CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

PUBLIC SERVICE ALLIANCE OF CANADA (LOCAL 70396)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN MUSEUM OF CIVILIZATION

Respondent

RULING ON SECTION 11 MOTION

MEMBER: Athanasios D. Hadjis	2005 CHRT 17 2005/03/21

[1] The Respondent, the Canadian Museum of Civilization (the "Museum") has brought a preliminary motion requesting that the Tribunal dismiss the complaint insofar as it alleges a breach of s. 11 of the *Act*. In the alternative, the Museum seeks an order compelling the Complainant, the Public Service Alliance of Canada (Local 70396) (the "Union"), to provide detailed particulars of its s. 11 complaint.

I. BACKGROUND

[2] On March 6, 2000, the Union filed a complaint with the Canadian Human Rights Commission (the "Commission") alleging that the Museum uses a job evaluation plan that is flawed and results in the underpayment of female jobs in relation to male jobs of comparable value, in contravention of ss. 10 and 11 of the *Act*. The Commission referred the complaint to the Tribunal on April 1, 2004.

[3] The Museum's employees were at one time classified according to the Treasury Board Standard, which sorted jobs into various occupational groups including the CR and GT groups. It is alleged in the complaint that the CR group was composed of predominantly female jobs and that the GT group was made up predominantly of male jobs. On April 1, 1997, the Museum implemented a new job evaluation plan. The Union claims that the plan differentiates adversely against female jobs in comparison to male jobs of equal value. Certain factors that are known to measure aspects of jobs that are typically female are allegedly absent from the plan, and conversely, other factors that typically favour predominantly male jobs are taken into consideration by the plan.

[4] An interesting characteristic of the new plan is that jobs are no longer divided into occupational groups. Instead, each job is individually assessed and, depending on its point rating, is assigned to one of several levels. Wage ranges increase in proportion to the assigned level.

[5] The complaint form contains a table purporting to demonstrate that after the conversion to the new plan, all of the employees in the female-dominated CR jobs were given designations between levels 2 and 4, whereas only 16.7% of the male-dominated

GT positions were rated at level 4 or lower. The remaining GT employees were ranked between levels 5 and 8, of which 43% were ranked at level 6. The highest maximum salary at level 4 (as indicated in the table) was $37,737.82, while the maximum available wage at level 6 was $49,111.11.

[6] The complaint alleges that the male bias illustrated in these results was confirmed by an evaluation of a random mix of seven predominantly female and seven predominantly male jobs using a "gender-neutral" job evaluation plan jointly developed by the Public Service Alliance of Canada (the "PSAC") and Deloite & Touche. The results allegedly demonstrate that two female jobs that were rated equal to two male jobs under the employer's new plan, were higher rated than the male jobs when assessed under the "gender-neutral" plan. Similarly, the review found that three predominantly male jobs that were higher rated than three other female jobs under the new plan, were given ratings that were equivalent or slightly lower than the female jobs, when assessed under the "gender-neutral" plan.

[7] It is important to note here that the complaint form does not specify which jobs were the objects of this random assessment. In addition, the Union does not indicate which predominantly female jobs are undervalued when compared to the predominantly male jobs. This alleged omission in the complaint lies at the core of the Museum's present motion.

[8] The Museum points out that although there is some reference in the complaint to CR and GT jobs, these classifications ceased to exist on April 1, 1997. The alleged discriminatory practice relates to the new job evaluation plan under which there is no breakdown of occupational groups.

[9] The Museum contends that without a particularization of the female complainant group and the male comparator counterpart, the Union's claim of discrimination under s. 11 cannot be substantiated, especially when taking into account the *Equal Wage Guidelines*, 1986, SOR/86-1082, (the "*Guidelines*") adopted pursuant to s. 27(2) of the *Act*. According to s. 12 of the *Guidelines*, where a complaint alleging differences in wages is filed by or on behalf of an identifiable occupational group, the group must be predominantly of one sex and the group to which it is compared must be predominantly of the other sex. The Museum claims that in order to comply with this provision, both the complainant group and its male comparator group must be precisely identified.

[10] The Museum maintains that the present complaint does not conform to the *Guidelines* because it fails to identify the complainant and comparator occupational groups. Moreover, claims the employer, this omission constitutes a denial of its right to know the case it must meet and is in breach of the minimum requirements of procedural fairness.

[11] The Museum has over the years repeatedly conveyed its concerns regarding the lack of particularization of these occupational groups to the Union and the Commission. A first reference appears in the Museum's initial response to the complaint, communicated to the other parties in June 2000. The same misgivings were reiterated as recently as August 2004, in a Statement of Case filed by the Museum in preparation for a case management meeting. The Museum notes that at no time along the way did the Union or the Commission provide it with the requested details. An expert's report obtained by the Commission (the Haignire Report), released in June 2003, studied whether the new classification plan tended to deprive women of employment opportunities, in breach of s.

