

In the matter of
THE CANADIAN HUMAN RIGHTS ACT,
R.S.C. 1985, c. H-6, as amended

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

MINISTER OF PERSONNEL FOR THE
GOVERNMENT OF THE NORTHWEST TERRITORIES
AS EMPLOYER

Respondent

**RULING OF THE HUMAN RIGHTS TRIBUNAL
ON THE COMMISSION'S REQUEST FOR FURTHER PARTICULARS**

Before: Paul Groarke, Chairperson
Jacinthe Théberge, Member
Athanasios Hadjis, Member

Appearances: Judith Allen
For the Complainant

Rosemary Morgan/Ian Fine
For the Commission

Guy Dufort/Thomas Brady
For the Respondent

Date & Location of Sitting: February 8, 11, and 14, 2000
Ottawa

On December 6, 1999, we ordered the Respondent to provide the other parties with particulars of its allegation that the Complainant acted in bad faith in negotiating the relevant wages and filing the complaint. The Government of the Northwest Territories subsequently prepared a document entitled "Particulars of the Government of the Northwest Territories", which was provided to the other parties before Christmas. A meeting was subsequently held between the parties, on January 4th, to discuss a number of concerns arising out of these particulars.

The particulars provided by the Government of the Northwest Territories have now been entered into evidence, as Exhibit R-12.2. A three-page letter to Ms. Morgan, dated January 21, 2000, has also been entered, as Exhibit R-12.3. The letter addresses a number of questions raised by the Commission in the course of the discussions between counsel. The Canadian Human Rights Commission was apparently unsatisfied with these representations and has filed a Notice of Motion requesting a direction that the Government of the Northwest Territories comply more fully with our ruling of December 6, 1999. The Complainant has joined the Commission in support of the Motion.

There is a written argument and supporting material attached to the Notice of Motion, which set out a number of alleged deficiencies in the particulars. At the end of the written argument, the Commission requests that the Respondent "be ordered to provide responses to the questions set out in paragraph 11 herein". That paragraph contains a request for further particulars on five points, which are elaborated below.

The first request in paragraph 11 is for particulars which "support" how the complainant could have known the extent of any wage gap prior to the conclusion of the Joint Equal Pay Study. This goes into argument and evidence, however, rather than material facts. We have already made it clear that the Respondent has no obligation to go into supporting facts in providing the particulars of its case.

The second request is that the Respondent "specify what is meant by the term unrepresentative", as it is used in paragraph 2(C)(1) of the Respondent's particulars. That paragraph reads as follows:

Due to the unrepresentative nature of the collected and/or used in the JEPS AND JUMI processes, some groups were over or under represented as compared to their numbers in the actual make up of the public service . . .

The Commission argues that this allegation requires further particularization.

At page 4964 of the transcript, Mr. Dufort responded to this submission by arguing that the Respondent has no obligation to go beyond an identification of issues.

We submit that in the context of particulars, we have to identify the issues that we will bring in defence.

It's not a detailed and specific and point-by-point argument of all the elements that we will bring in defence. These issues are identified, they are known by the other side, they have to address it in their direct evidence. (ll. 17-25)

On the following page, Mr. Dufort argued that the meaning of the term "unrepresentative" was plain. Although "it could be an element of expert testimony", it was not restricted to such a use and "could also be an element of other reasons". (ll. 23-24)

We accept the position adopted by the Respondent. The parties are only obliged to set out the material facts on which they are relying in pleading their cases and are not required to plead evidence. As Mr. Dufort suggested, the rationale behind such a procedure is to clarify the issues in the case and establish the case that the other parties must meet in presenting their own evidence. The Complainant and the Commission have accordingly been put on notice that the Respondent is asserting, as a material fact, that the data used in the Joint Equal Pay Study was unrepresentative. There is no need to go further in the Statement of Case and particulars.

The third request raises a similar complaint with respect to paragraph 2(C)(2) of the particulars, which reads:

The use of 1990 evaluations, 1991 gender dominance of occupational groups and 1992 salary data cannot validly support the conclusions in the JEPS final report . . .

In its written argument, the Commission argues that "the use of vague wording such as "validly support", appears to suggest a statistical reference, but lacks adequate particularization of the allegation." Although the Commission is undoubtedly correct, in arguing that the particulars do not indicate how the Respondent intends to prove such an assertion, that is a matter of evidence and is not the purpose of particulars.

