

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

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: Edward P. Lustig 2010 CHRT 19
2010/06/30

[1] This Ruling is in response to a request by the Complainants dated December 10, 2009 for the Tribunal to finalize the List of Complainants and settle the quantum of the Complainants' costs in connection with this matter.

[2] The Complainants are a group of predominately female nurses who work with medical advisors as medical adjudicators in the CPP Disability Benefits Program to determine eligibility for CPP disability benefits. The medical advisors are a group of predominately male doctors.

[3] The Complainants allege 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. .

[4] The Complaint was initiated on the 8th day of December, 2004 and was referred by the Canadian Human Rights Commission (the “Commission”) to this Tribunal on the 10th day of December, 2005 pursuant to s. 44 (3) (a) of the *Canadian Human Rights Act* (“CHRA”).

[5] In a Decision dated December 13, 2007, (the “liability” decision), 2007 CHRT 56, as amended on May 28, 2009 the Tribunal found that while there was a 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.

[6] 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. This was the only reservation by the Tribunal in its liability Decision.

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

[8] 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.

[9] The majority of Complainants were represented by Mr. Laurence Armstrong as Counsel. Those Complainants who were not represented by Mr. Armstrong did not appear in person or through counsel at either the liability or the remedy stages of the hearings, although they had notice of both.

[10] An Application for Judicial Review with respect to the Tribunal’s liability decision was filed on January 14, 2009 with the Federal Court (see Federal Court File T-55-08). The Federal Court dismissed the Application for Judicial Review on May 4, 2010. (See *Canada (A.G.) V. Walden*, 2010 FC 490, appeal pending, see Federal Court of Appeal File A-219-10)

[11] In the Decision dated May 25, 2009 (the “remedies” Decision), 2009 CHRT 16, the Tribunal found:

- (1) The appropriate manner to redress the discriminatory practice was to create a new Nursing subgroup for the medical adjudication position (s) and that work on the creation of the new subgroup be commenced within 60 days of the date of the Decision;
- (2) There would be no compensation for lost wages;
- (3) The compensation payable by the Respondents for pain and suffering experienced by the Complainants as a result of the discriminatory practice would be \$6,000.00 for each of two of the Complainants only, plus interest; and
- (4) Reasonable Counsel costs plus interest should be paid by the Respondents to Mr. Armstrong for his services in representing most of the Complainants with the parties to agree on the quantum of the costs and the Tribunal to retain jurisdiction on this point should the parties fail to agree.

[12] Applications for Judicial Review with respect to the Tribunal's remedies decision were filed on June 24, 2009 with the Federal Court (see Federal Court files T-106-09, T-1024-09 and T-1025-09). The Federal Court has not ruled on these applications and this matter is continuing as a specially managed proceeding before the Federal Court.

[13] According to their submissions, the parties disagree on the number and identity of individuals on the List of Complainants.

[14] The Respondents' position is that the 413 people listed as Nos. 1 to 413 inclusive in Schedule "A" attached hereto, should be on the List. The Respondents' position is based on their view that these people were the only ones that the Tribunal was dealing with when it made its liability decision and that having done so it is *functus officio* with respect to the request of the originally identified Complainants to supplement the List of Complainants with more people.

[15] The Commission's position is that the 416 people shown as Nos. 1 to 416 inclusive in Schedule "A" attached hereto, should be on the List. The Commission's position is the same as the Respondents' position except that it submits that the people listed as Nos. 414 to 416 inclusive in Schedule "A" attached hereto, should also be on the List since they had complaints that the Commission referred to the Tribunal but inadvertently were not added as parties and, therefore, fall within exceptions to the principle of *functus officio*.

[16] The Complainants' position is that the 427 people shown as Nos. 1 to 427 inclusive in Schedule "A" attached hereto, should be on the List. The complainants take the same position as the Commission regarding individuals numbered 414 to 416 inclusive. In addition, the Complainants' position is that the person listed as No. 417 in Schedule "A" attached hereto should be on the List since her complaint was also referred by the Commission to the Tribunal but was inadvertently not added as a party. Further, the Complainants' position is that the people listed as Nos. 418 to 427 inclusive in Schedule "A" attached hereto, should be on the List since their names were submitted and they participated from the outset in these proceedings but somehow their names were removed or disappeared from the List notwithstanding that there is no evidence of any complaint being filed by them, or on their behalf, with the Commission and referred to the Tribunal and notwithstanding that their names were first presented during the remedies hearing after the liability decision was rendered, and that they were never accepted as being part of the List by the Respondents or the Tribunal.