10 of the *Act*. The findings of this report were later incorporated into the Commission investigator's report. In the Museum's view, neither the expert nor the Commission investigator looked into nor reported on any s. 11 contravention. The expert's report did review several specific jobs, which were identified as either female or male, but no comparison was done of these jobs' values or relative rates of pay. The investigation report recommended that a tribunal be appointed to inquire into the s. 11 portion of the complaint, but did not state which were the complainant and comparator groups.

[12] The Union for its part mentioned in its Statement of Case dated July 9, 2004, that it was relying "on the male-dominated and female-dominated occupational groups as defined in terms of job titles and commonality of duties and responsibilities". The Museum contends that this declaration did not provide it with any further insight as to the identification of the complainant and comparator occupational groups.

[13] The issue re-emerged during the ensuing case management meeting that was conducted by the Tribunal Chairperson on August 20, 2004. Following some discussion, the Museum undertook to communicate to the other parties the "point factor weightings" and the "sub-factor weighting scales" that were applied in the implementation of the new job classification plan. Counsel for the Union had explained at the meeting that without this data, it would be difficult for his client to provide any particularization regarding the groups. After receiving this information, the Union's counsel addressed a letter dated October 15, 2004, to the Museum's counsel, "in an effort to clarify the position of the Complainant on the position of complainant and comparator groups for purposes of the section 11 portion of the [...] complaint". He went on to list in his letter eleven "female-dominated groups" and nine "male-dominated groups". At the hearing into the present motion, conducted on February 22, 2005, counsel for the Union elaborated on this statement. He confirmed the Union's position that, subject to any change in the data, each of the listed female groups constitutes a discrete, predominantly female complainant group. He added that the combined list of male occupational groups comprises a single male comparator group, in accordance with s. 14 of the *Guidelines*. Section 14 provides that where the comparison is being made to two or more occupational groups, those groups are deemed to be one group.

[14] The Museum points out that the jobs listed in the October 15th letter do not correspond to any previously declared enumeration of jobs. In particular, the PSAC/Deloitte & Touche review of the new plan that is referenced in the complaint alluded to a different set of jobs. The occupations catalogued in a schedule attached to the Haignire Report do not correspond to those in the newer list either. For that matter, it would appear that the October 15th list does not even match the breakdown of jobs as delineated by the old CR and GT classifications. The Museum contends that the Union is now in effect attempting to amend its complaint.

[15] In sum, the Museum alleges that by failing to identify the complainant and comparator groups, the s. 11 portion of the complaint does not comply with the *Guidelines* and is therefore "invalid". As such, the Museum argues that it does not know the case it has to meet, and to require it to respond to the complaint would constitute a breach of fundamental fairness and natural justice. Alternatively, the Museum contends that the incorporation of the job titles into the complaint through the October 15th letter amounts to an amendment of the complaint that is impermissible on account of the resulting prejudice to the Museum. In addition, the Museum submits that the complaint,

as "amended" by the October 15th letter, makes a fundamentally new complaint, which is not the one referred to the Tribunal. As a result, the Tribunal has no jurisdiction to inquire this "new" complaint.

II. ANALYSIS

[16] I have difficulty accepting the premise that the complaint is "invalid". The complaint sets out a series of facts that are alleged to constitute discrimination on the basis of sex. There can be no doubt, upon reading the text, about what is being alleged. Simply put, it is claimed that the Museum adopted a job evaluation plan in 1997 that was inherently gender-biased in its formulation and application. This bias resulted in female-dominated jobs being undervalued when compared to male-dominated jobs. In order to substantiate these allegations, it is plain that the Commission and the Union will have to establish that the bias in the plan exists and that the bias has resulted in the undervaluation of female jobs. As for remedy, it will have to be demonstrated that on account of this undervaluation, the wages of employees in those female jobs were less than they would have been had an unbiased plan been used. Compensation for this wage "gap" would have to be calculated. This is in essence the complaint alleged. It is up to the Union and Commission to lead their evidence and make their case.

[17] A given set of facts could in theory constitute a breach of more than one provision of the *Act*. For instance, an employer practice that deprived an employee of an employment opportunity on the basis of a prohibited ground (a violation of s. 10) could at the same time also constitute adverse differential treatment of that employee (a breach of s. 7). In the correspondence between the Union and the Commission prior to the filing of the present complaint, there was in fact some debate about whether the claim should be made under ss. 7, 10, and/or 11 of the *Act*.

