T. D. 4/91

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TREASURY BOARD

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL:
Robert W. Kerr -Chairman
Jane Banfield-Member
John I. Laskin -Member

APPEARANCES:

René Duval
Counsel for the Canadian Human Rights Commission

Andrew Raven
Counsel for the Public Service Alliance of Canada

Denis Bouffard
Counsel for the Treasury Board

DATES AND LOCATION
OF HEARING:

June 12, 1985, July 14-15, 1987,
November 8-10, 1989,
November 14-16, 1989, January 22-26, 1990,
June 18-22, 1990 and August 21-22, 1990,
Ottawa, Ontario.

HISTORY OF THE PROCEEDINGS

The complaint in this matter was originally filed on September 9, 1981. The nearly ten-year interval which has passed in this case is not due entirely to the process of investigation and adjudication, however. At the same time that the complaint was proceeding through the human rights process, the parties were also involved in extensive negotiations over the same issues and the Human Rights Commission and the federal government were considering changes in subordinate legislation relevant to the issues in this case. Rather than press forward to an outcome based on the state of the law and the circumstances in 1981, therefore, the parties sensibly agreed from time to time to delay the human rights process until other avenues of resolving the matter were exhausted.

This Tribunal was appointed on August 14, 1984. A pre-hearing conference was held on June 12, 1985 at which time the Tribunal agreed to adjourn the matter sine die pending adoption of new Equal Wages Guidelines then under consideration by the Human Rights Commission. It appeared that those Guidelines might assist the parties in reaching a settlement of the dispute. The new Guidelines were eventually published in the Canada Gazette on December 10, 1986.

Following that, the Tribunal proceeded to establish hearing dates and the commencement of the hearing was finally set for July 13, 1987. The hearing was subsequently postponed one more day and commenced on July 14. At that time, the parties advised the Tribunal that they had reached an agreement in principle which would include a request that the Tribunal issue a consent order. They asked for a further one day adjournment to complete the drafting of the terms of this settlement.

The terms of the settlement were incorporated into a Consent Order that the Tribunal agreed to endorse. Under this agreement, a scheme of wage adjustments and a process for classification review were put into effect. In general terms, the Respondent was to make wage adjustments which would serve to equalize the wages for Hospital Services employees with that for General Services employees at comparable classification levels. It was to revise its existing Hospital Services classification standard to produce a new Hospital Services standard corresponding to the then existing General

Services classification standard. A copy of the Consent Order dated July 15, 1987 is attached to this decision as Appendix A.

According to paragraphs 10 and 11 of the settlement and Consent Order, the Tribunal was to remain seized of the matter for specific purposes. Under paragraph 10, the Tribunal was to retain jurisdiction concerning certain aspects of the dispute in the event that the implementation of the terms of the settlement did not resolve them. Under paragraph 11, the Tribunal would remain seized with respect to the effect that another ongoing process, a Joint Union/Management Initiative concerning compensation practices, might have on the payments agreed to under the settlement.

Late in 1988, the Complainant applied to have the Tribunal exercise the jurisdiction retained under paragraph 10 of the Consent Order. After further unavoidable delays, the Tribunal reconvened on November 8, 1989, at

which time the Respondent objected to the jurisdiction of the Tribunal to continue hearing the complaint on the basis that the Tribunal was functus officio and that issues being raised by the Complainant at this stage went beyond the scope of the complaint. The Tribunal, in an oral ruling, concluded that it was not functus officio and the hearing proceeded.

Questions as to the scope of the complaint seemed better dealt with in relation to the relevancy of particular evidence or at the end of the case as part of the overall merits. Thus, the Tribunal held that this aspect of the Respondent's preliminary objection was premature.

Because the ruling on the issue of functus officio was important to the parties, the Tribunal undertook to provide the parties with written reasons. These reasons were released as a Preliminary Decision on March 1, 1990 and a copy is attached as Appendix B.

The hearings continued on November 8, 1989 and, after various adjournments, concluded on August 22, 1990.

ISSUES

Before dealing with the merits of the case, it seems appropriate to address the basic question of whether the issues raised before us fell within the scope of the complaint. If not, then any observations we might make with respect to these issues would have no legal effect and it is questionable whether it would be appropriate for us to even discuss them. In order to

address this question, however, it is necessary to define the issues which were raised before us and which the Complainant and the Commission submitted were within the scope of the complaint.

The complaint which gave rise to this proceeding alleged that:

Treasury Board has discriminated in the classification and pay of employees in the female-dominated Hospital Services group in relation to employees in the male-dominated General Services group on the basis of sex; contrary to sections 7, 10, and 11 of the Canadian Human Rights Act.

The Hospital Services and General Services groups will be referred to frequently throughout these reasons. For convenience, the abbreviations HS for Hospital Services and GS for General Services will be used in subsequent references.

After alleging a violation of the Canadian Human Rights Act in the terms quoted, the complaint went on to request a remedy by way of a raise in the rate of pay for each HS employee to the GS rate applicable using the GS classification standard and levels and the replacement of the pay ranges applicable to HS employees with a single rate.

As we ruled in our Preliminary Decision, the role of the Tribunal in accepting the Consent Order related to procedural matters. We agreed to an

indefinite adjournment to accommodate the parties in their ongoing efforts to resolve the dispute. We never addressed the question of whether there was actually a violation of the Canadian Human Rights Act in 1981 when the complaint was filed. Under section 53(2) of the Act a finding by us that the complaint is substantiated is a condition precedent to any remedial order. Thus, one issue left open is whether there was a violation of the Act at the time of and within the terms of the complaint. While this issue might be further refined, it seems unnecessary to do so.

By virtue of the settlement incorporated into the Consent Order and its subsequent implementation, many of the issues originally in dispute between the parties were resolved. As a consequence the evidence at the hearing focused on much narrower issues. One problem presented by this procedure, however, is that there was no formal originating document to help define the outstanding issues.

Although the Respondent objected from time to time during the hearing that it did not know what issues the Complainant was raising and that the Complainant was attempting to raise additional issues, it is our view that the Complainant clarified the specific issues it wished to raise during the first day of the hearings on November 8, 1989. The specific issues are whether any of the following involved discrimination on the ground of sex contrary to the Act:

(1) the classification level of community health representatives employed by the Department of Health and Welfare on native reserves;

(2) the classification level of dietary helpers at Ste-Anne-de-Bellevue Hospital; and

(3) the classification standard for the HS group.

As to the second of these three issues, we note that there was evidence of persons employed as dietary helpers, other than those at the Ste-Anne-de-Bellevue Hospital, who were classified at the same level. It appears, however, that the classification level of these other dietary helpers is not in dispute. When clarifying the issues at the opening of its case and at subsequent points when the question of the scope of the complaint was raised, the Complainant indicated consistently that it disputed only the level of the Ste-Anne-de-Bellevue employees.

SCOPE OF THE COMPLAINT

The history of these proceedings which is set out above raises one obvious concern with respect to the scope of the complaint. That is the question of whether the original formal complaint in 1981 can give this Tribunal any jurisdiction to deal with the situation existing in 1987. The circumstances have substantially changed in the interim as a result of the efforts of the parties to resolve the dispute by agreement.

In our view, this concern over the scope of the complaint is easily disposed of. The original complaint relates to discrimination in classification and pay as between the HS and GS groups. While the efforts at resolving the matter clearly appear to have reduced any such discrimination, the allegation which the Complainant seeks to establish before us is that aspects of discrimination which existed in 1981 continue to exist.

The success of subsequent attempts to remedy the 1981 complaint is relevant to the question of what, if any, remedy should now be granted in the event that the complaint is substantiated. If these efforts or other interim events introduced new elements of discrimination, such discrimination would probably be a matter for a new complaint and not within the jurisdiction of this Tribunal. In so far, however, as any discrimination is a continuation of that alleged in 1981, it is within the scope of the complaint and hence within the jurisdiction of this Tribunal, given that we have never made a decision on that complaint.

The major, and the most cogent, objection made by the Respondent to these proceedings based on the scope of the complaint relates to the reference in the complaint to the relation between the HS group and the GS group as respectively female-dominated and male-dominated segments of the public service. It is the submission of the Respondent that, if any gender discrimination still exists, it is a result of the internal application of the new HS standard. The new HS standard, in the Respondent's view, is a faithful conversion of the old GS standard in the context of HS employment. Hence, there is no longer discrimination arising from comparison between the HS and GS standards and the discrimination alleged here is outside the scope of the original complaint.