[17] Mr. Armstrong, on behalf of the Complainants, has essentially requested the Tribunal to reopen its liability decision to add new parties. Pursuant to the legal principle known by the term *functus officio* (“having discharged one’s duty”), courts cannot, as a general rule, reopen their final decisions except where there has been “a slip in drawing it up” or where there was an error in expressing the manifest intention of the court *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (S.C.C.), [1989] 2 S.C.R. 848. The Supreme Court in *Chandler* found that the *functus officio* rule applies to administrative tribunals as well, though its application may be more “flexible”. Thus, a decision can be reopened if there are indications in the tribunal’s enabling statute that it may do so in order to discharge its functions. In addition, a tribunal may “complete its statutory task” and reopen its decision if it failed to dispose of an issue that was fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose.

[18] In *Grover v. Canada (National Research Council)*, [1994] F.C.J. No. 1000 (Q.L.), the Federal Court held that although the *Act* does not contain an express provision that allows for the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that the *Act* should be interpreted liberally in a manner that accords full recognition and effect to the rights protected under the *Act*, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The Court found in that case that the Tribunal had specifically retained jurisdiction to deal with any issues relating to the implementation of one of the remedies that it had ordered in disposing of the complaint. It was within the Tribunal’s jurisdiction, therefore, to “reopen” its hearing and hear new evidence.

[19] Similarly, in *Canada (Attorney General) v. Moore*, 1998 CanLII 9085 (F.C.), [1948] 4 F.C. 585, the Federal Court noted that the Tribunal in that case had also explicitly stated, in issuing its remedial order, that it would retain jurisdiction in the event that the parties were unable “to work out the details” relating thereto. The Court found that the Tribunal was therefore entitled to reopen its proceedings and “revisit” its previous order.

[20] Consistent with this reasoning, the Tribunal in *Goyette v. Syndicat des employé(es) de terminus de Voyageur Colonial limitée* (CSN), 2001 CanLII 8495 (C.H.R.T.), recognized that the rule of *functus officio* prevented it from reopening an inquiry regarding an issue in respect of which it had not reserved jurisdiction.

[21] Turning to the present case, the Tribunal did not retain any jurisdiction to deal with any issue, except remedies, in its liability decision. The decision was clearly final, even though it was amended to deal with a mathematical error.

[22] The exceptions to the *functus officio* rule articulated in *Chandler* however, should apply to the people listed as Nos. 414 to 417 inclusive in Schedule “A” attached hereto since I find that their exclusion from the List suggested by the Respondents was either a “slip” in how the liability decision was drawn up or represented an error in the expression of the Tribunal’s manifest intention in its liability decision. I am unable to find that the persons listed as Nos. 418 to 427, inclusive in Schedule “A” attached hereto have a similar claim of status for the reasons set out in paragraph 16 herein, namely that there is no evidence of any complaint for them being filed with the Commission and referred to

the Tribunal and that their names were first presented during the remedies hearing after the liability decision was rendered, but they were never accepted as being part of the List by the Respondents or the Tribunal.

[23] For these reasons, the Tribunal finds that the people listed as Nos. 1 to 417 inclusive in Schedule "A" attached hereto are the correct persons to be on the List of Complainants.

[24] As noted in paragraph 11 (4), the Tribunal retained jurisdiction with respect to the question of the quantum of the reasonable Counsel costs in its remedies Decision. The parties have not agreed on the quantum and have requested a Ruling on this matter as well.

[25] Subsequent to the rendering of the remedies Decision by the Tribunal, the Court of Appeal on the 26th day of October, 2009 released its Decision in *Mowat* wherein it held that the Tribunal had no jurisdiction to award legal costs. An Application for Leave to appeal the *Mowat* Decision was granted by the Supreme Court of Canada on the 22nd day of April, 2010. Under the circumstances, it is appropriate and in the interests of justice that the Tribunal waits until the Supreme Court of Canada has rendered a Decision in the *Mowat* case. Thereafter, if the Supreme Court of Canada issues a judgment that clearly establishes the Tribunal's jurisdiction to award legal costs in the present case before me, the Tribunal will receive submissions with respect to quantum.

