Date: 20010730

File: 169-2-638

Citation: 2001 PSSRB 81

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

RE: Reference under Section 99 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Bargaining Agent: Andrew Raven

For the Employer: Richard Fader

Heard at Ottawa,
26 and 27 June 2001.

[1] The Public Service Alliance of Canada (PSAC) filed this reference under section 99 of the *Public Service Staff Relations Act* (PSSRA) on March 1st, 2001.

[2] In 1984 and 1990, the PSAC referred pay equity complaints to the Canadian Human Rights Commission (CHRC) on behalf of their members in the Clerical and Regulatory (CR), Library Science (LS), Secretarial, Stenographic and Typing (ST), Hospital Services (HS), Educational Support (EU) and Data Processing (DA) groups (Exhibit A-1, Tabs 1 and 2).

[3] The complaints were investigated by the CHRC and eventually referred to a Canadian Human Rights Tribunal (CHRT). The CHRT issued decisions relating to the complaints in 1996 and 1998 (Exhibit A-1, tabs 3 and 4). The 1998 decision ordered "*inter alia*" that wage adjustments for employees in the complainant groups be made going back to March 8, 1985.

[4] On November 16, 1999, the CHRT issued a Consent Order which incorporated an agreement entered into by the parties on October 29, 1999 as the final resolution of all remaining issues relating to the 1984 and 1990 complaints.

[5] On December 13, 1999, the Consent Order was filed in the Federal Court of Canada pursuant to section 57 of the *Canadian Human Rights Act*.

[6] The PSAC now contends that all benefits, perquisites and allowances contained in various relevant collective agreements for the complainant groups and which were tied to rates of pay found to be discriminatory by the CHRT must now be adjusted on an events basis for the whole of the retroactive period unless otherwise agreed to by the parties. This would require the employer to go back to its pay records to recalculate every benefit payment previously made on the basis of wage rates now found to have been discriminatory.

[7] Ms. Margaret Jaekl, a classification and equal pay officer, was the only person to testify. She related background information concerning the PSAC pay equity complaints including the meaning of certain expressions such as "pay for all purposes" and "fold-in" (Exhibit A-3, Tab 4). Ms. Jaekl stated that discussions between the PSAC and the employer concerning pay equity had taken place before 1984. The employer was therefore, prior to 1984, aware of the existence of pay equity problems relating to some PSAC members.

Arguments

For the PSAC

[8] The various decisions issued by the CHRT and the Federal Court have clearly identified the existence of systemic problems surrounding discriminatory wage rates. The employer was aware of this problem prior to the 1984 complaint.

[9] The PSAC has always held the position the CHRT had first to assess the discriminatory wage gap brought about by the systemic problems and then determine, pursuant to subsection 11(7) of the CHRA, the pay for all purposes issue.

[10] The PSAC believes that, given the language of subsection 11(7) of the CHRA, once base rates are found to be illegal, then the necessary adjustment for all benefits tied to wages must be done. The fact that such adjustment may require substantial work is irrelevant. The employees affected by the employer's discriminatory practices must be made whole and must be given whatever benefits they would have received had they been paid properly from the start.

[11] Phase III of the CHRT process was to discuss the administrative difficulties that the employer might encounter in applying the pay for all purposes principle.

[12] Given the employer's position on the application of the Consent Order, the issues raised by this reference are not matters which could give rise to individual grievances. The Board is not being asked to amend collective agreements or read in or out certain provisions, but merely to apply them in accordance with the very clear provisions of the CHRA.

[13] The Board is amply equipped with the jurisdiction to find and declare that pay for all purposes flows from subsection 11(7) of the CHRA and that consequently, the employer must make the necessary adjustments. Had the Consent Order been meant to be all encompassing the parties would clearly have stated so.

For the employer

[14] The Board has no authority to redo Phase III of the CHRT proceedings, to review the Consent Order, to enforce the Consent Order as a judgment of the Federal Court or in any way to re-open the tribunal order.

[15] The Consent Order issued by the CHRT is full and final and cannot be altered by the Board. The PSAC, by this application, seeks to do just that.

[16] The CHRT in its July 1998 decision (Exhibit A-1, tab 4, paragraph 436) clearly recognizes that "in establishing a period of compensation, common sense applies and some limits need to be placed upon liability for the consequences flowing from a discriminatory act, in the absence of bad faith."

[17] The employer believes that the Consent Order contains all of the terms of settlement and unless otherwise stated does not call for the adjustment of indirect benefits prior to the fold-in date in July 1998.

[18] Only the CHRT can amend its Consent Order. In any event, enforcement of the Consent Order lies in the Federal Court since the Consent Order was filed as a judgment of the Court.

[19] The parties' silence in their settlement agreement on the issue of the retroactive adjustment of all indirect benefits indicates their understanding not to do so.

Reply of the PSAC

[20] What has been placed before the Board is the enforcement of various collective agreements and not the CHRT's Consent Order. Disputes involving collective agreements can only be heard by the Board.

[21] As the authority charged with the enforcement of collective agreements, the Board must first determine what are the lawful rates of pay that employees were entitled to over time as set by the Consent Order and then administer the relevant past collective agreements in keeping with those adjusted rates.

Analysis and reasons for decision

[22] The PSAC takes the position that, unless otherwise agreed to by the parties, subsection 11(7) of the CHRA requires that all benefits tied directly to an employee's wage rate must be adjusted retroactively in accordance with the terms of relevant collective agreements when the wage rates themselves were adjusted retroactively to counter the effects of past discriminatory practices.

[23] The employer argues that the adjustment of all such benefits takes effect on the date of fold-in and that any retroactive adjustment of those benefits must be

specifically covered by the Consent Order which represents the full and final agreement of the parties on that issue.

[24] I find it unfortunate that the parties were not clearer in their intentions when they drafted their settlement agreement in 1999. Regrettably, their lack of clarity and precision in the settlement agreement was incorporated into the CHRT's Consent Order. Although it is easy now to state that the parties could easily have more clearly and completely expressed their respective positions in their settlement agreement, it serves no purpose to dwell on that fact in the case at hand other than to highlight why this matter is still not resolved and to encourage them to ensure that such future documents, to the extent possible, fully and without ambiguity convey the true nature of their agreement.

[25] Given the language used by the CHRT in its 1998 decision (Exhibit A-1, tab 4, paragraph 436), it is certainly not clear that the tribunal agreed that it was required by law to order the adjustment of all indirect benefits on an events basis for the full retroactive period or that it would necessarily have done so had Phase III of the proceedings taken place. In fact, subsection 53(2) of the CHRA states that a Tribunal may, not shall, include in an order against a person found to have violated the CHRA any of a list of terms that it finds appropriate. The CHRT's ability to fashion an appropriate remedy with respect to indirect benefits is also highlighted in order 13 of the Tribunal's July 1998 decision (Exhibit A-1, tab 4, page 131).

[26] The imprecision of the language used in the Consent Order can give rise to differing views and interpretations. I do not believe that this Board should attempt to correct the ambiguity contained in the order of the CHRT. Unless the parties agree on this issue, the matter must go back to the Federal Court and eventually to the CHRT.

[27] Given the delays that such proceedings would necessarily entail, the Board wishes to formally offer its dispute resolution services to allow the parties to try and resolve their differences as quickly as possible.

[28] On the basis of the above, I am not satisfied that the PSAC has established the existence of an obligation for purposes of section 99 of the PSSRA. Accordingly, the Board finds that it cannot accede to the PSAC's section 99 reference.

Yvon Tarte,
Chairperson

Ottawa, July 30, 2001.