CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RUTH WALDEN ET AL.

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SOCIAL DEVELOPMENT CANADA, TREASURY BOARD OF CANADA, AND PUBLIC SERVICE HUMAN RESOURCES MANAGEMENT AGENCY OF CANADA

Respondents

DECISION

MEMBER: Karen A. Jensen

2007 CHRT 56
2007/12/13

I. INTRODUCTION

[1] Ruth Walden is one of 431 Complainants who believe that the Respondents have discriminated against them on the basis of their gender. The Complainants are a group of

predominantly female nurses who work as medical adjudicators in the CPP Disability Benefits Program. For 35 years they have worked alongside doctors, a predominantly male group of workers, in a common enterprise - the determination of eligibility for CPP disability benefits.

[2] The Complainants say that the doctors (known as "medical advisors") and nurses (known as "medical adjudicators") do the same work: they apply their medical knowledge to determine eligibility for CPP disability benefits. When medical advisors perform that work, they are classified as health professionals within the Public Service classification system. However, when the medical adjudicators do this work, they are not classified as health professionals. Rather, they are designated as program administrators. As a result of their classification, medical advisors receive better compensation, benefits, training, professional recognition and opportunities for advancement than medical adjudicators.

[3] The Complainants assert that it is discriminatory to treat a female dominated group of workers differently from a male dominated group when they are performing the same or substantially similar work. They seek to be treated the same as medical advisors.

[4] The issues to be determined in this complaint are whether the Respondents have discriminated against the Complainants on the basis of their gender by: (1) treating them differently from the medical advisors contrary to s. 7 of the *Canadian Human Rights Act*; and/or (2) pursuing a practice that deprives the Complainants of employment opportunities, contrary to section 10 of the *CHRA*.

II. SUMMARY OF THE DECISION

[5] The Complainants met the legal requirement to establish a *prima facie* case under s. 7 of the *Act*. To meet that requirement the Complainants were required to produce credible evidence which, in the absence of a reasonable explanation from the Respondents, would substantiate their complaints.

[6] The Complainants' evidence supported their allegation that since 1972, medical adjudicators have performed the same or substantially similar work as the medical advisors. They both apply their medical qualifications and expertise to determine eligibility for CPP disability benefits. Yet, only the medical advisors are classified as health professionals within the Health Services (SH) Group in the Public Service, and only the advisors receive the benefits and recognition that flow from that designation.

[7] The Complainants have also made out a *prima facie* case under s. 10 of the *Act*. To establish a *prima facie* case there must be credible evidence that the Respondent is pursuing a practice that deprives or tends to deprive individuals of employment opportunities.

[8] The Complainants' evidence supported their allegation that the Respondent's ongoing characterization of the Complainants' work as fundamentally different from that of the advisors' constitutes a practice that deprives the Complainants of employment opportunities.

[9] The burden then shifted to the Respondent to provide an explanation for the conduct that has been found to be, on the face of it, discriminatory.

[10] The Respondents provided a reasonable explanation that rebutted part of the Complainants' *prima facie* case, but not all of it. While there is a significant overlap in the functions of the two positions, there are also some important differences. Within the common enterprise of eligibility determination, medical advisors exercise an oversight

and advisory role that is not performed by the adjudicators. This results in some differences in the job tasks performed by advisors and adjudicators. These differences explain the distinction in the job titles and explain some of the differences in compensation and benefits.

[11] However, the differences are not significant enough to explain the wide disparity in treatment and, more particularly, they do not explain why the advisors are recognized as health professionals and the adjudicators are not. The core function of both positions is applying professional knowledge to determine eligibility for CPP disability benefits. The Respondents have failed to provide a reasonable, non-discriminatory explanation as to why this function is medical work when the advisors do it, and program administration work when the adjudicators do it.

[12] The Respondents also failed to show that classifying the medical adjudicators as health professionals within the Health Services Group would cause them undue hardship. Therefore, I have found that the complaints are substantiated.

III. WHAT ARE THE CIRCUMSTANCES GIVING RISE TO THIS COMPLAINT?

[13] In 1966, the Canada Pension Plan ("CPP" or "the Plan") came into being. Along with pension benefits, the Plan offered disability benefits to workers. A person was eligible for disability benefits if he or she had contributed to CPP for a minimum of 5 years and had a severe and prolonged mental or physical disability.

[14] In about 1971, medical doctors were hired to determine applicants' eligibility for CPP disability benefits. There were so many applications that the doctors were unable to process the applications on a timely basis. A backlog developed. For this reason, in 1972, the Director of the program hired registered nurses to work with the doctors to determine eligibility for disability benefits.

[15] The determination of eligibility for CPP disability benefits requires the use of medical knowledge to fully understand and assess the documentation submitted in support of the application. Both medical advisors and medical adjudicators have always used their professional knowledge to determine eligibility for CPP disability benefits. Neither position involves the provision of direct patient care.

[16] The use of medical advisors' professional knowledge in the determination of eligibility is reflected in the classification of their position within the Public Service of Canada. The adjudicators' use of their professional knowledge of nursing is not reflected in their classification.

[17] The classification of positions in the Public Service is important. It determines, among other things, the professional recognition, pay and benefits, and opportunities for continuing education and career advancement that the incumbent will receive. Positions are classified according to the primary function of the position. They are first allocated to an Occupational Group, which is a collection of jobs that are grouped together based on common duties or similarity of work. Within an Occupational Group, there are Classification Standards that are more specific to the kinds of work that are done within that group. For example, within the Health Services (SH) Group there is the Nursing (NU) Classification Standard, and the Medicine (MD) Classification Standard, among others. Within the Program and Administrative Services (PA) Group, there is the Programme Administration (PM) Classification Standard, among numerous others.

[18] Medical advisors are classified as MD's within the Health Services Group. The Health Services Group definition includes positions that involve the application of

medical or nursing knowledge (among other professional specialties) to the safety, and physical and mental well-being of people. Medical advisors have always been included in this Group because the definition of "medical officer" has historically included positions that have, as their primary purpose, responsibility for the assessment of medical fitness for the determination of disability and other federal government benefits.

[19] Medical adjudicators have always been classified as PM's within the Program and Administrative Services (PA) Group. The PA Group comprises positions that primarily involve the planning, development, delivery or management of administrative and federal government programs to the public. Positions within the PA Group do not involve the application of a comprehensive knowledge of professional specialties such as nursing or medicine.

[20] From 1988 until just recently, the medical adjudicators have been seeking recognition as health professionals through classification of their position in the Nursing (NU) Group within Health Services. These attempts have been unsuccessful. Over the years, a number of classification reviews have been undertaken by the Respondents Treasury Board and Public Service Human Resources Management Agency of Canada (PSHRMAC; now CPSA), and in each case the classification of the medical adjudicator position has been confirmed in the PM group.

[21] In 2004, Ruth Walden filed a human rights complaint with the Canadian Human Rights Commission. Between 2004 and 2007, 430 other medical adjudicators filed human rights complaints alleging the same discriminatory conduct and requesting the same remedy.

[22] The majority of the Complainants were represented by counsel during the hearing. Approximately 17 Complainants were not represented during the hearing. Those Complainants who were not represented by counsel were provided with information about the hearing through regional representatives.

IV. WHAT IS THE APPROPRIATE TIME FRAME FOR THE COMPLAINTS?

[23] Each Complainant alleges that the discriminatory conduct began on the date that she or he was hired, and has continued either until the present time (if the individual is still employed in the CPP Disability Benefits Program), or when her or his employment with the Program ended.