The Tribunal is convinced that we were right in our Preliminary Decision that this argument should be ruled upon in light of all the evidence, and not at a preliminary stage of the proceedings. It is conceivable that the evidence led could have gone only to internal discrimination in the application of the HS standard, in which case the argument that this is beyond the scope of the complaint might well have been persuasive. The evidence before us, however, goes to the existence of continuing gender discrimination as between the effect of the new HS standard and the effect of the GS standard. If such effects exist and are a continuation of discrimination that existed in 1981, this is within the scope of that complaint.

The basis for concern about the scope of a complaint is generally a matter of fairness as to whether a Respondent has been adequately informed of the case to be met. There is no general claim here that the Respondent has been surprised by the continuing concerns of the Complainant with respect to the classification of the HS group of employees. Given the overall collective bargaining relationship between the Complainant and the Respondent, such a claim of surprise would have been hard to sustain.

The Respondent did, however, attempt to claim surprise with respect to the claim that the impact of the new HS classification standard is

discriminatory. This claim was based on the fact that, when it initially asked the Tribunal to reconvene, the Complainant had raised only the question of the specific classification levels of the dietary helpers at Ste-Anne-de-Bellevue and of the community health representatives. The new HS standard had not yet been released at that time.

As already stated, the question of continuing discrimination in the relationship between the new HS standard and the GS standard is within the scope of the original complaint, and thus the Respondent was not surprised in the sense of this being a new and different complaint. The issues the Complainant intended to raise were all specified in an opening statement to the Tribunal at the beginning of the hearings in November, 1989. This was really the first formal occasion for the Complainant to define the issues on which it was asking us to exercise jurisdiction. The type of surprise that the Respondent alleged was a matter to be addressed by an appropriate adjournment to allow the Respondent additional time to prepare, if needed, not by dismissal of the complaint.

It was open to the Respondent to make an appropriate application based on unfairness in the proceedings and it did not do so. Even if it was taken unawares by the general challenge to the new HS classification standard when these hearings commenced, the lengthy adjournments which ensued in any event left the Respondent with sufficient time to prepare to meet this aspect of the Complainant's case.

In summary, then, the issues raised by the Complainant at this stage of the proceedings are within the scope of the complaint in so far as they involve a continuation of discrimination alleged in the original complaint and, in particular, in so far as this discrimination involves the relationship between the HS and GS groups. At the same time, in so far as the evidence before us may raise inferences of new discrimination or discrimination which is purely internal to the new HS standard, this would lie beyond the scope of the complaint and we will treat the evidence within this framework.

SUBSTANTIATION OF THE ORIGINAL COMPLAINT

As we ruled in our Preliminary Decision, this Tribunal made no decision at the time of the Consent Order. This leaves open the basic question as to whether the original complaint in this case is substantiated. That question is easily answered in our view.

There were two main aspects to the original complaint:

(1) there was discrimination in wages as between the HS and GS groups of employees; and

(2) there was discrimination in classification as between the HS and GS groups of employees.

Before assenting to the Consent Order, the Tribunal did commence a hearing and received evidence which the parties submitted by agreement. This evidence is part of the record before us and we are entitled to base findings upon it.

At that time, the parties submitted to the Tribunal an agreed statement of fact, together with an amending addendum. The agreed terms of the Consent Order included recitals based on the agreed statement of facts and the addendum. In the recitals, it was acknowledged that the HS group, being predominantly female, was in receipt of less wages than the GS group, being predominantly male, for performance of work of at least equal value. The facts stated in the addendum brought the complaint under the provisions of ss. 12-13 of the Equal Wages Guidelines, 1986, which provide that a group of over 500 employees is predominantly of one gender if 55% of the group is of that gender. Together, these admissions made out a violation of s. 11 of the Canadian Human Rights Act with respect to wages as between the HS and GS groups.

While the facts agreed to at the time of the Consent Order stopped short of an acknowledgement of discrimination in classification, there was no real dispute between the parties that some such discrimination did exist. The HS and GS standards were both numerical rating systems that were virtually identical in basic structure. The division of the numerical scale into levels differed, however, so that employees rated identically under both standards were commonly classified at different levels.

Since wage scales were level dependent, this difference contributed in turn to the discrimination in wages that existed. Since the HS and GS groups were predominantly female and male respectively, we are satisfied that this difference in the classification standards was a practice which adversely differentiated individuals on the ground of gender contrary to s. 7 of the Act. Thus, the original complaint was also substantiated with respect to discrimination in classification.

THE CURRENT JURISDICTION OF THE TRIBUNAL

This brings us, then, to the real issues which separate the parties. By their agreement under the Consent Order, the parties limited the issues in dispute for the purpose of the proceeding now before us to those referred to in paragraph 10 of the Consent Order. Moreover, even among those issues on which the parties asked the Tribunal to retain jurisdiction under paragraph 10, it appears that some are no longer in dispute. Thus, there is no dispute with respect to the classification of former HS-1 employees other than the dietary helpers at Ste-Anne-de-Bellevue Hospital or with respect to the classification of seamstress positions.

The issues remaining are those listed above, namely, whether any of the following involved discrimination on the ground of sex contrary to the Act:

(1) the classification level of community health representatives employed by the Department of Health and Welfare on native reserves;

(2) the classification level of dietary helpers at Ste-Anne-de-Bellevue Hospital; and

(3) the classification standard for the HS group.

In the strictest sense, of course, these issues did not exist at the time of the original complaint. All arise as a result of the efforts of the parties to resolve the dispute through the Consent Order. It is the submission of the Complainant, however, that any discrimination existing in these three areas is a continuation of the discrimination on which the original complaint is based and is, therefore, a yet-to-be-resolved part of the original complaint.

If the parties had never resolved any of the issues by agreement between themselves, but had simply arranged for periodic adjournments of this matter, we would remain seized today of the jurisdiction to find that the original complaint is substantiated and that we should order an appropriate remedy. If, in the meantime, the party which had contravened the Act in some significant way already had remedied the situation, it would be appropriately within our jurisdiction to recognize this in formulating the appropriate remedy.

We see no reason why the appropriate exercise of our jurisdiction should be any different in this case because there was a partial resolution by agreement of the parties and a partial remedy as a result. To the extent

the original complaint continues, we still have jurisdiction, but we should frame any remedy in light of the circumstances that now exist.

THE NATURE OF THE ALLEGED CONTINUING DISCRIMINATION

There is a common feature to the discrimination alleged to be continuing in the classification system in all three aspects which are in dispute. All involve a question of systemic, rather than deliberate, discrimination.

The concept of systemic discrimination is perhaps as hard to define as such discrimination is to identify. It is not identical in concept to indirect or adverse impact discrimination. Adverse impact discrimination involves requirements which do not, on their face, discriminate on a prohibited ground, but which affect a group identifiable on a prohibited ground in such a way as to have a discriminatory effect on that group.

While adverse impact discrimination may be quite subtle in its operation, often the effect is fairly obvious. Most people today, for example, recognize that minimum height and weight requirements discriminate against women. Similarly, it takes only a fairly rudimentary knowledge of religious diversity to realize that a hard hat requirement will adversely affect one particular religious group.

The concept of systemic discrimination, on the other hand, emphasizes the most subtle forms of discrimination, as indicated by the judgement of Dickson, C.J. in CN v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, at 1138-9. It recognizes that long-standing social and cultural

mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, the historical experience which has tended to undervalue the work of women may be perpetuated through assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men.

The type of health care work which most persons in the HS group perform has long been predominantly performed by women, while the care of property which is the focus of many employees in the GS group has predominantly been a male occupation. It is plausible, therefore, that the relationship between wages in these two sectors of the public service which existed at the time of the original complaint in this case reflected systemic discrimination.

This wage difference was, moreover, a product of the role of private sector comparability in the original structure of collective bargaining in the federal public service. Thus, attitudes about the value of these types of employment in society as a whole were deliberately mirrored in the federal government pay structure. If these attitudes did reflect assumptions about the relative values of work normally done by women and work normally done by men, this was systemic discrimination in the fullest sense of the term.

The main evidence of the role of systemic discrimination in the classification system which is subject to this complaint was led by the Canadian Human Rights Commission from an expert witness on employment equity, Dr. Lois Hagniere. Her evidence of how assumptions about the value of work evidencing systemic gender bias had invaded the new HS standard is quite persuasive. There is, however, a problem with this evidence in terms of the scope of the complaint.

In so far as she was asked to express an opinion on the existence of systemic gender bias in the actual HS and GS classification standards with which this Tribunal is concerned, Dr. Hagniere's evidence focused on the new HS standard. This is not, of course, the HS classification standard that existed at the time of the original complaint. This raises a couple of questions, therefore, as to whether Dr. Hagniere's evidence supports a finding of discrimination within the scope of the complaint.

