Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Social Development Canada,
Treasury Board of Canada, and
Public Service Human Resources and Management Agency of Canada

Respondents

Decision

Member: Karen A. Jensen
Date: May 25, 2009
Citation: 2009 CHRT 16

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[1] This is a decision regarding the appropriate remedies in complaints involving approximately 413 medical adjudicators in the CPP Disability Benefits Program. The Complainants are a group of predominantly female nurses who work with medical advisors, a group of predominantly male doctors, to determine eligibility for CPP disability benefits.

[2] The Complainants alleged that since they were first hired in 1972, they have been performing the same work as the medical advisors and yet have been treated very differently from the advisors in terms of professional recognition, remuneration, payment of licensing fees, and training and career advancement opportunities.

[3] In a decision dated December 13, 2007, the Tribunal found that while there was significant overlap in the functions that had been and were being performed by the advisors and the adjudicators, there were differences in the work that justified some, but not all, of the differential treatment between the two groups of employees. In particular, the Tribunal found that the Respondent had not provided a reasonable, non-discriminatory response as to why the advisors are recognized as health professionals and compensated accordingly, when their primary function is to make eligibility determinations and yet, when the adjudicators perform the same function, they are designated as program administrators and are compensated as such.

[4] Having found the complaints to be substantiated, the Tribunal granted the parties' request to order that the discriminatory practice cease, but refrained from specifying the measures that should be taken to redress the practice. As per their request, the parties were given an opportunity to negotiate the appropriate measures to be taken with all of the stakeholders, with the Tribunal retaining jurisdiction over the remedy issues in the event that the matters were not resolved.

[5] The parties were given three months to negotiate a settlement of the outstanding remedy issues. However, an agreement was not reached.

[6] Therefore, a hearing was convened to address the following issues: (1) the appropriate manner to redress the discriminatory practice; (2) compensation for lost wages if any; (3) the compensation for pain and suffering experienced by the Complainants as a result of the discriminatory practice; and (4) any other outstanding issues with respect to remedy.

[7] The majority of the Complainants were represented by counsel. Those Complainants who were not represented by counsel did not appear at either the liability or the remedy stages of the hearings, although they had notice of both.

I. What Is The Appropriate Manner To Redress The Discriminatory Practice?

[8] Section 53(2)(*a*) of the *Canadian Human Rights Act* (the *CHRA* or the *Act*) provides the Tribunal with the authority to make orders to redress the discriminatory practice or to prevent the same or a similar practice from occurring in the future.

[9] In its decision of December 13, 2007, the Tribunal found that while both the advisors and the adjudicators use their professional knowledge in the health sciences to determine eligibility for CPP disability benefits, only the advisors are classified as health professionals within the federal public service. The adjudicators are classified as program administrators (PM's) within the Programme Administration (PA) classification, whereas the advisors are classified as medical officers (MOF's) within the Medicine (MD) in the Health Services Group. Positions that are classified within the Health Services Group are recognized as involving the application of professional health care knowledge.

[10] From 1988 onward, the medical adjudicators have been seeking recognition as health care professionals through classification of their position in the Nursing (NU) Group within Health Services. These attempts have been unsuccessful.

[11] The Tribunal found 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 constituted a discriminatory practice. The effects of the discriminatory practice were to deprive the adjudicators of professional recognition and remuneration commensurate with their qualifications, including payment of their licensing fees, as well as training and career advancement opportunities.

[12] One of the principal ways that professional work is recognized in the federal public service is through the classification of positions. Positions are classified according to their primary function. Positions are first allocated to an Occupational Group, which is a collection of jobs that are grouped together based on common duties or similarity of work. Within an Occupational Group, there are Classifications that are more specific to the kinds of work that are done within that group. For example, within the Health Services Group there is the Nursing Classification, and the Medicine Classification, among others. Within the Classifications there are subgroups that further narrow the definition of the work done. For example, within the Nursing Classification, there is the Community Health Nursing subgroup. That group of employees provides community health nursing services, whereas the Hospital Nursing subgroup provides hospital nursing care.

[13] Initially, the represented Complainants and the Commission asserted that the only way to redress the discriminatory practice was to create a new Classification that might be called Medical Adjudication, which encompassed the work of both the adjudicators and the advisors. Only through the creation of a new Classification could the similarity and relative value of the professional work done by the adjudicators and the advisors be fully recognized and compensated, it was argued.

[14] However, at the conclusion of the hearing on the remedy issues, the represented Complainants changed their position, asserting instead that the appropriate redress would be to include them in an existing subgroup within the Nursing Classification. They stated that either the Community Health Nurse or the Nurse Consultant subgroups would be appropriate. The reasons provided for the proposal were that it would avoid the delays involved in establishing a new subgroup or classification, and would effectively redress the discriminatory practice.

[15] The Commission, on the other hand, maintained its position to the end that the only appropriate redress was to create a new Classification for both the advisors and the adjudicators since no other solution would fully address the issues raised in the liability decision.

[16] The Respondents proposed that a new Nursing subgroup be created for the medical adjudicators within the Health Services Occupational Group and the Nursing Classification. It might be called the Medical Adjudicators' subgroup.

[17] What follows is a review of the evidence regarding each of the proposals provided by the parties.

A. The Respondents' Proposal: The Creation of a New Nursing Subgroup

[18] Ms. Patricia Power, Special Advisor to the Vice-President of Strategic Infrastructure, Organization and Classification at the Public Service Agency, one of the Respondents, testified that a number of different options were considered for redressing the discriminatory practice. The options included the creation of a new Occupational Group outside of the Health Services Group that would contain both the advisor and the adjudicator positions, the creation of a new Classification within the Health Services Group that would contain both positions and the creation of a new subgroup within the Nursing Classification for the adjudicators alone.

[19] Ms. Power testified that the option of creating a new Nursing subgroup was considered to be the best for the following reasons: (1) it provides effective redress for all of the issues raised in the Tribunal's liability decision of December 2007; (2) it is the most expedient option; and, (3) it is the least disruptive in terms of its effects on other public service employees and on the public service classification system.

[20] With respect to the first issue – effective redress of the discriminatory practice – Ms. Power testified that creating a new subgroup of Nursing for the adjudicators within the Health Services Occupational Group will have the following effects:

i. Professional recognition – By including medical adjudication as a subgroup within the Health Services Occupational Group, it will be acknowledged and recognized that medical adjudicators apply their comprehensive knowledge of the professional specialty of nursing in the work that they do. Like the medical advisors, they will be recognized and classified as health care professionals.

ii. Remuneration commensurate with qualifications – In the Federal public service, the rates of pay for represented employees are set through collective bargaining. Ms. Power testified that once the new subgroup has been approved by the Minister, the bargaining agent for the adjudicators would likely change. The adjudicators would most likely be represented by the same bargaining agent as the medical advisors.

Although there are different pay lines for each of the medical specialties in the Health Services Group, they are negotiated at the same bargaining table by the same bargaining agent. Compensation will be negotiated on the basis of the adjudicators' classification as NU's, not PM's. The adjudicators will therefore, be

in a position to receive remuneration that is commensurate with their classification as Nurses.

iii. The payment of licensing fees – Classification within the Health Services Occupational Group would mean that, like the advisors, the adjudicators would have a separate line item in the budget for the payment of their licensing fees. Payment of the fees would not come out of the education budget as is currently the case.

iv. Training and career development – Ms. Powers testified that classification as health care professionals would put the nurses on the same footing as the doctors; training and career development would have its own place in the budget, and would be recognized as being as important as the training and career development of other health care professionals.

v. Career advancement possibilities – In the liability portion of the hearing, Ms. Walden testified that her chances of obtaining a job as a nurse in the public service were not as good as they would be if she was classified as a health care professional, like the medical advisors. Ms. Power testified that the classification of medical adjudicators as health care professionals within the Health Services Occupational Group would resolve that issue.

[21] With regard to the second reason as to why the creation of an NU subgroup is preferable from the Respondents' point of view, Ms. Power testified that the creation of a new subgroup is expedient since it is the only viable option that would not likely require the creation of a new classification standard. Developing a new classification standard takes a considerable amount of time. It involves at least two to three years of extensive consultation and work. Since there are

likely only one or two levels of adjudicator work, a new subgroup could be created almost immediately without the need to create a new classification standard.

[22] With regard to the third reason, Ms. Power testified that the creation of the new subgroup would not affect the advisors' classification and would be in keeping with the public service's classification principles. She stated that the advisors are appropriately classified at present. It would be unprecedented to carve out a little portion of jobs that are now allocated to the Medicine Classification and to reclassify the advisors as Adjudicators. Moreover, any change to the advisors' job classification or Occupational Group definition would likely cause them some concern. Such changes should not be made without providing the advisors with an opportunity to speak to the issue. The advisors have not been given that opportunity.

