T.D. 4/97
Decision rendered on April 10, 1997

CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, C.H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

Stanley Moore & Dale Akerstrom

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Treasury Board, Department of Foreign Affairs
& International Trade, Canada Employment and
Immigration Commission, Public Service Alliance
of Canada and Professional Association of Foreign Service Officers

Respondents

- and -

Professional Institute of the Public Service of Canada

Interested Party

TRIBUNAL DECISION

TRIBUNAL:

J. Grant Sinclair, Q.C. Chairperson
Janet Ellis Member

APPEARANCES:

Rosemary Morgan, Counsel for the Canadian Human Rights Commission

Brian Saunders and James Hendry, Counsel for the Treasury Board, the Department of Foreign Affairs and International Trade and Canada Employment and Immigration Commission

Andrew Raven, Counsel for the Public Service Alliance of Canada

P. MacEachern, Counsel for Professional Association of Foreign Services Officers and Professional Institute of the Public Service of Canada

DATE AND LOCATION OF HEARING:

October 17, 1996 and November 12, 1996,
Ottawa, Ontario

At the conclusion of the hearing into the Complaint in this matter, counsel for the parties requested that,

"in the event of a finding that the complaints were substantiated, they be given general direction in an order from the Tribunal and an opportunity to work out the details while the Tribunal retains jurisdiction."

The Tribunal accepted this proposal and retained jurisdiction as requested.

The remedy ordered by the Tribunal was set out in four separate paragraphs, paragraph a), paragraph b), paragraph c), and paragraph d). Subsequent to the release of the Tribunal's decision on June 13, 1996, the Tribunal was advised by the parties that there were a number of disputes concerning the details of the remedy ordered by the Tribunal. The Tribunal reconvened on October 17, 1996 and November 12, 1996 to deal with the disagreements between the parties. These are dealt with under separate headings by reference to the relevant paragraphs of the Tribunal's order.

Paragraph c)

The Respondents Treasury Board, Foreign Affairs & International Trade and Canada Employment and Immigration Commission ("Employers") responded to the Tribunal's order in paragraph c) by proposing a Memorandum of Understanding which is attached as Appendix "A" to this decision. Under this memorandum the same employment benefits given to a common law spouse are to be given to an employee who is living in a same sex partner relationship.

The memorandum defines "a same sex partner" relationship as follows:

a "same-sex partner" relationship exists when, for a continuous period of at least one year, an employee has lived with a person of the same sex in a homosexual relationship,publicly represented that person to be his/her partner and continues to live with that person as his/her partner.

The CHRC, the Unions and particularly the complainant Stanley Moore objected to this definition because, in their view, it continues the discrimination. Rather than treating same sex partners as a common law spousal relationship (as is the case with opposite sex partners), the definition of "same sex partner" creates a separate class of persons who are entitled to employment benefits, but on the basis of their sexual orientation rather than their spousal relationship. The Employers offered no explanation as to the need for a separate classification and have proceeded to implement the provisions of this memorandum.

The Unions submitted to the Tribunal a Memorandum of Understanding which contains their preferred definition of spouse which is to be included in all collective agreements and in foreign service directives in determining eligibility for employment benefits. This Memorandum of Understanding is attached as Appendix "B". The CHRC and the complainants support this approach. The definition of spouse in this memorandum makes no reference to gender or sexual orientation.

The CHRC, the complainants, and the unions have asked the Tribunal to resolve the differences between the parties and find that the proper approach for determining eligibility for benefits is as set out in their memorandum. The Employers' position in response is that there is nothing left for the Tribunal to resolve with respect to paragraph c) of the order. The Employers have made the employment benefits in question available to all employees including those in a same sex relationship, and the manner by which this is achieved is not reviewable by the Tribunal. The Employers also argued that paragraph c) being a cease and desist order is a final order and the Tribunal is functus officio.

The principle of functus officio was considered by the Supreme Court of Canada in Chandler v. Alberta Association of Architects, [1989], 2. S.C.R. 848, and, in the context of the Canadian Human Rights Act, ("Act") in the case of Canada (Attorney General) v. Grover et al. (1994) 80 F.T.R. 256. It is clear from these two cases that this Tribunal has the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to the complainants.