In the first place, since she did not opine directly as to existence of systemic gender bias in differential application of the HS and GS standards that existed in 1981, her evidence does not indicate whether this was part of the discrimination existing at that time. Secondly, her testimony could also be interpreted to mean that systemic gender bias has been imported into HS standard from the GS standard. As the Respondent argued, this might take it outside the scope of the complaint since it is not a question of difference between the HS and GS standards.

In our view, however, the usefulness of Dr. Hagniere's evidence lies, not in the specific identification of systemic gender bias in the HS or GS classification standards, but in the theoretical framework for recognizing

such bias. This is particularly applicable in addressing the issue raised by the Complainant with respect to the new HS classification standard.

We turn first to examine the questions of discrimination concerning the community health representatives employed by the Department of Health and

Welfare and the dietary helpers at Ste-Anne-de-Bellevue Hospital.

COMMUNITY HEALTH REPRESENTATIVES

Under paragraph 4(2) of the Consent Order the Respondent agreed to review the evaluation of all community health representatives, although this agreement was given without prejudice to any position the Respondent might take in future proceedings. The essence of the relevant allegation by the Complainant is that the points assigned to these employees under the old HS standard were less than what they would have been if these employees were evaluated under the GS standard. Hence, the Complainant alleges this is a specific instance of the effect of gender discrimination as between the two standards.

While the duties of community health representatives at different locations in Canada are similar in many respects, it is clear from the evidence that there are also significant differences in the content of this job as between different locations. Generally community health representatives are involved in liaison between native communities and health professionals, as well as in assisting health professionals in other ways in providing services to the native community.

The communities served vary from ones which are located near the centre of sizeable urban communities through rural communities which nonetheless have good access to full service health facilities to more or less isolated communities which have limited local health facilities and must rely on medical evacuation for access to full service health facilities. In some cases, the community health representative may be the only resident person on a native reserve having any kind of health care training since health professionals visit the reserve only on a part-time basis.

Even within these broad categories there appears to be considerable variation in the ways individual communities are serviced. As a consequence the role of community health representatives covers a broad spectrum from those whose work consists primarily of relatively routine clerical work to those who are engaged in the actual provision of health care in a hands-on fashion.

A potentially complicating factor is that the federal government has been devolving the employment of community health representatives onto native communities. As a result, the numbers of those employed in the federal public service has greatly declined in recent years. It appears, however,

that the process of devolution has not homogenized the role of community health representatives employed in the federal public service.

As an apparent side effect of the efforts to resolve this complaint by agreement, the Respondent did propose that all community health representatives be given a common job description. The officials responsible for actual operations did not implement this proposal. As a result, a wide variety of specific roles continues to exist.

Nonetheless, the process of evaluating community health representatives under the GS standard pursuant to the Consent Order was implemented by evaluating a single job description, commonly referred to as the core job description. This was the same job description which the Respondent proposed to make the common job description for these positions. The use of the core job description for this evaluation purpose appears to have been accepted by the Complainant. We believe it appropriate, therefore, to use this core job description as the basis for our own decision on whether the classification of the community health representatives under the old HS standard in comparison to the GS standard is discriminatory.

Under a conversion process in the Consent Order, community health representatives were assigned a level 4 classification for the purpose of calculating the wages to which they were entitled to bring them in line with the GS wage rates. For comparison purposes, then, this can be regarded as the relevant level assigned to these employees under the old HS standard. The reevaluation of the core job description under the GS standard pursuant to the Consent Order resulted in a level 4 evaluation. This means there was no change in the classification of these employees as a result of the process under paragraph 4(2) of the Consent Order.

If the Respondent's reevaluation is correct, there is no difference in treatment under the two classification systems, once the obvious differences in numerical ranges have been adjusted. This would mean there would be no evidence of specific gender discrimination with respect to the community health representatives, or at least no practical discriminatory consequence that remains to be remedied.

On the other hand, if the Respondent's reevaluation under the GS standard is wrong and the community health representatives should be given a higher level, there is at least a differential in treatment in comparison between the old HS standard and the GS standard. Subject to some other explanation of this differential, this would provide a basis for concluding that the community health representatives are the victims of gender discrimination as a result of their classification under the old HS standard in comparison to the GS standard.

The Complainant and the Respondent each called a witness with expertise in classification to testify as to how the core job description for the community health representatives should be evaluated under the GS standard. Before comparing the evidence of these witnesses, we would observe that we do have one general concern about the evidence of Christopher Jones, the Complainant's witness, as to the evaluation of the community health

representatives. We are concerned that his view of the requirements of the job is based on a composite of the varied roles of these employees, rather than on the core job which the parties had mutually accepted as the basis for the evaluation process. Given the wide variation in roles already noted, this may tend to create an exaggerated view of the job. We think it unlikely that any single individual is fully performing all of these varied roles.

Evaluation of a position involves the rating of specified factors involved in the job description according to a series of degrees. For most factors, the classification standard provides a description for each degree, as well as an index of benchmark positions which illustrate that degree of the factor. Each degree is assigned a certain number of points.

The classification level is determined by totalling the points resulting from assigning a degree to each factor. We would note that the old HS standard and the GS standard do not include within them statements of the numerical ranges for classification levels. The evidence indicates, however, that the numerical ranges under the GS standard are the same as those stated in the new HS standard which is intended to replicate the GS standard. Our findings on the relevant numerical ranges, therefore, are based on the ranges set out in the new HS classification standard which is the best evidence before us of these ranges.

The rating of the core job by the Respondent under its reevaluation under the GS standard is as follows:

Factor Degree Points

Skill and Knowledge:

Basic Knowledge 339
Comprehension and Judgement 365
Specific Vocational Training 375

Effort:

Mental Effort 246
Physical Effort 120

Responsibility:

Resources or Services 258
Safety of Others 115

Working Conditions:

Environment 112
Hazards A14

This produces 334 total points for a GS-4 level, being within the level 4 range of 331-380.

The specific factors in dispute and the evaluation that Mr. Jones would have assigned to these factors are as follows:

Factor Degree Points

Comprehension and Judgement 5 105
Specific Vocational Training 6 200
Safety of Others 375
Environment 236
Hazards B123

The substitution of Mr. Jones' evaluations would produce 602 total points for a GS-9 level, being within the level 9 range of 581-630. We note that this was the position finally taken by Mr. Jones in his testimony, although at an earlier stage the Complainant proposed the community health representatives should be classified at a GS-6 level.

Before examining each of the factors under the general heading of Skill and Knowledge, we want to comment on one element that was the subject of considerable controversy during the hearing, that is, the attention to be given in classification to the fact that the work of community health representatives, as represented by the core job description, involves acting as an interpreter between members of the native community who use a native language and health professionals who do not speak that language. The Respondent took the position that the task of interpretation was irrelevant for classification purposes because it was federal government

policy not to rate positions on the basis of ability to use more than one language.

The reasons for this policy appear to relate to difficulties encountered in attempting to use the classification system to reward employees for bilingual ability under Canada's official language policy. We are not persuaded that this rationale has any bearing on the question of whether there should be recognition of the role of community health representatives as interpreters in assessing the factors under the Skill and Knowledge heading. For one thing, the task of being an interpreter is different from that of simply being able to use two languages. The old HS classification standard did in fact recognize ability in a native language as an element in the evaluation of basic knowledge for two benchmark positions - Community Health Worker and Housemaid, Nursing Station.

On the other hand, the task before us is to evaluate the community health representatives under the GS standard. There is no reference to use of language in that standard. Because we are obliged to use the GS standard to determine whether the classification of these employees was discriminatory, we will not make specific reference to the language requirement in our evaluation. Overall, it is our view that inclusion of language as a relevant element would support the same findings on the factors under Skill and Knowledge as we will make without reference to it.

The description of degree 3 for Comprehension and Judgement on the GS standard is:

The work requires sufficient understanding to work within established practices and instructions and allows some latitude for judgement in

their application. (Benchmarks: Cleaning Service Foreman, Cook, Tailor, Deportation Officer, Warehouse Foreman)

Degree 4 is described:

The work requires some understanding of relevant principles and methods and allows some latitude for judgement in interpreting instructions or in solving problems. (Benchmark: Chief Park Warden)

Degree 5 is described:

The work requires a thorough understanding of a set of relevant principles and methods and allows latitude for judgement in

interpreting instructions or in solving problems. (Benchmarks: Head Steward, Senior Guard)

While it does seem that the health care responsibilities under the core job description require the community health representative to be familiar with a wide-range of health care matters, we are satisfied that the degree of comprehension and judgement is one of exercising some latitude for judgement within established practices. It would be extremely dangerous for a community health representative to exercise latitude for judgement in the interpretation of instructions and in solving health care problems since there is no requirement to have the theoretical background in health care needed to appreciate the possible consequences.