B. The Commission's Proposal: The Advisors and the Adjudicators Share a Single Occupational Group or Classification called "Medical Adjudication"

[23] The Commission proposed that the advisors and the adjudicators share a Classification or Occupational Group. In the Commission's view, this would redress the discriminatory practice of classifying the adjudicators differently even though they perform substantially similar work to that of the advisors. The Commission argued that this means of providing redress would be consistent with the public service's practice of classifying positions on the basis of the primary function of the position, rather than on the qualifications of the person holding the job. Since the primary function of both the adjudicator and the advisor positions is to determine eligibility for CPP disability benefits, they should be classified in the same Group or Classification.

[24] The Commission did not produce evidence to support its proposal. Rather, it attempted to elicit evidence in support of the proposal through the cross-examination of Ms. Power and other Respondent witnesses.

[25] Counsel for the Commission asked Ms. Power if the Commission's proposal of having the advisors and the adjudicators share an Occupational Group or a Classification would result in greater wage parity between those two groups than if they occupied different Classifications within Health Services. Ms. Power did not believe that sharing a Group or a Classification would result in a wage and benefit package that was closer to that of the advisors than if they were in different Groups or Classifications. She stated that since the adjudicators do not perform exactly the same work as the advisors, and they utilize different professional knowledge from the doctors, the adjudicators' salary will be different from that of the advisors, regardless of whether they are in the same bargaining unit. It is their classification as nurses that will ensure that the adjudicators receive remuneration commensurate with their professional qualifications, not whether they are in the same bargaining unit or Occupational Group as the advisors.

[26] Ms. Power explained that the creation of a new Classification or Group that included both positions would take a long time because it requires the development of a new classification standard. Moreover, the creation of a new Classification or Group of this nature is not in keeping with the classification practices in the public service. Classifications tend to cross government departments and draw in positions based on the commonality of work that is performed across the breadth of the public service. A Classification or Group that included only 2 positions would be highly unusual and impractical.

[27] Ms. Power further testified that there are retention and recruitment problems with doctors across the core public service. These problems may be exacerbated by a change that would reclassify medical advisors from MD's to MA's (Medical Adjudicators) since they would no longer be classified as doctors in the public service. Given that health professionals, like the adjudicators and advisors, desire recognition and classification based on the professional knowledge that they utilize, this would not be a positive change.

C. The Complainants' Proposal: Include the Adjudicators in an Existing NU Subgroup such as Community Health Nursing or Nurse Consultants

[28] The represented Complainants stated that they are ambivalent with regard to the means of redressing the discriminatory practice, provided they are recognized as nurse professionals, and treated fairly relative to the advisors. However, they did assert a preference for being allocated to an existing Nursing subgroup such as Community Health Nursing (CHN) or Nurse Consultants. They argued that this could be accomplished by simply including a statement in the definition of the Nursing Classification like the one that is included in the Medicine Classification. That inclusion statement (called inclusion statement 5) permits all those who assess medical fitness for the determination of disability benefits and other federal government benefits to be placed within that Classification. According to the Complainants, if inclusion statement 5 were inserted into the definition of Nursing and into the Subgroup definitions of CHN or Nurse Consultants, the Complainants could easily be placed in one of those two subgroups.

[29] The Complainants argued that the advantage of placing them in either the CHN or Nursing Consultant subgroups instead of creating a new nursing subgroup is that it could be done by Tribunal order rather than going through the process described by Ms. Power to implement a new subgroup. This would make the implementation of the remedy more expeditious in the Complainant's view.

[30] In my view, the problem with this approach is that the adjudicators' work does not fit the Subgroup definition for Community Health Nursing, and there is no evidence on the record that would permit me to determine whether the adjudicators' work would fit the definition of the Nursing Consultant subgroup.

[31] According to the Subgroup definition for Community Health Nursing, that work involves "the provision of health guidance and nursing care to individuals, families and groups in the home and community directed towards the prevention of disease and the promotion and maintenance of health; the provision of consultative services".

[32] Medical adjudication does not appear to meet that definition since Community Health Nursing is directed specifically towards home and community health care. There was no evidence regarding the meaning of the last part of the definition – "the provision of consultative services". Therefore, I have no way of knowing whether the consultative services relate to home and community health or may be more general than that.

[33] However, Ms. Power did testify that a new Nursing subgroup had to be created because even with the addition of inclusion statement 5 into the NU definition, the adjudicators' work does not fit the existing NU subgroup definitions.

[34] In contrast, the Medical Officer subgroup definition (which is the medical advisors' subgroup) is clearly more general than the CHN definition. It states that the work of a Medical Officer involves the performance, provision of advice on, supervision, or direction of professional and scientific work in one or more fields of medicine. Even without inclusion statement 5, one can see how the advisors' work would more readily fit the subgroup definition of Medical Officer than the work of the adjudicators would fit the subgroup definition of Community Health Nursing.

[35] The Complainants also suggested that they be included within the NU consultant subgroup. However, there is no evidence as to what the definition of this position is and whether the adjudicators fit the definition.

[36] It was incumbent upon the Complainants to present evidence establishing the appropriateness of the remedial option they were advocating. They failed to do so.

Ms. Power's Credibility

[37] The Complainants and the Commission attempted to discredit Ms. Power's testimony by stating that there was a fundamental contradiction between the testimony that she gave in the liability portion of the hearing and the testimony she gave in the remedy portion. Therefore, her evidence, in its entirety, was not credible, according to the Complainants and the Commission.

[38] In the liability phase of the hearing, Ms. Power testified that it was impossible to classify the adjudicators as Nurses using the existing definitions and standards because the adjudicators' work did not fit the Occupational Group definition for Health Services and did not fit any of the existing subgroup definitions.

[39] Then, in the remedy phase, Ms. Power testified that, provided certain changes are made, it would now be possible to classify the adjudicators as Nurses. Ms. Power testified that the creation of the new subgroup would require the definition of Nursing to be changed so that direct patient care is no longer a requirement for inclusion in the Classification. In addition, she stated that it may be necessary to introduce inclusion statement 5 into the Nursing definition, which is provided in the Medicine Classification definition, and which allows advisors to be included in the MD Classification.

[40] Ms. Power testified that there may also have to be changes to the MD and PA definitions to ensure that the adjudicator work did not fall within these Classifications.

[41] In my view, there is no contradiction in Ms. Powers' testimony during the two phases of the hearing. Her testimony in the first phase was based on the definitions and standards as they were at the time. At that time, the Respondents did not believe that their classification practice with respect to the adjudicators was discriminatory. Ms. Power's testimony in the second phase was based on the Tribunal's finding that the Respondents' classification practice was

discriminatory and that action had to be taken to redress it. In view of those findings, the Respondents proposed changes to the definitions that they thought would provide effective redress.

[42] Ms. Power indicated that the Respondents could and would make the necessary changes to create a new nursing subgroup for the adjudicators, if ordered to do so by the Tribunal. I find nothing contradictory in the statements made by Ms. Power with regard to the possibility of reclassifying the adjudicator position.

[43] The Complainants submitted that the evidence of Ross MacLeod, the Director General of Service Delivery in the Human Resources Branch at HRSDC, was more credible and to be preferred over that of Ms. Power. Mr. MacLeod testified about the Service Management Structural Model, which is a new way of organizing the service delivery arm of the HRSDC portfolio to provide better service for Canadians. The Model requires standardized organizational designs and revised job descriptions that will ensure that wherever they are, Canadians can receive the same type of service.

[44] Mr. MacLeod testified that in a period of less than 2 years, the Service Management Structural Model team has classified and developed 22 job descriptions, and is working on an additional 18 to 20. He stated that ultimately the adjudicators' job description will also be modified. However, the team will wait until the present complaints have been resolved before modifying the adjudicators' job description to conform to the Service Management Structural Model. Mr. MacLeod stated that the team will respond as required to a decision from this Tribunal.

[45] Counsel for the Complainants asserted that, contrary to Ms. Power, Mr. MacLeod provided evidence that it is relatively simple and straightforward to reclassify positions in the public service. Therefore, the Complainants asserted, the Tribunal should reclassify the position

as it sees fit, without any consideration to the potentially negative consequences and disruptions to the public service about which Ms. Power testified. In the Complainants' view, the Service Management Structural Model team can deal with the repercussions of the Tribunal's decision, as Mr. MacLeod has clearly indicated they are willing to do.

