TD 3/84
Decision rendered on February 24, 1984

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.33, as amended;

AND IN THE MATTER of a Pre-Hearing Conference before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act.

BETWEEN:
LOCAL 916, ENERGY AND CHEMICAL WORKERS
Complainant
- AND -
ATOMIC ENERGY OF CANADA LIMITED
(CANDU OPERATIONS)

Respondent

DECISION ON PRELIMINARY MATTERS

BEFORE: Susan Ashley
Lois Dyer
Pierre Denault

APPEARANCES:
Daniel Ublansky Counsel for the Complainant
Russell Juriansz Counsel for the Canadian Human Rights Commission

Eric Durnford Counsel for the Respondent
PRE-HEARING CONFERENCE DATE: December 5, 1983 - Halifax, Nova Scotia
January 11-12, 1984 - Halifax, Nova Scotia

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This decision relates to questions of a preliminary or jurisdictional nature which were raised in a pre-hearing conference on December 5, 1983 and January 11 and 12, 1984. The merits of the complaint involve an allegation of unfair wages, specifically the denial of equal pay for work of equal value as provided for in section 11 of the Canadian Human Rights Act (hereinafter referred to as the Act). It should be noted that at the pre-hearing conference, it was agreed that the names of the parties in the style of cause should be Local 916, Energy and Chemical Workers Union and Atomic Energy of Canada Limited (CANDU Operations). Prior to proceeding with the merits of

this complaint, this Tribunal must determine whether its jurisdiction to hear the case is affected by any of the arguments raised by counsel for the respondent.

I At the December hearing, counsel for the Commission gave notice that he would be seeking to prove discrimination under section 7 of the Act as well as section 11, which deals specifically with equal pay. Counsel for the respondent objected to any amendment of the complaint. Mr. Juriansz for the Commission felt that no amendment to the complaint was necessary, as it was the duty of this Tribunal to "inquire into the complaint" (s. 39(1)). Since the complaint deals with an allegation of unfair wages, he argued that the remedy could be obtained either under s. 11 or s. 7; he stated that there would be no new factual allegations.

In deciding whether it would be possible or appropriate to add a new ground to the complaint, this Tribunal must look to the statute which gives us our authority. Section 39(1) of the Act states that

"The Commission may at any stage after the filing of a complaint, appoint a Human Rights Tribunal (herinafter in this Part referred to as a "Tribunal") to inquire into the complaint."

The remaining subsections refer to the eligibility, composition and remuneration of the Tribunal. In this case, the "complaint" into which we were appointed to inquire is dated April 27, 1979 (Exhibit R-10), and while not referring specifically to the section of the Act claimed to be violated, states the complaint in these terms:

"Local 9-916 (clerical workers) is approximately 97% female workers. We feel because of this our wages are not justly comparable with members of other unionized workers employed at this plant. Other locals are 100% male. Also we feel that male members of our local are being held back because of the high percentage of females in this particular local."

The complaint form then in use had boxes to be checked by the complainant, indicating what type of discriminatory treatment was alleged. The box for "sex" was ticked; there was no box for wages or equal pay. A letter from the Commission to the respondent dated July 3, 1979 (Exhibit R-11),

apparently
attached to the complaint form, states the allegation in terms of a s. 11
complaint. There was evidence that the first indication that proof was to be
tendered in regards s. 7 as well, occurred in December 1983 at the pre-hearing conference before this Tribunal.

Section 40(1) of the Act sets out the duties of the Tribunal, in part, as follows:

"A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire

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into the complaint in respect of which it was appointed ..."
The appointment of Tribunal form (Exhibit T-1) signed by Mr. R.G.L. Fairweather and dated October 3, 1983, appointed this Tribunal to

"determine whether the action complained of constitutes a discriminatory practice on the ground of sex under Section 11 of the Canadian Human Rights Act."