[24] Counsel for some of the Complainants provided a list of the dates of hire for those Complainants whom he represented. The earliest date is August of 1979. The latest date mid-February of 2007. The dates of hire for those Complainants who did not retain counsel were not provided to the Tribunal. Albina Elliott, one of the first nurses hired in 1972, testified during the hearing. Counsel for some of the Complainants stated that Ms. Elliott had filed a complaint. However, her name does not appear on the list of Complainants that was provided to the Tribunal by the Commission and counsel for the Complainants.

[25] During the hearing, counsel for some of the Complainants argued that although the complaint forms indicate that the discriminatory conduct began when the Complainants were hired, the Tribunal can and should make a finding that the impugned conduct began in 1972, when the first nurse was hired and classified as a PM.

[26] I disagree with this argument.

[27] The *Canadian Human Rights Act* came into force in March of 1978. The Courts and this Tribunal have consistently held that the *CHRA* does not have retrospective

application to conduct and practices that occurred before the *Act* or its amendments came into force (*Robichaud* [1987] 2 S.C.R. 84, at para. 20; *Nkwazi v. Canada (Correctional Services Canada)*, [2001] C.H.R.D. No. 1, TD 1/01 at para. 233; cited with approval in: *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at para. 50).

[28] In *Latif v. Canadian Human Rights Commission* [1980] 1 F.C. 687, the Federal Court of Appeal held that the newly enacted *CHRA* had retrospective application only in a very limited sense. It applied to conduct that began before the *Act* came into force and continued for a short time after its enactment (*Latif*, at para. 34). This was to enable the Commission to deal with complaints that were ongoing at the time the *Act* came into force. In that very limited sense, the Court held, the *Act* could have retrospective application to discriminatory practices begun before the *Act* came into force but continuing on or shortly after that date. Otherwise, the Court held, the *CHRA* does not apply retroactively. (On the issue of limited retrospectivity generally, see: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at para. 113).

[29] Accordingly, I conclude that the Respondents' potential liability in the present case is limited to conduct and practices following the coming into force of the *CHRA*.

[30] The Respondents contended that their potential liability for discriminatory conduct or practices should be further limited to one year prior to the filing of Ms. Walden's complaint. That would mean the limitation of liability to 2003 and onward. On that basis, the Tribunal would be required to dismiss the complaints of those Complainants who left the CPP disability benefit program prior to 2003.

[31] In my view, it would not be appropriate to do this. It is important, I think, to distinguish between a determination of the Respondents' liability for discriminatory conduct pursuant to sections 7 and 10 of the *Act*, and the exercise of the Tribunal's discretion under s. 53(2) of the *CHRA* to compensate victims for losses caused by the discriminatory conduct. They are related, but separate questions. The question of liability for discriminatory conduct should, in my view, be considered separately from the remedy that may flow from that determination.

[32] In this case, the Complainants allege systemic discrimination. By its nature, systemic discrimination occurs over time and cannot be isolated to a single action or statement (*Public Service Alliance of Canada v. Canada (Department of National Defence)* (*"NPF"*) [1996] 3 F.C. 789 at para. 16). For that reason, it is not appropriate in this case to fix an arbitrary date upon which the discriminatory conduct will be deemed to have commenced for the purposes of determining liability. Instead, the Tribunal must examine the evidence and make a determination, on the balance of probabilities, as to whether discriminatory conduct occurred and if so, when the conduct occurred.

[33] This does not mean, however, that the Tribunal cannot impose a limit on the compensable losses caused by the discriminatory practice in the event that the complaints are substantiated. Indeed in the recent case of *Chopra v. Canada (Attorney General)*, 2007 FCA 268, the Federal Court of Appeal indicated that the discretionary power under s. 53(2)(c) to award any or all of the losses suffered, leaves it open to the Tribunal to impose a limit on losses caused by the discriminatory practice. In my view, it was in the context of a consideration of the appropriate exercise of the Tribunal's discretionary powers under s. 53(2), that the Court in *NPF* stated that it was reasonable, in that case, to limit compensation for lost wages to one year prior to the filing of the complaint.

However, at this stage in the determination of liability, a one year limitation is not appropriate.

[34] For all of these reasons, liability will be assessed from March 1978 to the present time. Nevertheless, for the limited purpose of analyzing the work that was, and is, being done by the medical adjudicators and the advisors, and the circumstances that gave rise to the alleged discriminatory conduct, it is necessary to examine the whole history of the case from 1972 to the present.

V. WHAT IS THE PROCESS FOR DETERMINING ELIGIBILITY FOR CPP DISABILITY BENEFITS?

[35] To understand the issues in this case, it is helpful to have a basic understanding of the process for determining eligibility for CPP disability benefits. There are two conditions for eligibility: the applicant must have made sufficient contributions to CPP, and the disability must be prolonged and severe.

[36] The process for determining eligibility for CPP disability benefits was, and still is, as follows:

a) an individual makes an application for benefits;
b) an initial determination is made about whether to grant the benefits on the basis of the eligibility criteria;
c) if the application is denied, the applicant may apply for a reconsideration of the decision;
d) if benefits are denied at the reconsideration stage, the applicant may appeal the decision to the Review Tribunal ("RT") (formerly known as the Review Committee);
e) if benefits are again denied at the RT stage, the applicant may apply for leave to appeal to the Pension Appeals Board ("PAB");
f) if the applicant is granted benefits at the RT stage, the Minister in charge of the CPP program may apply for leave to appeal the RT decision;
g) both the applicant and the Minister may apply to the Federal Court of Appeal for judicial review of the PAB decision;
h) at any stage of the process, an applicant may submit additional or new medical or non-medical information. The decision-maker at that particular stage considers the information in determining eligibility for CPP disability benefits.

[37] The following flow chart may be helpful in visualizing the CPP disability benefit determination process. It is important to bear in mind, however, that 90% of all applications for CPP disability benefits are conclusively determined at the initial or reconsideration levels. Relatively few cases are appealed to the RT or PAB. Even fewer cases are the subject of applications for judicial review.

Initial -> Reconsideration -> Review -> Pension Appeals -> Federal Court
Determination Tribunal Board of Appeal

VI. WHAT IS REQUIRED TO ESTABLISH A *PRIMA FACIE* CASE UNDER SECTIONS 7 AND 10 OF THE *CHRA*?

[38] A discriminatory practice is defined under s. 7 of the *Act* as "adverse differentiation on the basis of a prohibited ground of discrimination". To establish a *prima facie* case under s. 7, the Complainants must present evidence that they are being adversely differentiated on the basis of their gender. With respect to s. 10(a) of the *Act*, evidence must be presented of a policy or practice that deprives, or tends to deprive, the Complainants of an employment opportunity based on a prohibited ground of discrimination.

[39] Statistical evidence that apparently neutral conduct negatively affects a disproportionate number of members of a protected group is sufficient to establish a *prima facie* case under sections 7 and 10. For example, in *Chapdelaine v. Air Canada*, 1987 CanLII 102 (C.H.R.T.); appeal on other grounds at (1991), 15 C.H.R.R. D/22 (C.H.R. Rev. Trib.), the complainants, both women, possessed all of the qualifications necessary to be pilots for Air Canada save only that they failed to meet the height requirement. The Tribunal accepted statistical evidence regarding the height of men and women in the general population, and concluded that although, perhaps "on its face neutral", the effect of the application of the height requirement was to deprive 82% of all Canadian women and 11% of all Canadian men between the ages of 20 and 29 of the opportunity for employment as a pilot. Therefore, the Tribunal found that the policy affected women "differently from" men. Evidence of a disproportionate impact of the rule on women was sufficient to establish a *prima facie* case under ss. 7 and 10 of the *Act*.