[46] I disagree with Complainant counsel's interpretation of Mr. MacLeod's evidence. In my view, he simply said that, working within the particular parameters set out by the Service Management Structural Model, his team was well on their way to accomplishing their goals. He certainly did not suggest that the Tribunal could issue any order it saw fit without regard to the evidence provided by Ms. Power. Nor did he present an alternative proposal as to how to redress the discriminatory practice. Indeed, he was not called to testify about the appropriate means to correct the discriminatory practice; he was called to testify that once the Tribunal had determined how to redress the discriminatory practice, the team would deal with the decision within the context of their mandate.

[47] Therefore, I reject counsel's suggestion that Mr. MacLeod's evidence contradicted that of Ms. Power's and that Mr. MacLeod's evidence is to be preferred. The two witnesses testified about different issues and did not contradict one and other.

[48] Moreover, I find that Ms. Power's testimony was credible, consistent and withstood the test of cross-examination very well.

[49] The Commission and the Complainants were unable to demonstrate how Ms. Power's solution fails to provide full redress. The Commission argued that the creation of a new Nursing Subgroup would not **guarantee** that the Complainants will receive remuneration commensurate with their professional qualifications; it will merely put them in a position to negotiate that. It was argued that the Tribunal should go further than simply putting the adjudicators in a good negotiating position in order to effectively redress the discriminatory practice.

[50] Although there is no guarantee with respect to the amount of compensation that the adjudicators will receive through collective bargaining, Ms. Power indicated that the adjudicators' new compensation will reflect the fact that they have been reclassified as nurses. The Commission's proposal to put the advisors and the adjudicators in the same Classification or Occupational Group would not guarantee a particular wage rate any more than being placed in a new NU subgroup would. Like the Respondent's proposal, it would simply put them in a position to negotiate a wage rate that is commensurate with their professional qualifications. Moreover, I accept Ms. Power's evidence that the adjudicators would not receive greater wage and benefit parity with the advisors merely by being in the same Classification or Occupational Group.

[51] Nor would the adjudicators' wage rate be guaranteed by allocating their work to the CHN or Nurse Consultant subgroups, as proposed by the Complainants, unless the Tribunal assigned a specific level to the adjudicators. In order to assign a level of work to the adjudicators, the Tribunal would need to have a reasonably accurate estimate of the value of the adjudicators' work relative to other jobs in the public service and the CPP Disability Benefits unit. As will be discussed in greater detail in the next section, it is not possible to do this with the information that has been provided to the Tribunal.

[52] The proposals put forward by the Commission and the Complainants are **not** superior in terms of their ability to correct the discriminatory practice. Moreover, they would likely produce negative effects on human resource management in the public service. The Commission's proposal would have a significant impact on the advisors since they too would be reclassified. The advisors have not been given an opportunity to speak to this issue. The Complainants' proposal of placing the adjudicator position in either the Community Health Nursing or Nurse Consultant Subgroups would provide recognition as health professionals, but the problem that formed the genesis of this case would persist: the work of the Complainants would be mischaracterized, and their duties, responsibilities and functions would be shoe-horned into a

category that was never intended to contain them. Who can say what new inequities would be spawned by such a "make do" solution? Surely the remedial goals of the *CHRA* require a form of redress better tailored to the actual needs of the situation.

[53] Therefore, I accept Ms. Power's testimony that the creation of a new Nursing Subgroup represents a reasonable and effective means of redressing the discriminatory practice and ensuring that it does not occur again in the future. It represents an effective redress option. Moreover, it creates the least disruption to and negative consequences for the broader public service.

[54] It must be noted however, that the proposal to create a new Nursing Subgroup right away does run counter to a suggestion made by Mary Daly, the expert witness who testified on behalf of the Respondent at the remedy stage.

[55] Ms. Daly is a human resource consultant with a strong domain expertise in classification, compensation and organizational design. She was asked to provide an assessment of an expert report by Scott MacCrimmon, a human resource consultant who testified on behalf of the represented Complainants with respect to the wage loss resulting from the discriminatory practice.

[56] In her report and testimony, Ms. Daly provided a thorough critique of Mr MacCrimmon's methodology for assessing wage loss and stated that, in her professional view, his conclusions were not reliable. She did not, however, provide an alternative assessment of whether the Complainants suffered any wage loss as a result of the discriminatory practice. Rather, she stated that to determine whether there was any wage loss, and also the appropriate redress, one would have to do a full "diagnostic" of the work of CPP disability claims adjudication.

[57] Ms. Daly suggested that a full diagnostic might reveal that the creation of a new subgroup within Nursing was **not** necessary. It could establish that the adjudicators should remain in the PM group, but that management practices must be improved.

[58] When asked in final argument what he made of this apparent difference in the testimony of his two witnesses, counsel for the Respondents indicated that in an ideal world, one might begin with Ms. Daly's suggested "diagnostic" to determine whether the creation of a new subgroup was indeed necessary. However, given that Ms. Power had provided evidence of action that could be taken immediately to correct the discriminatory practice, he submitted that this action - the creation of the new subgroup - constitutes the best solution in the circumstances.

[59] I agree with counsel for the Respondents. Ms. Power provided credible evidence to support the Respondents' proposal that a new Nursing Subgroup would redress the discriminatory practice. I do not think that Ms. Daly's proposal to undertake a full diagnostic is necessary given the satisfactory nature of the Respondents' proposal to create a new nursing subgroup.

[60] For these reasons and based on the evidence that was presented to me I find, on a balance of probabilities, that the most appropriate way to redress the discriminatory practice identified in the Tribunal's December 2007 decision is to create a new Nursing subgroup for the medical adjudication position(s). I order that such a subgroup be created and that the adjudicator work be placed in this subgroup. I further order that work on the creation of the new NU subgroup commence within 60 days of the date of this decision.

II. Compensation For Wage Loss

[61] Subsection 53(2)(*c*) provides the Tribunal with the authority to order that the person found to have been engaging in a discriminatory practice compensate the victim for any or all of the wages that the victim was deprived of as a result of the discriminatory practice.

[62] The Tribunal found that the Respondents had failed to provide the Complainants with remuneration commensurate with their professional qualifications. The Complainants were paid as Program Administrators, not as Health Care Professionals. However, there was no evidence provided during the liability phase as to what the wage loss might be, if any, resulting from the discriminatory practice.

[63] In the preceding section, I found that the appropriate way of redressing the discriminatory practice was to create a new Nursing subgroup. The problem, of course, is that the Nursing subgroup did not exist in the past. Therefore, it is difficult to determine if there was any wage loss when there is no past salary line for that subgroup to compare with the adjudicators' past compensation. One way of dealing with this problem is to determine the value of the adjudicator position relative to the value of other positions performing similar work. A comparison would then be made between the adjudicators' past remuneration and the past remuneration of positions that are of comparable value.

[64] The Respondents proposed to do just that at the outset of the remedy hearing. They sought leave of the Tribunal to call evidence comparing the value of the adjudicators' work with the value of work performed by similar nursing positions in the public service.

[65] In a Ruling dated June 6, 2008 the Tribunal granted the Respondents' request to call evidence but stated that because the remedy must flow from the discriminatory practice, a comparison of the relative value of the work performed by the adjudicators and the advisors was required. The Tribunal stated, however, that a determination of the value of the work performed

by the adjudicators relative to that of the advisors did not preclude a comparison of the value of the adjudicators' work to the value of other nursing positions in the public service.

[66] In the June 2008 Ruling, the Tribunal stated that 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 positions or to that of another position. 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 Tribunal also stated that the Complainants and the Commission were free to lead evidence of a different nature, and to argue that the wage loss should be differently calculated.

[67] In the end, however, there was a problem with the Respondents' evidence and they decided not to call evidence of a comparison that was done of the relative value of the adjudicators, the advisors and other Nursing positions in the public service. Rather, it was the represented Complainants who presented evidence of a comparison of the value of the advisors' work to that of the adjudicators. The Respondents presented the evidence of a human resource expert, Mary Daly, who criticized the Complainants' expert report, but did not provide an alternative assessment.

[68] The Tribunal must determine then, whether the Complainants' evidence establishes that the value of the adjudicator position is such that if the adjudicators are properly classified as health care professionals, there is a wage gap between what the adjudicators actually earn and what they would earn as NU's.

What is the standard of proof required to establish a right to compensation?

[69] In *PSAC v. Canada (Department of National Defence)* ("the *DND* case") [1996] 3 F.C. 789, the Court of Appeal stated that the standard of proof for establishing damages is the balance of probabilities. The complainants must show that their position is more likely than not.