It is our conclusion that the complaint in respect of which we were appointed was a s. 11 complaint. While it is not disputed that amendments to
a complaint are possible, provided that all parties are given sufficient time
to prepare their case on the matters contained in the amendment, we feel that
it would be in the interests of no one to further delay these proceedings by
opening up the hearing to include another ground. It was open to the Commission or the complainant at any time since the complaint was made in
1979 to inform the respondent that they wished to proceed on the basis of s.
7 as well as s. 11, and it is not reasonable, at this late date, to change
the basis of the complaint. Therefore, we deny the Commission’s submission
that the basis of the complaint include s. 7 as well as s. 11.

II
The respondent’s major submission is that the Tribunal should dismiss or
dispose of the complaint summarily under s. 36(2)(a) and (b), s. 36(3)(b) and
s. 33(b)(iii). These sections refer to the power of the Commission to require that a complainant exhaust grievance procedures or deal with the
matter under another statute, prior to or instead of proceeding under the
Act. The sections read as follows:

s. 36(2) If, on receipt of a report mentioned in subsection (1), the Commission is satisfied
(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or
(b) that the complaint could more appropriately be dealt with, initially or completely, by a procedure provided for under an Act of Parliament other than this Act,
it shall refer the complainant to the appropriate authority.

(3) On receipt of a report mentioned in subsection (1), the Commission,
(a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred to pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or
(b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should be dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv).

The relevant part of s. 33 states that
Subject to section 32, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ...

(b) the complaint

(i) is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament, other than this Act,
(ii) is beyond the jurisdiction of the Commission,
(iii) is trivial, frivolous, vexatious or made in bad faith,
or ..."

Sections 33 and 36 thus provide that the Commission shall not proceed with a complaint if it feels certain circumstances exist, and further, that after the investigator's report is received, they must refer the complaint to the appropriate authority if they feel it should be dealt with under grievance procedures or another statute. (It should be noted that we have heard no evidence that an investigator was appointed and a report submitted under s. 36(1), which would trigger the application of s. 36(2) or (3); nevertheless, we have proceeded to deal with the merits of the argument.)

The respondent's argument is that the complainant should have dealt with the wage complaint through the collective bargaining process or under the provision of the Canada Labour Code, and that the Commission, by

proceeding with the complaint to the point of appointing this Tribunal, has exceeded its jurisdiction by not insisting that these perhaps more appropriate avenues be pursued. Counsel for the Commission argues that this Tribunal has no authority to inquire into the discretion exercised by the Commission under these sections.

The respondent lead evidence as to the history of collective bargaining between the two locals (local 916 for the clerical workers, local 785 for the plant workers) and the company; it was their view that by failing to bargain collectively for equal pay for work of equal value in any of the collective agreements since 1978, and by agreeing to the wage rates set by these agreements, the union is, in effect, estopped from now disputing those wages under the equal pay sections of the Act.

It is not necessary to recount extensively the process of negotiations between the company and the union. Both company and union have agreed that the matter of equal pay for work of equal value was raised in an afternoon's discussion during contract negotiations on June 27, 1978, shortly after the Act was proclaimed. Exhibit C-1 represents notes of this meeting taken by Mr. Brown. Mr. Kane indicated that because the company was not prepared to compare jobs it was felt more appropriate to bring the complaint through the Human Rights Act than to hold up the agreement. He also testified that in the agreements signed since 1978, the union has added the rider that they were signed subject to disposition of the wage complaint by the Commission. During the 1980 contract talks, the union asked for a 50-70% pay increase for local 916, for the purpose of bringing their wages more in line with local 785. Mr. Brown agreed that the objective behind the union's demand was probably to deal with the equal pay complaint. The company did not accede to these wage demands.

Exhibit C-2 is a document listing amendments and additions to the collective agreement expiring May 31, 1981 between Local 916 and the respondent it makes the following note:

"AMEND": 16:03 Adjust all rates in accordance with the principle of equal pay for work of equal value. Comparison to be used - the GBHWP (Glace Bay Heavy Water Plant) and PHHWP (Port Hawkesbury Heavy Water Plant) rates; plus a general increase of 20%.