[40] The comments of Madame Justice L'Heureux-Dubé in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)* [1989] 2 S.C.R. 879 (*"SEPQA")* at paras. 80-82, although written in dissent and in *obiter*, are also instructive in the present context. In that case, Justice L'Heureux-Dubé stated that to establish a *prima facie* case under ss. 7 and 10, statistical evidence of professional segregation of the kind provided in that case is a most valuable tool. The evidence in *SEPQA* was that a predominantly female group of employees, who were working under similar conditions and at jobs having the same objective, were paid less than a predominantly male group of employees. That, said Justice L'Heureux-Dubé, was sufficient to establish a *prima facie* case under ss. 7 and 10 of the *CHRA*, but not sufficient to establish a *prima facie* case under s. 11. Under s. 11, the Complainant must provide evidence that the work is of "equal value" in addition to providing evidence of professional segregation.

[41] This is not a section 11 complaint. Therefore, to establish a *prima facie* case, the Complainants need not provide evidence of the "equal value" of the work. Rather, to establish a *prima facie* case under s. 7 of the *CHRA*, it is sufficient for the Complainants to present evidence that they constitute a predominantly female group of workers who are performing the same or substantially similar work as the predominantly male group of medical advisors, and yet are treated differently than the advisors. To establish a *prima facie* case under s. 10, it is sufficient to present evidence of a practice that has a disproportionate impact on women by depriving them of employment opportunities that are available to men who are performing the same or substantially similar work.

VII. HAVE THE COMPLAINANTS ESTABLISHED A *PRIMA FACIE* CASE UNDER S. 7 OF THE *CHRA?*

(i) What is the appropriate comparator group?

[42] The appropriate comparator group is implicit in the requirement for establishing a *prima facie* case: it is the group of predominantly male workers who are performing the same or substantially similar work to that of the Complainants. That group is the medical advisors. There is no other group of predominantly male employees in the CPP Disability Benefits program whose work could arguably be described as the same as or substantially similar to that of the adjudicators.

(ii) What is the evidence of gender predominance?

[43] Before they are hired, medical adjudicators are required to provide proof that they are licensed to practice as a Registered Nurse in Canada. There was no dispute that 95% of nurses are women. The predominance of women in nursing and the requirement to produce a nursing license before being hired as an adjudicator results in an overwhelming preponderance of women in the medical adjudicator position. Currently, according the Respondents, 95% of all medical adjudicators are women.

[44] The Respondents produced evidence that 80% of medical advisors are men.

(iii) What is the evidence that the work of the medical advisors is the same or substantially similar to that of the medical adjudicators?

[45] There are three distinct time periods in this case, marked by key events that affect the nature of the work done by the medical advisors and adjudicators. The *prima facie* case will be analyzed according to this temporal framework.

1972- 1989

[46] From 1972 to 1989, final determinations regarding eligibility for CPP disability benefits were made by the Director of the Disability Program, based on the recommendations of a Disability Determination Board. The Board was composed of at least two persons, one of whom was required to be "a duly qualified medical practitioner" (*Canada Pension Plan Regulations*, Consolidated Regulations of Canada *1978,* c. 385, s.71(1)).

[47] Albina Elliott, one of the first nurses hired in 1972, testified that both adjudicators and advisors assessed applications and signed recommendations to the Director. When the applications came in, they were placed in files on shelves. Medical advisors and adjudicators went to the shelves and took the file that was closest to them regardless of the complexity of the file. He or she would independently review the file and make a recommendation to grant or deny benefits. Ms. Elliott testified that the adjudicators were required to have a medical advisor "sign off" on their recommendations.

[48] Alfred Gregory, a physician who has been employed as a medical advisor in the CPP Disability Benefits Program since 1980, also testified that medical advisors were required to sign off on recommendations made by adjudicators during this time period. He stated, however, that medical adjudicators and advisors worked as colleagues; the adjudicators' professional judgment and recommendations on files were generally accepted.

[49] Dr. Gregory testified that both medical adjudicators and advisors performed the same core function during this time period - assessing applications and making recommendations for CPP disability benefits. He stated that this core function has always required the use of medical knowledge, training and experience by both medical advisors and medical adjudicators. Occasionally, medical advisors provided advice to the medical adjudicators on difficult files.

[50] Dr. Gregory testified that since the inception of the program, medical advisors have gradually "ceded" the work that they have done in determining eligibility for benefits to the medical adjudicators. At first only the medical advisors made the initial assessments. Then the medical adjudicators were hired, and they did initial applications as well. After that, the medical advisors handled only the reconsiderations and the Review Committee work. However, over time, that work too was given to the medical adjudicators.

[51] Dr. Gregory stated, by way of example, that prior to 1983, only medical advisors prepared the case summaries that were presented to the Review Committee. The Review Committee, composed of three members from the community, heard appeals from

reconsideration decisions. The case summary that was provided to the Review Committee, outlined the chronology of the file, explained the medical issues, summarized the case law, and provided a recommendation regarding eligibility to the Committee.

[52] In about 1982, the medical advisors indicated that they did not like preparing the case summaries. Ms. Elliott was asked to assume responsibility for this work. She was trained by a medical advisor and in April of 1983, she assumed full responsibility for preparing case summaries. The approval of a medical advisor was not required before she sent them to the Review Committee. Subsequently, additional nurses were hired to assist Ms. Elliott in preparing the case summaries.

[53] Dr. Gregory testified that when the medical advisors and the medical adjudicators were making initial determinations and reassessments, and preparing case summaries for the Review Committee, there was no difference in the functions that the two were performing. When Ms. Elliott did this work she was classified as a program administrator (PM). When Dr. Gregory did this work he was classified as a MOF or medical officer (MD).

1989 - 1999

[54] In 1989, changes were made to the CPP Regulations which permitted a single adjudicator to make final decisions on eligibility for disability benefits (*Canada Pension Plan Regulation,* amendment SOR/89-345, s. 7 of the Schedule). The new Regulations, which are still in force today, include a Regulatory Impact Statement which states that "the adjudication of and final decision on disability applications will be done by specially trained adjudicators with professional medical backgrounds (e.g. nurses, paramedics) and experience in the field of disability adjudication (Workers Compensation, Quebec Pension Plan). Staff physicians will be available at all times for consultation on contentious cases" (SOR/89-345: *Canada Gazette Part II, Vol. 123, No. 15*).

[55] Even though the Regulations stipulated that the adjudicators would be making the final decisions with regard to disability applications, the evidence established that from 1989 until about 1999, both medical advisors and medical adjudicators continued to make final determinations on initial applications and reconsiderations. Both were able to make final decisions without the signature or approval of the other.

[56] In about 1996, the adjudication of initial applications and reconsiderations was regionalized. As a result, from 1996 - 1999, most of these determinations, which were once the exclusive responsibility of medical advisors, were now being made in the regional offices by medical adjudicators. There were no medical advisors in the regional offices. However, there were still medical advisors in Ottawa who made final determinations on initial applications and reconsiderations until 1999.

[57] In 1988, the Medical Expertise Division (MED) in Ottawa was created to handle appeals to the Pension Appeals Board (PAB) and to provide expert medical advice on difficult files. Both medical advisors and medical adjudicators worked in MED to prepare for the PAB hearing. The Pension Appeals Board was, and still is, composed of three judges who make eligibility determinations at the final stage of appeal in the CPP Disability Benefit Program. Medical advisors testify under oath or affirmation before the PAB about the medical issues in the file.

