CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

YVONNE SUGIMOTO

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ROYAL BANK OF CANADA

Respondent

REASONS FOR DECISION

MEMBER: J. Grant Sinclair 2007 CHRT 5
2007/02/21

I. INTRODUCTION

[1] Yvonne Sugimoto is the complainant in this matter. She filed a complaint with the Canadian Human Rights Commission dated December 9, 2002. She alleges that the Royal Bank of Canada (RBC), in its Pension Plan provisions, has discriminated against her by treating her in an adverse differential manner, on the ground of sex, contrary to ss. 7, 10, and 21 of the *Canadian Human Rights Act*.

[2] The adverse differential treatment that Ms. Sugimoto complains of is this. Under the RBC Plan, a male the same age as Ms. Sugimoto with an identical employment record with RBC, can retire with an unreduced pension at age 56. If Ms. Sugimoto wished to retire at the same age, she would suffer almost a 35% reduction in her annual pension. To receive the same unreduced pension as her male counterpart, Ms. Sugimoto would have to work for an additional 70 months. This is all because Ms. Sugimoto was denied the opportunity that RBC gave to her male counterpart, to participate in the 2001 Re-opener.

[3] To understand how this impacted on Ms. Sugimoto, one must understand the nature of the RBC Plan and its evolution over the past 30 years or so.

[4] Ms. Sugimoto was a member of the defined benefit pension Plan at RBC prior to her retirement. Under the Plan, an employee could participate as a contributory or as a non-contributory member. The annual pension at retirement in the contributory plan is equal to 1.3% x final average salary x years of contributory pensionable service. For the non-contributory plan, it is .9% instead of 1.3% and there are no member contributions.

[5] A member could accumulate contributory or non-contributory service or a combination of both. The member contributes 4 or 6 % of his or her salary depending on salary level. RBC is responsible for funding the actuarial value and the administrative costs of the Plan.

[6] Ms. Sugimoto left RBC in March 2002 on a salary continuance arrangement. She was paid a salary by RBC until she took early retirement on October 4, 2006.

II. FACTS

A. Plan Membership Eligibility Pre-May 1, 1974

[7] Ms. Sugimoto was born on October 4, 1951 and joined RBC on February 23, 1970. She was 18 years old. Prior to May 1, 1974, male employees of RBC were eligible to become contributory members of the Plan at age 21. Female employees were not eligible for Plan membership until age 24.

B. The May 1, 1974 Plan Amendment

[8] On May 1, 1974, the Plan was amended to change the membership eligibility age for all employees, male and female, to age 30. Those employees, who were members of the Plan, but under age 30, were given the option of either remaining in the Plan as a contributory member or suspending their membership until age 30. If they suspended their membership, they would not accrue any pensionable service until they re-enrolled in the Plan at age 30.

[9] Plan members who were over age 30 as of this date could choose to remain as contributory members or become non-contributory members. The May 1, 1974 amendments did not affect Ms. Sugimoto. She was 22 years old at the time.

C. The 1980 Pension Plan Amendment

[10] On March 1, 1978, the *Canadian Human Rights Act* came into force. Under the *CHRA*, a two year grace period was given to bring federally regulated pension plans into conformity with its provisions.

[11] On September 1, 1980, RBC amended the Plan and changed the eligibility age for membership from age 30 to the earlier of age 25 or five years of continuous service. For any employee who joined the Plan, their date joined was made retroactive to March 1, 1980 (to meet the expiry of the grace period).

[12] Ms. Sugimoto was 26 years old and joined the Plan as a contributory member as of March 1, 1980. On March 1, 1985, she elected to become a non-contributory member which the terms of the Plan allowed after 5 years as a contributory member.

D. The 1987 Plan Amendment - Early Retirement

[13] Effective January 1, 1987, the Plan was amended to provide that Plan members with 35 years of contributory / non-contributory pensionable service could retire with an annual, unreduced pension after age 55. For each year less than 35 years of pensionable service, their annual pension would be reduced by 5 %. The normal retirement age is 65.

E. The 1996 Gender Buy-Back (GBB)

(i) Background to the GBB

[14] The introduction in 1987 of the early retirement option, raised a significant issue for female Plan members who, pre-1974, could only join the Plan three years after their male counterparts. The issue was the consequences of this disparity for early retirement and an unreduced pension.

(ii) The February 1995 Mercer Report

[15] In 1995, RBC began to consider ways of correcting the potential consequences of the pre-May 1974 eligibility rules. It retained the William Mercer Company to identify possible strategies and their potential impact on the Plan.

[16] In its February 1995 Report, *Analysis of past discriminatory practices in Canadian Pension Plans*, Mercer pointed out that female RBC employees like Ms. Sugimoto who had not attained age 24 at May 1, 1974, could not accrue pension benefits for her three years of service between ages 21 and 24. Further, because she was not eligible to join the Plan until March 1, 1980, she could not accumulate pension benefits for her years of service between May 1, 1974 and March 1980.

[17] The Mercer report noted that some Canadian financial institutions had eliminated all past discriminatory practices in their pension plans retroactively; some had made retroactive adjustments that partially eliminated past discriminatory practices; and some did nothing.

[18] The Mercer report emphasized that RBC has never made any retroactive amendments to the Plan. But if RBC wanted to make an exception to this policy, Mercer suggested two options.

[19] RBC decided to implement a third option, namely, counting the years of service a female employee had between age 21 and the earliest of, the day she joined the Plan, age 24, and May 1, 1974, as contributory pensionable service.

[20] In its report, Mercer recommended against considering the years from May 1974 to March 1980 for two reasons. First, it would be highly speculative to guess what a person today between ages 21 and 24 would have done in 1974, given the choice to continue as contributory member or opt out. Secondly, it would give these employees an unfair

advantage compared to those who were Plan members in 1974, and who had to make a decision then, not 20 years later.

(iii) The December 5, 1995 Board of Directors' Resolution.

[21] The matter was first considered by the Human Resources Committee who recommended certain retroactive changes to the Plan. On December 5, 1995, the RBC Board of Directors passed a resolution authorizing the Pension Plan Management Committee "to amend the Royal Bank Pension Plan to enable affected females to purchase benefits for any effected years of service". In its resolution, the Board recognized that the pre-1974 Plan eligibility rules had prevented women from joining the Plan at the same age as men, a practise now seen as discriminatory.