[70] The *DND* case involved a judicial review of a Tribunal decision regarding a s. 11 complaint. Section 11 provides that it is a discriminatory practice to maintain wage differences between male and female employees who are performing work of equal value. The union filed a complaint in February of 1987, alleging that the respondent, the Department of National Defence, was not paying certain female employees wages equal to those paid to certain male employees performing work of equal value. The respondent conceded that it had committed a discriminatory practice contrary to the *Canadian Human Rights Act* and that such discrimination was systemic.

[71] The respondent agreed to pay wage adjustments from June 1, 1987 onward, but not for a retroactive period. Following a hearing, the Tribunal concluded that it did not have the authority to grant retroactive relief under the *Canadian Human Rights Act*. The Tribunal also held that it was inappropriate to reach back in time to redress historic wrongs because there was no certainty with regard to the extent of the wage gap.

[72] The Court of Appeal held that the Tribunal does, in fact, have the authority to grant retroactive relief under the *Act.* Moreover, certainty in the proof of wage loss is not required; the standard of proof is the balance of probabilities. The Court noted that it is well settled law that once it is known that a plaintiff has suffered a loss, a court cannot refuse to make an award simply because the proof of the precise amount of the loss is difficult or impossible. The judge must do the best he or she can with the evidence that is available (see also: *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1998] C.H.R.D. No. 6, (aff'd: *Canada*

(Attorney General) v. Public Service Alliance of Canada [2000] 1 F.C. 146) in which the Tribunal applied the Court of Appeal's approach in *DND* to determining wage loss under s. 53(2)(*c*) of the *Act).*

[73] In *Public Service Alliance of Canada v. Canada (Treasury Board),* the Tribunal held that the standard of proof must be governed by a standard of reasonableness. That is, the Tribunal will assess whether the results of the job evaluation process are reasonably accurate. In the judicial review of the Tribunal decision, the Federal Court did not take issue with this approach.

[74] Notwithstanding that the above-noted cases deal with complaints under s. 11 of the *Act*, I think that the principles are applicable to the present case. The Tribunal must determine whether the Complainants have established, on a balance of probabilities that had they been treated as though they were doing substantially similar work to that of the advisors and classified accordingly, they would have been paid more than they were as PM's. If the answer to this question is "yes", the Tribunal must then determine whether the Complainants have proved, on a balance of probabilities, the extent of the wage loss that they suffered as a result of the discriminatory practice.

[75] The Complainants presented the evidence of Scott MacCrimmon, an expert in job evaluation, in support of their contention that had the Respondents treated the Complainants in a non-discriminatory manner, the advisors would have earned only 15 – 25% more than the adjudicators, instead of the 50% more that they actually earned. The estimate of the wage differential was based on a comparison of the relative value of the two positions.

Scott MacCrimmon's Evidence

[76] Mr. MacCrimmon has more than 33 years of consulting experience in compensation systems. He has served as project director for many large job evaluation, job classification and

pay systems studies for clients across Canada, the USA and in the Caribbean. In 2002, Mr. MacCrimmon was appointed by the Ministers of Justice and Labour to a three-member task force to conduct a comprehensive review of s. 11 of the *CHRA* and the *Equal Wage Guidelines, 1986.* Section 11 and the Guidelines define how pay equity is to be applied to all federally regulated employers in Canada (although now, federal public service employers are governed by the *Public Service Equitable Compensation Act*). The Task Force submitted a report to the Ministers in 2004.

[77] Mr. MacCrimmon was qualified, on consent, as an expert in job evaluation and compensation systems.

[78] Mr. MacCrimmon was retained by the represented Complainants to conduct a comparative analysis of the work of the advisors and the adjudicators and thereby provide direction on how this might affect the wage comparison. In the retaining letter, Mr. MacCrimmon was instructed by counsel for the represented Complainants to work independently and without influence by either counsel for the Complainants or any of the Complainants.

[79] Mr. MacCrimmon performed his analysis on the basis of the following sources of information:

(i) the December 13, 2007 CHRT decision in Walden et al v. Social Development Canada, Treasury Board of Canada, and Public Service Human Resources Management Agency of Canada 2007 CHRT 56, which established that the Respondents had discriminated against the Complainants contrary to sections 7 and 10 of the CHRA;

(ii) the June 6, 2008 CHRT Ruling in Walden et al v. Social Development Canada, Treasury Board of Canada, and Public Service Human Resources Management Agency of Canada 2008 CHRT 21, regarding the introduction of new evidence for the purpose of determining the appropriate remedy;

(iii) a job description for the Medical Adjudicator position dated June 6, 2006;

(iv) a job description for the Medical Advisor position dated March 14, 1990.

[80] Mr. MacCrimmon was not provided with any other material to undertake his job evaluation. Specifically, he noted that he was not provided with wage rates or salary data that might allow him to calculate differentials and the amount of wage loss arising from any discriminatory pay practice.

[81] Mr. MacCrimmon did not interview anyone in the CPP disability program, or anywhere else in the public service, to obtain more information for the job evaluation. He was told to perform the study with the materials noted above.

[82] It is important to note that at no point in time was I made aware that the Complainants had requested and were denied permission for Mr. MacCrimmon to enter the workplace to obtain additional job information to perform his job evaluation study. It would appear that the represented Complainants were of the view that the information provided to Mr. MacCrimmon was sufficient for the purposes of his study.

[83] To evaluate the adjudicator and advisor positions Mr. MacCrimmon used a generic point-factor job evaluation plan that he had developed. Mr. MacCrimmon's plan has been used by many employers including hospitals, community health care centres, banks, insurance companies and others.

[84] The plan applies 10 factors covering job skill, effort, responsibilities and working conditions. Each factor contains grade levels from low to high, with the highest grade producing the highest point rating for each factor. An accompanying job evaluation manual provides a definition of each of the factors as well as definitions for each of the grades within the factors.

[85] Mr. MacCrimmon rated the adjudicator and advisor positions using his plan. Factor by factor scores were developed based on the information contained in the two job descriptions as well as the two Tribunal decisions. Mr. MacCrimmon stated that he accepted all the findings of the Tribunal as factual and correct.

[86] Mr. MacCrimmon stated that job evaluation allows one to develop a total point score for each job. The point total becomes a measure of the "value" of the job to the employer, irrespective of who is in the job, their personal qualifications or their performance.

[87] Mr. MacCrimmon determined that the medical advisor position had a total value of 370 points. The medical adjudicator was valued at 313 points. The only difference in the total value of the two positions arose from the values Mr. MacCrimmon attributed to the decision making and education factors for each position. Mr. MacCrimmon accorded 125 points to the advisors for the education factor, and 80 points to the adjudicators. He attributed 50 points to the advisors for decision-making, and 43 points to the adjudicators.

[88] In his report, Mr. MacCrimmon stated that the evaluation scores by themselves do not provide clear direction on the extent of the wage loss that results from the discrimination identified in the December 2007 decision. They simply confirm the appropriate pay relationship, that is, that pay for the Advisor should be somewhat above pay for the Adjudicator.

[89] Mr. MacCrimmon stated that he was not provided with specific salary data for these jobs or any other jobs. Therefore, he was unable to quantify what the appropriate wage differential

between the advisor and the adjudicator position would be, based on the relative job values of the positions. However, he provided an opinion, based on several decades of experience conducting compensation surveys and designing salary structures for employers throughout Canada and North America. His opinion was that in most cases, any two jobs that are 57 points apart and in the 300 total point range would be about two pay grades apart (and perhaps only one). For typical salary structures, this represents a salary differential in the range of 15% to 25%, in Mr. MacCrimmon's opinion. That is to say, he stated, the pay range maximum for the Advisor would be about 15% to 25% higher than for the Adjudicator.

Do the Results of Mr. MacCrimmon's Job Evaluation Study Establish that the Complainants Suffered a Wage Loss as a Result of the Discriminatory Conduct?

[90] Mr. MacCrimmon was forthright in explaining the limitations of his study. His first concern was that making one-on-one job comparisons, such as the one that he was asked to do in the present case, can often later lead to inequities and inappropriate pay relationships that are difficult to justify and become difficult to administer. He stated that for that reason, a one-to-one job comparison would **not** be adopted by professional compensation managers. Rather, the typical approach would be to formally and objectively evaluate a representative sample of jobs within the work unit. An internal pay trend line would then be calculated which would provide a means of determining pay for jobs within the organization. This would support internal consistency and fairness.

[91] In cross-examination, Mr. MacCrimmon stated that he would be concerned about the potential for inequities and inconsistencies if the results of his study in the present case were to be implemented. He stated that using his study to determine wage adjustments could result in the adjudicators' managers, for example, being paid less than the adjudicators for the relevant period of time.

