Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Treasury Board of Canada and
Human Resources and Skills Development Canada)

Respondents

- and -

Professional Institute of the Public Service of Canada

Interested party

Ruling

Member: Matthew D. Garfield
Date: October 24, 2011
Citation: 2011 CHRT 19

Introduction

[1] On September 30, 2011, I granted the motion of the Professional Institute of the Public Service of Canada ("PIPSC") to become an Interested Party in the instant proceeding, with conditions. It may cross-examine witnesses and make submissions, but may only adduce evidence with leave of the Tribunal. These are my Reasons for making that Ruling.

Main Proceeding

[2] The proceeding involves the finding of a different panel of the Tribunal that:

> …the Complainants [now numbering 417] have established that the Respondents' refusal since March of 1978, to recognize the professional nature of the work performed by the medical adjudicators [almost exclusively female nurses] in a manner proportionate to the professional recognition accorded to the work of the medical advisors [predominantly male doctors], 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.
> [*Walden v. Canada (Social Development)*, 2007 CHRT 56, at para. 143]

The Medical Adjudicators and Medical Advisors adjudicate claims under the Canada Pension Plan Disability Benefits Program.

[3] Both the Tribunal's Liability and Remedy Decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The Remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage (including benefit) loss. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue. The wage loss issue remains outstanding.

Motion for Interested Party Status

[4] PIPSC brought a motion to be added as an Interested Party, with full status: i.e., right to adduce evidence, cross-examine witnesses and make submissions (oral and written). The Armstrong- and Harrison-represented Complainants and the Commission consent to PIPSC being added as an Interested Party. The Self-represented Complainants take no position. The Respondent opposes the motion.

Grounds of the Motion

[5] PIPSC argues that section 50 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*") gives the Tribunal wide discretion in making this determination. It states that interested party status (sometimes referred to as "intervenor" status) has been granted in the past by the Tribunal in situations where:

> (a) the prospective interested party's expertise will be of assistance to the Tribunal;
> (b) its involvement will add to the legal positions of the parties; and
> (c) the proceeding may have an impact on the moving party's interests.

PIPSC submits that meeting any one of these criteria is sufficient to be accorded the status.

[6] The moving party argues that it has met all three criteria or conditions. Regarding the first criterion, PIPSC has a 91-year history as an association, then union, representing federal public servants. Today, it has approximately 57,000 members employed by approximately 27 different employers in seven jurisdictions. Eighteen of the bargaining units with over 40,000 members are in the federal government sphere. These members in the federal public service "are a highly skilled and well-educated workforce, comprised largely of scientists and other professionals." Notably, PIPSC is the bargaining agent for the Medical Adjudicators (nurses) (as of July 20, 2011), the Medical Advisors (doctors), and indeed, all of the sub-groups in the Health

Services Occupational Group (SH). This Group includes other Medical/Disability Adjudicators in the federal public service.

[7] PIPSC submits that its expertise will be of assistance to the Tribunal in determining the quantum of wage loss and the method for arriving at that determination. "As a sophisticated and experienced federal public service bargaining agent, the Institute has professional staff with expertise in the areas of classification, collective agreement bargaining, and federal public service wage rates. This is expertise and knowledge that the complainants do not possess." PIPSC also points out that it has a human rights expertise, and "a proven track record" in advancing human rights claims before this Tribunal and the courts.

[8] The bargaining agent also states that its involvement will add to the legal positions of the parties. It cites a number of examples. PIPSC claims that its participation will not duplicate those of the parties, although it acknowledges that many of the positions of it, the Complainants and the Commission will be similar.

[9] On the third criterion, it claims that that its interests as the bargaining agent and those of its members are clearly engaged in this proceeding. It is the bargaining agent now for the Medical Adjudicators, which includes most of the Complainants (some are retired), and those Medical Adjudicators who are not Complainants in this proceeding, but may be entitled nevertheless to compensation as "victims" pursuant to the *CHRA*.

