Date: 20170426

File: 666-02-15

Citation: 2017 PSLREB 44

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

KEVIN KELLY AND DAVID CARTER

Complainants

and

TREASURY BOARD AND DEPARTMENT OF VETERANS AFFAIRS

Respondents

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

Indexed as
Kelly 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*

Decision: Complaint dismissed

Before: John G. Jaworski, a panel of the Public Service Labour Relations and Employment Board

For the Complainants: Themselves

For the Respondents: Kathleen McManus and Shawna Noseworthy, counsel

For the Professional Institute of the Public Service of Canada: Isabelle Roy, counsel

Heard at Charlottetown, Prince Edward Island,
April 24, 2015.

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

[1] On August 22, 2012, Kevin Kelly and David Carter ("the complainants") made an inquiry to the Canadian Human Rights Commission (CHRC) concerning allegations of discrimination involving Veterans Affairs Canada (VAC).

[2] On September 20, 2012, the CHRC advised the complainants, pursuant to s. 41(1)(a) of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), to file a grievance under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), which they did on October 16, 2012. It was denied at the final level of the grievance process on June 14, 2013. On June 26, 2013, the complainants made a complaint with the CHRC.

[3] Mr. Kelly is employed by the Treasury Board ("the employer") and holds a disability adjudicator position at VAC. Mr. Carter has retired; however, he was employed by the employer in that same role from March of 2005 to May of 2006 and again from August of 2006 until January of 2014. That position was previously known as a pension adjudicator position and was created on September 15, 1995. At that time, the position was classified at the PM-04 group and level.

[4] For ease of reference throughout this decision, the complainants' position shall be referred to as "VAC Disability Adjudicator".

[5] In their complaint, the complainants allege as follows:

> *Our basis of claim is that we feel that we (VAC medical Adjudicators) have been discriminated against in two ways:*
>
> 1. ***Equal Pay for Equal Work*** *– We feel that the Walden settlement by its existence has created a wage /benefit discrepancy between to [sic] similar medical adjudicator positions within our same federal government.*
>
> 2. ***Gender Discrimination*** *– We feel that in the Walden gender discrimination case, the work wasn't totally the same – there were some differences, but the core function was the same; the work if not the same was substantially similar, and the minor differences didn't explain the wide disparity in treatment.*

[6] Section 7 of the *CHRA* provides as follows:

> ***7*** *It is a discriminatory practice, directly or indirectly,*

> ***(a)*** *to refuse to employ or continue to employ any individual, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

[7] Section 10 of the *CHRA* provides as follows:

> ***10*** *It is a discriminatory practice for an employer, employee organization or employer organization*
>
> ***(a)*** *to establish or pursue a policy or practice, or*
>
> ***(b)*** *to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*
>
> *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*

[8] On September 19, 2013, the CHRC referred this complaint to the former Public Service Labour Relations Board (PSLRB) pursuant to ss. 396(1) of the *Budget Implementation Act, 2009* (S.C. 2009, c. 2; *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.***
>
> [Emphasis in the original]

[9] The PSLRB reviewed the complaint pursuant to s. 396(4) of the *BIA* and on November 26, 2013, referred it to the employer, the Professional Institute of the Public

Service of Canada (PIPSC), and the Public Service Alliance of Canada (PSAC).

[10] The PIPSC is the bargaining agent for the Health Sciences (SH) occupational group, which includes the Nursing (NU) Medical Adjudicator (EMA) subgroup (NU-EMA), to which Mr. Kelly currently belongs. Mr. Carter belonged to it immediately before his retirement. The PSAC is the bargaining agent for the Program Administration (PM) occupational group, which the complainants belonged to before the NU-EMA subgroup was created.

[11] By its letter of November 26, 2013, the PSLRB provided the complainants, the employer, the PIPSC, and the PSAC with six months to attempt to resolve the complaint.