[92] In re-examination, Mr. MacCrimmon was asked whether he thought his study had produced an accurate result. Mr. MacCrimmon responded that based solely on the comparison between the advisor and the adjudicator positions, his evaluation provided an accurate measure of the difference in value between the jobs. However, he also stated that "to simply make an adjustment based on one job-to-job comparison is not the way that a professional person would set up the salary structure and determine what the pay relationship should be".

[93] Mr. MacCrimmon further testified that additional information about the positions might well affect the values that he assigned to them. He conceded, in cross-examination, that if he had been permitted to perform the study in his preferred manner, he would have interviewed people in the CPP Disability Unit. He would have obtained more information about the positions and the amount and percentage of time spent performing the various tasks. He would have obtained more up-to-date job descriptions. That information, he stated, could have made a difference in the values that he assigned to the positions.

[94] In cross-examination, Mr. MacCrimmon also admitted that his estimate of the appropriate wage differential between the advisors and the adjudicators was speculative. He stated that it was based on his past experience in performing numerous job evaluations. Mr. MacCrimmon admitted that his past experience did not necessarily inform him about what the specific result would be in the present case. He stated that to properly make the connection between the job evaluation and the rates of pay, one would follow the approach that he recommended which is to develop a pay trend line on the basis of a comparison of the relative value of a representative sample of jobs within the organization.

[95] In re-examination, Mr. MacCrimmon stated that although his estimate of the wage differential was speculative, it was based on extensive experience in the field. That experience led him to assert that when, as in the present case, two positions in the 300 point range are approximately 20% apart in point ratings, they are usually a couple of pay grades apart.

[96] When asked by counsel for the Respondents, Mr. Bendin, what weight should be given to his opinion in light of the limitations and concerns he had expressed about his study, Mr. MacCrimmon stated the following:

> **Mr. MacCrimmon**: Well, you'll have to decide. I was given, I made, as he just mentioned, I made my report based on the information I was given. I was asked to render a judgment. So I said, this is the information I'm given, and this is, this is the result. But, I think there's a better way of doing it. So, I rendered my opinion.
>
> **Mr. Bendin**: So if you'd had your druthers, you would have done this completely differently.
>
> **Mr. MacCrimmon**: I would have had more time and more information.

[97] In re-examination, Mr. MacCrimmon stated that he stood by his report, nonetheless.

Mary Daly's Critique of Mr. MacCrimmon's Study

[98] Mary Daly was qualified on consent by the Tribunal as an expert in classification, compensation and organizational design. She testified that Mr. MacCrimmon's study did not provide reliable results regarding potential wage loss. The essential points of her critique may be summarized in the following way:

1) The job evaluation **process** followed by Mr. MacCrimmon did not produce reasonably accurate results.

2) The job evaluation **tool** used by Mr. MacCrimmon did not produce reasonably accurate results.

3) Mr. MacCrimmon's speculation regarding the pay differential was unfounded.

(1) *The Job Evaluation Process*

[99] In her expert report and her testimony before the Tribunal, Ms. Daly described the systematic process that experts follow when they are measuring the relative worth of jobs within an organization. She described the process as essentially the professional standard for job evaluation studies. Ms. Daly assessed Mr. MacCrimmon's job evaluation study on the basis of this process.

[100] The first step in the process is to interview managers. Ms. Daly stated that the job evaluation process begins and ends with the managers who are responsible for managing the work and the workforce to produce business results and to fulfill the purpose of the organization. An understanding of the work and the workforce allows an evaluator to discern the most prominent realities of the work, in the way that "depth of field" in photography provides a means of bringing target objects into focus. Ms. Daly testified that without management consultation to reveal the business frame within which the work is done, the job evaluation plan or job evaluation results cannot meaningfully reflect the work.

[101] In cross-examination, Ms. Daly was asked how she dealt with the possibility that management might not be telling the truth. She responded that her initial step in the evaluation process would also include conversations with employees, supervisors and unions. She stated that she tests the perspectives that have been provided to her by obtaining multiple perspectives from multiple functions at multiple levels. She does not rely on any single source of information. In that way, she is able to piece together a coherent and accurate picture of how the organization values the work that is performed by its workforce.

[102] Ms. Daly testified that another important part of ensuring that the job evaluation results are accurate in the public service is to compare jobs both within and outside of the particular work unit. Within a unit such as the CPP Disability Benefit Unit in the core public service, there

is a hierarchy of occupational groups. There is also a hierarchy within the Occupational Group or Classification that extends across the core public service. As a result, the job evaluation study must compare positions both within the Unit and within the Occupational Group or Classification. This is because adjudicators, for example, will look both within the CPP Disability Benefit Unit to see if they are being treated fairly, and also outside the Unit to see if they are being treated fairly relative to other PM's or NU's elsewhere in the public service. An evaluation that fails to take into account relativities within the Unit as well as across the public service will not accurately reflect the value of the job to the public service as a whole, or to the CPP Disability Benefits Unit.

[103] Ms. Daly stated that as a result of the constraints placed on his study, Mr. MacCrimmon was not able to benefit from contextual information about the CPP Disability Program, its processes, or related and connected work. He was not able to interview management, supervisors or employees to obtain an accurate picture of how the organization values the work in the Unit. He did not have information about work volumes, how work flows from one stage to the next, or what the nature of the work was in Ottawa versus other offices. He did not have information about the work of other nurses or program administrators throughout the public service who performed work of a similar nature to the adjudicators. He did not have any information other than the documents that he was given. In short, Mr. MacCrimmon simply did not have enough information to perform an accurate and reliable job evaluation.

[104] Ms. Daly testified that the job descriptions and the Tribunal decisions did not provide sufficient information for an accurate job evaluation to be performed. The job descriptions were very different lengths. The adjudicators' job description was much longer and more detailed than that of the advisor. The advisors' description was also much older than that of the adjudicators. She stated that it was like looking at the adjudicators' job with an electron microscope, and looking at the advisors' job with the naked eye. One does not have the chance

to understand the full value of the work if they are unevenly treated in terms of job documentation.

[105] With respect to Mr. MacCrimmon's use of the Tribunal's 2007 decision, Ms. Daly stated that Mr. MacCrimmon did not provide a specific explanation of how he used the findings from the decision to evaluate the jobs. It seemed to her that he selectively used descriptions of the work from the decision, and the work descriptions, and was unable to say which he used and where, in the evaluation of the jobs. By way of example, Mr. MacCrimmon did not explain what use he made, if any, of the Tribunal findings that the adjudicators in Manitoba and Saskatchewan prepare for and appear before the Review Tribunal. Did he attribute that responsibility to all of the adjudicators? To do so would have been an error. Not all adjudicators appear before the Review Tribunal and it would distort the value of the adjudicators' position to attribute that responsibility to all adjudicators.

[106] Ms. Daly stated that Mr. MacCrimmon was not able to explain how he used the Tribunal's decisions in his evaluation of the positions. He did not provide a sufficiently detailed rationale to support the ratings assigned to a job. Therefore, the Tribunal had insufficient information upon which to assess the reliability of his results.

(2) *The Job Evaluation Tool*

[107] Ms. Daly took issue with Mr. MacCrimmon's use of his own generic job evaluation tool. She stated that a generic point factor plan cannot meaningfully reflect the nature and value of work involved in the adjudicator and advisor roles. Important aspects of the professional nature of the work of the adjudicators and advisors are not effectively captured in the generic plan.

[108] Ms. Daly also stated that the MacCrimmon job evaluation tool is designed to capture the full range of work within an organization and therefore, cannot have the level of detail and focus

required to distinguish the differences between two specialized professional roles. The work measured by Mr. MacCrimmon is just a portion of the work of the unit, leaving a large part of the available value scale unused, and therefore understating the significant differences that exist between the values of the jobs reviewed.

(3) *The Pay Differential*

[109] Ms. Daly observed that Mr. MacCrimmon arrived at a total point difference between the two positions and then speculated on what the link might be to a salary structure.

[110] She explained that there are a number of problems with this approach. Firstly, it erroneously assumes that there is a single generic approach to determining compensation based on point banding. Ms. Daly stated that every organization has a unique approach to job evaluation, job evaluation ratings, how they cluster their ratings, how they do their point bands, and what the salary lines are that correspond to the point bands.

[111] To explain what she meant, Ms. Daly stated that a good job evaluation design will result in some reasonable pattern, whereby those jobs that are highly valued are paid more than those jobs that are of lower value. Some time ago, organizations would provide a fixed number of dollars per point. But that meant that the employer would be paying a job with 312 points more than a job that had 311 points. That system did not make sense since job evaluation is not precise enough to justify such pay differentials. Instead, organizations now create point bands whereby the positions with point ratings between 150 - 200, for example, constitute a “band” of notably similar value. They are paid the same.