[58] Ruth Walden, one of the Complainants, was hired in 1993 to work as a medical adjudicator in MED. She continues to work in MED. Ms. Walden testified that the doctors and nurses in MED worked together to "work up" the file for a PAB hearing.

This involved reviewing the file, seeking additional medical information if necessary, and making a decision as to whether the case should be settled before it goes to the PAB.

[59] Dr. Gregory and Ms. Walden testified that the primary function of both adjudicators and advisors in MED, and in the regions during this time period, was to apply their comprehensive medical knowledge to determine eligibility for CPP benefits. Dr. Gregory testified that there was no difference in the work done by medical adjudicators making final eligibility determinations in the regions from the work done by medical advisors in Ottawa who were making eligibility determinations during this period.

1999 - Present

[60] By 1999, all medical advisors employed in the CPP Disability Benefits Program had migrated to MED. Since that time, the final adjudication of all disability benefits at the initial and reconsideration levels has been handled by the medical adjudicators. In Manitoba and Saskatchewan, medical adjudicators represent the Minister in hearings before the Review Tribunal (RT). Medical advisors are involved in the initial, reconsideration and Review Tribunal stages of disability determination only when there is a request for their advice, or there is a backlog of applications to be processed. Dr. Gregory testified that medical advisors provide advice on only 1-2% of the files at the initial, reconsideration or RT stage. Backlogs occur infrequently.

[61] Dr. Gregory testified that since 1999, the majority of the work done by medical advisors in MED involves preparing for, and appearing before the PAB. This involves an extensive review of the file, preparation of a case summary and testifying under oath or affirmation before the PAB.

[62] Since 1999, one of the Complainants, Elizabeth Franklin, has represented the Minister responsible for the CPP Disability Benefit Program before the Review Tribunal in Manitoba and Saskatchewan. Before she attends an RT hearing, Ms. Franklin prepares a case summary for the Tribunal which includes an analysis of the medical and legal issues in the file. She then appears before the Tribunal, asks questions of the witnesses and answers questions from the Tribunal. Ms. Franklin explains the Minister's position and the medical issues in the case to the Tribunal. She points out inconsistencies in the oral testimony. Ms. Franklin is authorized to offer a settlement, without prior approval, to the applicant prior to the commencement of the hearing if she is of the view that the applicant's case is a strong one.

[63] The description of the work that medical advisors do to prepare for, and appear before the PAB was read to Ms. Franklin. Ms. Franklin stated that, other than testifying under oath or affirmation, the work that she does at the RT stage is the same as the work of the medical advisors at the PAB stage. Both the advisor and the adjudicator present the Minister's position at the hearing, both are required to explain the basis for the previous decision from which the appeal is being sought, and both are called upon by the decision-makers to explain medical conditions, terminology and diagnoses.

[64] Dr. Gregory testified that in the Medical Expertise Division, both medical advisors and adjudicators work on cases that are appealed to the PAB. He testified that the primary function of both positions in MED is disability determination.

[65] Both medical advisors and adjudicators may be involved in outreach and policy development work. Dr. Gregory works with other medical advisors on policy development and analysis. Ruth Walden testified that she knew of at least one medical adjudicator who is working in the policy development area. The medical adjudicator's job

description stipulates that adjudicators may participate in or lead teams engaged in training and policy development.

[66] Dr. Gregory does outreach and networking with other divisions in the government, and with professional and medical associations. The medical adjudicator's job description states that the adjudicators may also represent the CPP Disability Benefit program in consultations with internal and external clients/stakeholders (including MP's, the medical community, representatives of insurance companies, special interest groups, the Canadian public) to provide advanced technical knowledge of program eligibility and medical issues.

(iv) Conclusion Regarding the Similarity of the Work of Medical Adjudicators and Advisors

[67] Based on the foregoing evidence, I am satisfied that the Complainants have established a *prima facie* case that the work they have done since March of 1978, and are still doing at the present time, is the same or substantially similar to the work of the medical advisors.

[68] The Complainants' evidence indicated that since the inception of the CPP Disability Benefit Program, the primary responsibility and function of both the medical advisors and the medical adjudicators has been to use their professional expertise and knowledge to determine eligibility for CPP disability benefits at all stages of the process, and/or to prepare for, and represent the Minister in appeals.

[69] Specifically, both advisors and adjudicators have performed the following functions at various points throughout the three time periods in this complaint:

(i) making recommendations and decisions on initial applications involving varying degrees of complexity and difficulty in terms of the medical and legal issues involved;
(ii) making recommendations and decisions on reconsideration applications that were also varied in terms of their level of complexity and difficulty;
(iii) preparing case summaries for the Review Committee, or as it was later called, the Review Tribunal;
(iv) requesting additional medical and non-medical information from applicants and others on an application for CPP disability benefits;
(v) preparing a file for the Pension Appeals Board;
(vi) making an offer to settle or a recommendation to settle (without prior approval);
(vii) working on policy and outreach.

[70] Over the three time periods, the amount of time spent by the advisors and the adjudicators performing the overlapping functions has shifted. However, the evidence established that from 1972 until 1999, there were medical advisors and medical adjudicators whose primary function was to make recommendations or final determinations on initial and reconsideration applications and to prepare case summaries for the Review Committee. The work on initial applications and reconsiderations represented a considerable amount of the advisors' and adjudicators' workloads since over 90% of all applications are conclusively determined at one of those two levels. As time went on, more and more adjudicators were hired and the medical advisors spent less time working on initials, reconsiderations and RT work and more time on PAB appeals. But, from 1972 - 1999, there were always advisors and adjudicators who performed substantially the same function of determining eligibility at the initial and reconsideration levels, as well as preparing case summaries for the RT.

[71] Since 1999, medical adjudicators in the regions have been doing substantially the same work that advisors performed from 1972-1999: the final determination of eligibility for CPP disability benefits at the initial and reconsideration levels.

[72] Also since 1999, medical advisors and medical adjudicators have performed similar functions in MED preparing cases for the PAB hearing. The work that the medical adjudicators have done in Manitoba since 1999 to prepare for and present a case before the Review Tribunal is substantially similar to the work done by the medical advisors in preparing for and testifying before the Pension Appeal Board.

(v) What is the differential treatment?

a) Professional Recognition

[73] Medical advisors have always been recognized as health professionals under the Public Service classification scheme, whereas medical adjudicators have not. Although neither position involves hands-on patient care, they both require professional knowledge about permanent disabling conditions.

[74] The knowledge required to perform a function is not generally relevant to the allocation of a particular position to an Occupational Group within the Public Service Classification system. However, in the case of the Health Services Group, the definition explicitly states that for a position to be classified within that Group, the position must primarily involve "the application of a comprehensive knowledge of professional specialties in the fields of medicine and nursing" (among others) "to the safety and physical and mental well-being of people".

[75] The application of medical advisors' knowledge of relevant professional specialties in the determination of eligibility for CPP benefits has always been reflected in the medical advisors' classification as MD's within the Health Services Group. However, the application of the medical adjudicators' knowledge of relevant professional specialties has never been reflected in their classification as program administrators (PM) within the Program Administration (PA) Group.

b) Salary and Benefits

[76] Ms. Walden testified that medical advisors have always been paid roughly twice as much as medical adjudicators and receive a yearly retention bonus which the adjudicators do not receive. The difference in pay is reflected in the adjudicators' comparatively lower pension benefits at retirement.