"Signed by"
Edward P. Lustig

OTTAWA, Ontario
June 30, 2010

Schedule A

- (1) Arlene Abrey
- (2) Gloria Allan
- (3) Cindee Andrusiak
- (4) Elizabeth Antony
- (5) Sandra Armitage
- (6) Karen Attridge
- (7) Margaret Helen Attwood
- (8) Agnes Baba
- (9) Kimberly Barber
- (10) Ginger Barnes (Haines)
- (11) Patricia Basso

- (12) Linda Bates
- (13) Léa Beauchamp-Charlton
- (14) Roxanne Bedard
- (15) Nicole Beggs
- (16) Sheryl Ann Bell
- (17) Affrene Benjamin
- (18) Sylvie Benoit-Lemire
- (19) Diana Berardinetti
- (20) Gisèle Bériault
- (21) Joanne Bevilacqua
- (22) Joy Bishop
- (23) Althea Blagrove
- (24) Diana Blanchard-McAlpine
- (25) Joy Bobier
- (26) Sharon Boland
- (27) Janet Bo-Lassen
- (28) Linda Bond
- (29) Christine Bongertman
- (30) Sharon Booker
- (31) Aline Bouillon
- (32) Kristine Bowes
- (33) Laurette Brademann
- (34) Joan Breuer
- (35) Susan Bridges
- (36) Morag Broad
- (37) Connie Brown
- (38) Nancy Brown
- (39) Susan Buott
- (40) Judy Burke
- (41) Cindy Butler
- (42) Karla Butterfield
- (43) Paula Callahan
- (44) Jan Cameron-Gionet
- (45) Joanne Carrothers
- (46) Diane Carson
- (47) Nina Castle
- (48) Esther Cavanagh
- (49) Brenda Ceasar
- (50) Maggie Chan
- (51) Michele Charlebois
- (52) Paul Charett
- (53) Kathleen Sandra Charrette
- (54) Trudy Charron
- (55) Elizabeth Chase
- (56) Amy Chen
- (57) Sheila Christ

- (58) Geraldine Christopher
- (59) Shelley Chuckrey
- (60) Cory Ciampa
- (61) Christine Cloutier
- (62) Danise Collins
- (63) Linda Collins
- (64) Jacqueline Combden
- (65) Kyla Conners
- (66) Sally Constantine
- (67) Fay Cormier
- (68) Norma Corstorphine
- (69) Lisa Cota (Bowen)
- (70) Lois Coultis
- (71) Tanisha Coultis
- (72) Lynda Craig
- (73) Martha Cross
- (74) Marie Cuda
- (75) Anges G. Cunningham
- (76) Tracy Dakin
- (77) Dianne Darch
- (78) Miranda Dare
- (79) Lynn Darrow
- (80) Carole Davidson
- (81) Charlene Davies (Jenner)
- (82) Connie Davis
- (83) Emily Del Castillo
- (84) Marian Devine
- (85) Janice Deyne
- (86) Julia Dhillon
- (87) Jublee Dhisna
- (88) Joanne Dietrich
- (89) Melissa Dingwall
- (90) Debra Dobberthien
- (91) Janet Donaldson
- (92) Frances Donely
- (93) Cheryl Doty
- (94) Monique Douglas
- (95) Susan Drysdale
- (96) Elizabeth Duhaime
- (97) Kim Duke
- (98) Linda Dulong
- (99) Barbara Duncan
- (100) Susan Duquette
- (101) Anne T. Durand
- (102) Elaine Durling
- (103) Denise Ely

- (104) Denise Feaver
- (105) Bonnie Jean Fenton
- (106) Allison Ferreira
- (107) Roxanne K. Ferrier
- (108) Vanda Fikus
- (109) Pam Fitzsimonds
- (110) Michelle Fleury
- (111) Barbra Flynn
- (112) Donna Fontaine (Jones)
- (113) Jean T. Forbes
- (114) Lee Franczak
- (115) Elizabeth Franklin
- (116) Barbara Fraser
- (117) Ruth Frayne
- (118) Connie Freeman
- (119) Laurie Freeman
- (120) Susan Frew
- (121) Simone Gardezy
- (122) Frances Gardiner
- (123) Judy Gauthier
- (124) Nicole Gauthier-Tschupruk
- (125) Karrie Gevaert
- (126) Chantal Giguere-Carriere
- (127) Katie Girard
- (128) Rhoda Godin
- (129) Nancy Graham
- (130) Jacqueline Gratton
- (131) Hazel Gray
- (132) Suzanne Green
- (133) Janet Gudel
- (134) Sherry Guikas
- (135) Brenda Gutoske
- (136) Angela Hales
- (137) Sheila Halls
- (138) Vanessa Hamberger
- (139) Jamie Hanley
- (140) Paul Harris
- (141) Susan Harris
- (142) Brenda Hart
- (143) Leslie Hassan
- (144) Lisa Hatcher
- (145) Marie-Jeanne Hawley
- (146) Jacqueline Healy-Lentz
- (147) Patricia Hébert
- (148) Carole Heley
- (149) Lorraine Henderson

