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Public Service Labour Relations and Employment Board Act and *Budget Implementation Act, 2009*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

NICOLE BISHOP-TEMPKE AND THE ASSOCIATION OF CANADIAN FINANCIAL OFFICERS

Complainants

and

TREASURY BOARD

Respondent

Indexed as
Bishop-Tempke v. Treasury Board

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

INTERIM DECISION ON A PRELIMINARY MOTION

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Complainants: James G. Cameron, counsel

For the Respondent: Marie-Josée Montreuil, counsel

Heard at Ottawa, Ontario,
December 9, 2016.

I. Complaint before the Public Service Labour Relations and Employment Board

[1] On April 18, 2016, the Canadian Human Rights Commission ("CHRC") referred this complaint to the Public Service Labour Relations and Employment Board pursuant to s. 396(1) of the *Budget Implementation Act, 2009* (S.C. 2009, c. 2; "the *BIA*"), which came into force on March 12, 2009. Section 396 provides 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*.*
>
> *(2) The complaints referred to in subsection (1) shall be dealt with by the Board as required by this section.*
>
> *(3) The Board has, in relation to a complaint referred to it, in addition to the powers conferred on it under the* Public Service Labour Relations Act*, the power to interpret and apply sections 7, 10 and 11 of the* Canadian Human Rights Act*, and the* Equal Wages Guidelines, 1986*, in respect of employees, even after the coming into force of section 399.*
>
> *(4) The Board shall review the complaint in a summary way and shall refer it to the employer that is the subject of the complaint, or to the employer that is the subject of the complaint and the bargaining agent of the employees who filed the complaint, as the Board considers appropriate, unless it appears to the Board that the complaint is trivial, frivolous or vexatious or was made in bad faith.*
>
> *(5) If the Board refers a complaint under subsection (4) to an employer, or to an employer and a bargaining agent, it may assist them in resolving any matters relating to the complaint by any means that it considers appropriate.*
>
> *(6) If the employer, or the employer and the bargaining agent, as the case may be, do not resolve the matters relating to the complaint within 180 days after the complaint is referred to them, or any longer period or periods that may*

> *be authorized by the Board, the Board shall schedule a hearing.*
>
> *(7) The Board shall determine its own procedure but shall give full opportunity to the employer, or the employer and the bargaining agent, as the case may be, to present evidence and make submissions to it.*
>
> *(8) The Board shall make a decision in writing in respect of the complaint and send a copy of its decision with the reasons for it to the employer, or the employer and the bargaining agent, as the case may be.*
>
> *(9) The Board has, in relation to complaints referred to in this section, the power to make any order that a member or panel may make under section 53 of the* Canadian Human Rights Act*, except that no monetary remedy may be granted by the Board in respect of the complaint other than a lump sum payment, and the payment may be only in respect of a period that ends on or before the day on which section 394 comes into force.*

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Pubic Service Labour Relations and Employment Board ("the Board") to replace the Public Service Labour Relations Board ("the former Board"). Pursuant to s. 441 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40), the Board replaced the former Board for the purpose of s. 396 of the *BIA*.

[3] On February 25, 2016, Nicole Bishop-Tempke and the Association of Canadian Financial Officers ("ACFO"; together, "the complainants") filed a complaint with the CHRC based on ss. 7, 10, and 11 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*"). The complainants allege that the Treasury Board (the "respondent") has discriminated against financial officers, who are members of a female-predominant occupational group, on account of their sex, contrary to ss. 7, 10, and 11 of the *CHRA*.

[4] According to the complainants, the discrimination flows from the fact that the respondent, through its discriminatory practices, has been paying financial officers at classification levels FI-1, FI-2, FI-3, and FI-4 less than male-dominated occupational comparator groups that perform work of equal value within the same establishment. This discrimination results in unequal pay for work of equal value performed by the financial officers.

