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Budget Implementation Act, 2009

Before a panel of the Public Service Labour Relations Board

BETWEEN

DIANE MELANÇON, MICHAEL BRANDIMORE AND LOUISE IPPERSIEL

Complainants

and

TREASURY BOARD

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervener

Indexed as
Melançon et al. v. Treasury Board

In the matter of complaints referred to the Public Service Labour Relations Board pursuant to subsection 396(1) of the *Budget Implementation Act, 2009*

REASONS FOR DECISION

Before: Renaud Paquet, a panel of the Public Service Labour Relations Board

For the Complainants: Aaron Rubinoff, Joël Dubois and Jessica Barrow**,** counsel

For the Respondent: Lynn Marchildon and Talitha Nabbali, counsel

For the Intervener: Edith Bramwell, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
May 21 to 24 and 27 to 31, 2013.
Written submissions filed September 30, October 30 and November 11, 2013.

I. Complaints before the Public Service Labour Relations Board

[1] Diane Melançon, Michael Brandimore and Louise Ippersiel ("the complainants") are compensation consultants. Their positions are part of the Administrative Services (AS) occupational group. They filed complaints with the Canadian Human Rights Commission (CHRC) under sections 7, 10 and 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), on November 25, 2004. Amended complaints were filed on March 5, 2007. In accordance with the coming into force of section 396 of the *Budget Implementation Act, 2009*, S.C. 2009, c. 2 (*BIA*), the CHRC referred the complaints to the Public Service Labour Relations Board ("the Board").

[2] The complaints were filed on behalf of all AS's working in the compensation stream employed both in the core public administration and in separate agencies. In addition to each complainant filing a complaint against the Treasury Board ("the respondent"), the complainants also filed individual complaints against their departments. The following three departments were named as respondents: the Department of Industry, the Department of Health and the Canadian International Development Agency. In *Melançon et al. v. Treasury Board et al.*, 2010 PSLRB 20, the Board ordered that separate employers be removed from the complaints and that the complaints against the three named departments be dismissed, considering that the Treasury Board is the employer. Finally, the Board ordered that the complaints be amended to exclude references to section 7 of the *CHRA*. Later on, the complainants removed the references to section 10 of the *CHRA*.

[3] Following the 2010 decision in *Melançon et al.* and the removal of the reference to section 10 of the *CHRA* from the complaints, the complaints are directed at the Treasury Board and allege a violation of section 11 of the *CHRA*. That section reads as follows:

> ***11.*** *(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.*
>
> *(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.*

> *(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.*
>
> *(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.*
>
> *(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.*
>
> *(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.*
>
> *(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes*
>
> *(*a*) salaries, commissions, vacation pay, dismissal wages and bonuses;*
>
> *(*b*) reasonable value for board, rent, housing and lodging;*
>
> *(*c*) payments in kind;*
>
> *(*d*) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and*
>
> *(*e*) any other advantage received directly or indirectly from the individual's employer.*

[4] The jurisdiction conferred on this panel of the Board in respect of these complaints is outlined at paragraph 396(1)(*a*) of the *BIA*, which directs the Board to deal with certain complaints filed under sections 7, 10 and 11 of the *CHRA*. That paragraph reads as follows:

> *396. (1) The following complaints with respect to employees that are before the Canadian Human Rights Commission on the day on which this Act receives royal assent, or that are filed with that Commission during the period beginning on that day and ending on the day on which section 399 comes into force, shall, despite section 44 of the* Canadian Human Rights Act, *without delay, be referred by the Commission to the Board:*

> (a) *complaints based on section 7 or 10 of the* Canadian Human Rights Act*, if the complaint is in respect of the employer establishing or maintaining differences in wages between male and female employees; and*
>
> (b) *complaints based on section 11 of the* Canadian Human Rights Act*.*

[5] In their complaints, the complainants made a number of allegations. They stated that their work is evaluated according to a job evaluation system that dates from 1965 and that fails to assess their work in relation to the four factors specified in the *Equal Wages Guidelines, 1986*, SOR/86-1082 (*EWG*), namely, skill, responsibility, effort and working conditions. They also stated that the Treasury Board has established and maintained differences in wages between the female-predominant compensation consultants and male-predominant groups performing work of equal value, in violation of section 11 of the *CHRA*.

[6] The complaints purport to cover all employees working in the compensation work stream, which includes positions ranging from the AS-01 level to the AS-05 level. In general, compensation positions at the AS-01 level are held by trainees or junior compensation consultants and at the AS-02 level by fully trained compensation consultants. The AS-03 to AS-05 levels include senior compensation consultants, compensation team leaders and compensation managers. According to the Treasury Board figures, there were 2514 employees working in the compensation work stream in 2011-2012. Of those 2514 employees, 13% were AS-01s, 55% AS-02s, 17% AS-03s, 10% AS-04s and 6% AS-05s. During the hearing and in many of the documents adduced in evidence, the parties used the term “compensation consultant” to designate all AS’s working in the compensation stream. I will do the same in this decision.

[7] For pay equity purposes, the complainants initially compared themselves to the following groups and levels: ES-03, SI-04, HR-03, PC-02 and CS-02, as potential male-predominant comparator groups. Later in the process, they dropped the ES, SI and HR comparators, but included more than one level of PC’s and CS’s. The final male comparators included PC-01 to PC-03 (Physical Sciences), CO-01 and CO-02 (Commerce), CS-01 to CS-04 (Computer Systems), GT-01 to GT-05 (General Technical) and EG-01 to EG-06 (Engineering & Scientific Support).

II. The form and structure of the evidence presented by the parties

[8] The complainants called Jill Ronan as a witness. They also produced evidence through an affidavit signed by Ms. Ronan. Ms. Ronan has been employed in the federal public service since 1976, has held the positions of compensation consultant, compensation team leader and compensation manager and has worked approximately 20 years in compensation at the Department of National Defence. She is also the former chairperson of the Interdepartmental Association of Compensation Consultants. Among other things, her evidence was on the role of compensation consultants, their training and career path, and the challenges associated with their work. She also testified on the evolution of the position and of the compensation consultants' efforts to obtain proper wages. Finally, she brought forward several precisions on the complaints.