[10] PIPSC notes that the SH Group collective agreement expired last month. The determination of the Tribunal on the wage loss issue will be relevant to the bargaining of a new agreement, although the two processes are distinct. PIPSC acknowledges that the Tribunal is to determine the appropriate quantum of past wage loss based on the *CHRA*, case law and evidence before it. "Regardless, even a lump sum payment for past wage loss could impact the wage rate provisions in the Medical Adjudicators' next Collective Agreement, and therefore its terms are potentially affected by any Tribunal decision."

[11] PIPSC also submits that the Respondent's position regarding bargaining has been inconsistent and unclear "with respect to the role of collective bargaining and a negotiated wage rate on the Tribunal's determination of wage losses." As a result, it "remains concerned that its interests and that of its members will be affected by any Tribunal order."

[12] The bargaining agent further claims that its interests and those of its members are in play here especially given the fact that the discriminatory practice continues to this day – i.e., the Medical Adjudicators are still being paid at the Program Administrator classification rate. This is notwithstanding the Tribunal having ordered on May 25, 2009 that they be reclassified as a new nursing sub-group (NU-EMU) and that "work on the creation of the new NU subgroup commence within 60 days of the date of this decision": see *Walden v. Canada (Social Development)*, 2009 CHRT 16, at para. 60. This has resulted in "a pyrrhic victory" for the Complainants, according to PIPSC.

Respondent's Position

[13] The Respondent states that, to obtain interested party status, an applicant must meet the following two-prong test:

(a) the applicant must demonstrate that its expertise will be of assistance in determining the issues before the Tribunal; and
(b) the applicant must demonstrate that it will add significantly to the legal position of the parties representing a similar viewpoint.

The Respondent says PIPSC meets neither.

[14] Now that the pain and suffering component appears to be settled (depending on whether all of the Self-represented Complainants have agreed to the settlement), the outstanding issue before the Tribunal is a discrete one: the quantum of wage loss (including benefits). The

Respondent submits that PIPSC's claimed areas of expertise (i.e., in the areas of classification, collective bargaining, federal public service wage rates, and human rights) will not be of assistance to the Tribunal.

[15] Regarding its expertise in classification, the Respondent argues that the Tribunal has already made a determination and ordered the creation of a new nursing sub-group. This aspect of the Order was not judicially reviewed. "In fact, the complainants argued before the Tribunal that the appropriate redress would be to include them in the Nursing Classification [as a new sub-group: NU-EMU]." PIPSC should not be allowed "to launch a collateral attack on the earlier re-classification order…" Thus, its expertise in this area will not be of assistance to the Tribunal.

[16] The Respondent states that PIPSC's expertise in collective bargaining is also of no assistance here. The Tribunal cannot order compensation for any period beyond the date at which the discriminatory practice ceases, according to the *CHRA*. As well, it can only order a lump sum award as a monetary remedy.

[17] Regarding public service wage rates, the Respondent says these are publicly available and on-line. "…PIPSC offers no greater or additional expertise than what is already available publicly and/or through Treasury Board Secretariat."

[18] With respect to human rights expertise, the Respondent argues that the Tribunal itself as well as the Commission has a statutorily recognized expertise in this area.

[19] PIPSC also will not add to the legal position of the parties, according to the Respondent. The bargaining agent's "submissions indicate its position is virtually identical to that of the represented Complainants and the Commission."

[20] The Respondent further submits that the Tribunal's re-determination of past wage loss will not impact on PIPSC's interests. Nothing in this proceeding to date will impact on the

bargaining agent's reputation and indeed, it only recently became the bargaining agent for the Complainants who are CPP Medical Adjudicators. As well, there is no collective agreement at present between Treasury Board and PIPSC covering the Medical Adjudicators. The Medical Adjudicators are still being paid at the PM rates. Furthermore, "collective bargaining is a process separate and apart from the Tribunal's re-determination of past wage loss." As well, the Respondent says that, while PIPSC represents the Medical Advisors and other nursing sub-groups, none of these people are parties to this proceeding. Hence, the Tribunal does not have the jurisdiction to make an order affecting these groups.