[22] This resolution was implemented through what is described as the "1996 Gender Buy-back". The GBB was a one-time offer made to female employees who joined the Plan on or before March 1, 1980, and who had continuous, full time service between age 21 and age 24 prior to May 1, 1974. Those eligible could purchase up to three years of additional pensionable service, calculated as the time period between the later of, their 21st birthday and their start date at the Bank, and the earlier of, their 24th birthday and May 1, 1974.

[23] After the GBB was in place, Mercers, the Plan's actuary, calculated that the net increased actuarial liability for RBC of the GBB was approximately $13,000,000 after the employee contributions of between $3,000,000 - $4,000,000.

F. The September 5, 2003 GBB Plan Amendment

[24] The additional benefits given under the GBB required a Plan amendment. Interestingly, the amendment was only made on September 5, 2003, effective January 1, 1996, more than seven years after the 1995 Board resolution. The amendment was by resolution of the Pension Plan Management Committee which was authorized by the Board to make amendments to the Plan.

[25] The reason for this delay (as explained by Gary Dobbie, RBC Senior Vice-President, Compensation and Benefits, in his March 25, 2003 letter to the Office of the Superintendent of Financial Institutions) was that, after 1996, Plan members and former Plan members had approached RBC on numerous occasions asking for additional benefits based on the GBB. To ensure that the GBB was equitably and consistently offered, RBC postponed the Plan amendment until the matter was fully considered and resolved.

[26] To appreciate how the 2003 Amendment works, it must be located in the context of Section C (Canada) Royal Bank Pension Plan as amended and restated on January 1, 2002. This is the most recent iteration of the Plan text provided by the parties to the Tribunal.

[27] Section 2.01(6) defines "Admission Date" as the date a Member is admitted to the Plan. "Member" is defined in s. 2.01(38) as an employee who has been admitted as a member to the Plan under the eligibility rules in s. 3 of the Plan and who continues to be entitled to benefits under the Plan. "Vesting" in s. 2.01(71) means acquiring the right to a deferred pension after having a defined number of years of Service.

[28] Section 4 is entitled "Service," Service is defined in s. 4.05 as an employee's continuous employment with RBC. "Pensionable Service," s. 4.04(1), is the period of service commencing on the Member's Admission Date and ending on the earliest of retirement, termination or death in service or attaining 35 years of Service.

[29] Section 4.06 - "Inclusion of Prior Service"- provides that, where a Member is terminated prior to becoming vested in their pre-1987 Service and is re-employed by RBC after 1986, the prior period of Service shall be included in the Member's Pensionable Service.
[30] Section 4.07 is entitled "Inclusion of Prior Service at Election of Member." Section 4.07(1) deals with the situation where a Member with contributory Service prior to 1987, who terminated employment prior to becoming vested in such service, and was re-hired prior to January 1, 1987, may apply to the Administrator of the Plan to have that prior period reflected as Pensionable Service.
[31] Section 4.07(2) - "Election by Female Members in respect of Employment Prior to May 1, 1974" - reproduces the 2003 GBB amendment. This section sets out the eligibility rules for the GBB and provides that eligible members may apply to the Administrator of the Plan to have their period of employment pre-May 1, 1974, between ages 21 and 24, reflected as Pensionable Service.
[32] Section 4.07(2) also sets out the terms of payment for the GBB and goes on to provide that the GBB period of Pensionable Service does not affect the Member's Admission Date nor shall the Member be deemed to have been a Member during that period.
[33] It is very important to note that ss. 4.06, 4.07(1) and 4.07(2) by their terms are made exceptions to s. 4.04, the definition of Pensionable Service.

G. Ms. Sugimoto and the GBB

(i) Initial Correspondence and Consultations

[34] The GBB offer was communicated to eligible Plan members by an internal RBC communication called "Between Ourselves". It is dated January 24, 1996 and the headline read "Royal Bank Moves to Correct Gender "Gap" in Pension Plan".
[35] This communication sets out that one of the stated goals coming out of a series of gender conferences held by RBC a year earlier, was to make RBC a leading employer for gender equality. To achieve this, where possible, RBC would be making changes to previous policies that do not accord with its current gender policies. One of the past inequities identified was the disparity in the pre-1974 Plan eligibility rules for men and women.
[36] In an effort to deal with this inequity, women who had continuous RBC employment pre-May 1974 and who were age 21-24 at the time would be given a one-time option to purchase up to three years of "contributory pension plan membership".
[37] Interested employees who wanted additional information were provided with a document called Royal Bank Past Gender Discriminatory Practices. This outlined that eligible employees could purchase "contributory pension benefits" and set out the terms and costs, etc.
[38] The Human Resources Service Centre issued a further communication to employees on May 17, 1996 following up on the Between Ourselves newsletter. This referred to the special policy, previously outlined, for eligible female employees to buy "pension plan service" for full time employment prior to May 1, 1974 between ages 21 and 24.
[39] Ms. Sugimoto was interested and submitted a Request for Information form indicating both that she wished to purchase three years of pension plan service and her eligibility to do so. She received an "Application to Purchase Pension Plan Service Female Employees - 1996 Option", which she completed.

[40] The Application set out her date of birth, 04-Oct-51; her continuous service date, 23-Feb-70; the date joined plan 01-Mar-80; years of service purchased 1.5833 (19 months); and deemed date joined pension plan, 01-Aug-78. The Application also contained the statement that this purchase of pension benefits provided additional years of service for benefit calculations and early retirement discount purposes only. Ms. Sugimoto had to pay $4,835 for the buyback years, which she did.

[41] Ms. Sugimoto understood that at least to the extent of the GBB, RBC had made an attempt to eliminate the gender gap. But, in her view, there still existed a disparity between male and female employees of the same age and employment record.

[42] So, on July 12, 1996, Ms. Sugimoto wrote to the RSVP Coordinator. She pointed out that male members with her employment record and age, who had elected to remain as contributory members rather than opt out, would be able to retire 72 months earlier than she could. Ms. Sugimoto asked whether RBC was making any efforts to close the remaining gap, namely, the period from 1974 to 1980.

