performed by the medical adjudicators in a manner proportionate to the professional recognition accorded to the work of the medical advisors, was discriminatory. Upon the request of the parties, the Tribunal declined to order a remedy for the discriminatory practice. It gave the parties time to negotiate a remedy, failing which the Tribunal would make a conclusive determination after providing the parties with an opportunity to present evidence if necessary, and argument. The parties were unsuccessful in reaching an agreement. Therefore, a hearing was set for the week of July 28 - August 1, 2008.

[2] The Respondents have brought a motion requesting permission to lead evidence on their proposal for redressing the discriminatory practice. They would also like to adduce evidence with regard to whether the discriminatory practice resulted in any wage loss to the Complainants and, if so, what the basis for calculating the loss should be.

Evidence Regarding the Proposal to Redress the Discriminatory Practice

[3] The Respondents' proposal to redress the discriminatory practice identified in the December 13, 2007 decision of the Tribunal is that a new Nursing (NU) classification be created within the Health Services (SH) Group which would include medical adjudicators. There are currently two sub-groups under the NU classification: Hospital Nursing (HOS) and Community Health Nursing (CHN). The proposal would see a third sub-group added to the NU Classification.

[4] The Respondents assert that the Tribunal needs to hear from Patricia Power, Senior Advisor to the Vice-President of Strategic Infrastructure, Organization and Classification Sector, Canada Public Service Agency and Charles Tardiff, Project Coordinator and Senior Researcher, Expenditure Analysis and Compensation, Planning Division, Treasury

Board Secretariat, to understand why the discriminatory practice is best redressed by the creation of a third NU sub-group for the medical adjudicators.

[5] Counsel for some of the Complainants and the Canadian Human Rights Commission are both in disagreement with the Respondents' position. They contend that a new NU category is not appropriate. Rather, the medical adjudicators and medical advisors must share a classification standard, although they may be separated by different "levels" within that classification. Both parties argue that this remedy is implicit in the Tribunal's December 13, 2007 decision. They contend that nothing further is needed than an order from this Tribunal requiring the creation of a new classification standard that encompasses the work of both the adjudicators and the advisors. Treasury Board must then exercise its exclusive authority to classify positions within the Federal Public Service to create this classification standard. There is no need, according to the Complainants and the Commission, for further evidence on this issue.

[6] I agree with the Respondents that they should be permitted to adduce evidence regarding their proposal for redressing the discriminatory practice. In paragraph 138 of the December 2007 decision, I provided examples of the action that Treasury Board might have taken to address the concerns that had been raised over the years by the adjudicators about the classification of their position. However, the examples in that paragraph were not provided as possible remedies for the discriminatory practice that was found to exist in the December 2007 decision. Indeed, I left that issue open for the parties to negotiate or, in the event that they were unsuccessful, for the Tribunal to conclusively determine after the parties had been given a chance to adduce further evidence (if necessary) and make submissions.

[7] The Respondents have a proposal regarding the remedy that they think is most appropriate in the circumstances. Ms. Power and Mr. Tardiff will provide evidence to support that proposal. The Complainants are free to challenge the evidence and the proposal as well as arguing that their position is preferable to that of the Respondents. The Complainants are certainly free to call evidence of their own should they see fit. However, it would be unfair for the Tribunal to deny the Respondents the opportunity to call evidence and make arguments with respect to their proposal, given that the December 2007 decision did not provide an indication of what the appropriate remedy would be and indeed, left open the option of presenting evidence and argument on that issue.

Evidence Regarding the Existence of and Compensation for Wage Loss Resulting from the Discriminatory Practice

[8] In order to calculate compensation for any lost wages which may have resulted from the Respondents' discriminatory practice, the adjudicators' wages must be compared to the wages of an appropriate comparator group. The Respondents assert that the appropriate comparator group is the NU-CHN-02 or NU-CHN-03 position, not the medical advisors, to whom the Tribunal compared the work of the adjudicators in the December 2007 decision. They base this assertion on the fact that in the December 2007 decision, the Tribunal found the work of the adjudicators and advisors to be sufficiently different to justify a different level of classification and a difference in salary and benefits. Therefore, according to the Respondents, the medical advisor position is not an appropriate comparator. The Respondents assert that their position is further supported by the Tribunal's decision to bifurcate the hearing, and the fact that the medical adjudicators have, until recently, sought recognition as nurses.

[9] In my view, it is both appropriate and necessary to engage in a comparison of the wages and work of the advisors and the adjudicators for the purpose of determining whether a wage loss has resulted from the discriminatory practice. Section 53(2)(*c*) of the *Canadian Human Rights Act* provides the Tribunal with the authority to compensate the victim(s) for any or all of the wages that the victim(s) were deprived of as a result of the discriminatory practice. The discriminatory practice that was identified by the Tribunal in the December 2007 decision was not the Respondents' refusal to classify the adjudicators as nurses. Rather, the Tribunal found that the Respondents are pursuing a discriminatory practice of treating the advisors and the adjudicators as though they were doing different work even though they were doing substantially similar work, and classifying them accordingly (*Walden et al v. Social Development Canada et al*, 2007 CHRT 56, at paras. 11, 95 and 143). The remedy must flow from the differential treatment of the adjudicators relative to the advisors. This requires a comparison of the relative value of the work performed by the adjudicators and the advisors.

[10] However, a determination of the value of the work performed by the adjudicators relative to the advisors does not preclude a comparison of the value of the adjudicators' work to the value of other positions such as the NU-CHN-02 and NU-CHN-03 positions. It may be that the comparison between the advisors and the adjudicators reveals that the value of the adjudicators' work is equivalent to that of the NU-CHN-02 or NU-CHN-03. In that case, the Respondents might argue that the adjudicators' wage loss should be determined on the basis of a comparison with the wages of the CHN positions at the relevant time. The Complainants and the Commission are, of course, free to lead evidence of a different nature and to argue that the wage loss should be differently calculated.

[11] It would be of assistance to the Tribunal to hear testimony from a job evaluation expert regarding the various means of determining the value of the adjudicators' work relative to that of the advisors. Therefore, the Tribunal grants the Respondents' request to open the hearing to receive evidence from a job evaluation expert on the understanding that the appropriateness of using the medical advisor position as a comparator must be addressed.

Pain and Suffering

[12] In the December 2007 decision, the Tribunal found that some compensation should be provided to the Complainants pursuant to s. 53(2)(*e*) of the *Act* for the pain and suffering that they experienced as a result of the discriminatory practice. The Tribunal left the *quantum* of this award to be negotiated by the parties or to be determined by the Tribunal if no agreement was reached. The parties have been unable to agree to the *quantum* and therefore, this matter will be determined following the hearing on remedy.

[13] The Tribunal is in agreement with the parties that no further evidence is needed on this point. However, to assist in the determination of the *quantum*, it would be helpful to have a complete list of the Complainants (both unrepresented and represented by counsel) with the start and end dates (in the event that they are no longer employed there) of their employment with the CPP Disability Benefit Program.

"Signed by"

Karen A. Jensen

OTTAWA, Ontario

June 6, 2008

PARTIES OF RECORD

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APPEARANCES:	
Lawrence Armstrong	For the Complainants
Ikram Warsame	For the Canadian Human Rights Commission
Patrick Bendin/Claudine Patry	For the Respondents