[12] In February of 2014, the parties contacted the PSLRB and asked if it would facilitate discussions and a possible mediation, so a case conference was arranged for April 29, 2014. It resulted in the PSLRB arranging for its Dispute Resolution Services (DRS) division to attempt to conduct and facilitate discussions between the complainants, the employer, the PIPSC, and the PSAC.

[13] On June 20, 2014, pursuant to s. 396(6) of the *BIA*, I granted an extension of time, to September 15, 2014, sufficient to allow exploring potential dispute resolution discussions.

[14] On July 16, 2014, DRS determined that discussions to resolve the complaint would not be fruitful, so it referred the matter back to me. By letter dated July 18, 2014, the PSLRB advised that a hearing would be scheduled in Charlottetown, Prince Edward Island.

[15] In response, the PSLRB received a request that a case conference be held to discuss process issues. I ordered that one be convened for September 8, 2014. At that point, the PSAC ceased to participate.

[16] The complainants and representatives of the employer and the PIPSC (who will be referred to as "the parties") attended the case conference, during which I issued the following direction:

1. Counsel for the respondents was to provide, by no later than September 26, 2014, to the complainants a written request detailing

the precise nature of the particulars it required (a "request for particulars" or "RFP").

2. The complainants were to provide, by no later than October 27, 2014, the respondents and the PIPSC with their written reply to the employer's RFP.

3. Counsel for the respondents and the PIPSC were to provide, by no later than December 1, 2014, their response to the complainants' reply.

[17] On September 26, 2014, the PSLRB received a copy of the respondent's RFP, and on October 24, 2014, it received a copy of the complainants' reply.

[18] The RFP set out a number of questions to which the complainants responded in sequence in their reply, in which they appear to have added to or amended their complaint to reference s. 11 of the *CHRA*, which provides 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.*

[19] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 441 of the *Economic Action Plan 2013 Act, No. 2*, the Board replaced the PSLRB for the purpose of s. 396 of the *BIA*.

[20] On December 5, 2014, the Board received a copy of the respondent's response to the complainants' reply, in which the respondent advised that it would bring a motion to dismiss the complaint.

[21] On February 20, 2015, at another case conference, I determined that I would hear the respondent's motion to strike or dismiss the complaint at a hearing on April 22, 2015, in Charlottetown. I further ordered that motion material be exchanged as follows:

1. Counsel for the respondent was to provide the complainants and the PIPSC with its motion materials by no later than Friday, March 20, 2015.

2. The complainants and the PIPSC were to provide to the respondent with their motion materials by no later than Friday, April 10, 2015.

3. Counsel for the respondent was to provide any reply material to the complainants and the PIPSC by no later than Friday, April 17, 2015.

[22] Due to scheduling conflicts that arose after the February 20, 2015, case conference, the hearing date for the motion was changed from April 22 to April 24, 2015.

[23] On March 20, 2015, the respondent submitted a "Motion Record" in support of its motion to dismiss the complaint. It attached the following:

1. a "Notice of Motion", dated March 20, 2015;

2. a copy of the complaint, dated June 26, 2013;

3. the respondent's RFP, dated September 25, 2014;

4. the complainants' reply to the RFP, dated October 24, 2014;

5. the respondent's response to the complainants' reply, dated December 1, 2014;

6. the consent order in the Canadian Human Rights Tribunal's (CHRT) File Nos. T1111/9205, T1112/9305, and T1113/9405, dated July 31, 2012, and the attached "Memorandum of Agreement" (MOA), dated July 3, 2012; and

7. the affidavit of Pam MacKenzie, a human resources ("HR") business analyst with VAC, sworn on March 18, 2015.

[24] The complainants and the PIPSC provided submissions in response to the respondent's motion material on April 9 and April 10, 2015, respectively.

[25] At the outset of the hearing, counsel for the respondents advised that Ms. MacKenzie was present at the hearing and available for cross-examination by the complainants if they wished to contest the evidence in her affidavit. I explained to the complainants the ramifications of choosing to not cross-examine her. After taking time

to discuss their options, they chose not to cross-examine her. She was excused from the hearing.