[43] Susan Ormiston, the RSVP Coordinator responded in her letter dated September 17, 1996. She wrote that in introducing the GBB, RBC recognized that this could not and did not solve all the past Plan inequities. Other reasons which she gave echoed those given in the February 8, 1995 Mercer Report.

[44] RBC had considered offering a buy-back for the 1974 - 1980 period, but rejected this because it would be unfair to those who had opted out in 1974. If they had known then about the early retirement amendment, they would have made a different decision.

[45] Further, to allow a buy-back of this period of service for the GBB employee could raise similar demands for the same from new hires where the Plan admission age was 30.

[46] Ms. Sugimoto also obtained a letter dated December 23, 1996, from Brad Lambert, Vice-President, Business Banking, British Columbia and Yukon. In his letter, which was written in response to requests to buy back pension membership for the 1974-1980 period, Mr. Lambert pointed out that, with the benefit of hindsight, it was possible to assume some employees would have stayed in the Plan in 1974. But the assumption was that those seeking to buy back the 1974-1980 period, would have opted out in 1974 had they been Plan members. This was based on the fact that most people at that time who had only a few years service did in fact opt out. He reiterated that the GBB went some distance to deal with past gender inequity, but did not address all of the concerns.

[47] Ms. Sugimoto also spoke with someone in the Pension Benefits department about the fact that she wanted to make this purchase. She says that she was told that when developing the GBB, the RBC had concluded that because most of the employees in her age group had opted out of the Plan in May 1974, the GBB participants would also likely have opted out. According to Ms. Sugimoto, RBC deemed her and the others to have opted out of the Plan as at May 1, 1974.

[48] At this point in time, only one thing remained to Ms. Sugimoto's puzzlement. That was the concept of the deemed date joined plan that first appeared in her GBB Application.

[49] Ms. Sugimoto says that she called the RBC Connections Help Line which was set up to advise employees on the GBB. She spoke to Carol Ann Clark and asked why she was being assigned a deemed date joined pension plan of August 1, 1978 and not October 1, 1972 to May of 1974.

[50] According to Ms. Sugimoto, Ms. Clark told her it was for administrative purposes to show continuous pension plan membership and that, in effect, she had purchased contributory Plan membership for that period.
[51] Ms. Sugimoto also spoke to Evelyn Murphy at Connections who told her that the terms, pension membership/benefits/service were interchangeable. In their evidence before the Tribunal, both Marianne Wilson and Gary Dobbie agreed with this.
[52] Ms. Sugimoto said that Ms. Murphy told her that in that same conversation that, with the GBB, she had purchased Plan membership for October 1, 1972 to May 1, 1974.
[53] Ms. Sugimoto was satisfied that after the GBB, she was now on an equal footing in terms of pension benefits to her male counterpart who in 1974 had opted out of the Plan. Both were eligible for a full unreduced pension at age 61 years, 10 months. There was no longer a gender problem and she did not pursue the matter any further in 1996.

(ii) Ms. Sugimoto's Personal Benefits Statements

[54] The personal benefits statement is an annual statement from RBC to its employees giving details of all their employment benefits. As to her pension details, Ms. Sugimoto's 1994 statement showed her date of birth, October 4, 1951; date joined Plan, March 1, 1980; and her contributory pensionable service dates are March 1, 1980 to March 4, 1985. Her early retirement date, after 35 years of credited Plan membership, was February 28, 2015.
[55] Ms. Sugimoto's post-GBB 1997 statement showed these same details with the addition of contributory pensionable service, being August 1, 1978 to February 28, 1980 and March 1, 1980 to March 4, 1985. Also added was deemed date joined plan, August 1, 1978. Her early retirement date with 35 years of credited pension plan membership was now July 31, 2013 which reflected her GBB purchase of 19 months. All of Ms. Sugimoto's subsequent personal benefits statements up to and including 2001 had these same details.

(iii) The BenPlus DB Pension System

[56] Ms. Sugimoto also referred to a computer printout from the BenPlus DB pension system. This is a computer generated retirement modeling tool that RBC makes available on-line to Plan members. It was introduced in October 2001 to allow employees to make retirement calculations and retirement planning scenarios available on RBC's intranet. The employee inputs certain data assumptions such as estimated salary growth and pensionable bonus, retirement ages etc. Other data on the printout comes from RBC's pension records.
[57] This printout is dated September 17, 2001 and consists of five pages. On page two, there is a box labelled "Pensionable Service Details". This shows Ms. Sugimoto to be in the defined benefit plan with a service period of 1980/03/01 to date. Her contributory pensionable service period is shown as 1980/03/01 to 1985/03/04 and her previous contributory pensionable service as 1972/10/01 to 1974/05/01.
[58] There is a disclaimer on page four of the printout. It provides that the information in the printout may not be accurate, complete or current. It is for estimation purposes only and the estimates are based on assumptions inputted by the employee which could change in the future. The disclaimer goes on to provide that the actual Plan benefits will be based on the Plan provisions and if there is any conflict between the printout and the Plan, the Plan will prevail.

H. The 2001 Re-opener

[59] The 2001 Re-opener was an offer by RBC to active employees and retirees, male and female, who had suspended their Plan membership between May 1, 1974 and their 30th birthday, to elect to have their period of suspension treated as a non-contributory membership in calculating their pension benefits.

[60] The push for the 2001 Re-opener came from a number of individuals who questioned the actions that they had undertaken at May 1, 1974 in suspending their membership. After three years of negotiating with RBC, they threatened to bring a class action if RBC did not take remedial action.

[61] RBC retained a number of law firms to review the text of the May 1, 1974 Plan amendment. Their advice was that the amendment could be interpreted as providing three options to the under age 30 members. Option one, to remain as a contributory member; option two, to suspend membership until age 30; and, option three, to remain in the Plan as a non-contributory member. There was no legal interpretation that required RBC to offer the 2001 Re-opener to any other Plan members.

[62] After reviewing this legal advice, RBC requested William Mercer to estimate the cost of providing this third option. In doing its costing, Mercer considered two groups:

Group A - members of the Plan who opted out on May 1, 1974, and the cost of offering them additional periods of pensionable service from May 1, 1974 to the earliest of March 1, 1980 and age 30;

Group B - male employees under 21 and female employees under age 24 at May 1, 1974 who were not eligible to join the Plan and the cost of offering them additional pensionable service from the later of May 1, 1974 and age 21, to March 1, 1980.