Perhaps there is some latitude for judgement in interpreting administrative instructions, but even here it appears that practices are well established and it is more a matter of latitude in application, not in interpretation. Comparison with the benchmarks supports this evaluation. Thus, we find the Respondent's degree 3 evaluation of this factor to be correct.

There are no degree descriptions for specific vocational training. There is a profile guide which indicates that the maximum degree of training for non-supervisory positions is 5. Thus, it does not appear conceivable that a community health representative could be rated at 6 on the GS standard as Mr. Jones urges.

The benchmark comparisons for degrees 3 through 5 are:

Degree 3: Cleaning Service Foreman, Shift Matron, Deportation Officer

Degree 4: Cleaning Service Foreman, Butcher, Cook, Spare Parts Storeman

Degree 5: Tailor, Senior Guard, Warehouse Foreman

Evaluation of this factor is clearly problematic under the GS standard. The lack of any description of the various degrees means there is no basis for a preliminary assessment of what degree should be assigned. While the profile guide does set narrow limits for some sub-groups within the GS category, for the sub-group of Miscellaneous Personal Services which seems

most relevant to community health representatives, a range of 1-5 degrees is recognized.

This leaves the evaluator entirely to comparisons with the benchmarks, but the benchmarks themselves fail to provide a clear progression in terms of the vocational training required. Indeed, the most obvious progression in the evaluation rationales for this factor in the benchmarks appears to be more one of supervisory responsibility, rather than amount of training.

This is particularly evident when one compares the two Cleaning Service Foremen benchmarks which are a degree apart in specific vocational training. The rationale for the degree 4 rating differs from that for the degree 3 rating in that degree 4 involves a "good" knowledge of methods and products, while degree 3 involves only "knowledge", and degree 4 involves skill in working through subordinate supervisors which is not involved in the degree 3 rationale.

In the same vein, the most obvious distinction in the rationales for the degree 5 benchmarks in specific vocational training in comparison to the degree 4 rationales is the need for knowledge of how to supervise. Only the Cleaning Service Foreman benchmark among those at degree 4 involves this element of specific vocational training and for that position supervision is an element even in the degree 3 rationale.

Evidence of the training required was led by both the Complainant and the Respondent. The evidence of the Complainant was perhaps less relevant since it involved a new training program that, so far as the evidence disclosed, has not been taken by any of the community health representatives whose classification is in dispute. Nonetheless, the training manual filed in evidence by the Respondent suggests comparable training requirements. The main difference is that the training program in the manual entails primarily on-the-job training, while the new training program is provided in a community college setting. The specifications for the GS standard indicate that both are accepted as methods of acquiring specific vocational training.

In the final analysis, we find that the amount of training needed for a community health representative belongs more at degree 4 than degree 3. This is based on the range of knowledge required, rather than the depth of knowledge on any particular health care practice. We are satisfied that the amount of training required is at least comparable to that described in the rationales for the benchmarks at degree 4 for 100 points. It is less, however, than that for the benchmarks at degree 5 because there is no need for training in supervision as is common to the degree 5 benchmark rationales.

With respect to the safety of others, the degree 1 description is:

There is little possibility of injury or distress to others. (Benchmarks: Janitor, Cook, Spare Parts Storeman)

Degree 2 is described:

Reasonable care is required to prevent injury or distress to others. When injury or distress occurs it is of a minor nature. (Benchmarks: Cleaning Service Foreman, Head Steward, Deportation Officer, Warehouse Foreman)

Degree 3 is described:

Special care is required to prevent injury or distress to others. When injury occurs it is of a "lost-time" nature, such as serious burns, eye injuries, or crushed body members. Where distress occurs it results in aggravation of emotional strain. (Benchmarks: Senior Guard, Chief Park Warden)

We would have some difficulty assessing the proper degree if we were left with only the evidence of the two classification witnesses called by the Complainant and the Respondent. The difficulty arises from the difference in approach involved. The approach of the Respondent's witness, Penny Carter, focuses on the responsibility of the employee for activities which are likely in themselves to cause harm to other people. We would have to agree with her that the activities of a community health representative, which are directed to alleviating health problems, create little such risk.

Mr. Jones' view, on the other hand, is that one needs to consider the risk arising from the responsibility of the community health care to promote proper community health practices. If this task is not properly performed, the health of the community is placed at risk, not so much directly as a result of the activities of the community health representative, but indirectly from the failure of the representative to help prevent inappropriate practices.

Our reading of the GS standard tends to persuade us that promotion of care by others is recognized as relevant to the factor of responsibility for the safety of others. The rationale for this factor under the benchmarks of Cleaning Service Foreman, Head Steward and Warehouse Foreman at degree 2 and Senior Guard and Chief Park Warden at degree 3 all involve this type of safety concern, and not just the possibility that the activities of the employee may directly cause harm to others.

Our evaluation of this factor is ultimately facilitated by the process of site visits that the Respondent carried out while the hearings were in progress. According to the testimony of Yvon Lauzier, committees which conducted on-site visits agreed to a degree 2 evaluation for the safety of others for community health representatives, although Mr. Lauzier himself expressed reservations about going above degree 1. These on-site visits included the God's Lake Narrows Reserve on which the core job description was based.

Our own reading of the description of this factor in the GS standard, as well as comparison with the benchmarks leads us to the same conclusion. Hence, we find that the correct evaluation of this factor is degree 2 for 45 points.

In relation to the factor of environment, degree 1 is described:

Good working environment with few disagreeable conditions. (Benchmarks: Charwoman, Lookout Towerman, Spare Parts Foreman)

Degree 2 is:

Fair working environment, such as significant exposure to one disagreeable condition, or occasional exposure to either several disagreeable conditions or to one very disagreeable condition. (Benchmarks: Janitor, Butcher, Kitchen Helper, Washman, Deportation Officer, Watchman)

The essence of the dispute as between these degrees revolves primarily around the home visit role of the community health representative. It appears that community health representatives, including the God's Lake Narrows employee on which the core job description is based, spend most working time in some type of health centre which fits within the degree 1 description. On the other hand, community health representatives do carry out home visits to chronic patients and may be responsible for monitoring community health hazards, such as sanitary or garbage facilities. These tasks are recognized in the core job description. The evidence provides some basis for the conclusion that these tasks involve exposure to disagreeable conditions sufficient to justify an evaluation at degree 2.

One of the alleged disagreeable conditions was exposure to the outdoor environment at the location of many native reserves. While the members of the Tribunal all reside in major urban centres on the southern fringe of Canada and are, therefore, impressed by the evidence of the weather and

other natural environmental conditions to which community health representatives are exposed in northern native communities, we are not persuaded that the limited exposure to these conditions involved in making home visits in itself constitutes significant exposure to a disagreeable condition. It is, after all, simply the normal outdoor environment in the community.

Home visits may involve other potentially disagreeable conditions such as the presence of dogs or unpleasant conditions within the home. We are not persuaded, however, that there is more than an occasional exposure to disagreeable conditions of this nature.

The core job description does include an explicit requirement to provide temporary emergency care. Exposure to disagreeable conditions can arise in performing this duty, both in relation to the physical condition of the person needing care and in relation to weather or other conditions that may cause or coincide with the emergency. Again, however, the evidence would indicate that this exposure is only occasional.

The core job description indicates some participation in screening and treatment procedures at the health centre. For the most part these procedures do not involve disagreeable conditions, but some occasional exposure to bodily fluids and waste may result.

Finally, the core job involves surveillance and control of environmental factors affecting health. From the evidence of the employee on whose position the core job description was based, it appears that this involves monitoring of garbage and sanitary facilities. Clearly exposure to disagreeable conditions results. The frequency would seem to be more than occasional, although it is less obvious how significant this exposure really is in relation to the overall work of the community health representative.

Our conclusion is that, while the core job does not involve significant exposure to any one disagreeable condition, there is occasional exposure to several disagreeable conditions. We also believe the exposure to disagreeable conditions described in the benchmark positions supports this evaluation. Consequently, we find that degree 2 for 36 points is the correct evaluation of this factor.

The evaluation of the degree of hazards is based on a double axis. One two-sector axis is based on the "probable severity of injury", divided between (A) "minor injuries such as cuts, bruises or burns" and (B) "lost-

time injuries such as fractures, serious burns, eye injuries or loss of finger". The other two-sector axis is based on the "frequency of unavoidable exposure to hazards", divided between (1) "occasional" and (2) "frequent". The benchmarks are:

Degree A1: Messenger, Tailor

Degree A2: Cook, Spare Parts Foreman

Degree B1: Janitor, Lookout Towerman

The Complainant and the Respondent are agreed that the frequency of hazards is occasional. The dispute relates to the severity of injury.