[5] On April 28, 2016, the Board reviewed the complaint pursuant to s. 396(4) of the

BIA and referred it to the respondent. According to the legislation, the parties then had up to 180 days to settle the matter raised in the complaint, after which the Board could schedule a hearing if the matter remained unresolved.

II. Motion by the respondent

[6] By letter dated July 12, 2016, the respondent indicated that it would raise a preliminary objection by way of a motion. In a letter dated August 12, 2016, counsel for the complainants indicated that the parties had been unsuccessful in their attempts to resolve the complaint and requested that the preliminary objection be submitted to the Board for consideration.

[7] The motion for consideration is to have the Board strike the part of the complaint that it already decided in *Hall and Association of Canadian Financial Officers v. Treasury Board*, 2015 PSLREB 56 ("*Hall*").

[8] The parties provided written submissions on the motion in advance of the hearing. This decision concerns only the respondent's motion to strike part of the complaint.

A. *Hall* decision

[9] For the purposes of this motion, I will summarize the *Hall* decision.

[10] Karen Hall and the ACFO filed a complaint with the CHRC in March 2009 alleging discrimination under ss. 7, 10, and 11 of the *CHRA*. According to the complaint, financial officers classified at the FI-1 and FI-2 levels, which were both female-predominant groups, were being paid less than certain male-predominant comparator groups within the same establishment, that is, with the same employer.

[11] The parties agreed that the appropriate test to determine whether there is a gender-based wage gap unfavourable to the female-dominated group was established in *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56. According to that test, to establish a *prima facie* case of discrimination under s. 11 of the *CHRA*, the complainant must establish the following:

> *1. The complainant occupational group is predominantly of one sex, and the comparator occupational group is predominantly of the other sex….*

> *2. The female-dominated occupational group and the male-dominated occupational group being compared are composed of employees employed in the same establishment.*
>
> *3. The value of the work being compared between the two occupational groups has been assessed reliably on the basis of the composite of the skill, effort and responsibility required in the performance of the work, and the conditions under which the work is performed. The resulting assessment establishes that the work being compared is of equal value.*
>
> 4. *A comparison made of the wages being paid to the employees of the two occupational groups for work of equal value demonstrates that there is a difference in wages between the two, the predominantly female occupational group being paid a lesser wage that the predominantly male occupational group. This difference is commonly called a "wage gap."*

[12] The complainants failed on the third part of the test, that is, the reliable assessment of the value of the work being compared between the predominantly female occupational group and the predominantly male occupational group. The Board found too many deficiencies in the expert report on the assessment and thus found it unreliable. On that basis, it dismissed the complaint, as the conditions to find a case of *prima facie* discrimination were not met.

[13] The Board's decision was final; it was not judicially reviewed.

III. Summary of the arguments

A. For the respondent

[14] The respondent moves to have part of the present complaint declared *res judicata* or, if the strict conditions of *res judicata* are not met, to have a declaration that it would be an abuse of process to include the FI-1 and FI-2 groups in the wage discrimination analysis for the period covered by the *Hall* decision.

[15] According to the respondent, part of the complaint is *res judicata*, as it has already been decided, and it is an abuse of process, insofar as the FI-1 and FI-2 groups are concerned, for the period that was at issue in the *Hall* decision. The proper remedy would be for the Board to strike the FI-1 and FI-2 groups from the complaint for the period covered in the *Hall* decision.

[16] The employer's main argument is that the complaint for the FI-1 and FI-2 groups, for the period from 2004 to 2015, was conclusively dealt with by the *Hall* decision. According to the employer, the Board decided in *Hall* that there was no *prima facie* discrimination based on ss. 7, 10, and 11 of the *CHRA*.

[17] The complaint is barred as *res judicata* since it has the same parties, the same cause of action, and the same object. In addition, it constitutes an abuse of process. The complainants had the opportunity to fully present their case before the Board in *Hall*. They cannot restate it to obtain a more favourable determination.