[63] Mercer noted that there were 304 females and 290 males in Group A as of January 1, 2001. And 885 females and 53 males in Group B. The increased actuarial costs to RBC for Group A were calculated to be $23,178,000. For Group B, $28,346,000.

[64] After receiving Mercer's report, RBC did consider offering the 2001 Re-opener to Group B members. But decided not to do so because it would have required a Plan amendment; there was a significant cost to do so; and RBC felt that it would be inappropriate to offer it to Group B and not to other categories of employees who were not Plan members at May 1, 1974.

[65] In its September 26, 2001 letter, RBC offered to those employees in Group A and retirees who had suspended membership in May 1974, to elect non-contributory membership for the period of their suspension. 260 females and 250 males took advantage of the 2001 Re-opener. It was not offered to Ms. Sugimoto. RBC did not consider that she was a Plan member who had suspended her membership at May 1, 1974.

[66] RBC characterized the 2001 Re-opener as a re-interpretation of the May 1974 Plan amendment. As such, it was not necessary to amend the Plan to effect the 2001 Re-opener. RBC was only administering the Plan in compliance with the Plan text. And it was done through administrative process.

[67] There was, however, an amendment to the Plan relating to the 2001 Re-opener. Section 1.02 "History of the Plan" was amended to provide an explanation for the 2001 Re-opener, which is referred to in this section as the "2001 Fix".

I. Ms. Sugimoto and her OSFI Complaint

[68] When Ms. Sugimoto learned of the 2001 Re-opener, she enquired from RBC as to why the offer was not made to her. She was told that she did not qualify because she was not a Plan member on May 1, 1974.
[69] She was shocked and considered this to be sex and age discrimination. She believed that as a result of the GBB, she had been made equal at least to her male counterpart who had opted out in 1974. Now, because of the 2001 Re-opener, her male counterpart could retire with an unreduced pension at age 56, but she had to wait to age 61 years, 10 months for the same pension benefits.
[70] Ms. Sugimoto was persistent in her efforts to remedy what she considered to be another gender inequity. She wrote numerous letters and e-mails to senior officials of RBC. She had numerous conversations with RBC officials, but to no avail.
[71] Ms. Sugimoto first wrote to the Office of the Superintendent of Financial Institutions on September 4, 2002, three months before her complaint to the CHRC. One of OSFI's responsibilities is to oversee federally administered pension plans under the *Pension Benefit Standards Act*.
[72] In her letter, Ms. Sugimoto documented in great detail all of the events from 1974 to the 2001 Re-opener. She sought OSFI's assistance and advice regarding the effects of the GBB and particularly the 2001 re-opener which she considered to amount to age and gender discrimination.
[73] Ms. Sugimoto's submissions mirrored her submissions to the CHRC and the evidence she presented at the hearing before this Tribunal. In addition, her counsel made a number of written submissions to OSFI and met with OSFI officials. Their submissions raised these concerns. First, the gender gap issue which OSFI advised both Ms. Sugimoto and her counsel to be a human rights issue and beyond its jurisdiction.
[74] Secondly, improper disclosure by RBC in that not all eligible female employees were properly informed of the GBB and some were misinformed. Further, the words pensionable service and membership were used interchangeably in the communications from RBC and this raised the question of whether the members bought back membership or pensionable service. Finally, there was the question of the delay by RBC in filing the GBB amendment with OSFI.
[75] OSFI's review of the issues raised by Ms. Sugimoto took over two years. It reached its conclusions and communicated them in its December 14, 2004 letter to Grosman, Grosman & Gale, Ms. Sugimoto's counsel; in its December 20, 2004 letter to Ms. Sugimoto; and in its January 21, 2004 letter to RBC.
[76] As to the question of improper disclosure, OSFI concluded that RBC did comply with the *PBSA* with respect to the communicating to affected members of the GBB offer and Plan amendment.
[77] OSFI was critical of RBC for the delay between the 1995 Board resolution and the filing of the 2003 GBB amendment and suggested that RBC review its procedures to ensure compliance with the *PBSA*.
[78] OSFI also criticized RBC for the confusion caused in its communications with members with respect to the use of the terms "purchase of three years plan membership" and "purchase of pension benefits or years of pension plan service." OSFI pointed out that had the Plan amendment closely followed the 1995 resolution, this confusion could have been avoided.

[79] On the question of the GBB, pensionable service and Plan membership, OSFI wrote that it had reviewed the written disclosure provided to members including the Between Ourselves newsletter, the GBB Application, the May 17, 1996 memorandum to eligible members, and the documentation submitted by Ms. Sugimoto including her annual personal benefits statements. OSFI concluded that:

We noted the communication to members did refer to the purchase of past benefits as the purchase of three years contributory plan membership, contributory pension Plan benefits, as well as pension service.

We are unable to comment on any verbal advice received by individual Plan members from Bank personnel. However, we cannot conclude from the material submitted that any promise was made to members that specified their purchase of the pension benefit would affect their date of entry into the plan or deem them to be a member during the buy-back period.

This is consistent with the wording of the 1995 Board resolution and applicable amendment filed with OSFI in October 2003.

[80] Ms. Sugimoto was not very accepting of OSFI's conclusion. On June 20, 2005, she wrote to OSFI saying that it appeared that OSFI's findings were based on incomplete information, evidence and documentation and that there were a number of issues that OSFI failed to consider. In her 16 page letter, Ms. Sugimoto set out the further considerations that OSFI should address. She also wrote to OSFI on December 9, 2005 claiming that RBC had contravened the *PBSA*, and giving particulars. This is unrelated to her human rights complaint.

[81] OSFI replied on June 22, 2006, that they were reviewing the issues that she had raised. That remains the current status.