[18] In the case of *Canada (Attorney General) v. Robinson*, [1994] 3 F.C. 228 at paras. 37-39, the Federal Court of Appeal indicated that in conducting its inquiry, a Tribunal should not be pre-occupied with the enumeration in the complaint of the provisions of the *Act* that were allegedly breached. The matter before the Court in that case related to a Tribunal decision in which one of the respondent's policies was found to be in violation of s. 10 of the *Act*. The complaint, however, had only alleged a s. 7 violation. The Court held this fact to be irrelevant noting that human rights complaint forms are not to be perused in the same manner as criminal indictments. What was important for the Court was that the facts brought before the Tribunal proved the policy to be discriminatory, whether in violation of s. 7 or s.10.

[19] The rationale for not adopting too narrow or technical an approach in perusing complaint forms was articulated in a recent ruling from the Tribunal in the case of *Gaucher v. Canadian Armed Forces*, [2005] CHRT 1 at para. 10. The Tribunal observed that the complaint form exists primarily for the purposes of the Commission. It is a necessary first step, which raises a set of facts that calls for further investigation. The form is inherently approximate and was never intended to serve the purposes of a pleading in the adjudicative process leading to a hearing. It is the Statement of Particulars (ordinarily filed pursuant to Rule 6 of the Tribunal's Rules of Procedure), rather than the original complaint, that sets the more precise terms of the hearing.

[20] In the present instance, the Statements of Particulars have yet to be filed. Nonetheless, the Union has provided additional details, not only by way of its Statement of Case submitted in preparation for the August 2004 case management meeting, but

more importantly, through the letter of October 15, 2004. Counsel for the Union further elaborated upon these particulars during oral arguments on the motion. In my view, these additional details complete any information that the Museum alleges was lacking from the complaint form in relation to the claim under s. 11. To order the Union and the Commission to provide any further particulars would go beyond what is required for the purposes of pleadings. As was noted in *PSAC v. Northwest Territories (Minister of Personnel)*, [2000] C.H.R.D. No. 9 at para. 7 (CHRT), parties are only obliged to set out the material facts on which they are relying in pleading their cases - they are not required to plead evidence. I am satisfied that the information given to the Museum is sufficient for it to know the case that it must meet. I am also satisfied that the details provided do not constitute an amendment to the original complaint but merely further particulars relating to the existing complaint.

[21] The matter does not end there, however. These particulars were provided fairly recently. The October 15, 2004, letter was issued about six months after the case was referred to the Tribunal and the final clarification regarding the female complainant groups was made four months later at the motion hearing. The issue, therefore, is whether the Museum is somehow prejudiced by the disclosure having come at this stage in the process.

[22] In its written submissions on the motion, the Museum alleged that it would be "significantly prejudiced" if it were required to proceed to a hearing in respect to what it described as "new allegations". As I have indicated, I do not consider the details provided to the Museum since the referral of the complaint to the Tribunal as new allegations, but rather as further particulars regarding the existing complaint. Assuming that these details were communicated somewhat tardily, what is the prejudice to the Museum?

[23] The Museum asserted in its written submissions that the advancement of the inquiry into this complaint would somehow be delayed. I am not quite sure how that would be the case. Will the Museum need more time to prepare its case? Hearing and disclosure dates have yet to be set so it is likely that we are still many months away from the opening of the inquiry. The Museum should therefore have adequate time to prepare itself. Moreover, it was made quite evident by Commission and Union counsel that at the outset, their evidence will consist of establishing the existence of an inherent gender bias in the current job evaluation plan. The Commission even suggested bifurcating the case so as to deal with this issue in its entirety before advancing to the secondary question of determining the existence of any wage gap. Whether or not the bifurcation will occur, it is nonetheless evident that the issues arising from the application of the *Guidelines* are not likely to come before the Tribunal for quite some time. If the Museum needs additional time to organize its case, it is certainly free to request some reasonable accommodation from the Tribunal in terms of scheduling. In any case, I fail to see how the Museum is prejudiced.

[24] The Museum argued that it was also prejudiced in having been denied access to the Commission's investigation and conciliation processes with respect to what it views as the "new allegations" regarding s. 11. However, as I have stated earlier, these are not new allegations, just particulars concerning the existing complaint. This submission need not therefore be addressed.

[25] For all these reasons, the Museum's motion is dismissed.

"*Signed by*"
Athanasios D. Hadjis

OTTAWA, Ontario
March 21, 2005

PARTIES OF RECORD

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APPEARANCES:	
Andrew Raven	On behalf of the Complainant
Patrick O'Rourke	On behalf of the Canadian Human Rights Commission
Peter Doody	On behalf of the Respondent