The Employers' argument is too narrowly focused. In paragraph c), the Tribunal ordered that the Employers cease and desist in the application of any definition of spouse which has the effect of denying the provision of employment benefits to same sex common law spouses.But, the Employers are also directed to interpret any definition of spouse or any other provisions of the documents referred to in paragraph c) to be in compliance with the Canadian Human Rights Act and Charter so as to include same sex common law couples. The Employers have not done this. Rather, in extending these benefits to same sex couples, the Employers have put forward a definition in addition to the definitions set out in the Foreign Service Directives, the Collective Agreements, National Joint Council politics, the Public Service Heath Care Plan and Dental Care Plan. This is not in accordance with paragraph c) of the Tribunal's order. Our order requires that the definition of spouse be interpreted to comply with the Act and Charter. This is obviously and easily accomplished by interpreting the definition of spouse or common law spouse as found in these documents as if the words "of the opposite sex" were not included in the definition; or in the case of the declaration to designate a spouse for purposes of the Foreign Service Directives, by interpreting any definition of spouse or spousal relationship without reference to gender.This is what paragraph c) requires and the Employers are ordered to offer the benefits on this basis not on the basis of a classification outside these documents.

Paragraph a)

STANLEY MOORE: spousal related entitlements and expenses
The Tribunal ordered that Stanley Moore be paid:

(1). an amount equal to all the spousal related entitlements and expenses to which he and Mr. Soucy would have been entitled but for the discrimination commencing asof the beginning of his posting to Jakarta in July 1991.

At the resumption of the hearing, we were informed that agreement had been reached respecting entitlements and expenses except for two matters still in dispute. The disputed matters pertain to claims by Mr. Moore under Foreign Service Travel Assistance (FSD 50).

Mr. Moore was entitled to two return trips to Ottawa during his posting. Mr. Moore could take those trips at any time during the posting. Mr. Moore

need not have actually traveled to Ottawa but could travel anywhere and be refunded the cost up to a maximum cost of a return trip to Ottawa. Mr.

Moore was also entitled to two return trips of his common-law spouse on the same terms as his own entitlement.

The first dispute concerns Mr. Moore's travel. Mr. Moore has been paid for the maximum entitlement for one trip. Regarding a second trip, Mr. Moore's evidence was that he could not pay the costs for his common-law spouse so he did not plan an expensive trip together. He did not want to lose the use of the entitlement altogether so he submitted a request for reimbursement for a trip he took to Vancouver. This trip did not cost the maximum entitlement and the difference in cost between the trip to Vancouver and the maximum entitlement is $2,734.92. Mr. Moore and the Commission seek reimbursement for Mr. Moore for this amount. The position of the Employers is that the travel allowance is not automatically the maximum entitlement, but rather reimbursement is based on receipts submitted by the employee. Mr. Moore submitted receipts to his employer for the cost of this trip and was reimbursed.

The Tribunal accepts Mr. Moore's evidence that if he had any time during his posting been permitted to claim entitlements and expenses as a spouse he would have so claimed and he would have claimed the maximum amount possible. Mr. Moore would have taken all the trips he could at the maximum trip cost that he could have been reimbursed. Therefore, the Tribunal orders that the Treasury Board pay Mr. Moore the sum of $2,734.92.

The second dispute concerns Mr. Soucy's travel. After the decision of this Tribunal, the Treasury Board paid for two trips at the maximum entitlement amount of Mr. Soucy. However the Treasury Board is now claiming back approximately $5,000.00 being the entitlement for one trip. The reason is that when Mr. Moore submitted exhibit HR-1 he claimed for one FSD 50 referable to a trip taken in April/May 1992. The Treasury Board takes the position that Mr. Moore's claim is for the trip taken prior to the Haig decision in August 1992, and therefore, Mr. Moore is not entitled to be reimbursed for this part of his claim.

Mr. Moore's position is that he never made a claim to his employer for reimbursement for the April/May 1992 trip. Mr. Moore submitted HR-1 as an example for how to calculate an FSD 50.

The Employers have recognized that Mr. Moore is entitled to two FSD 50s for Mr. Soucy. There is no reason to assign an April /May 1992 date because that trip was used by Mr. Moore as an example. It is irrelevant when the trip took place because the Treasury Board has agreed to pay for two trips. Therefore, the Tribunal orders that the maximum entitlement for two trips for Mr. Soucy, which sum has already been paid by the Employer, is deemed

to be payment for trips taken at any specific date during the posting cycle that the complainant decides.

Paragraph a) and Paragraph b) - Interest

There are numbers of issues relating to interest on which the parties cannot agree. The issues are:

(i) are the complainants entitled to interest on foregone entitlements;

(ii) is the interest payable under paragraphs a) and b) to be simple or compound interest;

(iii) what is the date from which interest is to be calculated; and

(iv) what is the rate of interest.

Initially, the Employers refused to pay any foregone entitlements to Mr. Moore, but have now agreed to do so. The Tribunal ordered under paragraph c), (4) that interest is "payable on the above amounts", which includes foregone entitlements. Therefore interest is payable on this amount.