[9] The complainants also called two expert witnesses to testify, Paul Durber and Alan Sunter. I accepted the complainants' request to qualify Mr. Durber as an expert in pay equity and its implementation and in job evaluation within the context of the federal public service. I also accepted the complainants' request to qualify Mr. Sunter as an expert in statistics, including in the estimation of gender-based wage differentials within the context of the federal public service. The reports prepared by Mr. Durber and Mr. Sunter were adduced in evidence by the complainants.

[10] The respondent called Sylvie Cavanagh as a witness. It also produced evidence through an affidavit signed by Ms. Cavanagh. Ms. Cavanagh has worked for 20 years in the public service after serving in the Canadian Forces as an officer for 15 years. Since 2010, she has occupied a managerial position within the Workforce Classification and Organization Division of the Treasury Board Secretariat. On many points, her evidence was comparable to that provided by Ms. Ronan. Among other things, her testimony and her affidavit related to the public service classification system, the role of compensation consultants, the evolution of the position and the classification reviews that took place over the years.

[11] The respondent also called three expert witnesses to testify, Dr. Nan Weiner, Dr. John Kervin and Robert Bass. I accepted the respondent's request to qualify Dr. Weiner as an expert in pay equity and its implementation and in job evaluation, and to qualify Mr. Bass as an expert in job evaluation in the pay equity context. I also accepted the respondent's request to qualify Dr. Kervin as an expert in pay equity, job

evaluation, data analysis, statistical methodology and data collection in the context of gender bias and pay equity.

[12] Ms. Bramwell briefly intervened on behalf of the Public Service Alliance of Canada (PSAC), which is the bargaining agent for compensation consultants. However, she did not adduce evidence or make arguments related to the substance of the complaints.

[13] Based on the advice of one of their expert witnesses, the complainants suggested that pay equity complaints should be considered using the following eight-step analytical process:

- Is there a female-predominant complainant group?
- Is there a male-predominant comparator group?
- Are both groups working in the same establishment?
- Was an appropriate job evaluation method used?
- Is the work of both groups of equal value?
- Is there a wage difference?
- Is there a reasonable justification for the difference?
- What is the appropriate remedy?

[14] I agree with the analytical process proposed by the complainants and note that the respondent did not oppose the use of this process. In fact, it largely used the above process to structure its final arguments. After presenting the general evidence provided by the parties on the historical demands for better pay for compensation consultants, I will present the evidence and arguments and my reasons on those questions in that order. The order in which those questions are listed implies that with regard to some of the above steps a positive or a negative answer would mean that the analysis stops at that question. For example, if there is no female-predominant complainant group, there is no usefulness in continuing the analytical process. Nor would there be a point to continuing the analysis without a wage difference for groups of equal value or if a reasonable justification for the difference is proven to exist.

III. The compensation consultants' historical demands for better pay

[15] There are compensation consultants in every department and agency of the public service. The compensation consultants provide compensation advice, guidance and counsel to management and employees. They determine employees' entitlements with respect to a wide range of complex compensation and benefit issues. They research, analyze, explain and apply changes in rules and regulations affecting pay and benefits. They ensure that government employees are paid as they should be and receive the benefits that they are entitled to receive. Each compensation consultant serves approximately 250 to 300 clients. The position has become increasingly complex as the number of rules and regulations governing compensation entitlements has increased.

[16] In 1997, the compensation consultants who were classified at the CR-05 group and level were reclassified to the AS-01 group and level. At that time, more than 70 000 rules were applicable to the compensation function. Treasury Board personnel and pay administration manuals included 12 000 pages of instructions. It was then recognized that the job included an increasing element of discretion and independent judgment.

[17] Compensation consultants were disappointed by the decision to reclassify them only to the AS-01 group and level. Their disappointment was exacerbated by the pay equity settlement obtained by the PSAC for the Clerical and Regulatory Group (CR) in December 1999. That settlement resulted in the CR-05 pay level becoming higher than the AS-01 pay level.

[18] Following a review in 2000, AS-01 compensation consultants were reclassified to the AS-02 group and level. Again, they were unsatisfied with that decision. Many of them filed a complaint with their employer, which dealt with it as a classification grievance. The decision to classify the position at the AS-02 group and level was maintained.

[19] In 2002, compensation consultants wrote to the president of the Treasury Board to ask to be reclassified in the PE group, which has a higher pay level than the AS group. That request was refused by the Treasury Board in June 2003.

[20] In 2007, it became apparent that there were several important issues with compensation services in the federal public service. Members of Parliament and bargaining agents were receiving complaints from employees that public service compensation requests were not being dealt with in a timely manner. The problem was extensively discussed by the House of Commons Standing Committee on Government Operations and Estimates. The committee issued a report in which it recommended that the government take action to provide equitable pay for compensation consultants and that it develop a classification standard that would reflect the complexity of their duties.

[21] In September 2009, the Treasury Board responded to the Standing Committee's report by stating that no actions were necessary based on the fact that it was in negotiations with the PSAC to pursue equitable compensation for the Program and Administrative Services Group, which group included AS's. The Treasury Board also indicated that plans were in place to streamline the compensation field.

[22] In March 2011, the PSAC signed a new collective agreement with the Treasury Board. That collective agreement included an annual $2000 retention allowance for AS-02 compensation consultants. Most compensation consultants did not agree with that allowance; they felt it was too low, and it did not apply to the entire compensation stream.