[77] Ms. Walden stated that health professionals in the Health Services Group, including medical advisors, have always received more vacation allowance than medical adjudicators. The Respondent did not dispute this.

c) Payment of Professional Fees and Educational/Training Opportunities

[78] The Respondent Social Development Canada ("SDC") has paid the licensing fees for medical advisors on a yearly basis. Payment of the advisors' fees does not come out of the training and education budget line for the medical advisors in the CPP Disability Benefit Program.

[79] In contrast, until 1999, the medical adjudicators paid their own fees to maintain their nursing licenses and were not entitled to reimbursement from SDC. They grieved this and in 1999, SDC agreed to pay the adjudicators' fees out of the training budget. Ms. Walden stated that the payment of the adjudicators' fees out of the training budget leaves less money for training and continuing education opportunities for the adjudicators. She has been told that there was no money left in the budget for ongoing education and training.

She stated that medical advisors, on the other hand, are able to attend conferences on a regular basis; there does not seem to be a shortage of money for their continuing education activities.

d) Career Advancement

[80] Ms. Walden testified that as a PM, her chances of obtaining a job as a nurse in the government were not as good as if she was classified as a health professional, like the medical advisors. Nursing positions require recent nursing experience. Ms. Walden stated that although the Nurses' Associations across the country recognize that adjudicators are engaged in the practice of nursing, the Public Service of Canada does not. Therefore, when seeking a position as a nurse within the Public Service her work as an adjudicator would not be viewed as recent nursing experience.

(vi) Conclusion: the Complainants Have Established a *Prima Facie* Case under Section 7

[81] I find that the Complainants have established a *prima facie* case that since March of 1978, they were, and still are treated differently from the predominantly male group of medical advisors who performed the same or substantially similar work as them in the past and continue to do so in the present.

VIII. HAVE THE COMPLAINANTS ESTABLISHED A *PRIMA FACIE* CASE UNDER S. 10 OF THE *CHRA?*

[82] To establish a *prima facie* case under s. 10(a) of the *Act*, the Complainants must present evidence of a policy or practice that deprives or tends to deprive them of an employment opportunity based on a prohibited ground of discrimination.

(i) *What is the allegedly discriminatory practice?*

[83] The Complainants assert that the Respondents have pursued a practice of treating the advisors and the adjudicators as though they do different work and classifying them accordingly.

[84] As established above, on a *prima facie* basis, the core function of both the advisor and the adjudicator position is the application of professional knowledge to assess medical fitness for the determination of eligibility for CPP disability benefits. According to the Group Definition for the Health Services Group, both positions should fall within that group. However, since 1972, when they were first hired, Treasury Board and PSHRMAC have maintained a practice of classifying the adjudicators within the Program and Administrative Services (PA) Group.

[85] Treasury Board has consistently asserted that the medical adjudicator position does not fit the Nursing Classification Standard (NU) within the Health Services Group, since its primary function is not to provide direct care to patients. The NU Standard stipulates that the position must involve the application of nursing knowledge to the physical and mental well-being of people and specifically, to the care of patients and the treatment and management of illness in cooperation with medical doctors.

[86] In 2002, the Assistant Deputy Minister of Income Security Programs wrote to Treasury Board stating that the outmoded classification standard which required that nurses provide direct health care did not reflect current realities in nursing, under which many practicing nurses do not provide direct health care to individual clients. He stated that the NU standard should include medical adjudicators and proposed that a benchmark position be added to the NU standard to facilitate their inclusion in the SH Group.

[87] In March of 2004, SDC prepared a Business Case in an attempt to persuade PSHRMAC to create a Nursing subgroup that would include the adjudicators in the

Health Services Group. In the Business Case, SDC stated that the department refers publicly to its medical adjudicators as "medical professionals". SDC further stated that "the medical adjudication process is complex and requires professional nursing knowledge, skills and judgment". In addition, provincial nursing licensing associations, as well as the Canadian Nursing Association, recognize medical adjudication work as falling within the practice of professional nursing.

[88] In response to the Business Case, PSHRMAC stated that while medical and nursing knowledge is important for the adjudicator positions, the primary purpose of the positions is the delivery of a federal program to the public, not the application of nursing knowledge to the safety and physical and mental well being of people, or the assessment of medical fitness. PSHRMAC also pointed out that the Business Case did not have the support of the bargaining agent, which they asserted, is one of the prerequisites when considering changes to occupational group definitions.

[89] As a result of that characterization of the adjudicators' work, Treasury Board and PSHRMAC have continued to pursue the pre-1999 practice of classifying medical adjudicators as PM's and advisors as MD's.

[90] The Commission argued that had the Respondents classified the medical adjudicators as nurses instead of program administrators, part of the discriminatory practice would have been resolved because then, like the advisors, the adjudicators would have been recognized as health professionals and classified within the Health Services Group.

[91] However, Commission counsel maintained that the discriminatory practice at issue in this case would not have been completely resolved by classifying the adjudicators as nurses. It is also the Respondents' failure to recognize that adjudicators and the advisors are doing the same work, and that they should both be in the same position and compensated accordingly, that is a discriminatory practice, according to the Commission and the Complainants.

[92] Until recently, the adjudicators have not maintained that they were doing the same work as the advisors; they claimed that they were engaged in the practice of nursing, just as the advisors' work involved the practice of medicine. As a result, the Respondents' practice of maintaining the advisors and adjudicators in different positions with resulting differences in compensation and benefits has never been in issue prior to the filing of the present complaints.

[93] According to the Commission, it is of no consequence that the Complainants have only just recently clearly argued that they do the same work as the medical advisors'. It is not a requirement under the *Act* to establish that the Respondents knew or ought to have known that the impugned practices were discriminatory. If the effect of their practices is to deprive the group of an employment benefit on the basis of a prohibited ground, then regardless of the Respondents' awareness of the nature of their conduct, it will be found to be a violation of the *Act*. The question of knowledge or intent is relevant only to the issue of compensation under s. 53(3) of the *Act*.

[94] I agree with the Commission's position on this issue.

[95] I find that the Complainants have established a *prima facie* case that since 1972, the Respondents have pursued a practice of treating the advisors and the adjudicators as though they were doing different work, even though they were doing substantially similar work, and classifying them accordingly.

(ii) *What are the "employment opportunities" of which the Complainants were allegedly deprived?*

[96] The Complainants allege that the Respondents' practices have denied them the following: (i) recognition as health professionals; (ii) salary and benefits equal to those of the medical advisors; (iii) payment of professional fees and the provision of educational/training opportunities on the same basis as the advisors; and (iv) career advancement opportunities like those of the medical advisors. Do all of the foregoing employment benefits constitute "employment opportunities" as that term is used in s. 10 of the *CHRA?*

[97] The French version of s. 10 refers to practices that deny or tend to deny "les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus". When the French and the English versions of s. 10 are read together, one is led to the conclusion that the term "employment opportunities" refers to conditions which enable employment and the advancement of individuals in their employment.

[98] This interpretation is reflected in the Tribunal's jurisprudence wherein the term "employment opportunities" has been used to refer to opportunities to transfer to another job (*Gauthier v. Canadian Armed Forces* [1989] C.H.R.D. No. 3 T.D. 3/89; opportunities to do certain kinds of work that would enhance earnings and career potential (*O'Connell v. Canadian Broadcasting Corp* [1988] C.H.R.D. No. T.D. 9/88); training opportunities (*Green v. Canada (Public Service Commission* [1998] C.H.R.D. No. T.D. 6/98, reviewed on other grounds in: *Canada (Attorney General) v. Green* [2000] 4 F.C. 629 (T.D.)); and continued and uninterrupted employment (*Hay v. Cameco* [1991] C.H.R.D. No. 5 No. T.D. 5/91).