On the question of simple or compound interest , counsel advised that there are no Tribunal cases in which compound interest has been awarded. But there is a discretion under section 53(2) of the Act to award compound interest. The Tribunal was referred to a number of cases to support the argument of compound interest. These included Francis v. Dingman, 43 O.R. (2d) 641; Cashin v. CBC , 12 C.H.H.R. D/222; Re CBC and N.R.P.A., 45 L.A.C (4th) 445; and CBC v. C.U.P.E. [1987] 3. F.C. 515. Counsel for the CHRC relied on these cases for the proposition that if the complainants had not been deprived of the money they would have made the most beneficial use of it or, alternatively, the wrongdoer made the most beneficial use of it. But whichever it is, to give adequate compensation, the money should be replaced at compound interest.

The Employers' counsel, on the other hand referred to a number of cases including Mills v. Via Rail, [1996] C.H.R.R. No. 7; A.G. Canada v. Uzoaba, [1995] 2.F.C. 569; Fry v. D.N.R. (Taxation)T.D. 10/94, (CHRT); and A.G. Can v. Morgan (1991) C.H.R.R. D/87. The Tribunal has reviewed these authorities and has concluded that the operative principle is that set out in the reasons of Mr. Justice Marceau and Mr. Justice MacGuigan, namely, that simple interest is the norm except in special circumstances identified and justified by the Tribunal. We do not consider that the evidence or

circumstances of this case justify compound interest, and accordingly, the interest shall be simple interest payable in accordance with the Courts of Justice Act of Ontario, in the case of Mr. Moore and in accordance with similar legislation in British Columbia for Mr. Akerstrom.

Finally, interest shall be paid on foregone expenses from the date when the entitlement accrued; on hurt feelings from the date of the Tribunal's order, and on any other costs and expenses from the date as and when incurred.

There will be no award to the complainants for time spent in preparation for and participation in the litigation as per Ms. Morgan's January 16, 1997 letter.

Paragraph d) - Inventory

The Tribunal also ordered under paragraph d) of its Order that the Employers, in cooperation and consultation with the CHRC, prepare an inventory of all legislation, regulations, directives, etc. which contains definitions of spouses which discriminate against sex common-law couples or definitions when applied operate to discriminate on the basis of sexual orientation in the provision of employment related benefits and also provide a proposal for the elimination of all discriminatory provisions.

The CHRC identified certain provisions of the Income Tax Regulations which it considered had a potential impact on employees in a same sex partner relationships. Counsel for PAFSO and PIPSC raised the question of the regulation dealing with the issuance of diplomatic and special passports and how that may impact on members of the immediate family of an employee to whom a passport has been issued and the discretion of the Secretary of State to decide whether or not immediate family members will be qualified for diplomatic or official status.

The income tax issue has been resolved by the following correspondence. By letter dated September 9, 1996 from Bryan Dath of Revenue Canada to John Ambridge, Treasury Board of Canada, and by letter dated October 4, 1996 from Brian H. Saunders, Civil Litigation Section Department of Justice to the Canadian Human Rights Tribunal, it is set out and confirmed that Revenue Canada will recognize a private health services plan which provides coverage for same sex couples. It was also confirmed by counsel for the Employers before the Tribunal, that all employees will be treated the same by Revenue Canada with respect to their employee benefits including employer financial contribution under private health services plan under

the policies and directives of the National Joint Council or under the various collective agreements.

Counsel for PAFSO and PIPSC raised concerns about Regulation P.C. 1956-1373 respecting the issuance of diplomatic and special passports to immediate family members of a person holding such passports. The Employers' counsel advised the Tribunal that as of November 1, 1995 the policy has been adopted that, in determining which individuals will be considered as members of the immediate family of persons to whom diplomatic or special passports have been issued, there will be no differentiation and the same criteria will apply to same sex spouses and family relationships as are applied to opposite sex spouses and family relationships in making this determination.

The Employers' Counsel also advised in his October 4, 1996 letter that the Employers will make available to those in a same sex relationship the benefits under:

Head of Post Directives
Recreational Hardship Support Program
Incentive Award Plan
Training and Development Policy
Guaranteed House Sale Plan
Conference Policy

in the same manner that these benefits are available to employees with opposite sex partners.

Apart from identifying in the inventory various provisions of the Income Tax Act and Regulations, Regulation P.C. 1956-1373, (and in general provincial or territorial marriage legislation restricting opposite sex marriages and opposite sex adoptions as they impacted on the collective agreements and NJC directives and polices), there was no other legislation regulations, or directives, which were identified by the parties in the inventory.

Dated at Toronto this 17th day of March , 1997.

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J. Grant Sinclair, Q.C. - Chairperson

Janet Ellis, Member