[21] By way of conclusion, the Respondent states that the Armstrong-represented Complainants have been well-represented. "Laid bare, PIPSC's interest is in advocating, along with the complainants, for a past wage loss award that is premised on as high an imputed wage rate as possible so that it can use this imputed past rate as leverage in future collective bargaining."

Analysis

Statutory Provisions and the Law

[22] Section 50 of the *CHRA* gives the Tribunal the authority to add interested parties to the proceeding. The section does not provide any conditions for the exercise of this discretionary power. Rule 8 of the Tribunal's *Rules of Procedure* deals with the procedural aspects of such a motion. There has been ample case law at the Tribunal addressing motions for interested party status.

[23] Concisely put, the case law indicates that interested party status has been granted in the past by the Tribunal in situations where:

(a) the prospective interested party's expertise will be of assistance to the Tribunal;

(b) its involvement will add to the legal positions of the parties; and

(c) the proceeding will have an impact on the moving party's interests.

[24] I am granting the motion, with conditions on the basis that I am satisfied that PIPSC has demonstrated that it meets all three criteria. On the issue of expertise being of assistance to the Tribunal, I am satisfied that PIPSC, as demonstrated in the historical narrative referred to above, has expertise in areas not possessed by the Complainants and Commission that will assist the Tribunal in determining the quantum of wage loss and the method for arriving at that determination. The exercise before the Tribunal is not a simple one. PIPSC will be of assistance as an interested party. As well, while PIPSC's positions are for the most part identical or similar to those of the Complainants and the Commission, there are instances where it takes a different approach, some more nuanced than others.

[25] On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding.

[26] It is true that PIPSC did not become the bargaining agent until very recently. However, the discriminatory practice has not ceased; it is ongoing. While the Medical Adjudicator position has been reclassified, the Complainants (and "victims" if so included) are *inter alia* still being paid at the discriminatory PM rates. The Tribunal's Order dated May 25, 2009 has yet to be fully implemented.

[27] I also agree with PIPSC that the Respondent's position vis-à-vis the interplay between this proceeding and collective bargaining has not been consistent. While I acknowledge that the two processes are separate and that the Tribunal has a discrete issue before it (quantum of wage loss/benefits, assuming that pain and suffering has been agreed to by *all* of the Complainants),

there is interplay. The Tribunal's determination of wage loss *may* influence the positions taken by Treasury Board and the bargaining agent in upcoming collective bargaining negotiations. Whether this occurs with regard to the ultimate wage rate negotiated is of course up to the parties to the collective bargaining exercise.

Conclusion

[28] Based on the foregoing, I ordered on September 30, 2011 that PIPSC be granted interested party status, with conditions. I am satisfied that it can make the necessary contribution and represent its members' interests by cross-examining witnesses and making submissions – oral and/or written. If it becomes evident that it also needs to adduce evidence, then PIPSC may seek leave thereof.

[29] PIPSC's granting of interested party status should not be construed as an invitation to re-open matters already determined. For example, on the issue of the NU-EMU sub-group classification, I am reluctant to move in a backward fashion and re-open this issue as PIPSC seems to suggest, even assuming that I have the authority to do so, as this was determined by a previous panel of the Tribunal and was not judicially reviewed by any of the parties. This topic will be addressed at the upcoming Case Management Conference.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
October 24, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1111/9205, T1112/9305 & T1113/9405

Style of Cause: Ruth Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Ruling of the Tribunal Dated: October 24, 2011

Appearances:

Laurence Armstrong, for 382 Complainants

Marlene Harrison, for 9 Complainants

No submissions received, for 26 Self-represented Complainants

Daniel Poulin, for the Canadian Human Rights Commission

Lynn Marchildon, for the Respondent

Peter Engelmann, for the Interested Party