No such amendment was reflected in the agreement that was concluded between the parties. While it appears that this matter may have been raised in a general way in the negotiations, there was no evidence that it was pursued vigourously or that it would ever be a strike issue. In the next set of contract negotiations, the parties were bound by the C-124 restraint legislation although some job reclassifications were effected.

Mr. Brown testified that the company found it difficult to negotiate wages while the equal pay complaint was being investigated by the Commission, and that they wrote to the Canada Labour Relations Board (Exhibit R-8) for guidance on how to proceed. The letter, dated April 11, 1980 indicated that

"... By this letter, we wish to notify you that we believe we are unable to conclude negotiations on any or all economic matters until such time as the complaint before the Canada Human Rights Commission has been resolved."

The CLRB referred the letter to the Commission, and in reply dated May 29, 1980 (Exhibit R-9), the Commission said that

"...The filing of a complaint with the Canadian Human Rights Commission should not be an impediment to the negotiating of a contract through collective bargaining. It is the responsibility of both negotiating parties to arrive at agreements which do not contravene the law.

We are aware that a new collective agreement will soon be bargained between 9-916 and AECL. This will not interfere with or affect the investigation process."

The Act does not require that the parties exhaust grievance or review procedures prior to laying a complaint. What it does provide is that if the Commission is satisfied that it ought to have done so, the Commission must refer the complaint to that other authority. We do not have knowledge of the facts before the Commission when they decided to proceed with the complaint, although Exhibit R-9 does indicate that they were aware of the difficulties perceived by the company in dealing with wage issues in the contract

negotiations. Based on the evidence presented before us, it appears that the union made efforts to bring the equal pay issue to the table, but that both the union and the company thought the complaint should proceed through the Commission's process: indeed, Mr. Brown felt that there was little option to

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do otherwise. (Transcript pages 206-7)
The company relied on Article 2 of the agreements (which is contained all the local 916 agreements since 1978), stating that

"Should any provision of this Agreement be found to be in conflict with an applicable statute, then the parties shall meet and arrive at a satisfactory settlement of the provision in conformity with the statute; the remaining provisions shall continue to be operative and binding on both parties."

The company feels that this provision puts the responsibility on the parties to deal with the equal pay issue through the procedures as set out.
It appears that neither party took advantage of this article in reference to the equal pay complaint but we do not feel that failure to do so is significant. Regardless of the steps taken to deal with the matter through bargaining, we conclude that there is no evidence that the Commission exercised its discretion improperly under either s. 33 or 36. If we were to find that a union must exhaust grievance procedures or pursue their rights under the Canada Labour Code before the Commission could accept a complaint from them, we would be severely restricting the rights of union members to remedies provided by statutes such as the Canadian Human Rights Act. We do not feel that this was the intent of the legislation, which purpose is stated in broad terms in s. 2 of the Act. Such "fair, large and liberal" interpretation as is reserved for remedial statutes in the Interpretation Act (s.11) precludes this restrictive approach.

The respondent has also relied on s. 33(b)(iii), which states that the Commission shall not deal with a complaint where it appears to them that it "is trivial, frivolous, vexatious or made in bad faith". Exhibit R-8, referred to earlier as the letter from the company to the CLRB, states the company's "bad faith" argument as follows:

"... The Company is prepared to negotiate a salary settlement which resolves all outstanding differences between the parties. The Union, however, has clearly indicated that once a negotiated collective agreement is signed they fully intend to renew their complaint with the Canadian Human Rights Commission.

We believe this position taken by the Union precludes good faith bargaining and the Union Local is demonstrating clear unwillingness to negotiate a binding settlement on economic matters."

We do not agree that the union, by pursuing its remedies under the Act, has bargained in bad faith, and we dismiss this argument. In any case, there is no evidence that the Commission exercised its discretion unfairly or improperly.