IV. Are compensation consultants a female-predominant complainant group?

A. The evidence adduced by the parties

[23] The compensation consultant position is the working level for the compensation work stream. As stated earlier, the complaints cover employees whose classifications range from the AS-01 level to the AS-05 level. The compensation consultants are classified at the AS-02 level, and they form 55% of the compensation work stream or community. The AS-01 level is for trainees or junior compensation consultants, and the AS-03 level is for senior consultants. There are also compensation team leaders and managers classified at the AS-04 and AS-05 levels. A large number of the employees within the compensation community have their general work expectations specified in generic job descriptions or in comparable specific job descriptions. In other words, most AS-01 trainees do the same work, most AS-02 compensation consultants do the same work, most senior consultants do the same work, etc.

[24] According to the respondent, the compensation consultant position fits well within the definition of the AS group, which includes work streams like facilities management, finance and administration, internal audit, information management, security, and compensation, among others. Positions within the AS group, including the compensation consultants' positions, are classified by the employer based on the AS classification standard, which is dated August 1965. According to the respondent, a classification standard is a job evaluation plan that describes the factors and elements used to establish a hierarchy of jobs within an occupational group.

[25] As of March 2013, 28 857 positions were classified AS in the public service. The breakdown per level was as follows: AS-01, 6521; AS-02, 8079; AS-03, 4490; AS-04, 3362; AS-05, 3288; AS-06, 1786; AS-07, 1123; and AS-08, 98.

[26] Even though the AS group still exists for classification purposes, it was amalgamated with other administrative groups in 1999 to form the Program and Administrative Services (PA) group. It then became a sub-group of the PA group, which includes the following sub-groups: AS, CR, Communications (CM), Data Processing (DA), Information Services (IS), Office Equipment (OE), Program Administration (PM), Secretarial, Stenographic and Typing (ST), and Welfare Programs (WP). On March 31, 2013, 80 898 employees were in the PA group. Each of the PA sub-groups has its own classification standard. For collective bargaining purposes, the PA group is considered as a single bargaining unit, with one collective agreement covering all sub-groups. However, sub-groups have their own separate salary grids.

[27] From the parties' submissions, it is difficult to establish the percentage of women and men who form the compensation consultant community. Nevertheless, there is a consensus between the parties that the vast majority of the members of that community are women. That fact was stated by the complainants, and it was not contested by the respondent. According to the respondent's data, which was not challenged by the complainants, the AS group was composed of 75% women and 25% men in 2004, the year that these complaints were filed. In 2007, the year that the complaints were amended, the AS group was 76% women and 24% men. The PA group is also a group predominantly composed of women. It was formed in 1999 with the amalgamation of 10 previously existing groups (AS, CR, CM, DA, OE, ST, IS, PM, WP, and OM). Most of those existing groups, including some of the largest, were predominantly female as per section 13 of the *EWG* for the purpose of section 12 of the *CHRA*.

[28] In 2002, the Treasury Board began a multi-year classification reform involving all occupational groups, with the exception of the executive group. In 2008, the Treasury Board reached an agreement with the PSAC for meaningful consultations on the review of the PA group, including the development of classification standards that would reflect and measure elements in a gender-neutral manner, including the skill, effort, responsibility and working conditions of the work performed by employees in the groups covered by the new standards.

[29] To this day, the 2002 classification reform has not been completed. The documents adduced at the hearing indicate that the PA group will be split into three groups, the Rehabilitation Programs Group (RP), the Programs and Services Support Group (RS), and the Programs and Services Development and Delivery Group (RL). A specific new classification standard will be created for each of the three new groups. Those standards have not yet been developed. The RP group will correspond to the existing WP sub-group. The RS group will be composed of positions primarily engaged in administrative or transactional activities related to program delivery or services. The RS group will primarily cover the current CR, ST, OE, DA, CM, AS-01 to AS-03 and PM-01 to PM-03 sub-groups and classifications. The RL group will be composed of positions primarily engaged in the planning, development, delivery, or management of programs, services, or related policies. The higher levels of the AS and PM classification sub-groups will likely be part of the RL group.

[30] On November 6, 2000, the PSAC filed a pay equity complaint with the CHRC, alleging that the Treasury Board had discriminated against the predominantly female PA group, in violation of the *CHRA*, by using discriminatory classification standards to measure the value of jobs of employees who were members of that group. As a remedy, it asked that a non-discriminatory standard be developed and that all members of the PA group receive full compensation for all lost wages as a result of discrimination. The complaint stated “March 1999 and ongoing” as the date of the alleged discrimination.

[31] The 2000 PSAC pay equity complaint for the PA group was withdrawn as a result of a settlement reached in November 2008 in relation to the renewal of the PA collective agreement. The following provisions of that memorandum of settlement are of particular interest:

. . .

> 3. *Every employee who is a member of the bargaining unit on December 15, 2008 shall receive a pensionable lump sum payment of $4000.00, payable within the 150 day implementation period as of the date of signing . . . .*
>
> . . .
>
> 5. *The Memorandum of Understanding between the Treasury Board of Canada and the Public Service Alliance of Canada with respect to meaningful consultation regarding Occupational Group Structure and Classification Reform forms part of the collective agreement.*
>
> 6. *The parties agree that the PSAC will withdraw the complaints (files 20050122 and 20050123), and sign a complete release (Annex A) within 7 days of the signing of this tentative settlement, and to jointly inform the Canadian Human Rights Commission of such withdrawal (Annex B) upon ratification of PSAC tables (PA, EB, SV, and FB).*
>
> . . .
>
> 8. *The parties agree that ratified collective agreements will not be implemented until the Canadian Human Rights Commission has confirmed the withdrawal of the complaints referred to in paragraph 6.*
>
> . . .

[32] Federal government employees working in compensation form the compensation community. Around 2002, they created the "Association of the Compensation Community" (the "Association") when it became clear to them that they needed to form a group to promote their specific interests. They could then share issues, practices and ideas. The Association became the forum they used to try to obtain a better classification, better pay and pay equity with other groups. The membership in the Association was open to the whole compensation community, ranging from the AS-01 compensation trainees to the AS-05 compensation managers. Its members voluntarily contributed money to fund it.