We are not persuaded that the severity of injury likely to be incurred by a community health representative extends beyond that represented by the (A) segment. Namely, "minor injuries such as cuts, bruises or burns". While a community health representative may have some exposure to illness in performing health care duties, with normal precautions the risk of actually incurring such illnesses appears negligible. We find, therefore, that the A1 degree in the Respondent's evaluation is correct.

The result of our findings is that the correct evaluation of the community health representative under the GS standard, using the core job description, is as follows:

Factor Degree Points

Skill and Knowledge:

Basic Knowledge 339
Comprehension and Judgement 365
Specific Vocational Training 4 100

Effort:

Mental Effort 246
Physical Effort 120

Responsibility:

Resources or Services 258
Safety of Others 245

Working Conditions:

Environment 236
Hazards A14

This produces 413 total points for a GS-5 level, being within the level 5 range of 381-430.

It follows from this finding that there is indeed a differential between the level 4 classification of the community health representatives resulting from the simple conversion of the ratings under the old HS standard and the application of the GS standard. This raises the question of whether this differential constitutes gender discrimination covered by the original complaint.

The Respondent reserved to itself under the Consent Order the right to make any representations with respect to the classification of community health representatives which, in our view, included the opportunity to offer some explanation, other than gender discrimination, as to why these employees might have been classified at a lower level under the old HS classification standard than they would have received under the GS standard. In its submissions to this Tribunal, however, the Respondent focused on justifying its evaluation of the core job description at level 4 under the GS standard, rather than on offering any explanation of how under-evaluation might be justified on non-discriminatory grounds.

Indeed we think there is reason to believe that systemic discrimination is the main, if not the only, element leading to the Respondent's lower evaluation. It is apparent that, although a man occupied the position on which the core job description was based, the community health representative is usually a woman.

The under-evaluation of the specific vocational training factor in the face of a training manual calling for wide-ranging knowledge of health care practices may reflect the assumption that women, because of their traditional role as providers of routine health care in the home, particularly in rural communities, acquire much of this knowledge without special training. We wonder whether, if the job were regarded as a typically male role, it would still be the view that all this familiarity with health care practices is so readily acquired.

Similarly we wonder whether the under-evaluation of the factor of environment reflects an assumption that conditions encountered in making home visits or in carrying out routine screening or treatment procedures in a health care centre are not disagreeable. These are conditions which are commonly perceived as normal for women in their traditional roles as home-makers and care providers.

In any event, given that the HS group is predominantly female and the GS group is predominantly male and in the absence of any other explanation, we conclude that the evaluation of the core job description at level 4 under the conversion of the old HS classification, in comparison to the level 5 evaluation appropriate under the GS standard, is discrimination contrary in particular to s. 7 of the Canadian Human Rights Act. We will return subsequently to the question of remedy resulting from this conclusion.

DIETARY HELPERS AT STE-ANNE-DE-BELLEVUE

While the dietary helper group of employees at Ste-Anne-de-Bellevue also involved a number of separate positions, the evidence before us indicates that the job descriptions for these employees are indistinguishable from each other. Here, therefore, we are faced with the relatively simple question of whether the reevaluation of this job description by the Respondent under the GS standard is correct.

Under the provision for conversion under the Consent Order, these employees were placed at level 1. After reevaluation under paragraph 4(1) of the Consent Order, they remained at level 1 under the GS standard. The submission of the Complainant is that the correct evaluation under the GS standard is level 2 with the result that the simple conversion of these employees to level 1 constitutes gender discrimination as between the old HS standard and the GS standard.

If the Respondent's reevaluation is correct, there is no difference in treatment under the two classification systems, once the obvious differences in numerical ranges have been adjusted. This would mean there is no evidence of specific gender discrimination with respect to the dietary helpers at Ste-Anne-de-Bellevue, or at least no practical discriminatory consequence that remains to be remedied.

The evaluation by the Respondent of these positions is as follows:

Factor Degree Points

Skill and Knowledge:

Basic Knowledge 115
Comprehension and Judgement 125
Specific Vocational Training 125

Effort:

Mental Effort 120
Physical Effort 246

Responsibility:

Resources or Services 125
Safety of Others 115

Working Conditions:

Environment 236
Hazards A14

This produces 211 total points for a GS-1 level, being within the level 1 range of less than 230 points.

The Complainant's objection to this evaluation involves the assessment of one factor, that of physical effort. According to the evidence of Mr. Jones, this factor should be evaluated at degree 3 for 73 points. This would have the effect of raising the total points to 238 for a GS-2 level, being within the level 2 point range of 231-280.

Under the GS standard, the description of degree 2 for physical effort is:

The work requires moderate physical effort, such as continual standing or walking where only limited periods of relief are possible, or continual handling of light-weight objects. The duties occasionally require greater physical effort for short periods. (Benchmarks: Charwoman, Butcher, Cook, Messenger, Shift Matron, Watchman, Spare Parts Storeman).

The description of degree 3 is:

The work requires considerable physical effort, such as frequent climbing, working from ladders, handling of medium-weight objects, or

working in a difficult position. The duties occasionally require greater physical effort for short periods. (Benchmarks: Janitor, Kitchen Helper, Washman, Warehouse Labourer)

The view of the Complainant that the simple conversion of the old HS rating to a GS-1 level is discriminatory is based in particular on comparison to the Kitchen Helper benchmark under the GS standard. The work of the dietary helpers is very similar to that of the Kitchen Helper benchmark. The Kitchen Helper benchmark, however, is rated at degree 3 for physical effort. While it is also rated higher for hazards, degree A2 for 22 points, rather than A1 for 4 points, the difference in this rating is not sufficient to affect the level. The difference of 27 points between degree 2 and 3 for physical effort, however, would be sufficient to change the level from 1 to 2.

The Complainant's concern with the rating of the dietary helpers by the Respondent under paragraph 4(1) of the Consent Order in light of this particular benchmark is indeed understandable. Apart from this benchmark,

the rating would be difficult to challenge since the degree description and the other benchmarks at degree 3 all emphasize heavy lifting or considerable physical effort. While some of the evidence led by the Complainant with respect to the dietary helpers at Ste-Anne-de-Bellevue suggests heavy lifting is involved, overall the evidence is to contrary. Heavy lifting appears to be the function of other employees who are rated at level 2.

While the Respondent takes the view that heavy lifting or considerable physical effort is involved in the Kitchen Helper benchmark under the GS standard, in the actual rationale for the degree 3 rating of this benchmark for physical effort there is no mention of this. The only suggestion of exceptional effort is that standing and walking is prolonged, but this duration of effort is also encompassed by degree 2 which refers to "continual standing or walking".

Not only is there a lack of reference to heavy lifting or considerable physical effort in the physical effort rationale for the Kitchen Helper benchmark, but also the description of duties for this benchmark does not on its face indicate exceptional effort is involved. The Respondent attempted to distinguish its lower rating of the dietary helpers on the basis that cleaning duties and carrying of food supplies, both referred to in the Kitchen Helper benchmark description of duties, involve heavy physical effort. The duties of the dietary helper, however, also include

cleaning duties and handling of food supplies which would appear to include carrying. It is not apparent from the face of the GS standard that the effort demanded of the Kitchen Helper benchmark to perform similar work must be greater.

This leaves us in somewhat of a dilemma. Apart from the Kitchen Helper benchmark in the GS standard, we would be satisfied that the degree 2 rating for physical effort and hence the classification at level 1 of the dietary helpers is correct. This particular benchmark, however, supports a degree 3 rating for physical effort and hence a GS-2 level.

In the final analysis, we conclude that conclusive weight should not be placed on a single benchmark in determining how a position would be classified under the GS standard. It appears either that there is a deficiency in the classification standard in the way that the Kitchen Helper benchmark is described or the Kitchen Helper benchmark is not accurately assessed for physical effort. Looking at the standard and the benchmarks as a whole, however, we think it is evident that heavy lifting or considerable physical effort is necessary for a degree 3 rating for physical effort. On this basis, we find the degree 2 rating for physical effort placed on the Ste-Anne-de-Bellevue dietary helpers during reevaluation under paragraph 4(1) of the Consent Order to be correct.

In light of this finding, the rating of GS-1 under the conversion phase of the Consent Order process and the rating as a result of reevaluation are the same. There is no differential on which to base a finding of discrimination with respect to the classification of these employees.