[26] In its notice of motion, the respondents requested the following:

1. that the complaint be dismissed in its entirety;

2. that in the alternative, an order be made striking those portions of the complaint that allege gender discrimination pursuant to ss. 7 and 10 of the *CHRA*;

3. that in the alternative, an order be made striking those portions of the complaint that allege gender-based wage discrimination between VAC Disability Adjudicators and medical advisors at VAC pursuant to s. 11 of the *CHRA*;

4. that in the alternative, an order be made striking the complaint insofar as it relates to allegations of discrimination that allegedly occurred more than one year before it was filed; and

5. that the Board order such further and other relief as it deems just.

II. Summary of the evidence

A. The *Walden* decisions and settlement and the creation of the NU-EMA subgroup

[27] The complainants alleged as a basis for the complaint the settlement reached in a separate series of CHRT proceedings, those being *Walden v. Social Development Canada*, 2007 CHRT 56 ("*Walden No. 1*"), affirmed in 2010 FC 490; and *Walden v. Social Development Canada*, 2009 CHRT 16 ("*Walden No. 2*"), judicial review allowed in 2010 FC 1135 and affirmed in 2011 FCA 202 (both CHRT decisions will be referred to collectively as "*Walden*" in this decision).

[28] The respondent in *Walden* was the minister responsible for the department named at the time as Social Development Canada (SDC), which was later renamed Human Resources and Skills Development Canada (HRSDC) and is now Employment and Social Development Canada (ESDC).

[29] *Walden* involved a complaint based on ss. 7 and 10 of the *CHRA* and brought by a predominately female group of mostly nurses who worked as medical adjudicators in SDC's Canada Pension Plan (CPP) Disability Benefits Program ("CPP Medical Adjudicators"). In their complaint, the CPP Medical Adjudicators alleged that they were doing the same or substantially the same work as and alongside medical advisors ("CPP Medical Advisors") and that they made similar determinations. The CPP Medical Adjudicators were classified at the PM-03 group and level. The CPP Medical Advisors, who were doctors and were predominately male, were classified in the HS group. The CPP Medical Advisors received better compensation, benefits, training, professional recognition, and opportunities than did the CPP Medical Adjudicators, who were not doctors, were predominately female, and were qualified predominantly as nurses.

[30] In *Walden No. 1*, the CHRT found that on the evidence, there had been considerable overlap in the functions of the CPP Medical Adjudicators and the CPP Medical Advisors over several periods since 1978. According to the CHRT, the failure to recognize the professional nature of the work performed by the CPP Medical Adjudicators in a manner proportionate to the professional recognition accorded to the work of the CPP Medical Advisors and the classification of their work in the PM group constituted discriminatory practices. The CHRT found that the core function of both the CPP Medical Advisors and the CPP Medical Adjudicators was the same.

[31] In *Walden No. 1*, the CHRT ordered that SDC cease the discriminatory practice and that it take measures, in consultation with the CHRC, to redress things and to prevent the same or a similar practice from occurring in the future. The CHRT felt that it was appropriate to give the parties an opportunity to negotiate the appropriate measures to take. However, it retained jurisdiction to deal with the issue if the parties could not reach an appropriate resolution.

[32] *Walden No. 1* was the subject of a judicial review application by the Attorney General for Canada, which was unsuccessful.

[33] When the parties to *Walden No. 1* could not agree on the appropriate resolution, the matter went back before the CHRT, which resulted in *Walden No. 2*. That decision dealt with the discriminatory practice identified in *Walden No. 1* by ordering a new nursing subgroup created for the CPP Medical Adjudicator position. With respect to the CPP Medical Adjudicators' claim for wage loss, the CHRT found that they had not

established that the assessment of the wage differential was reasonably accurate but instead that it was speculative. The CHRT did make one award for damages for pain and suffering to one CPP Medical Adjudicator, in the amount of $6000.