III. ANALYSIS

A. The *Prima Facie* Test, and the Issues to be Decided

[82] In a human rights case before this Tribunal, the complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, i.e. credible, is complete and sufficient for a decision in the favour of the complainant, in the absence of a reasonable answer from the respondent. The respondent's answer should not figure in the determination of whether the complainant has made a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 2004; *Dhanjal v. Air Canada*, (1997) 139 F.T.R. 37 at para. 6)

[83] Ms. Sugimoto makes three arguments for a *prima facie* case of discrimination:

i) by the GBB, Ms. Sugimoto bought back pre-1974 Plan membership, in which case she was treated adversely vis-à-vis her male counterpart because she was denied the opportunity to participate in the 2001 Re-opener.

ii) alternatively, if she did not buy back pre-1974 Plan membership, the GBB was under-inclusive. It purported to, but did not give Ms. Sugimoto the same status as her male counterpart. This is also alleged to be adverse discrimination.

iii) the 2001 Re-opener was facially neutral and was to apply to all members who had opted in 1974. However, the GBB women, who were told that they were being made equal to their male counterparts, were denied the 2001 Re-opener. The effects of this seemingly neutral rule were adverse for the GBB women.

B. Did Ms. Sugimoto Establish a *Prima Facie* Case of Pre-May 1, 1974 Plan Membership?

[84] There are a number of facts that support Ms. Sugimoto's *prima facie* case for pre-1974 Plan membership and adverse treatment. There is the announcement in the Between Ourselves newsletter that RBC "moves to correct gender gap in pension plan." To deal with past inequities in the Plan, those eligible were offered the opportunity to buy back up to three years of "contributory plan membership."

[85] Other documentation provided to the employees such as the May 17, 1996 Human Resources bulletin characterized the GBB as being the purchase of "pension plan service." The Request for Information form described the GBB as the purchase of "contributory pension benefits".

[86] Ms. Sugimoto was told by Evelyn Murphy when she called the Connections Line that the terms pension plan membership/service/benefits were used interchangeably. This was confirmed by other RBC officials (Gary Dobbie and Marianne Wilson).

[87] As to the deemed date joined pension plan, Ms. Sugimoto was told by Carol Ann Clark at the Connections Line that it is a term used by RBC for administrative purposes to show continuous pension plan membership. But this term is not found anywhere in the Plan text.

[88] According to Ms. Sugimoto, both Ms. Clark and Ms. Murphy told her that she had purchased contributory Plan membership for the period of October 1, 1972 to May 1, 1974.

[89] There is the December 23, 1996 letter to Brad Lambert in which he talked about the assumption that employees in Ms. Sugimoto's position would have opted out in 1974. Further, Ms. Sugimoto was told by the Pensions Benefits department that RBC, in developing the GBB, had concluded that the GBB participants would likely have opted out and RBC deemed Ms. Sugimoto and others to have opted out in 1974. If this is so, then logically RBC must have considered her to be a Plan member in 1974.

[90] Finally, there is the BenPlus printout which shows Ms. Sugimoto's previous contributory pensionable service to be 1972/10/01 to 1974/05/01. This information came from RBC pension records and was not inputted into the system by her.

[91] There is no argument that, immediately after her GBB purchase, Ms. Sugimoto was equal to her male counterpart insofar as both could retire at the same age with the same pension.

[92] Accepting the facts that the Between Ourselves newsletter communicated to employees that RBC was moving to correct the gender gap; that Ms. Sugimoto was told that by participating in the GBB, she had purchased contributory plan membership for the relevant period, and that term is interchangeable with pensionable service/benefits; and that deemed date joined pension plan is not a Plan term; and that RBC deemed the GBB women to have opted out in 1974 thereby suggesting that they had become members; and that the BenPlus printout showed her previous contributory DB pensionable service to be from 1972/10/10 to 1974/05/01, it is fair to conclude that Ms. Sugimoto has established, on a *prima facie* basis, that she has attained the same status as her male counterpart, i.e. a pre-1974 Plan member who was deemed to have opted out in 1974.

[93] There is also *prima facie* evidence that Ms. Sugimoto was not eligible for the 2001 Re-opener; that her male counterpart was; that the 2001 re-opener differentiated between the two; and the differentiation adversely affected Ms. Sugimoto in the course of her employment.

[94] Accordingly, I have concluded that Ms. Sugimoto has shown a *prima facie* case of adverse differentiation in respect of the 2001 Re-opener on the basis of the distinction drawn between her male counterpart's pre-1974 membership and her own pre-1974 membership.

C. Has the Respondent Provided an Answer to the *Prima Facie* Case of Discrimination?

[95] Many aspects of the *prima facie* case have not been refuted: Ms. Sugimoto's ineligibility for the 2001 Re-opener and her male counterpart's eligibility; the uniquely female nature of the GBB initiative; the fact that the GBB in the immediate aftermath, equalized retirement possibilities. The only contested question is whether the GBB gave her pre-1974 membership.

[96] RBC notes that there is nothing in Ms. Sugimoto's Application that refers to any pre-May 1, 1974 Plan membership, nor did Ms. Sugimoto sign any enrolment card that would give her retroactive Plan membership for that period. Further, her Application clearly sets out that the purchase of pension benefits provides additional years of service for benefit calculations and early retirement discount purposes only.

[97] All of her personal benefit statements from 1997 to 2001 consistently showed her date joined plan as March 1, 1980. There is nothing on these statements that show that she was a member of the Plan between October 1, 1972 to May 1, 1974.

[98] Bernard Morency, an actuary with William Mercer was the actuary to the Plan and was actively involved in the development of the GBB and the 2001 Re-opener. He said that any pension benefits that may accrue to Plan members must be found in the Plan text. And although the GBB amendment was not added to the text until 2003, Plan members and the Plan trustee could look to the 1995 Board resolution to define their GBB entitlement.

[99] In his view, the GBB gave eligible employees the option to make a contribution in order to get the eligible service considered pensionable. If accepted, the GBB would be counted as contributory service towards the annual pension amount and also count towards the 35 years required for early retirement. For him, the GBB did not affect the date joined plan. It changed or added to the years of pensionable service.

[100] Marianne Wilson was the Manager, Pension Administration in the Human Resources Centre from 1987 to 1998. She was responsible for the day-to-day operation of the Plan, to ensure all calculations for benefits were appropriately done for employees, to respond to employees questions and to maintain the payroll records for pension purposes and the administration of the pensioners' payroll. She was very much involved in implementation of the GBB including the development of the documentation required for the GBB.

[101] According to Ms. Wilson, the date an employee joined the Plan never changed. The term deemed date joined plan was the method that RBC used to account or record employees buying back previous service. It gives a date for prior service to count as credited service.