In all of these arguments, the fundamental question arises whether a Tribunal appointed under the Act has jurisdiction to examine or second-guess the exercise by the Commission of its statutory authority. Mr. Juriansz says that we have not. There are several cases dealing with this matter, although

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in a different context from this case. A Tribunal has examined the method of its own appointment, and decided that since there could be a reasonable apprehension of bias, even though not based on a specific section of the Act, it was improperly appointed. (Ward v. Canadian National Express and the Canadian Human Rights Commission (1981) 1 CHRR D/415). Another case dealt with whether the complaint which a Tribunal was appointed to hear was a proper one. CHRC v. Bell Canada (1981) 1 CHRR D/265 concluded that since the complaint lacked particulars, the Tribunal had no authority to deal with it. That case involved a complaint initiated by the Commission under s. 32(3), which allows the Commission to initiate a complaint where it "has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice". The Tribunal held that a proper complaint had not been filed, since the complaint was in the form of a general letter from the Commission to the company; thus since the complaint was inadequate, the Tribunal had not been appointed properly, and had no jurisdiction to hear the matter. In that case, the Tribunal noted at D/266 that

"...Although sections 32(1) and 32(3) give the Commission the power to initiate a complaint in a form acceptable to it, we do not believe that it was the intention of Parliament to give them a totally free hand."

The issue in that case dealt with a denial of natural justice, which is not the situation here. In both Ward and Bell, the Tribunal's review of the Commission's exercise of its discretion dealt directly with the jurisdiction of the Tribunal to hear the matter, as in this case, a finding that the Commission had erred in exercising its discretion would affect our own jurisdiction. In cases such as those cited and such as the present case, it cannot be said that the Commission's discretion is absolute. However, the evidence before us does not point to an improper exercise of discretion by the Commission in not suggesting that the union exhaust other avenues. On the contrary, there was evidence that unsuccessful efforts were made to deal with the matter through negotiations.

Nor do we feel that there was any evidence of bad faith by the union. In conclusion, we dismiss the respondent's arguments, and find that the matter is properly before us and that we have jurisdiction to deal with it.

III On another preliminary matter, the respondent alleges that s. 11(2) of the Act and the Equal Wage Guidelines issued pursuant to s. 22(2) violate their rights under s. 7 of the Charter of Rights and Freedoms, in unfairly limiting the factors to be used in determining the question of whether the jobs under consideration are of equal value. Section 11(2) states that

"In assessing the value of work performed by employees employed in the same establishment the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed."

The respondent introduced evidence through Marilyn Sykes, who was employed from 1975 to December 1983 with the respondent in the area of Human Resources, specializing in compensation. She stated that factors such as the demands of the marketplace and collective bargaining must be taken into account in setting wage rates, and that this was the universal practice, the conclusion being that the Act, by precluding the employer from taking these factors into consideration in setting wage rates, is unfairly restricting the employer's liberty. Section 7 of the Charter, which is relied on, states that

"Everyone has the right to life, liberty and security of the person

and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

R. v. Halpert, a judgement of the Ontario Provincial Court dated November 1, 1983 (now on appeal) gave a broad interpretation to this section of the Charter, finding that the procedures for implementing the federal government's metric conversion scheme unfairly restricted the right of the gas station owner. Ross, J. accepted the American definition of the term "liberty", and Mr. Durnford urges that approach upon this Tribunal. At page 33 of that decision, Ross, J. quotes Board of Regents of State College and Roth (U.S.S.C.) in dealing with "liberty" and "property" in the due process clause of the Fourteenth Amendment.

"... Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men. In the Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

Halpert is now on appeal, and we must await determination by a higher Court of the interpretation to be placed on the words of s. 7. However, it should be noted that Halpert dealt mainly with the "draconian" (per Ross, J. at p. 45) powers given to inspectors under the Weights and Measures Act, and the lack of natural justice in the procedures under that Act. Section 11 and the Equal Wage Guidelines of the Canadian Human Rights Act are quite different from the matters under discussion in Halpert. The purpose of s. 11 is truly remedial, the object being to attempt to eliminate the wage gap between men and women, especially in so far as it exists as a result of women being employed, for the most part, in lower paying jobs. The fact that the factors to be considered in determining equal value do not include marketplace and collective bargaining realities may be a reflection that, to date, the wage gap between men's and women's jobs in general has not improved, perhaps because these factors are commonly used in setting wage rates. The failure

to include them in the legislation could be interpreted as an attempt by Parliament to remove factors that have restricted the wages of certain groups of employees.