(150) Margaret Henry
(151) Susan Hertz
(152) Janet Hess
(153) Marilyn Hewitt
(154) Sandra Highgate
(155) Maria Hillman
(156) Yvonne Hodder
(157) Jean Hodgson
(158) Joy Holt
(159) Donna Hooper
(160) Pamela Horning
(161) Judy Howard
(162) Lynda G. Heustis
(163) Marian E. Humprey
(164) Carolyn Hynes
(165) Lise Ireland
(166) Dale Jameson
(167) Maureen Johansson
(168) Katharine Johnson
(169) Mary B. Johnson
(170) Donna Johnson
(171) Paulette Jolicoeur-Wells
(172) Barbara Kader-Farber
(173) Katie Kassam
(174) Richard Kavanagh (also known as Owen Kavanagh)
(175) Sharon Kean
(176) Mary Lynne Kelly
(177) Gail Lynn Kirkpatrick
(178) Carol Knowles
(179) Beth Koehler (also known as Beth Kowhler)
(180) Louise Koen
(181) Veronika Kreager
(182) Sally Kress
(183) Geri Krietemeyer
(184) Hikka Kuokkanen
(185) Joyce Kutnikoff
(186) Lisa Lacompte
(187) Shabine Ladha
(188) Colleen Lafleur
(189) Jennifer Lake
(190) Ruth Lanktree
(191) Denise Laplante
(192) Cathy Lavery
(193) Ann Lawn
(194) Jo-Anne Lawrence
(195) Joanna Lawson

(196) Mary Ann Lawton-Berts
(197) Christine Leacock
(198) Fancoise Lebel
(199) Donna Leblanc
(200) Gisèle Leblanc
(201) Karen Leblanc
(202) Nancy Lebreton
(203) Colleen Ledrew
(204) Anne Lee
(205) Carole Legros
(206) Florence Lessard
(207) Jocelyne Lessard
(208) Marsha Lett
(209) Marielle Levesque
(210) Bertrande Liberty
(211) Elizabeth Lingenfelter
(212) Tiffany Link
(213) Kathleen Logan
(214) Sophia Long
(215) Shirley E. Lowthian
(216) Janet Lockett
(217) Janine Lynch
(218) Joan MacEachern
(219) Heather MacNeil
(220) Diane MacPherson
(221) Rosa Madsen
(222) Arlene Mahadoo
(223) Carol Ann Mahar
(224) Glenda Manning
(225) Susan Manning
(226) Janet Marsh
(227) Darlene Marshall
(228) Michelle Matwiy
(229) Sharon Maundrell
(230) Shelley Maunsell
(231) Gail McCarthy
(232) Diane McClure
(233) Lynn McGregor
(234) Nancy McGuire
(235) Karen McIlroy
(236) Sandy McKenna
(237) Barbara McKinnon
(238) Ken McKinnon
(239) Paola McKinnon
(240) Angeline McLaren
(241) Fay McLaughlin

(242) Adele McLean
(243) Deborah McLeod
(244) Catherine McParlan
(245) Bonnie McWhirter
(246) Farida Meghani
(247) Carole McGill-Fressan
(248) Karen Meyer
(249) Christina Miller
(250) Susan Mitchell
(251) Nargis Mitha
(252) Robert Morency
(253) Dawn Morgan
(254) Victoria Morgenstern
(255) Chuck Morris
(256) Doreen Mourits Aaron
(257) Jennifer Mugford
(258) Sheri-Lynn Muise
(259) Adrian Mulholland
(260) Jane Mullin
(261) Patricia Murphy
(262) Tracie Murray
(263) Charlotte Neill
(264) Gloria Nemeth
(265) Renee Noah
(266) Barbara Noel
(267) Rosemary Nordstrom
(268) Colleen Noyle
(269) Jennie Paiuk
(270) Cheri Palin
(271) Francie Palmer
(272) Lynn Parker
(273) Tisha Parris
(274) Frances Paulin
(275) Joe Pellizzaro
(276) Tammy Pennel
(277) Vikky Penney
(278) Irene Pepin
(279) Line Periard
(280) Barb Perkin
(281) Katherine G. Peters
(282) Michele Petrak
(283) Kelly Pezzola
(284) Karen Pick
(285) Michelle Pieroway
(286) Sandra Pollett
(287) Inese Pope