[33] There is no consensus from the experts on the question of whether the compensation consultants are an occupational group for pay equity purposes and for the application of the *CHRA* and the *EWG*.

[34] According to Mr. Durber, these complaints are not individual but collective because they were filed by a group of employees. Section 12 of the *EWG* refers to "occupational groups" but does not define them. It reads as follows:

> ***12.*** *Where a complaint alleging different wages is filed by or on behalf of an identifiable occupational group, the group must be predominantly of one sex and the group to which the comparison is made must be predominantly of the other sex.*

[35] The *EWG* do not define the concept of "identifiable occupational group." On that question, Mr. Durber referred to a booklet entitled, *Implementing Pay Equity in the Federal Jurisdiction* ("the 1992 CHRC booklet"). That booklet was published by the CHRC in 1992. Mr. Durber was directly involved in writing it. In it, the CHRC proposes the following four criteria for assessing the question of whether a group is an occupational group:

- *Jobs grouped together are characterized by similar work;*
- *They probably have the same basic qualifications;*
- *They are characterized by similar career patterns and interchangeability of personnel; and*
- *They may already be grouped together for administrative purposes, have similar wage scales and have common representation bargaining.*

[36] Mr. Durber believes that compensation consultants are characterized by similar work. He reviewed a sample of 100 job descriptions within the compensation consultant group. It reveals a great deal of homogeneity. Many of those job descriptions are nearly identical, being generic job descriptions. In the private sector labour market, compensation specialists are recognized as distinct occupations in the *National Occupational Classification* (*NOC*) as part of the pay and benefits stream of jobs. Those jobs have titles including pay and benefits administrator, benefits officer, pay clerk, supervisor of payroll clerks, payroll officer, and salary administration officer. The *NOC* is a governmental taxonomy of occupations in the Canadian labour market.

[37] According to Mr. Durber, compensation consultant positions all require as a common qualification, the completion of a college program or courses related to the work. The sample of jobs that Mr. Durber analyzed all referred to knowledge of a wide

range of laws, regulations and policies and inferred underlying formal training and experience.

[38] In the jobs he sampled, Mr. Durber found a clear progression for careers in the public service compensation field. The progression is from the entry level of administrative services (AS-01) to the fifth level (AS-05). It is clear that those levels represent progressively more demanding work. Furthermore, for all the jobs, the associated wages can be found in the AS pay rates, and the same bargaining agent represents them.

[39] Mr. Durber believes it appropriate that the compensation consultants be separated from the wider AS group. According to the 1992 CHRC booklet, creating a subset of jobs within a large group might be required to make the work done by women more visible. When doubt exists, it is generally preferable to opt for smaller units. According to Mr. Durber, the homogeneity of the work and the sense of community that is evident among the practitioners at issue and their collective action in relation to their profession and to its recognition are examples of reasons for separating their grouping from the AS group as a whole. One might add that the latter is heterogeneous, being a collection of all jobs relating to internal administration within the public service that are not otherwise part of more specialized groupings.

[40] Based on the four criteria cited earlier, Mr. Durber testified that it was reasonable to conclude that compensation consultants are an occupational group within the meaning of the *EWG*.

[41] Dr. Weiner does not agree with Mr. Durber's conclusion. For her, the compensation consultants are not an occupational group but rather part of a job series found in classification levels AS-01, AS-02, AS-03, AS-04 and AS-05. In breaking down the work force, if no whole occupational groups (the PAs) or whole classifications are used (the ASs), Dr. Weiner believes that it is best to use classification levels as the unit of work when ensuring pay equity within the core public administration.

[42] According to Dr. Weiner, work in the federal public service is divided into occupational groups. Some occupational groups (i.e., PA) are divided into classifications, which themselves are occupations. The classifications are divided into levels, and each level is assigned a salary. Positions are classified at a particular level because they are similar in value to other positions at the same level and thus should

be paid the same. Compensation consultants hold a subset of positions found in five classification levels of a classification in an occupational group.

[43] Dr. Weiner agrees with Mr. Durber that it could be appropriate to use a subset of an occupational group to make the work done by women more visible for pay equity purposes. However, Dr. Weiner stated that that would pose a problem when the subset is within a female-dominated group, like the AS classification. That would imply that the compensation consultants' work has been undervalued relative to other female-dominated AS positions within the same levels because the compensation consultants' work is done mainly by women. That makes no sense. Comparing female-dominated work to female work is not part of pay equity. In fact, the first four levels of the AS classification are all female dominated, and the fifth level is gender neutral. If compensation consultants' work is female-dominated work and it is within classification levels that are female-dominated, then why would one pull out the compensation positions from their classification group to make work done mainly by women visible from the AS-01 to AS-05 levels? The need to make work done mainly by women visible occurs when a female works in a male-dominated or gender-neutral classification or classification level and there is a concern that because it is work done mainly by women, it has been undervalued.

[44] Dr. Kervin did not comment on whether the compensation consultants are an occupational group for pay equity purposes, as per the *EWG*. He simply took for granted that they were and did not analyze the question, as did Mr. Durber and Dr. Weiner.

[45] Rather than refer to the occupational group as per the *EWG*, Mr. Bass referred to "job classes" to examine pay equity. A job class comprises jobs within the bargaining unit that have similar or identical job duties, responsibilities and qualifications and that are paid on the same wage schedule. The simple way to describe a job class is to think of a job by its title. The concept of job class is used under the Ontario pay equity legislation. Mr. Bass believes groupings larger than job class cannot be precise because they include many job classes and therefore a wide variety of qualifications, responsibilities and duties.

[46] After examining a sample of the compensation stream's job descriptions, Mr. Bass concluded that the complainants are part of five different job classes, namely, Compensation Consultant Developmental (AS-01), Compensation Consultant (AS-02),

Policy Analyst (AS-03), Compensation Team Leader (AS-03) and Compensation Manager (AS-04). Each of those job classes should be considered a distinct occupational group for the purposes of the *EWG*. It should be noted that Mr. Bass analyzed the AS-05 job descriptions separately.