[99] In the present case, I find that the following constitute "employment opportunities" within the meaning of s. 10: recognition and classification as health professionals; the payment of professional fees and training/educational opportunities on the same basis as the medical advisors; and opportunities for career advancement as health professionals. These conditions affect the Complainants' ability to enhance their earnings and career potential within the Public Service. For that reason, they are "employment opportunities" within the meaning of s. 10 of the *Act*.

(iii) *Conclusion: the Complainants have established a prima facie case under s. 10*

[100] The Complainants' evidence establishing a *prima facie* under s. 7 of the *Act* also establishes, on a *prima facie* basis, that the Respondents' pursuit of the practice identified above deprived or tended to deprive the Complainants of the employment opportunities in question. The designation of the adjudicators' work as program administration, and the treatment of the adjudicators' work as different from that of the advisors, has resulted in a deprivation of the employment opportunities listed above which are enjoyed by medical advisors.

[101] As noted above, it is sufficient to provide evidence that the practice had a disproportionate impact on women to establish the connection between the practice and the prohibited ground of discrimination. The evidence of the gender predominance of women in nursing and therefore, in the medical adjudicator position, establishes a *prima facie* case that the practice deprived the Complainants of employment opportunities on the basis of gender.

IX. WHAT IS THE RESPONDENT'S EXPLANATION?

[102] Once a *prima facie* breach of ss. 7 and 10 has been made out, the onus shifts to the Respondents to provide a reasonable, non-discriminatory explanation for their conduct.

[103] In the present case, the Respondents have offered the following explanations with regard to both the s. 7 and the s. 10 complaints:

(i) The most appropriate group of predominantly male workers to which the work of the female medical adjudicators should be compared is the group of male medical adjudicators. In comparison to this group, the female adjudicators have not been treated in an adverse differential manner;

(ii) In the alternative, if the Tribunal determines that medical advisors constitute the appropriate comparator group, the work that is done by the advisors and the adjudicators is different. Any differences in treatment between the advisors and the adjudicators are based entirely on the difference in the work that is done, not on gender;

(iii) In the further alternative, if the Tribunal determines that the Respondents have not rebutted the *prima facie* case under both provisions, the differential treatment and the practices are *bona fide* occupational requirements.

(i) The Appropriate Comparator Group

[104] The Respondents argued that male medical adjudicators constitute the most appropriate comparator group because they perform comparable functions using comparable levels of skill, effort and responsibility. The Respondents urged the Tribunal to take guidance from the British Columbia Human Rights Tribunal in *Prpich v. Pacific Shores Nature Resort Ltd.*, 2001 C.L.L.C. 230-035. That case involved a complaint under s. 13 of the *British Columbia Human Rights Code* which prohibits employers from paying different wages to employees of one sex than employees of the other sex who are performing "similar or substantially similar" work. Section 13(2) of the B.C. *Code* stipulates that the concepts of skill, effort and responsibility must be used to determine whether the work is similar or substantially similar.

[105] Sections 7 and 10 do not prescribe the factors that must be taken into account in determining whether the impugned conduct is discriminatory. In contrast, s. 11 of the *Canadian Human Rights Act*, like s. 13 of the B.C. *Human Rights Code*, sets out the criteria that must be used to determine whether an employer has committed a discriminatory practice by establishing or maintaining differences in wages between male and female employees who are performing work of equal value. Those factors are skill, effort, responsibility and the conditions under which the work is performed.

[106] In my view, the *Prpich* case is inapplicable to the present case. *Prpich* deals with legislative provisions from another jurisdiction that are comparable to s. 11 of the *CHRA*, rather than to ss. 7 and 10 of the *CHRA*.

[107] Moreover, the Respondents' argument that the male medical adjudicators' work should be compared to that of the female medical adjudicators is unreasonable. The male adjudicators are not a separate group, but rather are part of the predominantly female group of medical adjudicators. Therefore, by virtue of their membership in this group, they too are subject to any potential discriminatory difference in treatment vis-à-vis the medical advisors. A comparison of their work with that of the female adjudicators would not be a meaningful indicator of equal treatment of the overwhelmingly female population in the group. The Complainants in this case allege that their inferior working conditions are a function of the strong gender predominance of their occupational group.

This allegation cannot be properly tested by examining the working conditions of this small male minority within their ranks.

[108] Therefore, I maintain that the appropriate comparator group is the predominantly male group of medical advisors.

(ii) The Work done by the Advisors is Different from the Work done by the Adjudicators

[109] The Respondents argued that the evidence revealed that during all three time periods, the functions of the medical advisors and the adjudicators have been different. In support of this argument, the Respondents produced the job descriptions that applied during all three time periods for both positions.

[110] The advisors' description states that they provide expert medical advice on more difficult and contentious disability cases; review and assess the quality of decision-making; contribute to professional development of other medical advisors and of medical adjudicators; communicate internally and externally regarding disability under the Canada Pension Plan; review and respond to requests for personal information under the *Privacy Act* and perform other duties.

[111] The medical adjudicators' job description states that their key activities are: the medical adjudication of Canada Pension Plan Disability claims; providing applicant referral and navigation service; leading/managing project teams including program design, services and policies; initiating and maintaining contact with representatives of the medical community, other departments and levels of government, the insurance industry, the public, etc. to maintain a critical knowledge of medical and disability issues, trends and emerging medical conditions.

[112] The job descriptions suggest that the key difference between the work of the advisors and the adjudicators is, in fact, reflected in their respective job titles: the medical advisors fulfill more of a medical advisory and oversight function, while the medical adjudicators deal directly with the applicants in adjudicating their claims and providing referral services.

[113] It is important, however, to consider the job descriptions together with the testimony of those who do the work and administer the program to determine if the job descriptions are an accurate reflection of the work that is done and was being done during the three time periods in question in this complaint.

[114] Dr. Raymond Aubin, the Acting Director of the Medical Expertise Division, testified on behalf of the Respondents. His testimony was directed primarily at the differences in the work performed by the advisors and the adjudicators in the 1999 to the present time period.

[115] He testified that currently, medical advisors are exclusively responsible for many of the decisions and actions taken in the last stage of the disability benefit appeal process - the Pension Appeals Board. It is the medical advisor who reviews the file, prepares the case summary and testifies before the PAB. The medical advisors currently spend roughly 75% of their time preparing for the PAB hearing. Some of that time is spent performing an overlapping function with medical adjudicators - developing the file for the hearing. However, the advisors have more decision-making authority at this stage of the process than the adjudicators.

[116] The work done by the advisors in preparing for the PAB from 1999 until the present time was compared to the work done by some adjudicators in Manitoba who prepare for and appear before Review Tribunals. The evidence established that the work

is indeed very similar to the PAB work, with some important differences. The adjudicator and the advisor must both apply their medical knowledge and their knowledge of the CPP disability benefit program to prepare for and present information to the respective decision-makers. However, it is only in Manitoba and Saskatchewan that medical adjudicators represent the Minister before the RT. In other provinces, the case summaries for the RT are prepared by employees who do not necessarily have a medical background, and no one appears on behalf of the Minister. Thus, it would appear that, with the exception of Manitoba and Saskatchewan, at the present time the presentation of expert medical information to a decision-maker is reserved for the final stage of appeal - the PAB. That function is performed exclusively by medical advisors.