[102] Ms. Wilson called this ante-dating. This is similar to what was done in earlier Plan texts and the GBB amendment tracked the earlier versions in concept, except that the structure of the GBB amendment is somewhat different.

[103] Ms. Wilson referred to previous Plan texts as they evolved over the years to show the historical analogy for the deemed date joined plan under section C1.25 of the

Consolidated By-laws of the Pension Fund Society amended to May 1, 1974, a Plan member whose service was terminated and was later re-hired, was treated as a new employee with a new date of admission in the Plan. This new date of admission could be backdated to allow for the employee's previous service. This backdating did not involve giving the employee deemed membership at his or her original commencement date of employment. This treatment is analogous to the administrative measures taken by RBC in assigning the deemed date joined plan to Ms. Sugimoto.

[104] The January 1, 1981 Consolidated By-laws carried forward C1.25 and also added C1.26 which allowed for service lost because of a labour dispute to be deemed pensionable service. Notably absent from this provision is any reference to changing the admission date.

[105] The 1974 and1981 Consolidated By-laws are also instructive in showing the relationship in the Plan between the buy back of service and pensionable service. Under paragraph C1.12 (m) of the 1974 Consolidated By-laws, pensionable service was the period of years commencing with the date of admission to the Plan and ending with the date of termination of service or the 35th anniversary of admission. Member is defined as an employee who has been admitted to the Plan.

[106] The January 1981 Consolidated By-laws carried forward this same definition except that the definition of pensionable service was now made subject to the application of C1.25 and C1.26. Therefore, for the purposes of these two provisions, the concept of pensionable service was uncoupled from the concept of admission to membership. They were no longer interchangeable.

[107] Mr. Morency gave an example of how s. C1.25 worked. If an employee was a Plan member between 1974 and 1978, left RBC and returned to employment in 1981, the employee would have four years of prior service. When the employee re-joined RBC, his or her date joined Plan would be 1981. But C1.25 would allow the employee's admission date to be backdated to 1977.

[108] Mr. Dobbie spoke to the BenPlus computer printout. He noted the disclaimer which provided that the information may not be complete, accurate or correct and that it was there for a variety of purposes. This was a new system; it was for information purposes only; and it was not intended to provide specific advice because the calculation is to some extent, generated by input from the employee. It was not meant to replace the annual personal benefits statements.

[109] As to that part of the printout, "Pensionable Service Details, Previous Royal Bank Pensionable Service, Pension Service Period, 1972/10/01 to 1974/05/01", it shows only that Ms. Sugimoto bought contributory pensionable service for that period. To that extent, said Mr. Dobbie, it is similar to the date that would be reflected there for employees with broken service records.

[110] Any rights or benefits Ms. Sugimoto may have acquired through her GBB purchase must flow through the 1995 Board resolution and the 2003 GBB Plan amendment which was effective January 1, 1996. Accordingly these are the sources that I must look to.

[111] I include the Plan amendment because OSFI, the authority charged with regulating federal pensions, has concluded that the 2003 GBB amendment is consistent with the 1995 Board Resolution. Ms. Sugimoto's suggestion that OSFI may change its position based on her June 20, 2005 submissions, is entirely speculative.

[112] What Ms. Sugimoto was told or promised by RBC officials or understood from the various documents can not be the source of her rights. The case before this Tribunal is not a contract case, nor is it a case of estoppel or misrepresentation.
[113] As I read the 2003 GBB amendment, it adds the period of the GBB as contributory pensionable service to the pensionable service Ms. Sugimoto began accumulating when she joined the Plan on March 1, 1980.
[114] This is made clear by s. 4.07(2) of the 2003 amendment, which applies notwithstanding the definition of Pensionable Service in s. 4.04. Just as C1.12(m) of the 1981 Consolidated By-laws made the definition of pensionable service subject to C1.25 and C1.26.
[115] Further, the concluding words of s. 4.07(2) makes it clear that the acquisition of additional Pensionable Service under this provision does affect the Member's Admission date. This was the consequence of the GBB and it did not confer on Ms. Sugimoto, the status of a pre-1974 Plan member who had opted out. Her date of admission to membership remained March 1, 1980.
[116] Thus, I have concluded that the respondent has answered the *prima facie* case and there is no discrimination relating the refusal of RBC to allow Ms. Sugimoto to participate in the 2001 Re-opener. Because the GBB did not grant her pre-1974 membership, she was not comparable to her male counterpart.

D. Was the GBB Under-Inclusive and therefore Discriminatory?

[117] Apart from her assertion that the GBB was under-inclusive because it did not give what it purported to give to Ms. Sugimoto, she offered little argument or legal authorities to support this position. However, since the argument was raised, I will deal with it.
[118] In *Brooks v. Canada Safeway Ltd*, [1989] 1 S.C.R. 1219, the Supreme Court of Canada considered the concept of under-inclusiveness and discrimination under the Manitoba *Human Right Code*.
[119] This case involved Canada Safeway's group insurance plan which provided generally for benefits during pregnancy, but excluded coverage for 17 weeks of the pregnancy period.
[120] In dealing with the question of whether such exclusion was discriminatory as being under-inclusive, the Supreme Court considered that under-inclusion may be a backhanded way of permitting discrimination. It is no less discriminatory to partially withhold benefits from a group than it is to impose a penalty or burden on the group.
[121] In *Brooks*, Canada Safeway had an ongoing, active obligation under the Manitoba *Human Rights Code* not to deny its female employees equal benefits under the group insurance plan.
[122] The problem with applying the principle of under-inclusiveness in this case is that it assumes that RBC had a legal obligation under the *CHRA* to remedy the pre-*CHRA* discrimination. But this is not so.
[123] It strains logic to say to an employer that you are under no legal duty to eliminate pre-*CHRA* discrimination, but if you choose to do so, you must eliminate all of it or incur liability under the *CHRA* for the outstanding balance. Or, to express it another way, an *ex gratia* gesture to account for pre-*CHRA* discrimination should not attract liability for under-inclusiveness.

[124] For these reasons, it is my opinion that Ms. Sugimoto has failed to establish a *prima facie* case of discrimination because of the alleged under-inclusiveness of the GBB.