[34] *Walden No. 2* was subject to a judicial review application filed by the CPP Medical Adjudicators with respect to the monetary compensation issue. Neither party challenged the CHRT's finding that a new nursing subgroup was to be created. In its review, the Federal Court held that the CHRT had erred in its finding on the wage loss compensation claim and pain and suffering claims and sent the matter back to the CHRT to address these two issues. SDC appealed that decision. However, the Federal Court of Appeal dismissed the appeal.

[35] The Federal Court's decision resulted in the CHRT's consent order dated July 31, 2012, and found at Tab E of the respondents' Motion Record. The consent order incorporates the MOA that the complainants in *Walden* and SDC negotiated in that matter ("the *Walden* settlement").

[36] The *Walden* settlement provided monetary compensation to the complainants in the *Walden* proceeding, which included any individual identified as performing "Eligible Work" during the "Eligibility Period". "Eligible Work" was defined as follows:

. . .

> *"the individual was primarily employed in the CPP Disability Program in Human Resources and Skills Development Canada (HRSDC) either conducting adjudications (i.e. assessing medical information for the purposes of determining the eligibility for CPP disability benefits and, in doing so, was required to use knowledge associated with being a registered nurse) or providing expert advice to or directly supervising those who did conduct adjudications."*

. . .

[37] The *Walden* settlement defines "Eligibility Period" as "the period between December 1, 1999 to September 30, 2011 inclusive."

[38] In 2011, the employer, to comply with *Walden No. 2*, converted the CPP Medical Adjudicator position from PM to the new NU-EMA subgroup.

[39] As part of the conversion process, but not as part of *Walden No. 2*, the employer also converted the VAC Disability Adjudicator position from PM to NU-EMA.

[40] After the NU-EMA subgroup was created, those persons who applied for a position in it were required to have training as nurses. Employees occupying VAC Disability Adjudicator positions (such as each complainant) as of the date of the conversion but not trained as nurses were not required to obtain nursing qualifications and were grandfathered in those positions.

[41] Four hundred thirteen CPP Medical Adjudicators were complainants to the *Walden* proceedings. The complainants in this case were not. The VAC Disability Adjudicators were also not part of those proceedings or of the *Walden* settlement.

[42] The complainants are not trained as nurses.

[43] The complainants did not receive any compensation as part of the *Walden* settlement.

B. <u>The complaint</u>

[44] The complainants are, or were, employed as VAC Disability Adjudicators in the VAC Disability Benefits Program (DBP), which deals with benefits and allowances that may be available for VAC clients, including veterans, Canadian Forces and Royal Canadian Mounted Police members, civilians, and other eligible persons, due to death or disability related to war, peacekeeping, or peacetime service.

[45] The VAC DBP has a process under which a determination is made as to whether an applicant is entitled to a benefit, and if so, what the benefit shall entail. The first step in the process is determining if an applicant has a disability and if it is related to service. Once that is done, an assessment is made to establish the extent of the disability based on medical information provided by the applicant and the criteria established in the VAC "Table of Disabilities".

[46] Since 1995, VAC Disability Adjudicators have been making entitlement decisions, and in 1998, they began making assessment decisions on disabilities and on allowances for simple claims for eligible VAC clients. They determine if an applicant has a disability by reviewing the available medical evidence or by obtaining or reviewing an opinion from a medical advisor ("the VAC Medical Advisors"). VAC

employs medical doctors in those medical advisor positions. If a determination is made that there is an entitlement (that a disability exists), then the VAC Disability Adjudicator makes an assessment decision, based on the degree of medical impairment, by using an applicant's medical information and by assessing it against criteria assigned in each specific medical impairment chapter in the Table of Disabilities to determine the resultant loss of function.

[47] When the VAC Disability Adjudicator position was created, the incumbents were required to hold education in a health-related field but were not required to be qualified as registered nurses or other registered medical professionals. Over time, it changed, and that education was no longer required if an extensive in-house training program had been put into place.