[112] The clusters of point ratings and resulting point bands are different in every organization, depending upon a number of factors, including for example, whether the organization has a lot of junior or senior level jobs. Some point ratings may cluster in certain ranges more than others.

Every organization has its own pattern of point ratings, its own approach to establishing the point bands and the corresponding salary rates. For that reason, Ms. Daly stated that it was inappropriate for Mr. MacCrimmon to use generalizations about the relationship between points and salaries in other organizations to arrive at a relatively precise conclusion regarding a specific organization, namely the CPP Disability Benefits Unit. Using generalizations based on experience with other organizations is likely to result in erroneous conclusions, in Ms. Daly's view.

[113] In addition, Ms. Daly stated that Mr. MacCrimmon's conclusion regarding pay rates makes a significant unfounded leap that is not based on the detailed analysis required to determine the compensation implications of a job evaluation.

[114] Finally, Ms. Daly stated that Mr. MacCrimmon's estimate of the appropriate wage differential between the advisor and the adjudicator positions was based on a job evaluation process which, because of the restrictions that were placed on him, was fundamentally flawed. Therefore, it could not produce reasonably accurate results.

[115] For these reasons, Ms. Daly was of the view that Mr. MacCrimmon's estimate of the appropriate wage differential between the adjudicators and the advisors did not represent an accurate reflection of what the adjudicators would have earned had they been paid commensurate with the professional nature of their work.

Ms. Daly's Credibility and Independence

[116] The Complainants and the Commission alleged that Ms. Daly was not a credible or independent expert witness. Therefore, her evidence in its entirety should be given no weight. They based their assertion on the following: (1) Ms. Daly admitted that part of the foundation of her criticism of the MacCrimmon report was that he accepted the findings made by the Tribunal

in December of 2007 as one of the factual bases of his study whereas she would have done the study differently; and (2) Ms. Daly admitted to having been influenced by counsel for the Respondents in the manner in which she presented her report.

[117] With respect to the first issue, Ms. Daly testified that she thought that the Tribunal's finding that the advisor and the adjudicator perform substantially similar work was a qualitative assessment that needed to be tested. She agreed that part of her critique of Mr. MacCrimmon's report was that he accepted the Tribunal's findings in that regard whereas she would have subjected them to empirical analysis. Counsel for the Complainants stated that this undermined the entire validity of Ms. Daly's critique of Mr. MacCrimmon's report. I disagree.

[118] Firstly, I do not think that Ms. Daly was suggesting that the Tribunal's findings with regard to the discriminatory practice were erroneous or open to challenge on an empirical basis. Rather, she thought that the question of whether there was wage loss resulting from the discriminatory practice must be empirically tested, instead of drawing that inference from the Tribunal's decision. I agree with Ms. Daly on this point.

[119] In the December 2007 decision I found that as a result of the discriminatory practice, the Respondents failed to provide the nurses with remuneration commensurate with their professional qualifications. This does not mean that I found a wage loss resulting from the discriminatory practice within the meaning of s. 53(2)(c). It means that the adjudicators should have been remunerated as nurses. If it is established that there is a gap between the remuneration provided to them as program administrators and the remuneration that would have been provided to them as nurses, they must be compensated for that wage loss. I accept Ms. Daly's evidence that the existence and extent of a wage gap must be empirically determined.

[120] Secondly, with respect to Mr. MacCrimmon's use of the Tribunal's findings, I think that Ms. Daly's critique was based on a concern that the findings did not provide enough information

for an accurate or reliable job evaluation. In that regard, Mr. MacCrimmon shared Ms. Daly's concern. He stated that he would have preferred to have more information. He also stated that additional job information might well make a difference in the relative values of the two jobs. Thus, to the extent that Ms. Daly was attacking the use of the Tribunal's decision in place of obtaining full job information in order to do a reasonably reliable job evaluation, I think she has Mr. MacCrimmon's support.

[121] The findings made in the December 2007 decision supported a finding of liability. Liability was based on the Respondents' failure to provide a reasonable explanation for the *prima facie* case of discrimination. Those findings were not designed to establish the *quantum* if any, of discriminatory wage loss. They can be used to justify an **inquiry** into possible wage loss, but were not intended to quantify the wage loss itself. In essence then, the findings with respect to the job differences and similarities opened the door to the remedial stage of the inquiry. They did not provide the final determination on remedy.

[122] Therefore, I find that Ms. Daly's critique of the use of the Tribunal's findings as the sole basis for the determinations made in the MacCrimmon report was valid, and does not undermine the weight or credibility of her report.

[123] With regard to the second point, the Commission and the Complainants pointed to correspondence between Respondent counsel and Ms. Daly which suggested that the scope and format of the report was altered as a result of suggestions by the Respondent. Specifically, there are electronic mail exchanges between Ms. Daly and counsel for the Respondents indicating that Ms. Daly initially planned to consider whether the creation of a new subgroup for the adjudicators made sense and if so, what the best approach to determining compensation redress would be.

[124] Ms. Daly testified that she was told that there was not enough time to undertake a full analysis of this issue. There was no evidence that limiting Ms. Daly's mandate to an opinion regarding the MacCrimmon Report had any effect on the substance of her critique.

[125] The Commission asserted that Ms. Daly was influenced with respect to the content of her Report by external counsel for the Respondents. The external lawyer was a member of the private bar who was retained by the Respondents to assist in preparation for the litigation of the present case. Together with counsel for the Respondents and the Department of Justice, the external lawyer met with Ms. Daly on several occasions to brief her about the scope and legal parameters of the case.

[126] An electronic mail exchange between external counsel for the Respondents and Ms. Daly was entered into evidence in which the former suggested that Ms. Daly make some formatting changes to her Report. Ms. Daly initially stated that she did not communicate with this person regarding drafts of her report and then later, when confronted with the electronic mail exchange in cross-examination, she admitted that external counsel had made a formatting suggestion with regard to her draft report.

[127] It is apparent from the text of the correspondence that the change that was suggested by external counsel was to move the conclusion from the beginning of her report to the end. Ms. Daly asserted that the change did not go to the substance of the Report. I accept Ms. Daly's testimony in that regard. It is consistent with the written documentation. Moreover, there is no evidence that either in face-to-face meetings or in electronic correspondence Ms. Daly was induced to change the **content** of her Report at the behest of external counsel for the Respondents.

[128] I do not find the initial inaccuracy in Ms. Daly's testimony as to whether she communicated with external counsel to the Respondents regarding changes to her report to be

significant. It does not cause me to question the independence or validity of her opinion evidence. Given how relatively minor the requested change was, and the apparent urgency to complete the Report, I think it understandable that Ms. Daly might have forgotten that external counsel to the Respondents had suggested a formatting change. There was no indication in the evidence that changes or suggestions were made with regard to the content of the report.

[129] Finally, the Complainants and the Commission assert that Ms. Daly was not an independent expert witness. They allege that she was induced by the original Statement of Work to provide only testimony that would be favourable to the Crown's position. The initial Statement of Work stipulated that Ms. Daly was to provide strategic advice consistent with the Crown's theory of the case and to address the remedy portion of the decision in the most favourable light to the Crown and to the Canadian taxpayer.

[130] The final contract, which Ms. Daly signed, stipulated that the objective of the retainer was to provide strategic advice to address the remedy portion of the CHRT's decision of December 13, 2007. Also the expert was to provide strategic advice and assistance in rebutting the Complainants' expert report.

[131] In cross-examination, Ms. Daly stated that she received correspondence including the original Statement of Work when she was in the midst of meetings to brief her on the nature of the work and to clarify her mandate. The original Statement of Work did not figure prominently in her memory of the events at that time. She subsequently sent a letter to counsel for the Respondents, dated November 3, 2008, which was at the beginning of her assignment, indicating her understanding of the objectives of the retainer: she was to provide strategic advice on the remedy; critique the MacCrimmon report; and attend the hearing as needed. This is what was reflected in the Final Contract which Ms. Daly signed after she sent the November 3rd letter.

[132] Ms. Daly testified for the better part of two days. While her answers to questions were often lengthy and involved, she was professional, forthright and consistent in her testimony. The fact that she contracted to provide "strategic advice" on the remedy in this case did not concern me. Expert witnesses do provide strategic advice on the litigation of factual questions that are within their expertise. Ms. Daly denied having been influenced by Respondent counsel and asserted that providing biased testimony would be contrary to her professional ethics. In light of all of the surrounding evidence, I find Ms. Daly's statement in this regard to be credible.