E. Is the 2001 Re-opener Discriminatory to the Extent it Distinguished Between Members and Non-Members?

[125] The 2001 Re-opener, although neutral on its face (it does not distinguish between men and women - only between members and non-members) imposes a restriction on women in Ms. Sugimoto's position because of a special characteristic they share, namely, ineligibility for Plan membership in 1974 because of their age and gender. This special characteristic arises from the operation of a pension rule that was in effect prior to the enactment of the *CHRA*. Indirect restrictions based on characteristics of this kind are referred to as adverse effect discrimination.

[126] Adverse effect discrimination has been recognized by the Supreme Court in *O'Malley*. But the difficulty in this case and not encountered in *O'Malley* is one of retrospectivity.

[127] Is it discriminatory for the 2001 Re-opener to distinguish on the basis of past membership, given this was in place pre-*CHRA*? In my opinion, the Federal Court of Appeal has answered this question in the negative. It did so in *Gell v. Canadian Pacific Ltd.*, (1987) 10 C.H.R.R. D/5494.

[128] In *Gell*, prior to the commencement of the *CHRA*, the company pension plan had a maximum age rule ("age rule") that excluded from membership any persons who were 40 years old or older when they started working for the company. The complainants, who were both over 40 when hired, were excluded from the pension plan pursuant to the age rule.

[129] In 1978, the company amended the plan to give eligible employees the right to join the plan if they had earlier elected not to join the plan, or if they had left the plan. The complainants were not eligible because of the age rule.

[130] In 1979, the company amended the plan again, allowing all those employees who joined the plan pursuant to the 1978 amendment the option to buy back up to 10 years of past pensionable service. The complainants were not eligible for the 1979 buy-back, because they had not been eligible to benefit from the 1978 amendment.

[131] In 1980, the *CHRA* became operative in respect of pension plan age discrimination. That same year, the company introduced a further amendment to the plan that allowed any employees who had been previously excluded from membership by the age rule to join the plan. The complainants joined.

[132] In 1982, another plan amendment was adopted, aimed exclusively at those employees who had benefited from the 1978 and 1979 amendments. The 1982 amendment allowed eligible employees to buy back pension service in respect of any remaining years of service which they had not already bought back. The complainants were ineligible to benefit from the 1982 amendment due to their ineligibility in respect of the 1978 and 1979 amendments.

[133] The complainants alleged that their exclusion from the 1982 buy-back amendment was discriminatory because the eligibility rules for the amendment incorporated by reference a discriminatory age rule that had existed prior to the commencement of the *CHRA* provisions. They argued that since the buy-back offer (to which the *Act* applied)

took into account past discriminatory considerations (to which the *Act* did not apply), the buy back offer was discriminatory.

[134] The Federal Court of Appeal disagreed. It noted first that the buy-back offer was in essence facially neutral (it distinguished only on the basis of membership in the plan on a specific date). It then observed that the complainant's ineligibility for the buy-back offer was caused solely by the former existence of a discriminatory rule that pre-dated the operation of the *CHRA*.

[135] The Court concluded that this rule was at the time perfectly legal and its effect, which is not required by the *Act* to be eliminated retroactively, must be taken as it is. Thus, according to *Gell*, a neutral event or transaction does not engage the *CHRA* by reason only of its reliance upon a discriminatory pre-*Act* state of affairs.

[136] Ms. Sugimoto argues that *Gell* is distinguishable because it lacked a crucial fact that is present in the case at bar, the GBB. Unlike in *Gell*, RBC took the initiative, post-*CHRA*, to narrow the disparity between the complainant group and their comparators. (The degree to which the gap was narrowed is in dispute, but no party denies that it was at least partially narrowed.)

[137] Ms. Sugimoto says that the GBB initiative constituted a commitment to full equality for all the GBB women, i.e. closing the gap that was created before the *CHRA* came into force. Moreover, she alleges that RBC represented it as such to its female employees. Ultimately though, from her perspective, RBC failed to live up to its commitment, and the GBB did not have the effect that RBC purported it to have.

[138] Ms. Sugimoto stresses that none of these circumstances were present in *Gell*. There was no initiative in *Gell* to narrow the disparity between the complainant and comparator groups. There was no commitment to close the gap between the over-40-year-olds and the under-40-year-olds, nor any representation to have effectively done so. Accordingly, it cannot be said that in *Gell* there was any failure to live up to such promises.

[139] It is true that there are factual differences between *Gell* and this case, including the absence in *Gell* of anything resembling the GBB initiative. However, this is not enough to distinguish the decision.

[140] To do so, it would be necessary to show that the factual differences in question are relevant to the Court's reasoning. *Gell* stands for the proposition that a neutral event or transaction does not engage the *CHRA* by reason only of its reliance upon a discriminatory pre-*Act* state of affairs. The presence of the GBB in the current matter does not make this proposition any less applicable.

[141] I have earlier concluded that the GBB did not alter Ms. Sugimoto's status to the point of putting her on the same footing as her male counterpart. The GBB merely narrowed the gap in years of pensionable service. I have also concluded that in narrowing the gap-a gap RBC had no obligation to close in the first place-the GBB cannot be viewed as under-inclusive or otherwise adversely differential towards Ms. Sugimoto.

[142] In effect, the GBB granted Ms. Sugimoto partial compensation for pre-*CHRA* exclusion. But in terms of status, the GBB did not place her in any better position vis-à-vis the 2001 Re-opener than the *Gell* complainants found themselves at the time of the 1982 amendment. In each case the individuals concerned had eventually acquired plan membership, but they were still ineligible for the "facially neutral" pension offer in question because the offer was tied to old discriminatory membership rules that existed prior to the commencement of the *CHRA*.