THE NEW HOSPITAL SERVICES CLASSIFICATION STANDARD

Under paragraph 8(1) of the Consent Order, the Respondent undertook to revise the HS classification standard to correspond to the GS classification standard. It is the submission of the Complainant that gender discrimination existed in classification when the old HS standard and the GS standard are compared and that at least some such discrimination continues to exist under the new HS standard.

The factors to be evaluated were already the same under the old HS standard and the GS standard, as were the degrees under each factor and the point values assigned to them. Except for minor differences, the descriptions of the factors were also already the same under both classification standards.

The significant differences between the two classification standards at the time of the complaint were of two types. First, the numerical ranges by which positions were assigned to levels were different. Secondly, the benchmark positions used to illustrate the application of the standards were different.

In the process of revision of the HS standard under the Consent Order, the minor differences in factor description were eliminated and the numerical ranges for the purposes of assigning levels under the HS standard were made the same as those under the GS standard. In addition, gender specific terms in the HS standard have been replaced with gender neutral terms. In so far as any of these aspects of the old HS standard involved gender discrimination, that gender discrimination has been removed by the revision.

The dispute remaining between the Complainant and the Respondent relates to the benchmarks. The essence of the Complainant's submission is that the benchmarks are described and evaluated in ways which perpetuate gender discrimination against employees in the HS group when evaluated under the new HS standard in comparison to employees in the GS group evaluated under the GS standard.

If there is discrimination as alleged by the Complainant, it is in the nature of systemic discrimination. There is no evidence that, directly or indirectly, there are specific requirements under the new HS standard which, in comparison to requirements under the GS standard, result in gender discrimination. Rather it is a question of whether the benchmarks in the new HS standard involve subtle assumptions about the value of work traditionally performed by women which give rise to discrimination in comparison to benchmarks in the GS standard.

For the most part, the question of whether systemic discrimination exists depends on applying the type of analysis which was presented in the testimony of Dr. Hagniere concerning such discrimination. There is, however, one piece of objective evidence supporting a conclusion that the new HS standard is discriminatory in comparison to the GS standard.

The process of reevaluation of positions under paragraph 4 of the Consent Order was carried out centrally by officers of the Respondent. A selection of 33 job descriptions were actually evaluated, including the proposed core job description for community health representatives. The other 32 positions evaluated consisted of 29 HS-1 positions and 3 seamstress positions. The evaluation of the seamstress and community health

representative positions did not result in any change from the level assigned under the process of converting former HS levels to GS levels. Of the 29 HS-1 positions, however, 15 were raised to GS-2 and one was raised to GS-3.

After the new HS standard was approved pursuant to paragraph 8(1) of the Consent Order, it was provided to operating departments and applied within the operating departments to evaluate positions individually. In the interim, the majority of the 16 selected positions raised in level pursuant to paragraph 4 of the Consent Order appear to have disappeared or undergone a significant change in job description.

The Complainant was, however, able to identify six of these 16 positions which still existed without substantial change and which had been evaluated again under the new HS standard. When evaluated under the new HS standard, each of these positions had been assigned to level 1. Thus, every former HS-1 job description raised to level 2 under the GS standard and still existing unchanged when the new HS standard was introduced appears to have been assigned a level 1 under the new HS standard.

This indicates both that there is a differential in treatment, apart from the obvious difference in numerical ranges for levels, as between the old HS standard and the GS standard and that the same differential still continues under the new HS standard. Given the predominance of women in the HS group and the predominance of men in the GS group, it may be inferred that this difference involves gender discrimination.

The classification levels assigned under the new HS standard are still subject to appeal under the normal classification grievance procedure. At the time of the hearings, such appeals were being held in abeyance between the Complainant and the Respondent pending the outcome of this proceeding. Thus, it is not known whether any change in these results may be produced by appeals. The evidence does indicate, however, that the majority of classification appeals are not successful. Thus, there is no reason to think that the results of reevaluating these six positions under the GS standard and the results of applying the new HS standard to these same six positions do not constitute a meaningful comparison of the application of these two standards.

The Respondent argues against the significance of this evidence on the basis that these six positions are only a minuscule portion of the total number of positions involved in the process. These are, however, positions selected by the Respondent as representative of the entire HS-1 classification level that it undertook to reevaluate under paragraph 4(1) of the Consent Order. In light of this, we can only conclude that the

evaluation of these employees at level 2 under the GS standard and at level 1 under both the old and new HS standards is significant.

The evidence does not provide any adequate non-discriminatory explanation of this result. Indeed, two of the rationales arising from evaluation under the new HS standard expressly declare this to be a confirmation of the former HS rating. It could hardly be clearer than this application of the new HS standard is a continuation of the way in which these positions were treated under the old HS standard.

Turning to the more subjective evidence of systemic discrimination, the Complainant relies heavily on submissions relating to HS benchmarks closely resembling the specific positions whose evaluation is also in dispute. The old HS standard includes a Dietary Maid benchmark and the new HS standard includes a Dietary Helper benchmark. Both were evaluated below a similar Kitchen Helper benchmark on the GS standard. The evidence that the dietary helpers at Ste-Anne-de-Bellevue were under-evaluated pursuant to paragraph 4(1) of the Consent Order and ought to have been given the same GS-2 level as the Kitchen Helper benchmark is offered to support also a conclusion that the Dietary Helper benchmark was undervalued in the HS standard.

Similarly, there is a Community Health Worker benchmark in both the old and new HS standards. The evidence that the core job description for community health representatives was under-evaluated under the GS standard is offered to support also a conclusion that the Community Health Worker benchmark is undervalued in the HS standard.

The classification of real positions may legitimately involve reliance on additional information to that contained in the actual job description. The task is to correctly evaluate the actual position, whether or not it is fully reflected in the formal job description. This is not the case with a benchmark. A benchmark is useful only to the extent that full information relevant to understand the benchmark evaluation is set out in writing in the job description or the rationale for the benchmark. Thus, while it was appropriate for the Complainant to show through other evidence that the community health representatives and the dietary helpers at Ste-Anne-de-Bellevue were undervalued, this evidence is of little assistance in deciding whether the benchmark positions are undervalued.

The benchmark positions in question are clearly different from the actual positions whose classification level is in dispute. The Community Health Worker benchmark, for example, appears to be essentially a community health information officer, rather than an actual care provider, even to the

limited extent that the core job description involves care provision. The Dietary Helper benchmark appears to be essentially a cafeteria worker with additional responsibility for cleaning raw vegetables. The Ste-Anne-de-Bellevue dietary helpers, on the other hand, are involved in a range of duties in a commercial kitchen.

Because of these differences, we are not persuaded that these benchmarks are undervalued in the HS standard by comparison to the GS standard. The Community Health Worker benchmark is rated below what we found to be the

correct rating for the core job description of a community health representative under the GS standard on the factors of basic knowledge (degree 1 instead of degree 2), specific vocational training (degree 3 instead of degree 4), resources and services (degree 1 instead of degree 2), safety of others (degree 1 instead of degree 2), and environment (degree 1 instead of degree 2). All of these lower ratings may be justified, however, for someone who serves solely as an information officer, rather than a care provider.

The Dietary Helper benchmark is rated below what we found to be the correct rating for the Ste-Anne-de-Bellevue dietary helpers on the factor of environment (degree 1 instead of degree 2). This may be justified on the basis that the benchmark position involves mainly cafeteria work which is more pleasant than the commercial kitchen environment in which the Ste-Anne-de-Bellevue workers spend much of their time. The kitchen work of the benchmark position is mainly the cleaning of raw vegetables which need not involve exposure to either the heat of cooking facilities or the cold of refrigerators to which the Ste-Anne-de-Bellevue workers are exposed. On the other hand, the work with knives and peelers in preparing raw vegetable raises the hazards of the benchmark position to degree A2, instead of degree A1 applied to the Ste-Anne-de-Bellevue workers.

On the matter of physical effort, where the Complainant argued for degree 3 for the Ste-Anne-de-Bellevue workers in line with the Kitchen Helper benchmark in the GS standard, the rationale in the Dietary Helper benchmark under the new HS standard makes clear that less effort is involved in this benchmark position. Thus, even if we had found in favour of the Complainant on the Ste-Anne-de-Bellevue rating issue, the Dietary Helper benchmark evaluation at degree 2 seems justified in comparison to the GS standard.

One general feature of the new HS standard which is drawn into question is the use of abbreviated job descriptions in the HS benchmarks in comparison

to the fuller job descriptions in the GS standard. The concern is that these abbreviated job descriptions serve to make the work appear less significant. A lower rating of what are really equivalent positions may appear justified under this type of benchmark job description in comparison to the rating of a more fully described job under the GS standard. This in turn could lead to lower ratings of actual positions under the HS standard.