[18] *Res judicata* is a doctrine that developed in common law and is applicable to both court and administrative tribunal decisions. Its premise is that there must be some finality to litigation, as relitigating the same issues is a wasteful exercise. *Res judicata* can be based on either of two types of estoppel, issue estoppel or cause of action estoppel. In this case, both tests are met: the cause of action is the same with respect to the FI-1 and FI-2 groups, and both the pay equity and discrimination issues were decided in the *Hall* decision, again with respect to the FI-1 and FI-2 groups.

[19] The two further conditions to finding *res judicata* are that the decision was final and that the parties involved are the same. Both are present in this case.

[20] Adding the FI-3 and FI-4 groups to the complaint and adding new comparator groups cannot justify including the FI-1 and FI-2 groups in the complaint. The analysis for the FI-3 and the FI-4 groups will be done separately, as each group must be evaluated to determine if there is a pay inequity. The new comparator groups that are being added in this complaint existed at the time of the *Hall* complaint. Again, the complainants cannot be allowed to simply better a case that has already been decided.

[21] The complainants had to put their best foot forward at the first attempt. It is unfair, and a waste of legal resources, to allow them to redo the exercise that could and should have been led properly in the first instance.

[22] The employer does acknowledge that even if the conditions of *res judicata* are met, a court or tribunal must consider whether it should exercise its discretion to proceed, in the interest of justice.

[23] Should the Board find that the matter is not *res judicata*, it should nevertheless find that including the FI-1 and FI-2 groups for the period covered by the *Hall* decision

is an abuse of process, as it forces the employer to respond twice to the same allegations, with the expense and work this entails.

B. <u>For the complainants</u>

[24] The complainants submit that the preconditions of *res judicata* are not met.

[25] The complainants agree with the respondent's description of the test: a matter will be considered *res judicata* if the same parties are involved, the same issues are at play or it is the same cause of action, and the decision of the court or tribunal was final.

[26] In this case, the same parties are not involved. It is the same bargaining agent, the ACFO, but the individual complainant in *Hall* was Ms. Hall, whereas it is Ms. Bishop-Tempke in this case.

[27] The issues are not the same. Although both cases are based on ss. 7, 10, and 11 of the *CHRA*, both the female-dominated group that claims discrimination and the male-dominated groups that serve as comparators are not the same. Moreover, the analysis will not be the same. In this case, it will be based on the wage-line approach, which is a regression analysis of wages in the female-dominated group and in the male-dominated groups. The approach is not only different in methodology; it also uses a different basis of comparison, the whole of the FI classification group, for the statistical analysis, as opposed to separate groups, such as FI-1 and FI-2. This change considerably alters the case and the issues to be decided by the Board.

[28] It is not an abuse of process. Since the issues to be decided are different, it cannot be considered an abuse of process. Moreover, there is no danger of obtaining contradictory results. In the *Hall* decision, the complainants failed to establish *prima facie* discrimination because the Board considered the analysis of the value of the work of the FI-1 and FI-2 groups unreliable. In this case, the Board will be considering the whole of the FI category. This includes the FI-1 and FI-2 groups but in a very different analysis that does not differentiate between the various levels of the FI category. It cannot be said then that the same issue is being relitigated.

IV. <u>Reasons</u>

[29] The respondent asked me to declare part of the complaint either *res judicata* or

an abuse of process. I shall consider each of these doctrines in turn as to their respective conditions. I will then address the issue of discretion, in the particular context of human rights law.

A. Res judicata

[30] The parties agreed on the test for *res judicata* (whether a matter has already been decided). The principle of *res judicata* is essentially that losing parties should not be allowed to relitigate matters that have been settled by a final decision. This is based on two rationales. One is that judicial resources should not be misspent in repeat litigation. The other is that the coherence of the system needs to be preserved, and this would be threatened by potentially contrary decisions. The proper avenue to challenge a decision is appeal or judicial review, not a review by the same level of tribunal or court. The test to be applied to determine *res judicata* is enunciated in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

[31] The test is three-fold: 1) the same issue has been decided, or the cause of action is the same; 2) the decision was final; and 3) the parties or their privies are the same in both proceedings. Even if these conditions are met, the decision maker must still decide whether *res judicata* should operate.