[117] Based on all the evidence presented in this case, I find that there are some functions which have only ever been performed by the medical advisors throughout the three time periods in this case. They are:

(i) signing off on adjudicators' recommendations regarding eligibility from 1972-1989;
(ii) providing expert medical advice to the adjudicators on 1-2% of the files during all time periods;
(iii) authorizing decisions or recommendations regarding settlement, requests for leave to appeal to the PAB, and requests for further information at the PAB level from 1999 to the present;
(iv) providing some training to adjudicators up until the past decade;
(v) reviewing the file, preparing case summaries and providing testimony before the Pension Appeal Board during all three time periods;
(vi) providing Affidavit and *viva voce* evidence if required on judicial review applications of the PAB decisions at the present time.

[118] Some of the Complainants admitted that there were differences in the work done by the advisors and the adjudicators. For example, Ms. Franklin candidly admitted that the medical advisors have a different role to play at a different level than she does. She stated however, that over the years, the advisors and the adjudicators have done many of the same functions. Furthermore, the core function is the same - the determination of eligibility for CPP disability benefits.

[119] In my view, Ms. Franklin's statement provides an excellent summary of the evidence that I heard in this case. Throughout the history of the CPP disability benefit program there has been, and continues to be, a significant overlap in the functions performed by the medical adjudicators and the advisors. However, the medical advisors' work is different from the adjudicators' work in certain respects. Unlike the adjudicators, the advisors have always provided an oversight and advisory role in the determination of eligibility for CPP disability benefits. This role involves the provision of medical advice on difficult files, training, and final decision-making responsibility at certain levels of the process. In addition, the advisors provide expert medical testimony to the final decision-makers at the final appeal stage of the CPP disability benefit determination process - the Pension Appeals Board. The PAB is the last opportunity for the parties to obtain a determination on the merits of the file based on the medical evidence presented to that point.

[120] The advisors bring a different kind of knowledge to the program, perform some different tasks and have been given different responsibilities than the adjudicators. This provides a reasonable and non-discriminatory explanation for some of the differences in

salary and benefits. It also explains why the advisor and the adjudicator positions might occupy different levels within a classification standard in Health Services.

[121] However, the differences in the work responsibilities of the respective positions are not extensive enough to explain the wide disparity in treatment between the advisors and the adjudicators. In particular, the Respondent has failed to provide a reasonable non-discriminatory response to the following question: why have the advisors been recognized as health professionals, and compensated accordingly, when their primary function is to make eligibility determinations and yet, when the adjudicators perform the same primary function, they are designated as program administrators and are paid half the salary of the advisors?

[122] The Respondents argue that the answer to this question can be found in the decision of the Public Service Labour Relations Board (PSLRB). That case involved an application by the Professional Institute of the Public Service of Canada (PIPSC) to have the medical adjudicators included in the Health Services Group. The PSLRB decided that medical adjudicators were appropriately classified as program administrators within the PA Group. The Respondents argued that the PSLRB decision provides a reasonable explanation for the differences in treatment between the two positions, and should be applied in the present context.

[123] The PSLRB found that the adjudicator position did not belong in the Health Services Group since adjudicators do not provide direct health care to CPP disability benefit applicants. The Vice-Chair of the Board stated that although medical adjudicators use their medical knowledge to assess the applications and files of claimants, they do not assess the claimants themselves. Therefore, they do not provide care to the claimants as is required to be classified within the Health Services Group.

[124] However, the evidence in this case leads me to conclude that if the medical adjudicators are not "assessing the claimants" when they determine eligibility for CPP disability benefits, then neither are the medical advisors. And yet, the advisors are recognized as health professionals and classified accordingly and the adjudicators are not. The PSLRB did not engage in a comparative analysis of the two positions, nor did it make a determination as to whether any such difference might violate the *CHRA*. For that reason, I find that the PSLRB's conclusion has very little bearing on my decision.

[125] Patricia Power, the Acting Director General of Classification, Policy and Strategy at PSHRMAC, testified on behalf of the Respondents. She stated that medical advisors are included within the Health Services Group because they meet the Health Services Group Definition and the Medicine (MD) Classification Standard. Ms. Power stated that the adjudicators are not included within the Health Services Group because they do not meet the Health Services Group Definition or the Nursing (NU) Classification Standard.

[126] To be included within the Health Services Group Definition, the position must meet the "umbrella definition" for the Health Services Group Definition, and then fall within an inclusion statement for the MD or the NU Classification Standards.

[127] The umbrella definition for the Health Services Group states that the Group comprises positions that are primarily involved in the application of a comprehensive knowledge of professional specialties in the fields of medicine and nursing (among others) to the safety and physical and mental well-being of people.

[128] Ms. Power testified that while the advisor position meets the umbrella definition for the Health Services Group, the adjudicator position does not meet that definition. The

basis for her distinction would appear to be the fact that medical adjudication does not involve the use of nursing knowledge to provide direct patient care. However, as indicated above, the evidence established that neither position involves the use of nursing or medical knowledge to provide direct patient care in the way that is done in a clinical setting. Therefore, if the adjudicators do not meet the umbrella definition because they do not provide direct patient care, then on that basis, the advisors' position does not meet the definition either.

[129] Nonetheless, in her testimony, Ms. Power went on to state that not only do the advisors meet the umbrella definition for the Health Services Group, they also fit within the MD Classification Standard because the position matches one of the inclusion statements provided in the MD definition. That is inclusion statement 5 which reads as follows: "the assessment of medical fitness for the determination of disability and other federal government benefits ...".

[130] Ms. Power explained that historically, inclusion statement 5 has always been a part of the MD Classification Standard. In 1999, it was incorporated into a new definition of the Health Services Group through a process known as the Universal Classification System ("UCS"). Ms. Power stated that had the new definition of the Health Services Group, developed through the UCS process, been applied to the medical adjudicator position, it would have allowed medical adjudicators to be classified within the Health Services Group by virtue of inclusion statement 5.

[131] However, as a result of a process that occurred in the late 90's, the new definition was modified and inclusion statement 5 was not applied to the adjudicators. Ms. Power explained that in 1993, Treasury Board was mandated under the *Public Service Reform Act* to reduce the number of Occupational Groups in the Public Service within 6 years. One of the conditions set out in the legislation was that bargaining unit affiliation was not to be changed by the reduction in Groups. To preserve bargaining unit affiliation, inclusion 5 was explicitly excluded from the NU Classification Standard and included in the MD Standard. The reason for this was that to allow inclusion statement 5 to apply to the adjudicators would have meant moving them out of the bargaining unit represented by the Public Service Alliance of Canada and into a bargaining unit represented by the Professional Institute of the Public Service of Canada. Ms. Power stated that the intent of the 1999 process was to avoid a change in bargaining unit affiliation.

[132] Ms. Power also stated, however, that the 1999 process was not intended to indefinitely freeze the composition of the bargaining units. She stated that changes could have been made to the classifications that would have resulted in changes to the bargaining units had there been a good reason to do so.

[133] Ms. Power agreed that one good reason for making a change to the Classification Standards in the Health Services Group would have been to eliminate gender inequities. She admitted that had there been a gender inequity in the classification system, the 1999 process would have had the unintended effect of carrying that inequity forward into the present. Ms. Power stated that had the 1999 process introduced or re-introduced gender bias, it would have been Treasury Board's responsibility to re-define the Group Definitions and Classification Standards in order to remove the bias. Treasury Board has the exclusive authority under s. 7 of the *Public Service Labour Relations Act* to determine classifications. Bargaining unit approval is not required to make changes to the classification standards.

[134] However, bargaining unit approval is exactly what Treasury Board and PSHRMAC stated that they required in their response to the Business Case proposed by Social Development Canada to change the NU Classification Standard. Treasury Board Secretariat indicated that it would only consider a change to the Health Services Occupational Group definition when there was a sound business case to do so and when all parties, including the bargaining agents, supported the change.