[143] In *Gell*, the impugned buy-back was an offer made to the comparators that was based on a certain status enjoyed by the comparators before the *CHRA* came into force (a status the complainants were not granted at the time).
[144] Likewise, in this case, the Re-opener was an offer made to the comparators that was based upon a certain status enjoyed by the comparators before the *CHRA* came into force (a status that Ms. Sugimoto was not granted at the time, *and never acquired retroactively, notwithstanding the GBB).*
[145] In *Gell*, the Federal Court of Appeal has stated that discriminatory differences in status pre-dating the *CHRA* can still be relied upon after the legislation has come into force, without engaging liability.
[146] In the current case, the result can be no different. The presence of the GBB does not alter the discriminatory difference in status pre-dating the *CHRA* which separates Ms. Sugimoto from her male counterpart.
[147] In her submissions, Ms. Sugimoto relied extensively on the dissenting judgment of Jackson JA in the case of *Anderson v. Saskatchewan Teachers Superannuation Commission* (1995) 24 C.H.R.R. D/177 (Sask.C.A.).
[148] In *Anderson*, a school board had a policy requiring female teachers to resign in order to take maternity leave and then re-apply for employment. Under this policy, the teachers were unable to accumulate pensionable service during their pregnancy-related absences from the workplace. In the late 1950s and early 1960s the complainant teachers resigned for pregnancy and childbirth reasons, and were later re-hired following the completion of their maternity leaves.
[149] In the 1970s, legislation came into force in the province which forbade discrimination in employment on the ground of sex.
[150] In 1976, the school board began approving formal maternity leaves instead of requiring resignations. In addition, in 1976 pension legislation was passed that essentially allowed women to buy back the pensionable service they lost while on board-approved maternity leave.
[151] In the early 1990s, the complainants applied to buy back the service lost on account of their pregnancies. The pension commission refused, given that the complainants' maternity leaves had not been board-approved; they had resigned to take their leave.
[152] The complainants then alleged that the pension commission's refusal to allow them to buy back service in respect of their maternity leaves was discriminatory.
[153] The majority in the Saskatchewan Court of Appeal held that the pension buy-back rule was not discriminatory. Given their finding, the majority was not required to address the fact that the origin of the buy-back dispute, the complainants' non board-approved maternity leaves in the late 1950's and early 1960s, pre-dated the commencement of the applicable anti-discrimination legislation.
[154] Jackson JA, in dissent, held that the pension buy-back rule was discriminatory. In doing so, she had to address the fact that the complainants' pregnancy resignations occurred prior to the coming into force of the *Human Rights Code,* and the *Code* could not deal with discriminatory acts occurring prior to its enactment.
[155] In her view, however, the relevant event for this analysis was not the old policy obliging women to resign to take maternity leave, but rather the "new act", i.e. the introduction of a new maternity buy-back rule that excluded the complainants because (due to pre-*Code* discrimination) they had been unable to take "board-approved leave".

[156] The new buy-back rule was not a natural consequence of the old pre-*Code* policy. In this regard it was noteworthy that the pension commission was *not obliged* to offer buy-backs.

[157] Given that it was not a natural consequence of the pre-*Code* rule, the new buy back rule could not be sheltered by the principle of non-retrospective application of the *Code*.

[158] In reaching her conclusion, Jackson JA referred to *Gell*, which she considered, on its facts, to be similar to the facts in *Anderson*. However, after discussing the *Gell* case, Jackson JA concluded that *Gell* should not be followed. In her view, once the respondent in *Gell* decided to offer the buy-back, it could not discriminate on the basis of age by building upon a prior discriminatory rule to create "present day discrimination".

[159] It is clear that in *Anderson*, Jackson JA refused to follow *Gell*. It is also clear that this was not because *Gell* was distinguishable on its facts.

[160] The only fair conclusion to be drawn from Jackson JA's reasons is that she believed that *Gell*, while dealing with facts similar to those before her, was not to be followed because, in her opinion, it was wrongly decided.

[161] However, while Jackson JA, as a judge of the Saskatchewan Court of Appeal, is free to disagree with the *Gell* decision of the Federal Court of Appeal, this Tribunal cannot.

[162] Ms. Sugimoto did not refer to any Federal Court of Appeal decisions that overrule *Gell*. Given the absence of salient dissimilarities between *Gell* and the present case, this Tribunal is bound to follow *Gell*.

[163] Even if the Tribunal were free to adopt the dissenting reasons in *Anderson*, they would not be of assistance. First of all, much is made in the reasons of Jackson JA that new acts that rely on past discrimination are themselves discriminatory. Yet there is a strong argument against characterizing the 2001 Re-opener as a fresh step. The facts are that the 2001 Re-opener is a re-interpretation of a 1974 Plan amendment that should have been made available at the time of the amendment.

[164] Moreover, given Jackson JA's statements about the factual similarities between *Anderson* and *Gell*, it is inconsistent for Ms. Sugimoto to argue on one hand that *Gell* is distinguishable on its facts, while on the other hand, *Anderson* should be applied to the current case. If *Gell* is distinguishable on its facts, then *Anderson* should be as well.

[165] The 2001 Re-opener adversely differentiates between Ms. Sugimoto and her male counterpart. But the *Gell* decision compels us to view the differentiation in terms of membership, as opposed to gender, and therefore there is no nexus between this adverse effect and a prohibited ground of discrimination. Ms. Sugimoto has not shown a *prima facie* case of discrimination.

IV. DECISION

[166] I have found that Ms. Sugimoto has made out a *prima facie* case of discrimination on the question of pre-1974 Plan membership and adverse differentiation because of the denial of the 2001 Re-opener. I have concluded, however, that RBC has provided a reasonable explanation to the *prima facie* case, so this allegation must be dismissed.

[167] With respect to the allegations of discrimination based on the under-inclusiveness of the GBB and the allegation of discrimination based on the adverse effect of the 2001 Re-opener on certain non-members, I have concluded that Ms. Sugimoto has failed to establish a *prima facie* case of discrimination.

[168] Accordingly, Ms. Sugimoto's complaint of discrimination against RBC under s. 7 of the *CHRA* is dismissed.
[169] In her complaint, Ms. Sugimoto also alleged that RBC contravened ss. 10 and 21 of the *CHRA*. However, she did not present any evidence or argument with respect to these allegations. I assume they have been abandoned. If not, these allegations have not been substantiated and for this reason are also dismissed.

"*Signed by*"

J. Grant Sinclair

OTTAWA, Ontario
February 21, 2007

PARTIES OF RECORD

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APPEARANCES:	
Norman Grosman Natalie MacDonald	For the Complainant
Daniel Pagowski	For the Canadian Human Rights Commission
Stephen Shamie, Elizabeth Brown, Sean Sells	For the Respondent