(288) Isabelle Prenat
(289) Donna Price
(290) Moira Prieto
(291) Maureen Randell
(292) Doreen Rasmussen
(293) Janissa Read
(294) Elma Renders
(295) Charlotte Richardson
(296) Eileen Richardson
(297) Donna Rideout
(298) Donna Ridout
(299) Helen Robertson
(300) Doris Robinson
(301) April Rodgers
(302) Pamela Rose
(303) Majit Ross
(304) Shirley Ross
(305) Anne Rowe
(306) Mary Rowsell
(307) Kevin Rundle
(308) Holly Ruryk
(309) Eleanor Ruthven
(310) John Ryan
(311) Tracey Ryan
(312) Joan Saarinen (Martin)
(313) Kim Samson
(314) Karen Saunders
(315) Kelly Saunders
(316) Angela Schaffer
(317) Thelma Schjerning
(318) Donna Schrank
(319) Diane Schuster
(320) Carol Schwab
(321) Cathy Scott
(322) Elizabeth Seabrook
(323) Susan Searle
(324) Julie Secord
(325) Leanne Seeto
(326) Jeanne Setler
(327) Jane Shenkarek
(328) Margaret Shepherd
(329) Mary Jo Shostak (also known as Jane Shostak)
(330) Priscille Sigouin
(331) Jo Ann Simmons
(332) Brenda Skanderup-Bergum
(333) Diane Skodak

(334) Barbara Smart
(335) Catherine Smith
(336) Brenda Sparkes
(337) Kimberly Spurrell
(338) Laura Stanford-Martin
(339) Carol Stanley
(340) Judy Stanley
(341) Jacqueline St.-Denis
(342) Carla Steiner
(343) Heather Stewart
(344) Karen Stewart
(345) Paula Stewart
(346) Diane St-Jacques
(347) Joanne Summers
(348) Nancy Summers
(349) Nabil Tarfa
(350) Andrea Taylor
(351) Cheryl Taylor
(352) Shirley Teather
(353) Stephanie Tempest
(354) Linda Templeton
(355) Katherine Thacker
(356) Bhawna Thakrar
(357) Jennifer Thibodeau
(358) Vicki Thompson
(359) Jo Ann Thorp
(360) Kelly Tole
(361) Vernon Toews
(362) Jill Turnour (Esplen)
(363) Patricia Tyndall
(364) Trina Ulrich
(365) Heather Vadovic
(366) Laura Van Buskirk
(367) Margaret Vandaalen
(368) Gwen Vanderheyde
(369) Judith Van Hamond-Ball
(370) Kari Vankoughnett
(371) Dana Vanvlymen
(372) Rose Vasta
(373) Joanne Vellinga (also known as Judy Vellinga)
(374) Marilyn Verstraete
(375) Ruth Walden
(376) Yasmin Walji
(377) Brenda Walker
(378) Karen Walker
(379) Cecil Waters

(380) Donnelly Watt
(381) Marlene Webber
(382) Marcia Weir
(383) Judy Whiteway
(384) Karen Wiebe
(385) Lynn Williams
(386) Sharon Williams
(387) Lori Williamson
(388) Gwen Wills
(389) Shanna Wilson
(390) Sharon Winters
(391) Cynthia M. Witty
(392) Margaret Woodrow
(393) Deborah Wortman
(394) Colleen Wozny
(395) Annette Wylie
(396) Anna Yan-Sang
(397) Brenda Young
(398) Leah Young
(399) Ann Boylan Currie
(400) Louise Duncan
(401) Charlene Dykstra
(402) Dzirra Goor (deceased)
(403) Carrie Gronau
(404) Jean Halpenny
(405) Marlene Harrison
(406) May Lou Kightley
(407) Suzanne Maltais
(408) Margaret Meester
(409) Anne Nolet
(410) Susan Pettersone
(411) James (Jim) Roberts
(412) Michelle Watson
(413) Annette Wetherly
(414) Manganaro, Sioban
(415) Rezk, Mamdouh
(416) Stevenson, Maureen
(417) McCrae (Walker), Karin
(418) Jovina Bachynski
(419) Philomena Fernandes
(420) Amira Jivra
(421) Diane King
(422) Kim Juliet
(423) Marilyn MacHutchon
(424) Julie McKenna
(425) Maureen McNally

(426) Mary Anne Murphy
(427) Cheryl Unger

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
RULING OF THE TRIBUNAL DATED:	June 30, 2010
APPEARANCES:	
Laurence Armstrong/ Heather Wellman	For the Complainants
Daniel Poulin	For the Canadian Human Rights Commission
Patrick Bendin/ Claudine Patry	For the Respondents