[47] Mr. Durber provided a rebuttal to the opinions expressed by Dr. Weiner. He responded that the purpose of separating the compensation consultants from the other ASs was not to compare them with the rest of the ASs. In addition, it should be pointed out the equity of compensation for jobs or for a series of jobs in the AS group has never been tested. There is no reason to dismiss the complaints of the compensation consultants because their work is now found in a female-predominant classification.

[48] For Mr. Durber, this case is comparable to *Walden et al. v. Social Development Canada et al.*, 2009 CHRT 16. In *Walden*, the complainants were medical reviewers in the federal public service. They were employed in a series of jobs found in a classification group (PM), which happened to be gender neutral. The complaint was allowed by the Canadian Human Rights Tribunal (CHRT) and led to a 2012 settlement. Another example is a complaint made by clinical social workers, who were embedded in a gender-neutral group. They made the claim that their series of jobs were occupationally distinct from the remainder of the jobs in the group, which was largely male predominant. For Mr. Durber, it would not be reasonable to suggest that the occupational identification of the complainants' job series is dependent on the gender predominance of their classification.

[49] Mr. Durber stated that in a number of other pay equity cases, the term "occupational group" was used when job titles were the pervasive unit for organizing work. On that point, he referred to *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36. In that case, the differing organizations of work and compensation did not pose a barrier to using varying units of work for the several stages of examining pay equity.

B. <u>The complainants' arguments</u>

[50] It is well-established that human rights legislation, like the *CHRA*, is quasi-constitutional in nature and that its provisions should be given a broad and liberal interpretation so as to further its underlying purposes. Any ambiguities in the

CHRA should be interpreted in a manner that furthers the *CHRA*'s objectives of implementing the government's policy against discrimination. Therefore, the rights enunciated in the *CHRA* are to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

[51] The *EWG* were promulgated by the CHRC in accordance with subsection 27(2) of the *CHRA*. The *EWG* are a form of law, akin to regulations that must be interpreted in the manner that best furthers the aims of the *CHRA* as a whole. Thus, the *EWG* complement the provisions of the *CHRA* and provide guidance on how section 11 of the *CHRA* should be interpreted.

[52] Section 12 of the *EWG* permits a comparison between occupational groups on the condition that those groupings represent work being done predominantly by males and predominantly by females, respectively. Section 12 refers to an "identifiable occupational group"; however, such a group is not defined. To determine if a group is occupational in nature, one must refer to the four criteria (see paragraph 35 of this decision) that the CHRC has set out for doing so and as outlined in its 1992 CHRC booklet.

[53] The complainants submitted that pursuant to Mr. Durber's written and *viva voce* evidence, the complainant group is an "identifiable occupational group" within the meaning of the *EWG*. With respect to similarity of work, Mr. Durber reviewed nearly 100 jobs, sampled from within the ranks of the compensation consultant group of jobs. His review revealed a great deal of homogeneity of work. At some levels, the work descriptions for those jobs were nearly identical, and the work required in all the jobs is very similar. Mr. Durber further notes that this group is viewed in the private sector labour market as a distinct occupation. It is clear that compensation consultants all perform very similar work, have a sense of community and have come together to remedy an injustice. The formation of the Association is evidence of that fact. Moreover, the respondent has recognized the homogeneity of the work they perform and their distinctiveness from the larger AS classification group.

[54] The evidence also shows that the compensation consultants have common qualifications and training in relation to the work that is performed and that generally they receive the same salary ranges, therefore experiencing wage commonality. Moreover, the job sampling revealed a progression of careers within the ranks of compensation consultants representing progressively more demanding work. Thus,

they also experience the same career patterns. Finally, they are represented by the same bargaining agent.

[55] In addition to listing the aforementioned criteria, the 1992 CHRC booklet states that creating a subset of jobs within a large grouping may be needed to make the work done by women visible. When doubt exists with respect to the delineation of occupational groups, the booklet says that it is generally preferable to opt for smaller units. While the AS group as a whole is vastly heterogeneous, the subset of compensation consultants forms an easily identifiable, distinctive, homogeneous group. Moreover, the distinctiveness of this group has been recognized on multiple occasions.

[56] Accordingly, the complainants submit that as a group they possess all of the requisite qualities, and as per the view of the CHRC, should be recognized as an occupational group despite being situated among a larger heterogeneous group so as to make the work of these women visible and to avoid creating a bar to equality.

[57] On the question at issue here, the complainants referred me to the following decisions: *Walden; Bell Canada; Public Service Alliance of Canada v. Canada (Treasury Board)* [2000], 1 F.C. 146 (TD); *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36; *Public Service Alliance of Canada v. Canada Post Corporation,* 2005 CHRT 39; *Canada Post Corporation v. Public Service Alliance of Canada,* 2010 FCA 56; *Public Service Alliance of Canada v. Treasury Board* [1998], C.H.R.D. No. 6.

C. <u>The respondents arguments</u>

[58] The complainants have not met their burden of establishing on a *prima facie* basis that the respondent has established or maintained differences in wages between male and female employees performing of equal value. As such, the complaints must be dismissed.

[59] Although the principle of "equal pay for work of equal value" is straightforward, the method for determining whether pay equity exists gives rise to considerable flexibility. In considering an allegation of pay inequity, one should keep in mind the

purpose of section 11 of the *CHRA*, that is, to identify and ameliorate wage discrimination based on gender.

[60] The *EWG* provide further guidance on the comparative nature of a pay equity inquiry. Section 12 of the *EWG* provides that in considering group complaints, when a complaint alleging different wages is filed by or on behalf of an identifiable occupational group, the group must be predominantly of one sex, and the group to which the comparison is made must be predominantly of the other sex. Therefore, the question of what constitutes the appropriate occupational groups in this complaint is important.