It is our conclusion that sufficient flexibility exists in the Act and the guidelines for the Tribunal to make a determination of whether the jobs in question are of equal value, as we are mandated to do by the Act. It is arguable that there is a distinction between deciding whether jobs are of equal value, and deciding what the wages for those "equal" jobs should be. We do not agree with the respondent's contention that the omission in the Act of such factors as marketplace and collective bargaining considerations in determining whether the jobs are of equal value unfairly fetters the Tribunal's discretion to decide the question.

There are many pieces of legislation, both provincial and federal, which take away an employer's "liberty" to set wage rates as they wish, among them, minimum wage, vacation pay, anti-inflation measures, etc., such as are found in labour standards legislation. Even if Ross, J's interpretation of s. 7 is upheld, it is not at all clear to us that it would affect the conclusion in this case. The 'liberty" of an employer must be defined in light of other statutory provisions, such as those just mentioned. There are other goals and principles which must be upheld by law, as are apparent in the Charter itself, which includes the right to the equal protection and equal benefit of the law without discrimination on the basis of, among other things, sex (s. 15). We would argue that, even if the s. 7 argument in Halpert succeeds, rights such as those protected by the Act are "limits prescribed by law as can be demonstrably justified in a free and democratic society". (s. 1)

IV The respondent has requested that the union, because it has accepted the wage rates as set by the collective agreement and because it acts as bargaining agent for both groups whose wages are sought to be compared, should be added as a respondent or a co-respondent along with the company, rather than continue in its present status as complainant. They contend that a company which bargains collectively no longer has any right to set

wage
rates unilaterally, and that by agreeing to the wages set for both local 916
and 785 through the collective bargaining process, the union should not be
permitted to now attack those very wage rates to which they have already agreed.
This Tribunal heard evidence from both the company and the union that, from the union's point of view, the agreements were subject to determination
of the issue by the Commission, and from the company's point of view, that
they felt obligated to let the wage complaint run its course through the
Commission. While it is true that the company cannot set wage rates unilaterally, it does not necessarily follow that the parties are thereby
equal. It is also true that the strike weapon is a strong one, and if the
union had proceeded with the wage complaint through bargaining, it could have
used this tool. However, we do not agree with the respondent that failure by
the union to go this route has made them complicitous in setting discriminatory wage rates, particularly in light of the evidence already
referred to. This argument is related to the s. 33 and 36 arguments, and our

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comments in relation to those arguments are equally relevant here. While it
is agreed that a Tribunal has the authority to add parties (Kotyk and Allary
v. CEIC and Chuba (CHRC Review Tribunal decision dated December 29, 1983), we
do not feel that this is an appropriate case for doing so. We conclude that
the union is properly the complainant in the matter before us.

V. During the course of the pre-hearing conference, counsel for the respondent submitted that the role of the Commission in the proceedings should be limited to that of observer, or at most
an advisor to the Tribunal on issues of procedure. The Tribunal decided the matter orally, stating at page 49 of the Transcript that

"the Act is sufficiently clear in giving the Commission a role to play in a Tribunal that we are prepared to allow them to play as active a part as they choose to do in that they can present evidence and make representations and cross-examine witnesses to the extent that they feel that it is in the public interest."

We do not feel it necessary to expand upon that, except to refer specifically
to s. 40(2) of the Act, which states that

"The Commission, on appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into."

It is common practice in virtually all human rights cases, both provincial and federal, for Commission counsel to carry the case, presumably, in the public interest. We feel that the Act is drafted sufficiently broadly to encompass this, and further, that it is a good practice as it relieves complainants, who are frequently lacking in expertise and/or resources, from the burden of proving the case.

Having dealt with all of the preliminary matters raised by counsel, and having decided that we have jurisdiction to do so, we may now proceed to argument on the merits.

>Dated
this 22nd day of February, 1984.

Susan M. Ashley, Chairperson
M. Lois Dyer, Member
Pierre Denault, Member

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