The Respondent's explanation of the abbreviated job descriptions is that this is a newer style in the writing of classification standards and will be followed in the GS standard when it next undergoes major revision. The fact remains that in the interim this is an obvious difference between the two standards.

The alleged consequences for employment equity are plausible and may indeed be operating in the case of the Community Health Worker benchmark under the new HS standard. Comparing the benchmark description for this position in the new HS standard with the fuller description in the old HS standard, substantial duties with respect to interpretation between health officials and members of the native community are unmentioned in the abbreviated

description. Such duties could support a higher rating on factors such as basic knowledge, specific vocational training and safety of others.

Another feature of the new HS standard which contrasts with the GS standard is that the indexing of benchmarks as illustrations of the various factors evaluated is comprehensive. The rating of every benchmark is listed under each factor. Under the GS standard, only a selection of benchmarks is listed under each factor and indeed a couple of benchmarks are not listed under any factor. Since the use of a standard involves working from the index of benchmarks for each factor, when a benchmark is not indexed under a factor it is unlikely to play any role in the assessment of that factor.

While this is not always the case, it appears that generally when a benchmark is not indexed under a particular factor it has been rated at a low degree for that factor. The effect of this is that the apparent distribution of benchmark positions under each factor in the GS standard involves a greater proportion of higher ratings than actually exist among the benchmarks. This may have some tendency to raise evaluation levels since it creates the impression that the norm among the benchmarks is higher than it actually is.

With the comprehensive indexing in the new HS standard, on the other hand, the true norm is evident. Since a greater proportion of benchmark

positions appears to be rated at the lowest degree under each factor, this may tend to pull down ratings in comparison to the GS standard where the selective indexing suggests that the proportion of low ratings is smaller.

For several factors in the new HS standard, the highest benchmark shown is a degree below the highest benchmark shown on the GS standard. There is likely to be considerable resistance to rating any factor at a degree higher than the highest benchmark for that factor. Consequently, the fact that the highest benchmarks are commonly at a lower degree under the new HS standard compared to the GS standard is likely to keep ratings lower.

While there are, then, several features of the new HS benchmark which may tend to produce lower ratings than the GS standard, there is a common problem with addressing these features in this case. The introduction of abbreviated job descriptions in the benchmarks, the use of comprehensive, rather than selective, indexing of benchmarks under the rating factors, and the lack of benchmarks at higher degrees relative to the GS standard are for the most part innovations in the new HS standard. For the most part, the old HS standard was like the GS standard in each of these respects. It is arguable, therefore, that if these features result in gender discrimination as between the new HS standard and the GS standard, similar discrimination did not exist under the old HS standard and such discrimination, therefore, goes beyond the scope of the complaint.

On the other hand, we do think these features involve elements of systemic gender discrimination. In comparison to the GS standard, the new HS standard leaves generally the impression that HS employees do less work than GS employees, that the rating norm of HS work is at a lower degree than the rating norm for GS work, and that the maximum rating for many

factors in HS work is lower than the maximum rating for GS work. This evidences an assumption that HS work, which is predominantly performed by women, is of less value than GS work, which is predominantly performed by men.

Moreover, there is no evidence to rebut this analysis of the new HS standard. The officers of the Respondent involved in revising the HS standard under paragraph 8(1) asserted in the clearest terms that they confined themselves to trying to replicate the ratings that would be obtained under the GS standard and did not make any attempt to assess the new standard on the basis of employment equity considerations.

Because of the difference in the numerical ranges for classification levels, the old HS standard openly classified HS employees at lower levels in comparison to similarly rated employees under the GS standard. In our view, this reflected in large part an assumption that this work, predominantly performed by women, is less valuable than equivalent work predominantly performed by men in the GS group. This is the same assumption, and constitutes the same systemic gender bias, which appears in the ways we have identified in the new HS standard.

The mere fact that this assumption now manifests itself in different ways does not convert it into discrimination outside the scope of the complaint. It is the same discrimination - only the form is more subtle which is the crux of the problem with systemic discrimination.

This does not mean that there was any deliberate attempt by the Respondent to perpetuate the consequences of the gender bias that existed between the old HS standard and the GS standard. It simply means that this bias did continue in effect. If the Respondent had viewed its responsibilities under the Consent Order more broadly, perhaps this could have been avoided.

Even if we are wrong in our conclusion that systemic gender bias continues in this subtle way in the new HS standard in comparison to the GS standard, there is still the objective evidence of the results of successive evaluations of six representative HS-1 positions under paragraph 4(1) of the Consent Order and then under the new HS standard pursuant to paragraph 8(1) of the Consent Order. The fact that these positions were classified at level 1 on a straight conversion from the old HS standard, went up to level 2 when evaluated under the GS standard, and then returned to level 1 when evaluated under the new HS standard is sufficient in itself for us to find a violation of s. 7 of the Canadian Human Rights Act, given that HS employees are predominantly women and GS employees are predominantly men. We find that such a violation existed at the time of the complaint and continues under the new HS standard.

REMEDYING THE CLASSIFICATION STANDARD

Since it may affect in turn the question of compensation for the community health representatives, we will deal first with the question of remedy for our finding that the new HS classification standard continues gender

discrimination that existed under the old HS standard in comparison to the GS standard.

Given the long history of these proceedings, the Tribunal is strongly of the view that we should issue a final remedial order. We are not prepared in this case again to retain jurisdiction in order to allow the Complainant and the Respondent a further opportunity to agree upon a remedy in the light of our findings on the merits of the case. Apart from the question of whether it would be appropriate for us to attempt to further retain jurisdiction, we are persuaded that the Complainant and Respondent have exhausted the potential for arriving at a resolution by agreement and that, in the interest of ending this litigation, it is incumbent on us to issue a definitive order.

As we understand the submissions of the Complainant, it would be its preference for this Tribunal to issue an order correcting the discriminatory features of the new HS standard. We are not prepared to do this, however. While we are satisfied that the evidence before us has sufficiently informed us concerning the classification process for us to determine that the new HS standard is discriminatory, the hearing has not trained the Tribunal to write a classification standard.

We are also doubtful of our authority to issue such an order. The direct remedial powers of the Tribunal under s. 53(2) of the Act appear to be somewhat limited, involving such remedies as compensation, an order to cease a contravention of the Act, or an order to make certain "rights, opportunities or privileges" available in the future. The only remedial power that would seem to cover the drawing of a complex remedial order, such as would be involved in rewriting the HS classification standard, is to require the taking of measures in consultation with the Human Rights Commission under s. 53(2)(a). While remedies under this power may involve affirmative action to remedy past discrimination: see CN v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, this provision does not appear to contemplate an actual retroactive order such as would be necessary to address the classification of the HS group of employees for the period back to July 27, 1987 under what was then the Future Phase of the Consent Order.

Based on our findings that the new HS classification standard involves gender discrimination in comparison to the GS standard and that this is a continuation of discrimination that also existed under the old HS standard, we conclude that the appropriate immediate remedy is an order that the Respondent cease using either the old or new HS classification standard or any other classification standard for HS employees which is similarly discriminatory in comparison to the GS standard. To provide a full remedy as soon as practicable, we would direct the Respondent, in consultation with the Canadian Human Rights Commission, to draft a new HS classification standard which does not involve systemic discrimination by undervaluing the work of the HS group of employees in comparison to the work of the GS group of employees.

From the evidence before us, we assume that this process may take some time. Since the effect of the HS classification standard resulting from

our Order will not be retroactive, and since it follows from our findings that the application of the HS classification standard introduced by the Respondent under paragraph 8 of the Consent Order involves continuing discrimination contrary to the Act, the only direct remedy available for this discrimination is compensation.

One implication of our finding that the new HS classification standard continues the violation of s. 7 that existed under the previous HS classification standard is that the process of reclassification carried out under paragraph 8 of the Consent Order has potentially continued specific adverse effects on individual employees in the HS group in comparison to employees in the GS group. This possibility is demonstrated by the fact that the six continuing positions raised under the GS standard were lowered to the old level when reclassified under the new HS standard.

Apart from the case of the community health representatives to be dealt with below, it appears that any loss up to July 26, 1987 was compensated through the application of the Consent Order. Since we can find no authority to make a retroactive order for reclassification, we conclude that any compensation for the period from July 27, 1987 should be based on a continuation of the method of calculating compensation applied under Part I of the Consent Order for the period up to July 26, 1987. Thus, for the period from July 27, 1987 to the date of our Order, HS employees adversely affected by reclassification under paragraph 8 of the Consent Order in comparison to the classification that would have resulted from applying the GS standard are entitled to compensation on the same basis as under Part I of the Consent Order.