[61] The experts of both the complainants and the respondent generally agreed that, for the purposes of considering alleged wage differences, one cannot simply adopt the federal government's definition of occupational group, as these occupational groups encompass a wide variety of work with different salaries and values. The experts also agreed that what constitutes an occupational group for pay equity purposes may vary from case to case.

[62] In this case, Dr. Weiner suggested that the most appropriate unit was the AS classification, as there is a discrete value, or range of values, for each AS level and a corresponding salary range.

[63] In 2000, the PSAC filed a pay equity complaint on behalf of members in the predominantly female PA occupational group. The complaint alleged that the jobs occupied by members of the PA group were undervalued because they were measured using discriminatory classification standards, including that used for the AS classification, which did not measure all the factors required by the *EWG.*

[64] In 2008, the PSAC withdrew that pay equity complaint as a part of an agreement with the employer, which included a lump-sum payment of $4000 to each employee who was a member of the PA group on December 15, 2008. All employees occupying compensation consultant positions or other positions within the compensation work stream on December 15, 2008 were entitled to receive the lump-sum payment.

[65] Finally, the facts and human rights provisions at issue in this case are not the same as in *Walden. Walden* was not a pay equity complaint but rather a complaint of

employment discrimination on the basis of sex under sections 7 and 10 of the *CHRA.* In *Walden,* the CHRT found that the federal government had discriminated against 413 medical adjudicators, who were mostly women, by classifying their jobs as "program administrators" in the PA occupational group while the jobs of doctors performing similar work, mostly men, were classified as health professionals within the Health Services occupational group. To remedy the employment discrimination, the CHRT ordered that the medical adjudicators' positions be reclassified to nurses within the same Health Services occupational group as the doctors.

[66] It should be noted that neither section 7 nor section 10 of the *CHRA* uses the concept of "occupational group." Thus, the question of whether the medical adjudicators were part of a larger female-dominated group (the PA group) was not relevant to the adjudication of the complaint in *Walden.*

[67] The respondent referred me to decisions already cited by the complainants.

V. Reasons

[68] As stated earlier, the first step in this decision must be to determine whether the compensation consultants are an identifiable occupational group as per section 12 of the *EWG*. The question of whether the complainant group is predominantly female is not at issue since both parties have admitted that this is the case. Neither the *CHRA* nor the *EWG* define or specify what is an identifiable occupational group. To make that determination, I will analyze the jurisprudence, the documents and the oral evidence submitted by the parties.

[69] In common language, an occupation is a job or a profession, and a group is a number of people or things located or classed together. By inference, an occupational group would be a type of job occupied by a number of people or a group of jobs classed together.

[70] In the federal public service, however, the term "occupational group" has a very specific meaning. Occupational groups are first defined by the Treasury Board and published in the *Canada Gazette*, Part I. Since 1999, the compensation consultants have been part of the PA occupational group, which is defined as follows at page 802 of *Canada Gazette*, Part I, Volume 133, No. 13:

. . .

> *The Program and Administrative Services Group comprises positions that are primarily involved in the planning, development, delivery or management of administrative and federal government policies, programs, services or other activities directed to the public or to the Public Service.*
>
> *Inclusions*
>
> *Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:*
>
> . . .
>
> *8. the research, analysis and provision of advice on employee compensation issues to managers, employees and their families or representatives;*
>
> . . .

[71] A table of concordance at pages 831 to 834 identifies the new occupational group to which a position within a former occupational group belongs. That table shows that the former AS occupational group is now part of the PA occupational group.

[72] The compensation consultants' positions are all classified in the AS group. That means that, for labour relations and human resources purposes, the complainants are all part of the PA occupational group, which since 1999 has included the former AS occupational group. The evidence also shows that the former AS group is still in use for classification and pay purposes but that the collective agreement applies to the entire PA group.

[73] All the cases cited by the parties involving the PSAC relate to the entire bargaining unit. In those complaints, the PSAC alleged pay discrimination for entire bargaining units. Examples of those complaints were the one involving the predominantly female former CR occupational group (now part of the PA group) and the Treasury Board and the one involving the same occupational group and the Canada Post Corporation.

[74] In *PSAC* (1998), the issue of what constitutes an "occupational group" was addressed despite the fact that the complaint was initially filed on behalf of the entire Clerical and Regulatory (CR) bargaining unit. The complaint was amended after filing,

and the PSAC asked the CHRT to treat as distinct and separate two sub-groups of the DA (DA-PRO and DA-CON) occupational group. One of those subgroups was predominantly male and the other one female. It also asked the CHRT to treat the work of court reporters (ST-COR) as distinct from their ST classification since it felt that that work was clearly distinct from the work of other STs.

[75] In *PSAC* (1998), the CHRT also referred to complaints filed by the PSAC in 1979 on behalf of three female-dominated sub-groups of the General Services (GS) group claiming discrimination when compared with the four male dominated sub-groups in the same occupational group. The-then GS group had seven sub-groups, each paid at different rates. The three lowest paid sub-groups, food, laundry and miscellaneous personal services, were female-dominated and the remaining four, messenger, custodial, building and stores services were male-dominated.