[135] In its Response to the Business Case, Treasury Board also maintained that the primary purpose of medical adjudication is not the application of nursing knowledge to the safety and physical well-being of people or the assessment of medical fitness. It is the administration of a government program.

[136] In my view, if the medical advisors are deemed to be applying their medical knowledge to the safety and physical well-being of people and assessing medical fitness for the purpose of determining eligibility, then the adjudicators should also be deemed to be doing the same for the purposes of classification. The Respondents have failed to provide a reasonable, non-discriminatory reason for the differential application of the principles of classification in the Public Service. They have failed to explain their refusal to recognize the professional nature of the work done by a group of predominantly female workers when they are performing essentially the same core function as predominantly male workers whose work receives professional recognition.

[137] Similarly, the Respondents have not provided a reasonable, non-discriminatory explanation for treating the adjudicators differently from the advisors with respect to the payment of professional fees and educational/training opportunities and the provision of career advancement opportunities. The adjudicators use their medical expertise to determine eligibility, just as advisors do. They are health professionals and should be provided with the same employment advantages and opportunities for career development and advancement that other health professionals have in the Public Service.

[138] Treasury Board had the exclusive power to make changes to the Classifications Standards with or without bargaining unit approval. Treasury Board could have decided that the Nursing Classification Standard was going to revert back to the one that was developed through the UCS process which included inclusion statement 5. Or, a new Classification Standard within the Health Services Group could have been developed that included the work done by both adjudicators and advisors. Indeed, Treasury Board had the prerogative to take any action it saw fit, provided the professional qualifications of the adjudicators were recognized commensurately with the professional qualifications of the advisors. Treasury Board did not exercise this authority.

(iii) Have the Respondents established that the differential treatment is a bona fide occupational requirement?

[139] Subsections 15(1)(*a*) and 15(2) of the *CHRA* provide a defense to discriminatory conduct and practices where it is established that they are based on a *bona fide* occupational requirement. To constitute a BFOR, the Respondents must establish that accommodating the needs of the individuals would cause them undue hardship having regard to health, safety and cost.

[140] The only factor that applies in this case is cost. The Respondents did not provide evidence that the cost of treating the adjudicators the same as the advisors with respect to professional recognition, the payment of licensing fees, and the provision of training and educational opportunities would cause them undue hardship.

[141] Marc Thibodeau, a negotiator with the Treasury Board Secretariat, testified that a change in the adjudicators' classification and the resulting impact on salary levels would affect the way that similar positions within the Public Service were classified and remunerated. For example, disability claims adjudication at the Department of Veterans Affairs is done by employees who are also classified as PM-4. The recognition of the medical adjudicators' professional expertise in the present case could result in a review of the classification levels of adjudicators in departments like Veterans Affairs. This, in turn, might cause a significant increase in the Public Service payroll.

[142] Almost invariably there is a cost involved in providing a workplace that is free from discrimination. Often increased cost is provided as a reason for refusing to deal with a problem of discrimination in the workplace. However, it is only when the cost of redressing the discrimination is so high that it would cause the Respondent undue financial hardship that the conduct will be considered a *bona fide* occupational requirement. The Respondents provided no evidence that the classification of medical adjudicators as health professionals would cause them undue financial hardship.

X. CONCLUSION REGARDING LIABILITY UNDER SECTIONS 7 AND 10 OF THE *ACT*

[143] I find, on a balance of probabilities, that the Complainants have established that the Respondents' refusal since March of 1978, to recognize the professional nature of the work performed by the medical adjudicators in a manner proportionate to the professional recognition accorded to the work of the medical advisors, is a discriminatory practice within the meaning of both ss. 7 and 10. The effects of the practice have been to deprive the adjudicators of professional recognition and remuneration commensurate with their qualifications, and to deprive them of payment of their licensing fees, as well as training and career advancement opportunities on the same basis as the advisors.

XI. WHAT IS THE APPROPRIATE REMEDY IN THIS CASE?

[144] Section 53(2)(*a*) of the *CHRA* provides the Tribunal with the authority to order the Respondents to cease the discriminatory practice and to take measures, in consultation with the Commission, to redress the practice or to prevent the same or a similar practice from occurring in the future. The parties requested that, in the event that I found the complaints to be substantiated, I make an order that the discriminatory practice cease, but that I refrain from specifying the measures that should be taken to redress the practice. They asked to be given an opportunity to negotiate the appropriate measures to be taken with all of the stakeholders. I am in agreement with this request. Accordingly, I make the following Order, but retain jurisdiction over this aspect of my decision in the event that the parties are unable to reach an agreement:

The Respondents are ordered to cease the discriminatory practice identified in paragraph 143 above.

[145] A case conference will be scheduled for three months from the date of this decision at which time the parties will provide the Tribunal with a report on the negotiations. On that date also, a deadline will be set by the Tribunal for the final resolution of any outstanding matters arising from this aspect of the decision. If resolution is not achieved by the deadline, I will make a final determination after the parties have had an opportunity to present evidence, if necessary, and argument on remedy.

[146] Section 53(2)(*c*) provides the Tribunal with the authority to order that the Respondents compensate the victims for any or all of the wages that the victim was

deprived of and for any expenses incurred by the victims as a result of the discriminatory practices. Given my order above in relation to s. 53(2)(a), and its possible impact on remuneration, I feel it is appropriate to reserve jurisdiction, on the same terms, in relation to any relief under s. 52(2)(*c*).

[147] Section 53(2)(*e*) of the *CHRA* provides the Tribunal with the authority to award compensation for the pain and suffering experienced by the victims as a result of the discriminatory practice. I heard evidence from Ms. Walden and the three other Complainants who testified in this case about the frustration, demoralization and loss of self-esteem that they experienced as a result of the Respondents' refusal to recognize their professional expertise. On that basis, I am prepared to order that some compensation should be provided to the Complainants under s. 53(2)(*e*). However, I have some questions regarding *quantum* which were not addressed during the hearing. For example, should a Complainant who has only been employed in the Program since February of 2007 receive the same compensation for pain and suffering as a Complainant who has been employed since 1993? I will reserve jurisdiction on the issue of *quantum* in the same terms as set out above. I encourage the parties to come to an agreement on this issue failing which, as with the above-noted issues, I will conclusively determine the matter.

[148] The Commission and the Complainants argued that the Tribunal should order compensation under s. 53(3) of the *CHRA*. That provision authorizes the Tribunal to award compensation not exceeding twenty thousand dollars to the victim where the respondent has engaged in the discriminatory practice willfully or recklessly. I find that an order for compensation under s. 53(3) is not appropriate in the present circumstances. This is a case of adverse effect discrimination where the unintended effect of a practice has been to expose a disproportionate number of women to unfavourable treatment. I was convinced by the sincerity and forthrightness of Ms. Powers' testimony that had she and other members of the Respondent group realized that discriminatory practices were occurring or had been carried over unintentionally through the 1999 negotiations with the bargaining agents, Treasury Board would have exercised its prerogative to take the appropriate corrective action. As such, I find no evidence of willful or reckless conduct warranting an order for compensation under s. 53(3).

[149] As noted above, I shall retain jurisdiction to deal with the three outstanding issues that have been left to the parties to negotiate. The three month progress report, and the deadline for the resolution of these matters applies with respect to all three issues.

"*Signed by*"

Karen A. Jensen

OTTAWA, Ontario
December 13, 2007

PARTIES OF RECORD

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