The fourth request refers to paragraph 2(C)(6) of the particulars, which states that employees were given instructions to fill out composite questionnaires. The Commission argues, in its written argument, that the Respondent is obliged to provide it with the names of the PSAC or UNW members "who allegedly instructed employees to complete 'composite' questionnaires", along with the details of "the benchmark jobs or questionnaires which were completed in this way". In our view, an order obliging the Respondent to plead these kinds of details would clearly require that it plead its evidence.

The fifth request refers to paragraph 2(C)(7) of the particulars, which contains, in the Commission's words, "a vague allegation that female bias was encouraged". We find it difficult to understand how such a general statement can be made the subject of further particulars without delving into matters that are more properly the subject of cross-examination.

This is sufficient to deal with the requests for further particulars in paragraph 11 of the Commission's Notice of Motion. There are broader concerns at the heart of the Commission's Motion, however, which are canvassed in paragraphs 15 and 16 of the written submissions. These were left largely untouched in the argument before us. It may nevertheless be of assistance to observe that the Respondent has raised a series of questions attacking the facts and evidence on which the other parties are relying. There is a reference to benchmarks, for example, in paragraph 2(D)(2) of the particulars, which states that the wrong benchmarks were used.

Although there is no direct answer to some of the questions raised in our ruling on particulars, those questions were provided to illustrate our general concerns and were not intended as specific questions. In our view, the Respondent has complied with the order for particulars and clarified its position on the question of bad faith.

The major concern of the Commission would appear to be expressed in paragraph 16, where the Commission states that the Respondent "has wholly failed to identify the statistical methods" pertaining to its allegations that the Joint Equal Pay Study is fundamentally flawed. We agree that there are reasons to be concerned in this regard. If the allegations in paragraph 2(C)(2) are based on statistical information, the Respondent should indicate, at some point, the nature of that information. This is a matter of evidence rather than material facts, however, and will be divulged in accordance with our rulings in that regard. As counsel is aware, the parties are obliged to provide each other with a summary of the evidence of their experts, which will eventually provide the kind of details that the Commission appears to be seeking.

This raises another point. In her argument before the Tribunal, Ms. Morgan appeared to be more concerned about the question of reply evidence than the question of further particulars. At page 4957 of the transcript, at lines 12-18, she stated:

I leave it in your hands. We can still prepare for trial no matter what. I think it just has an effect on our ability to address some of these allegations in our case in chief. It certainly has no impact on our ability to address these allegations in our case in reply if they ever lead any evidence in their case in defence, because we don't know yet.

It is too early to deal with the question of reply evidence. It needs to be said, however, that the Commission is not entitled to hold its case in reserve. Although the human rights process is more informal than the process in the courts, the case before us is too complex to be dealt with in a piece-meal fashion. It is important, in the interest of fairness, to sort out the issues in the case before the bulk of the evidence is called.

All of the counsel before us are aware that the process in equal pay complaints has proven to be lengthy, expensive and burdensome. Some of the difficulties are inevitable, given the complexity of such cases. That only makes it that much more important, however, that the parties before a Tribunal on such complaints present their cases in a timely and efficient manner. The public interest deserves no less. The purpose of pleadings is to establish the issues on which the parties have joined and confine the

testimony in a case, so that evidence can be presented in an expeditious and logical fashion. This is particularly important in the instance of a complaint which has been the subject to considerable delays.

We granted the Commission and the Complainant's request for an order for particulars because we felt that it was important to clarify the Respondent's allegations regarding bad faith. The issues identified by the Respondent in the particulars, and the subsequent letter, can now be considered as part of its Statement of Case. Although there are details which have yet to be revealed, the Tribunal has every intention of holding the Respondent to the facts which it has alleged in these documents. The same principle applies to the other parties. The Commission and the Complainant have also been put on Notice that the Respondent is relying on these factual assertions and cannot take the position, at a later point in the proceedings, that they were unaware of the issues in question.

It is important to observe, as a final matter, that we have not been asked to rule on the merits of the defence. This has been the subject of some controversy in the present proceedings, and we wish to make it clear that we have not taken a position on the question whether the facts set out by the Respondent constitute a defence in law.

Dated this 15th day of February, 2000.

Paul Groarke, Chairperson

Jacinthe Théberge, Member

Athanasios Hadjis, Member