After the date of this Order, in our view it would not be a continuation of the contravention of Canadian Human Rights Act that was the subject of the complaint before us if, pending implementation of an HS classification standard adopted pursuant to our Order, the Respondent elects to reclassify individual HS employees under the GS Classification Standard. Whether there are other objections under law or collective agreement to such reclassification is not a matter within our jurisdiction.

Unless and until HS employees are reclassified under either the GS standard or a HS standard consistent with our Order, however, the potential for continuing adverse effects as a result of the application of the old and new HS standards also exists. Thus, for the period from the date of this

order until an HS classification standard adopted pursuant to our order is implemented, HS employees adversely affected by classification under either previous HS classification standard are entitled to continuing compensation on the same basis as under Part I of the Consent Order. If the Respondent is able to reclassify an HS employee under the GS standard in the interim, of course, it could no longer be said that the employee is adversely affected in comparison to the classification of an equivalent position under the GS standard.

In so far as there are other questions of classification outstanding as a result of the introduction of the new HS standard, the effect of our Order would be that neither the old or new HS standards can be applied to resolve

such questions. We assume that, until an HS standard is adopted pursuant to our Order, such questions will have to be resolved on the basis of the GS standard or postponed.

COMPENSATION OF COMMUNITY HEALTH REPRESENTATIVES

It is the submission of the Complainant that the employees alleged to be wrongly classified under paragraph 4 of the Consent Order should be compensated for the retroactive period of the Consent Order, that is, from September 9, 1980 through July 26, 1987. If the Respondent's initial reevaluation of these employees had been in accordance with our findings, then compensation covering this period would have resulted from the Consent Order. Thus, a complete remedy would entail us providing equivalent compensation.

On the other hand, the Tribunal has some reservations about making an order for compensation at this stage which extends back more than 10 years. Our reservations are increased by the wide variation in the roles of individual community health representatives. This means that our level 5 evaluation based on the core job description has limited relevance to the correct evaluation of other individual community health representatives.

Since the only remedial power of the Tribunal which clearly extends to cover the past effects of a contravention of the Canadian Human Rights Act is the awarding of compensation, we conclude that the balance falls in favour of awarding full compensation to the community health representatives, notwithstanding the long period involved. Our findings indicate that these employees have long been the victims of significant gender discrimination resulting from the under-evaluation of their position

by the Respondent and this continued in spite of the re-evaluation under paragraph 4(2) of the Consent Order.

Consequently, we will order that any community health representatives employed by the Respondent at any time during the period from September 9, 1980 through July 26, 1987 be compensated by the difference between the equalization payments received pursuant to the Consent Order and the payments that would have been paid under the Consent Order if the community health representatives had been rated at a GS-5 level instead of a GS-4 level. These payments will remain subject to all other relevant provisions of the Consent Order, except for the provision setting a time limit of December 31, 1990 on applications for payment by former employees.

For the period since July 27, 1987, these employees are entitled to compensation on the same basis as other employees adversely affected as a result of the application of the new HS classification standard introduced pursuant to paragraph 8 of the Consent Order, that is, by continuing calculation of compensation
in accordance with Part I of the Consent Order.

CLAIMS BY FORMER EMPLOYEES

Under the Consent Order, former HS employees had until December 31, 1990 to apply for any payments to which they were entitled. Since that date has already passed, and since it will presumably be necessary for such persons to again make contact to claim any further compensation to which they are entitled under our Order, that date cannot be made applicable to such claims. We do believe it is reasonable that there be some such deadline so that the matter will ultimately be brought to a conclusion.

On the other hand, we are not sure it can be said with certainty that all claims have fully matured until the Respondent has actually implemented the non-discriminatory HS classification standard required by our Order. Consequently, we will order that the entitlement of former HS employees to claim compensation under our Order will continue until one year after the date of our decision, the date of any court decision in review of our decision, or the date on which such an HS standard is implemented, whichever last occurs.

FURTHER JURISDICTION

Late in the proceedings, a question was raised by the Complainant as to whether the Tribunal should take cognizance of issues potentially arising under paragraph 11 of the Consent Order. At the time, we declined to deal with the question, in part because the Complainant was attempting to interrupt the course of the Respondent's presentation of its case and in part because this was clearly a new issue not among those which the Complainant had indicated that it intended to raise when we commenced the hearing of evidence in November, 1989.

The question of whether our retention of jurisdiction under paragraph 11 of the Consent Order might yet be brought before us was not otherwise argued during these proceedings. The Complainant did indicate that, in its view, the need for us to exercise such jurisdiction might arise in the future.

While perhaps we cannot make a firm ruling on this matter since the parties did not have an opportunity to actually argue it, the issues are the same as those which were fully argued before us on the preliminary question as to whether this Tribunal was functus officio. We would advise the parties that it is our view that it would be contrary to the principle of functus officio for us to attempt to exercise any further jurisdiction in this dispute subsequent to this decision.

We believe that, if the Complainant desired to resort to this Tribunal pursuant to paragraph 11 of the Consent Order to resolve issues that remained in dispute, the appropriate procedure would have been to continue the adjournment under the original terms of the Consent Order until the Complainant was ready to submit all matters remaining in dispute as part of a single proceeding. One of the purposes of the principle of functus officio is to avoid excessive litigation through the division of proceedings. To allow the Complainant to reopen the case before this Tribunal at a later stage pursuant to paragraph 11 of the Consent Order would run directly contrary to this objective.

If the Complainant has concerns under the Canadian Human Rights Act in relation to the impact of the results of the Joint Union/ Management Initiative upon the resolution of its 1981 complaint through the Consent Order and this decision, we think it will have to initiate entirely new proceedings.

ORDER

Whereas the original complaint in this proceeding has been substantiated with respect to both wages and classification of Hospital Services employees; and

Whereas the Tribunal finds that discriminatory practices of the Respondent with respect to the classification of community health representatives at level 4 and with respect to the new HS classification standard in comparison to the GS standard have not been remedied by the agreement of the parties, the Tribunal orders:

(1) That the Respondent cease classifying Hospital Services employees on the basis of either the Hospital Services Classification Standard dated December, 1966, as amended, or the Hospital Services Classification Standard dated July, 1989, or any other classification standard for Hospital Services employees which is similarly discriminatory in comparison to the General Services Classification Standard dated June, 1969;

(2) That, in consultation with the Canadian Human Rights Commission, the Respondent adopt and implement as soon as practicable a Hospital Services Classification Standard which is free of systemic gender bias in comparison to the General Service Classification Standard;

(3) That, subject to all other relevant provisions of the Consent Order dated July 15, 1987 not inconsistent with this Order, persons employed by the Department of Health and Welfare as community health representatives at any time during the period from September 9, 1980 through July 26, 1987, are entitled to compensation in the amount of the difference between the equalization payments received pursuant to the Consent Order dated July 15, 1987 and the payments that would have paid under that Consent Order if these employees had been classified at a GS-5 level, instead of a GS-4 level, for the purposes of these payments;

(4) That any person employed in a Hospital Services position at any time during the period from July 27, 1987 until the date of this Order who has been adversely affected by classification pursuant to a Hospital Services Classification Standard in comparison to the classification that would apply to an equivalent position under the General Services Classification Standard is entitled to compensation calculated on the same basis as applied to the period up to July 26, 1987 under Part I of the Consent Order dated July 15, 1987, including compensation to community health representatives employed by the Department of Health and Welfare on the basis of classification at a GS-5 level, instead of a GS-4 level;

(5) That any person employed in a Hospital Services position at any time during the period from the date of this Order until the date of implementation of a Hospital Services Classification Standard adopted under clause (2) of this Order who is adversely affected by classification pursuant to a Hospital Services Classification Standard in comparison to the classification that would apply to an equivalent position under the General Services Classification Standard is entitled to compensation calculated on the same basis as applied to the period up to July 26, 1987 under Part I of the Consent Order dated July 15, 1987;

(6) That, where a person entitled to compensation under clause (3), (4) or (5) has ceased or ceases to be a Hospital Services employee of the Respondent, the entitlement to compensation may be exercised only if it is claimed by application in writing to the actual or last employing department or agency or to the Respondent within one year after the date of this decision, the date of any court decision in review of this decision, or the date of implementation of a Health Services Classification Standard adopted pursuant to clause (2), whichever last occurs.

DATED at Ottawa on March 19, 1991.

Robert W. Kerr, Chair

Jane Banfield, Tribunal Member

John I. Laskin, Tribunal Member