[76] In *Canada Post* (2005), the CHRT rejected the employer's position that the complainants, who were CRs, should be compared to the fourth level of the Postal Operations (PO) bargaining unit. Coincidently, the fourth level of the PO group was gender neutral. The CHRT rejected that argument. At paragraphs 270 and 271 of the decision, it wrote as follows:

> *[270] Canada Post's argument is that to take the Postal Operations group as a whole is to ignore the historical trend by which the number of PO-4 level employees is becoming increasingly the most critical and representative category of Postal Operations workers. In fact, employees classified at the PO-4 level within the Internal Mail Processing and Complementary Postal Service Subgroup represented just over 83% of its Subgroup total in 1983, and 88% in 1992. On the other hand, as a percentage of the entire Postal Operations group, PO-4 level employees represented 41% in 1983 and almost 42% in 1992.*
>
> *[271] The Tribunal does not accept this argument. The federal government job classification scheme is predicated upon the concept of groups of employees, bound together by occupational categories. Within these groupings, the concept of levels is connected to wage differentials. Historically, these levels, with their wage differentials, were based on factors such as seniority, management's view of the importance of the work performed at each level, and the requisite training and skills necessary. That a union at Canada Post, representing many or all of the Postal Operations group may have decided to attempt to create a situation where the classification levels are essentially unrelated to wage*

> *differentials cannot change the historical concept that is the basis for the groups and levels themselves. It is this concept that is important to the designation of "occupational group" in sections 12 and 13 of the 1986 Guidelines, and to the issue of "pay equity" in section 11 of the Act.*

[77] In *Air Canada*, the occupational group comprised all flight attendants working for the employer, which was the entirety of the bargaining unit. For pay equity purposes, they were compared to the mechanics' and to the pilots' bargaining units, which were male dominated.

[78] In *Walden*, the concept of an occupational group was not at issue since that case was not a pay equity complaint but rather a complaint of employment discrimination under sections 7 and 10 of the *CHRA*. The CHRT found that the employer had discriminated against medical adjudicators (mostly women) by classifying their jobs as PA while the jobs of doctors (mostly men) performing similar work were classified as Health Professionals. The CHRT ordered that the medical adjudicators, who were part of the PA group, be reclassified to the Health Services Group.

[79] In *Wiseman*, the CHRT dismissed a complaint filed on behalf of assistant team leaders (ATL) working in the Correctional Service of Canada's women's prisons. The predominantly female ATL complainant group alleged that the ATLs were subject to discriminatory treatment resulting in unequal pay for work of equal value. The allegation was based on the fact that the ATL position was assessed with the Correctional Services (CX) classification standard, which does not value the work in accordance with the valuation factors outlined in the *CHRA*. The CHRT concluded that the ATLs' work was of equal value to their male CX-04 counterparts working in male correctional institutions and that both groups were paid the same. It should be noted that both positions were classified in the same predominantly male occupational group (CX) and that the CHRT did not comment as to why each of them was considered an occupational group within the meaning of section 12 of the *EWG*.

[80] Based on the case law, I do not find that the employer's classification system or the bargaining unit structure is determinative of the issue of occupational groups for pay equity purposes. However, those systems and structures are indicators that should be taken into consideration for that purpose since they are directly reflected in group's pay structure and the organization of work.

[81] In looking at the federal public service collective agreement, one notes that some bargaining groups or units, which are referred to by the employer as "occupational groups" since 1999, correspond to recognizable streams of occupations like Air Traffic Control, Law, Foreign Service, Correctional Services, Finance, or Computer Systems. However, the PA category regroups AS, CM, CR, DA, IS, OE, PM, ST and WP positions. Positions in the WP (Parole Officers) category, for example, mostly involve social work. They have very little in common with the clerical work performed in office settings by the CRs. It could be argued that the PA group is a catch-all or umbrella group that lumps together several "occupational groups" for the purposes of bargaining. It would be fair to say that the compensation community is viewed as a discrete activity by most people. If, in casual conversation, one asks a compensation consultant what he or she does, they would reply not that they are an AS or in the PA group, but that they work in compensation. Most people would see compensation as the occupation at issue, and would not refer to either the AS classification or the PA group.

[82] The case of compensation consultants as an occupational group was indirectly addressed in *PSAC* (1998) at paragraph 262 in an exchange between the CRHT and Mr. Durber who was then a director at the Canadian Human Rights Commission. That paragraph reads as follows:

> *262. The Commission's approach to defining a "group" was further clarified by Mr. Durber under cross-examination by the Respondent in Volume 162 at p. 20207, line 2 to p. 20209, line 23 as follows:*
>
> > *Q. Now, would it be the position of the Commission that an equal pay complaint can be made on behalf of any group of individuals but would constitute an occupational group the way you've just defined it?*
> >
> > *A. Well, I think we ought to be somewhat clear here. The Commission isn't in the business of inviting complaints. We try to play a neutral role. So when you say a group can make complaints, I want to be quite clear that the Commission isn't in the business of permitting complaints. What constitutes a reasonable group for a complaint I think would first of all be up to the individuals concerned. They might seek advice from the Commission.*
> >
> > *We had an inquiry recently, for example, from nurses who were within a broader bargaining unit in a Crown*

corporation, and they asked us whether they could -- whether they could lodge a complaint. Well, clearly, everyone has the right to lodge a complaint.

Now, whether they were a group or not would remain to be seen probably during investigation. But -- by the way, we've yet to see a complaint. Now, on the face of it, of course, it's quite clear that nursing is a profession, it's accepted as a profession, so that some of these answers as to whether a group is a group are somewhat self-evident. But people, for example, in a specific job such as, let us say, pay clerks, might consider themselves to be a group, even though they're part of a broader, let us say, clerical group as in the public service. And then one would have to look at the nature of issues they were bringing forward in order to understand how discrimination, if at all, worked in respect of the people in that specific job.

Q. That's a good example, Mr. Durber. And if you were satisfied after investigation that the pay clerks meet the definition of occupational group or meet your -- come within the meaning of that expression, I guess is a better way of saying it.

A. Yes.

Q. I guess that's what I'm trying to ascertain, is whether the Commission would then be prepared to treat them as an entity and deal with that complaint as a group complaint in looking for comparison with other groups?

A. Well, I think the Commission has an obligation to investigate, in any event, under the Statute, unless under section 41 there are some impediments. But, yes, we would examine whether the characteristics of the work made it sensible to treat all of these individuals together in an occupational sense. I think we would have to recognize that those pay clerks did not have their own salary structure, if we use the public service as an example, so we would then have to examine the nature of the difficulties, the discrimination that was alleged.