Analysis of the Evidence and Findings

(1) *The Job Evaluation Process*

[133] Ms. Daly and Mr. MacCrimmon were in agreement with respect to many of the issues raised by Ms. Daly regarding the evaluation process. Although Mr. MacCrimmon did not think that a full diagnostic or an evaluation of all of the positions in the CPP Disability Benefits unit were necessary, he agreed that it would have been better to have the information suggested by Ms. Daly as well as to have undertaken an evaluation of more than just the two positions.

[134] Mr. MacCrimmon also stated that accurate and defensible job evaluation relies primarily on the objectivity and consistency of the evaluators and on their judgment as they interpret the facts. I have no doubt that as the sole evaluator in the study, Mr. MacCrimmon exercised the utmost of objectivity and consistency.

[135] However, there were other problems with the job evaluation process, as identified by Ms. Daly, which rendered it improbable that the results were reasonably accurate. Mr. MacCrimmon did not have access to important job information through interviews with incumbents, supervisors and managers. The job description for the advisor was dated and lacked the detail provided in the 2006 adjudicator description. Mr. MacCrimmon and Ms. Daly agreed

that additional job information could make a difference to the values that were assigned to the jobs. Mr. MacCrimmon and Ms. Daly also agreed that to produce results that can be relied upon to make fair and equitable decisions with regard to compensation, one should not compare only two positions, as was done in the present job evaluation study.

[136] As a result of the limitations that were placed on Mr. MacCrimmon, over which he had no control, Mr. MacCrimmon was unable to obtain all of the information and data necessary to undertake an evaluation that would yield reasonably accurate results. Without additional job information than what was provided to Mr. MacCrimmon and with only two jobs being compared using a generic job evaluation tool, the Tribunal is simply not getting a reasonably reliable estimate of the relative value of the relevant positions.

[137] Moreover, Mr. MacCrimmon did not provide the Tribunal with sufficient information as to how he used the data from the Tribunal decisions and the job descriptions to arrive at his conclusions. As a result, I am unable to conclude, on a balance of probabilities, that the results of the study are reasonably accurate.

(2) *The Job Evaluation Tool*

[138] The two experts disagreed about whether the use of a tailored job evaluation plan would make a difference to the results of the study. Mr. MacCrimmon testified that in his experience, there was little difference in the results of a job evaluation whether a custom-made or a generic job evaluation tool was used. Ms. Daly, on the other hand, testified that a generic point factor plan cannot meaningfully reflect the nature and value of work involved in the adjudicator and advisor roles.

[139] As has been noted, absolute precision is not required in the assessment of damages (*NPF*, *supra*, at para. 44). Therefore, I accept Mr. MacCrimmon's expert opinion that his use of a

generic job evaluation tool would not, in itself, render the results of his study unreliable for the purposes of the present analysis. However, as suitable as the job evaluation tool may have been, it cannot compensate for the serious deficiencies in other aspects of the study that were identified by both witnesses. These deficiencies vitiate the reliability of the study results to the point where it cannot be said on a balance of probabilities that they are reasonably accurate.

(3) *The Pay Differential*

[140] Mr. MacCrimmon used his extensive experience in job evaluation to estimate the appropriate wage differential between the advisor and the adjudicator positions as being in the order of 15 – 25%. He admitted that the estimate was speculative inasmuch as it was not based on the actual point banding or salary structures of the public service or the CPP Disability Branch.

[141] Ms. Daly's criticism of this approach is outlined above. Her conclusion was that Mr. MacCrimmon's assessment of the pay differential was unfounded and based on erroneous assumptions.

[142] I am persuaded by the logic and detailed explanation provided by Ms. Daly as to why it is inappropriate to make a generalized assumption about the point banding structure and the corresponding salary structure. Each organization has its own approach to point banding. Therefore, it is inappropriate to use generalities on the job evaluation landscape to arrive at a relatively precise conclusion.

[143] Mr. MacCrimmon was not able to provide any assurances that his conclusion was based on an understanding of the public service's point banding and salary structures. Indeed, Mr. MacCrimmon stated that his experience with the organizational structure of the federal public service is very limited. Mr. MacCrimmon acknowledged that his conclusion was

speculative and not based on any information relevant to this particular workplace. Therefore, I accept Ms. Daly's critique of Mr. MacCrimmon's estimate of the pay differential.

[144] Moreover, Mr. MacCrimmon qualified his evidence with respect to the pay differential by stating that, in practice, compensation is not set on the basis of one-to-one job comparisons such as the one he performed. This is not the way pay rates are established. The results would be anomalous and lead to unfairness and inconsistencies in pay among employees within an organization. He warned against the use of his job evaluation study to determine the appropriate pay rates for the adjudicators.

[145] And yet, this is precisely what counsel for the Complainants suggested that the Tribunal do. Counsel argued that we should use the differential of 15 – 25% suggested by Mr. MacCrimmon, on the basis of his job-to-job comparison, to determine the appropriate CHN or Nurse Consultant level to which the adjudicators should be assigned. This would not only establish the wage loss for the past, based on a comparison with the salaries for that level of CHN or Nurse Consultant in the past, but would also establish their wages for the future. According to the Complainants' own witness, this would not be the appropriate approach to take in this case.

[146] On the basis of the evidence, I find that the Complainants have not established, on a balance of probabilities, that Mr. MacCrimmon's assessment of the wage differential was reasonably accurate. It was speculative and based on job evaluation results that were not reasonably accurate.

Conclusion and Order

[147] The Complainants attempted to show, based on the job evaluation results, that the appropriate wage differential between the advisors and the adjudicators is 15 - 25%, rather than

the 50% difference that was found to exist in the liability phase. On that basis, they argued that 25 - 35% of the difference between the advisors' and the adjudicators' salaries constituted wage loss resulting from the discriminatory practice. For the reasons set out above, I find that the results of the MacCrimmon study do not support that conclusion. The results of the study are not reasonably accurate or reliable.

[148] The Commission requested that, in the event the Tribunal did not accept the MacCrimmon report, it retain jurisdiction over the matter and order the Respondent to conduct a job evaluation study. I decline to do so. The Complainants had the burden of establishing the existence and quantum of wage loss. They failed to do so.

[149] At the outset of the remedy hearing in July of 2008, the Complainants took the position that no further evidence was needed to establish the existence or quantum of wage loss. The Respondents, on the other hand, had the results of a job evaluation study which they were prepared to present. At the hearing, Complainant counsel challenged the admissibility of this study on grounds that were unrelated to the quality of the evidence. When that evidence was withdrawn, a request was made by the parties to adjourn the hearing to provide them with more time to obtain evidence regarding the wage gap between the advisors and the adjudicators. That request was granted.

[150] During the adjournment, the Complainants did not seek the intervention of the Tribunal to obtain access to additional information for their expert to perform his job evaluation study.

[151] The results of the Complainants' study were presented at the resumption of the hearing in December of 2008. As noted, they do not establish, on the balance of probabilities, that wage loss resulted from the discriminatory practice. Recently the Federal Court has indicated that providing the parties to a dispute with numerous opportunities to muster additional evidence may constitute a breach of the duty to provide a fair hearing (*Canada Post Corporation v. Public*

Service Alliance of Canada, 2008 FC 223 at para. 264-265). The Court stated that a fair hearing is not a continuing process. A fair hearing is one where a party knows the case against it and has an opportunity of addressing that case within a reasonable time. At that point, the Tribunal has a duty to adjudicate upon the case.

[152] Although the Federal Court made the above-noted comments in the context of a finding on liability, I am of the view that they apply with equal force to hearings on remedy. There must be some finality to litigation.

[153] In my view then, it would not be appropriate to further postpone the determination on the issue of wage loss to permit yet another job evaluation to be completed.

[154] For these reasons, no order for compensation for wage loss under s. 53(2)(*c*) will be issued.

III. Compensation For Pain And Suffering

[155] Section 53(2)(*e*) of the *CHRA* provides the Tribunal with the authority to award compensation for pain and suffering experienced as a result of the discriminatory practice. In the December 2007 decision, I noted that some of the Complainants testified about the frustration, demoralization and the loss of self-esteem that they experienced as a result of the Respondents' refusal to recognize their professional expertise. On that basis, I was prepared to order that some compensation should be provided to the Complainants. However, I indicated that the *quantum* of the award had yet to be determined.

[156] During the hearing on the remedy, the Respondents argued that I should not order that compensation be provided to all of the Complainants since I did not have a proper evidentiary

basis to do so. They based their argument on the Tribunal's statements in *PSAC v. Treasury Board, supra*.