[32] In this case, the parties disagree as to whether the same issue has been decided or if the cases are based on the same cause of action. At issue are discrimination and pay equity. The cause of action is the breach of the *CHRA* provisions.

[33] The respondent argues that the issues of discrimination and pay equity have been decided for the FI-1 and FI-2 groups since the Board in *Hall* ruled that the evidence was insufficient to establish a case of *prima facie* discrimination. The complainants argue that since the group is now the entire FI category, no decision has been made as to discrimination. The same respective reasoning applies for the cause of action. Since the group is different, the cause of action is necessarily different, according to the complainants. The complainants will also use different male comparator groups, which further alters the issues.

[34] I find that I cannot determine at this point, without any evidence, whether the cause of action or the issues are the same. Given the difference in the characterization of the group that is allegedly being discriminated against, there is an arguable case to

be made that the issue is not the same. The issue is now whether the whole of the FI category has suffered wage discrimination. The analysis is necessarily different. Moreover, the decision in *Hall* dealt with the issue of the reliability of the assessment. It did not pronounce on the discrimination as such. I understand the employer's point that a party cannot be allowed to recast its case in a better light in the hope of winning the second time. But it seems to me this argument is related more to abuse of process than *res judicata*.

[35] The parties also differ on whether these are the same parties. I accept the respondent's argument that the privies are the same (the respondent and the ACFO), even if the individual complainant is now Ms. Bishop-Tempke.

[36] I also accept that the decision in *Hall* was final and that there was no application filed for judicial review. I also agree that *Hall* was decided after a fair and procedurally sound hearing, so that one of the grounds invoked in *Danyluk* as part of the residual discretion does not apply here.

[37] However, I cannot conclude that the issues in *Hall* and in this complaint are the same, for lack of evidence and because the issue of wage discrimination for the entire FI group was not raised in *Hall*. For this reason, I cannot conclude that *res judicata* does apply.

B. <u>Abuse of process</u>

[38] The respondent argues that even if I find that this is not a case of *res judicata*, I must consider whether proceeding with the complaint as stated would be an abuse of process. According to the respondent, it cannot be that the complainants can simply redefine classes for the purpose of finding discrimination. Since the *Hall* decision did not find discrimination in the case of the FI-1 and FI-2 groups, they should not be considered in the analysis for the years 2006 to 2015.

[39] In *Canadian Union of Public Employees, Local 79 v. City of Toronto*, 2003 SCC 63 ("*CUPE*"), the leading case on abuse of process, the union was barred from relitigating before a labour adjudicator a matter for which the grievor had been convicted in a criminal trial, with the subsequent appeal dismissed. The Supreme Court of Canada in that case emphasized that abuse of process, as a doctrine invoked by courts to put an end to useless relitigation, was aimed less at preventing a party from having to present

and argue the same case twice and more at preserving the integrity of adjudication itself. Allowing relitigation can lead to unfortunate results for the adjudicative system, as stated by the Supreme Court at paragraph 51:

> ***51.*** *Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.*

[40] Abuse of process is therefore a mechanism to protect the integrity of the adjudicative system, not the interests of one or the other party. Deciding whether there is an abuse of process is a matter of discretion, which is discussed under the following heading.

C. <u>Discretion</u>

[41] The notion of residual discretion arises in the context of *res judicata*, as stated in *Danyluk*. It may be that despite finding that the conditions of *res judicata* are met, there are policy reasons that will impel a court or tribunal to still hold that the second proceeding should go ahead. In this case, I have not found that the conditions of *res judicata* have been met. In any event, even if I had found that the conditions of *res judicata* had been met, this would be the appropriate case to apply residual discretion to dismiss the motion. Whether seen in light of *res judicata* or abuse of process, it would not be proper to prevent the case from going forward as formulated by the complainants.