It might, for example, relate to how their work was valued. And indeed, we've seen instances of that. We had a complaint of registered nursing assistants, for example, compared with orderlies. Now, each of those groupings, if you like, was a job, and because it was a job with linkages in terms of the work, you could say it was occupational. So that complaint proceeded, and indeed, it reached a satisfactory conclusion of a settlement.

> *Q. And that's although the employer had established that as part of a larger group?*
>
> *A. Both of those jobs were part of a female predominant group, hospital services, but the Commission was satisfied that the registered nursing assistants were predominantly female and the orderlies were predominantly male. And the issue then was not the discrimination in the broader salary structure, which of course covered both, but in the value of the work, that is, should RNAs be the same as or greater than, whatever, in value than the orderlies.*
>
> *So again, that depended on the nature of the discrimination alleged, what one focused on. But clearly, that was an occupational group in the broad sense of the word. Both of them, I should say, were occupational.*

[83] In a nutshell, Mr. Durber thought at the time that the compensation consultants could be an occupational group for pay equity purposes because they appeared to constitute an identifiable occupation. However, he also pointed out that determining the issue could pose some difficulties because they did not have their own salary structure since they were part of the larger CR group. That still poses difficulties with the single difference now that they are part of the AS group.

[84] At this hearing, Mr. Durber referred to four criteria (see paragraph 35 of this decision) to assess whether compensation consultants are an identifiable occupational group. I find that the complainants meet some of those criteria but not all of them. They all work in the same field (compensation) even though they do not all perform the same type of work. The AS-02 compensation consultants certainly all perform the same type of work. However, that work differs from the work done by their managers or supervisors (AS-03 to AS-05) whose jobs are management related. In addition, the basic qualifications vary between a consultant and a manager, except that both need to know the compensation field. Finally, the employees occupying compensation consultant jobs and compensation manager jobs are not interchangeable because the skills and knowledge required for both jobs are different. When applied strictly, the four criteria cited earlier would instead produce a configuration comparable to the job classes suggested by Mr. Bass, who basically found one job class per classification level of the AS compensation field, except with level three, where he found two job classes. However, I do not believe that the test is that each criterion be met. They should rather be interpreted as concrete indicators of what could constitute an “occupational group.”

[85] It is clear from the jurisprudence and from the material adduced in evidence at the hearing that sometimes creating a subset of jobs within a large grouping might be required to make the work done by women more visible. However, in the cases when that was done, the subset of female-dominated jobs was taken from a male-dominated or a gender-neutral group.

[86] In the present case, the compensation consultants, taken as an entire group or taken separately at each level, are mostly female. They perform a subset of jobs from the AS group that is female dominated. The AS group is also a subset or a classification within the PA occupational group, which is also female-dominated. What the complainants suggest is that it would be appropriate to take a subset of female-dominated jobs from within a large grouping of female-dominated jobs to make the work done by women more visible. Based on the evidence adduced at the hearing, I am not convinced at all that, in this case, the existing occupational or classification grouping structure should be subdivided in order to, as stated by Mr. Durber, "make the work of women more visible." Compensation consultants are females who are part of the female AS group who in turn are part of the female PA group. I would need clear evidence as to why the compensation consultants should be isolated from the AS group for pay equity purposes to accept the proposal that they are a separate occupational group. Such clear evidence was not presented to me.

[87] The evidence shows that the AS group includes several work streams, like compensation, facilities management, finance, administration, internal audit, information management and security. Based on the complainants' logic, each of those subsets or any sub-subsets of those could be considered an occupational group, as per section 12 of the *EWG*. For example, it is common knowledge that most administrative assistants are part of the AS group. It is also common knowledge that those positions are mostly occupied by women. The Government Electronic Directory Services (GEDS) provides a directory of federal public servants. It lists more than 1000 entries under the title "administrative assistant" and more than 1000 other entries under the title "executive assistant". Those thousands of assistants would form an occupational group according to the complainant's logic. A closer look at the AS group would lead to the identification of many other of those alleged "occupational groups."

[88] Based on the fact that the AS group is female-dominated and on the evidence adduced at the hearing, I see no point in taking the compensation subset out of it for

pay equity purposes on the basis that it is female-dominated. Considering the jurisprudence and the history of occupational groups in the federal public service, I find, in this case, that the AS classification is the occupational group as per section 12 of the *EWG* and that the compensation consultants are a subset of that group or that they perform a stream of work within the AS group. If there are any pay equity issues, they should be viewed at that level, not at the level of each subset of jobs or stream of work forming the AS group.

[89] I am not saying here that groups should not be subdivided to examine pay equity claims from identifiable groups or trades or professions within the group. However, the case law shows that that was done when it helped to make women's work more visible. In most of these cases, the women's group was part of a larger group which was male-dominated. It is not the case here.

[90] The complainants did not prove on a balance of probabilities that it is appropriate to isolate them from the larger AS group and consider them as a distinct occupational group.

[91] Considering the above, I see no point to comment on the employer's evidence, reported at paragraph 63 and 64, regarding the pay equity complaint filed by the PSAC in 2000 on behalf of the PA group. I also see no reason to comment on it because despite having been part of the evidence, the respondent did not address any legal argument relating this point to the issue before me. Having said that, I recognize that there might be serious internal pay relativity problems within the AS classification standard, which was published in 1965, a long time before the massive introduction of technology in federal government workplaces. Furthermore, that standard does not comply with the assessment criteria in subsection 11(2) of the *CHRA*. However, the problem is with the entire AS group or between subgroups within that group.

VI. <u>Conclusion</u>

[92] Based on all of the above, I conclude that the first element necessary to the establishment of a *prima facie* case under section 11 of the *CHRA* has not been met. The complainants are not an identifiable occupational group as per section 12 of the *EWG*.

[93] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[94] The complaints are dismissed.

January 22, 2014.

Renaud Paquet,
a panel of the Public Service Labour Relations Board