[157] *PSAC v. Treasury Board* involved a pay equity complaint filed on behalf of 50,000 employees. The Commission and Complainant counsel requested that compensation be provided for the pain and suffering experienced by the employees. The Tribunal stated that an award for pain and suffering required an evidentiary basis outlining the effects of the discriminatory practice on the individuals concerned. Since none of the complainants testified with regard to the hurt feelings that they experienced, there was no evidentiary basis for the award.

[158] The Tribunal also stated that the impact of delays giving rise to frustrations, maybe even sadness or anger, although legitimate reactions, did not measure up to the degree and extent of hurt feelings and loss of self-respect that s. 53(3), as it then was, is designed to address. The Tribunal further held that to grant an award for pain and suffering to some 50,000 employees would amount to an award for hurt feelings, en masse. This was not what was contemplated by s. 53(3) of the *Act*, in the Tribunal's view.

[159] The Federal Court upheld the Tribunal's decision in *PSAC v. Treasury Board*, and did not comment on its reasoning with respect to compensation for hurt feelings.

[160] I agree with the Tribunal's reasoning in *PSAC v. Treasury Board*. The evidence that I heard from some of the Complainants convinced me that some, but not all of the Complainants, should be compensated for the pain and suffering they experienced. Ms. Walden testified generally that the adjudicators felt angry, demoralized and humiliated as a result of the discriminatory practice. However, I am not able to say, on the basis of these statements, that each and every adjudicator experienced the same degree of pain and suffering, or indeed any suffering at all. I cannot attribute Ms. Walden's statements to each and every complainant.

[161] There may well be some adjudicators who did not feel aggrieved by the practice and therefore, should not receive an award. On the other hand, there may be individuals like Ms. Walden who experienced a great degree of pain and suffering, and should receive compensation for that. I simply do not have the evidentiary basis to make a determination as to the pain and suffering that may have been experienced by all of the nurses.

[162] I am, however, convinced on a balance of probabilities that Ms. Walden did experience pain and suffering as a result of the Respondents' discriminatory practice. She spoke of the humiliation that she felt when, year after year, she was not given credit for using her professional knowledge to assess claims. She felt demoralized, angry and frustrated. Her self-esteem was affected by the Respondent's refusal to recognize her as a health professional. Therefore, on the basis of Ms. Walden's evidence I find that compensation in the amount of $6,000 to Ms. Walden is appropriate.

[163] Ms. Palmer testified that when she moved from Ottawa to Manitoba to continue her work as an adjudicator, she did not apply for a Manitoba Nurse's license. She was told by her supervisor that she needed a nursing license from any Canadian province to be an adjudicator, but that it did not have to be from the province in which she was living. However, the Manitoba College of Nurses took the position, contrary to that of the Respondents, that medical adjudication constituted nursing and she was required to have a license from the province in which she was practicing. Consequently, the Manitoba College disciplined Ms. Palmer for practicing nursing in Manitoba without a Manitoba nursing license.

[164] Ms. Palmer stated that it was humiliating to be disciplined for not having the appropriate license when she had been told that a license from any province was sufficient to be accepted for a position as an adjudicator. She did not speak about the discipline for years because she was so upset and embarrassed. By failing to recognize that the adjudicators are performing professional nursing duties, the Respondents failed to recognize a key aspect of the adjudicators' professional

status – the fact that they are subject to regulation by provincial self-governing professional bodies. I find, therefore, that Ms. Palmer's suffering was the result of the Respondent's discriminatory refusal to accord the adjudicators the same professional recognition and treatment that was accorded to the medical advisors.

[165] The Respondents are ordered to provide Ms. Palmer with compensation in the amount of $6,000 pursuant to s. 53(2)(*e*) of the *CHRA*.

[166] The Respondents are also ordered to pay interest on the awards of compensation for pain and suffering in accordance with Rule 9(12) of the Tribunals Rules of Procedure from the date of the complaints.

IV. Legal Expenses

[167] Counsel for the Complainants asked that the Tribunal award the represented Complainants compensation for the legal costs associated with the prosecution of their complaints. Those expenses include the cost of retaining a second lawyer in the latter part of the hearing on remedy.

[168] The preponderance of judicial authority supports the Tribunal's jurisdiction to award legal expenses under s. 53(2) of the *Act (Canadian Armed Forces* v. *Mowat* 2008 FC 118 (appeal to FCA pending)).

[169] Counsel for the Respondents argued that the Tribunal should award legal expenses only in exceptional circumstances. Such exceptional circumstances include cases where the Commission withdrew from the case, where a conflict existed between the position of the Commission and the complainant, or where the case was complex or involved a novel question (*Premakumar v. Air Canada* [2002] C.H.R.D. No. 17). Consideration has also been given to the

value of the private counsel's contribution (*Grover v. Canada (National Research Council* [1992] C.H.R.D. No. 12), and to whether the Commission counsel and private counsel fulfilled different roles at the hearing (*Hinds v. Canada (Employment and Immigration Commission*), (1988), 10 C.H.R.R. D/5683.

[170] It should be noted, however, that in *Premakumar*, the Tribunal decided to award legal costs in the absence of the exceptional circumstances, but where counsel had made a valuable contribution to the case.

[171] In the present case, counsel for the Complainants made valuable contributions to the case. As a result of Mr. Armstrong's involvement and efforts in representing over 400 Complainants residing in all parts of Canada, they were able to present their case in a logical and clear manner. In addition, the case involved a novel approach to provisions of the *CHRA*. It is highly unlikely that the Complainants would have been able to achieve the degree of coordination, communication and legal analysis necessary to present their case without the assistance of private counsel. Therefore, I find that the costs of retaining the services of Mr. Armstrong are expenses incurred as a result of the discriminatory practice, and I order the Respondents to compensate the Complainants for reasonable counsel costs for Mr. Armstrong's services.

[172] Counsel for the Complainants argued that the way in which the Respondents conducted the case made it necessary to have not only one, but two counsel present in the remedy stage of the hearings. They argued that the Respondents were dilatory in their responses to requests for documents and for information, refused to comply with the orders of the Tribunal in the December 2007 decision, and provided large numbers of documents for review in the middle of the hearing.

[173] I disagree that the above-noted actions on the part of the Respondents justify an award of compensation for the expense of retaining two lawyers. It is indeed lamentable that on at least one occasion, the Respondents failed to fulfill their duty to disclose all arguably relevant documents on a timely basis, thereby necessitating some last minute overtime on the part of Complainant counsel. However, given the active participation of Commission counsel in this case, I cannot agree that enlisting the services of another lawyer was necessitated by this conduct.

[174] Nor was it necessitated by the other actions taken by the Respondent in this case. As was their right, the Respondents asserted privilege over the expert's file until she took the stand. As a result, Complainant counsel was forced to review a number of documents in the evenings during one of the weeks of hearing. An adjournment of several hours could have been requested to deal with this issue. Similarly, the fact that the Respondents refused to negotiate a change in the Complainants' classification pending a decision on the judicial review application in this case did not necessitate the assistance of second counsel. There is no indication that the Complainants had commenced time-consuming contempt or enforcement proceedings in the Federal Court to enforce the Tribunal's order.

[175] Complainant counsel chose to enlist the services of the other lawyer in his firm. He thought that this would assist him to better present the remedy portion of the case. He may well be right. However, I find that the cost of the second lawyer's services was not an expense that resulted from the Respondent's discriminatory practice within the meaning of s. 53(2).

[176] Therefore, based on the considerations above, I find it appropriate to order the Respondents to compensate the Complainants for reasonable counsel costs for Mr. Armstrong's services only. I encourage the parties to come to an agreement on the amount, but will retain jurisdiction on this point should they fail to agree.

[177] I further order that interest be paid on the costs award from the date of this decision to the date of payment of the award, calculated in accordance with Rule 9(12)(*a*) of the Tribunal *Rules of Procedure.*

Signed by

Karen A. Jensen
Tribunal Member

Ottawa, Ontario
May 25, 2009

Canadian Human Rights Tribunal

Parties of Record

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

Style of Cause: Ruth Walden et al. v. Social Development Canada, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada

Decision of the Tribunal Dated: May 25, 2009

DATE AND PLACE OF HEARING: July 28 to 31, 2008
December 9 to 12, 2008

Ottawa, Ontario

Appearances:

Laurence Armstrong and Heather Wellman, for the complainants

Ikram Warsame, for the Canadian Human Rights Commission

Patrick Bendin and Claudine Patry, for the Respondent

Reference: 2007 CHRT 56, December 13, 2007