[42] Finding that a matter constitutes an abuse of process is a discretionary decision, meant to defend the integrity of the adjudicative system. The reason a tribunal or court would find a reason not to exercise its discretion to apply the doctrine of abuse of process is found as follows at paragraph 52 of *CUPE*:

> ***52.*** *… It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system ….*
>
> [Emphasis added]

[43] The Supreme Court then lists three instances. The first two do not apply, but the third is on point: "… when fairness dictates that the original result should not be binding in the new context."

[44] Since the Board in *Hall* did not pronounce on the wage discrimination applicable to the FI category as a whole, I have not been convinced that this is a proper case to invoke abuse of process to exclude part of the category, namely, the FI-1 and FI-2 groups. There was no conclusion on wage discrimination, and therefore, there is no risk of a contradictory decision. Moreover, I think it is necessary to exercise caution when determining the scope of a case based on human rights.

[45] Both parties submitted case law in which *res judicata* and abuse of process have been raised in the context of human rights litigation. In the cases submitted by the respondent (*Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81, affirmed in 2004 FCA 363; *Dick v. The Pepsi Bottling Group (Canada) Co.*, 2014 CanLII 16055 (MB HRC); *O'Connor v. Canadian National Railway*, 2006 CHRT 5; and *Raba v. Vaccarelli*, 2014 HRTO 97), a single individual brought the same case to a different forum; in those cases, the tribunal decided that the issue raised before the new forum had already been decided.

[46] In the cases submitted by the complainants (*Culic v. Canada Post Corporation*, 2006 CHRT 6; and *Mills v. Via Rail Canada Inc.*, 1998 CanLII 3157 (CHRT)), the finding was that the human rights dimension had not been fully explored in the first proceeding, and so the case should proceed to decide the human rights issue. The conclusion was that one had to be careful when considering human rights complaints. It would be wrong to deprive someone of the right to have their human rights case heard if the first tribunal had not fully addressed the human rights concerns.

[47] The cases submitted by both parties address mainly the issue of relitigation before different forums by the same person. In the present case, the complaint is

before the same forum as was the *Hall* complaint. The parties to the complaints are essentially the same, though not identical. The novel aspect of this motion is the idea that there can be severance for part of the larger group, for part of the relevant period. The only submitted decision illustrating the severance of an issue following a motion invoking abuse of process was *Lavigne v. Deputy Minister of Justice*, 2010 PSST 7, a staffing complaint in which the issue that was severed had already been clearly decided. My main concern in this case is that the issue raised in this complaint, the alleged wage discrimination claimed by the FI group, has not yet been decided.

[48] The complainants argue that the assessment of the work value will be conducted differently for the FI category as a whole. Counsel for the employer stated that this was impossible and that the analysis would have to proceed level by level, and thus, I could order that the FI-1 and FI-2 groups be excluded from the analysis for the years before 2015.

[49] I am extremely reluctant to order a measure without knowing its impact on how the complainants intend to present their evidence. I have stated earlier that I cannot be certain that this situation does meet the conditions of *res judicata*, as it is unclear whether the issues are the same. I cannot see that there is an abuse of process if I allow the complainants to fully present their case. I cannot see how the principle of abuse of process would operate to sever part of a complaint without knowing exactly how this severance would be carried out or what its impact would be. Removing the FI-1 and FI-2 groups from the global analysis for the period from 2006 to 2015 has an impact on the gender composition of the whole category. The employer has not satisfied me that a greater wrong might not occur by prematurely removing parts of the category that are to be used in the analysis that will be presented by the complainants.

[50] This complaint is based on a fundamental human right, the right of women to be paid the same as men for work of equal value. In my view, it would not be appropriate at this stage to make an order that could wrongly deprive the complainants of the opportunity to fully defend their rights.

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

(The Order appears on the next page)

V. Order

[52] The motion is dismissed.

January 11, 2017.

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board