[48] At no time before the position was converted from PM to NU-EMA (in 2011) were VAC Disability Adjudicators required to be qualified as registered nurses. Since the conversion, the education requirement for VAC Disability Adjudicators (as for all other individuals in the NU-EMA occupational subgroup) is registration or eligibility for registration as a registered nurse in a province or territory in Canada.

[49] As part of their responsibilities, from time to time, VAC Medical Advisors may be asked to do the following:

1. provide medical options to VAC Disability Adjudicators;

2. provide medical expertise to support entitlement decisions in complex cases;

3. provide interpretations of medical documents, if a diagnosis is unclear, to identify the most appropriate diagnosis for a claimed condition; and

4. provide training to VAC Disability Adjudicators.

[50] The VAC Medical Advisors do not make entitlement decisions and have never been responsible for doing so. VAC Disability Adjudicators make them.

[51] The complainants admit in the complaint that VAC Medical Advisors are tasked with different functions than are VAC Disability Adjudicators. The complainants state

on page 2 of the complaint as follows:

. . .

> *In our situation, the core function of our doctors is to review a client's available medical evidence and offer a medical opinion on either one or both 1, the existence/diagnosis of disability and 2, an assessment on the extent of disability.*
>
> *This function, however, is shared as doctors are only tasked to do so on the most complex of cases. For the most part it is VAC adjudicators are able to use their professional medical knowledge to determine if the available medical evidence is sufficient to both establish diagnoses of disabilities and provide an assessment on the extent of the disabilities in question. I realize that it may appear that I am saying that our work process is such that the doctors provide an expert function and then the adjudication decision is made by the adjudicator, Therefore, doctors not adjudicating directly.*
>
> [*Sic* throughout]

. . .

[52] The complainants allege the following:

- originally, in 1995, all VAC Disability Adjudicators were female nurses;
- as of the complaint's filing date, there were roughly 51 VAC Disability Adjudicators, 8 of whom were male, or roughly 15%;
- in 1995, all VAC doctors were male;
- as of the complaint's filing date, there were 4 male and 4 female doctors;
- doctors offer medical opinions in only the most complex cases;
- doctors and VAC Disability Adjudicators work independently of each other;
- doctors do not supervise VAC Disability Adjudicators; and
- levels of appeal and larger sums of money have no relevance.

[53] The complainants allege that the VAC Disability Adjudicators are a predominantly female group and that since 1995, they have worked alongside the doctors, who are a predominantly male group in a common enterprise, which is determining DBP eligibility.

[54] The relevant parts of the RFP and the complainants' reply to it state as follows:

> [Note: the questions posed in the RFP are in bold, while the complainants' answers are not.]
>
> . . .
>
> ***5. Describe all of the material facts that the Complainants rely on to support their Complaint, including but not limited to the particulars requested in the following paragraphs.***
>
> *Material Facts*
>
> *A. Complaint Overall*
>
> ***5.*** *We will prove that we are entitled to a settlement (similar to the Walden settlement) based on the administrative law principle of fairness.*
>
> *Based on the principles of fairness associated with administrative law, we will advance two main arguments:*
>
> *a. The walden settlement proved that the disability adjudicators at HRDC were discriminated against in relation to the doctors at HRDC. The adjudicators at HRDC and VAC (both departments within the same Canadian Federal Government) perform the same function of using professional medical knowledge to rule on applications for disability benefits for ordinary Canadians and Canadian Veterans respectively. Therefore, if adjudicators at HRDC were discriminated against, then adjudicators at VAC must also have been discriminated against (in this case both adjudicator positions vis-à-vis the doctors at HRDC).*
>
> *b. That the situation at VAC with predominately female adjudicators and historically male doctors at VAC is more similar than not to the situation which existed in the Walden case.*
>
> - *Material Facts:*

- *medical adjudicator positions at HRDC were established long before those at VAC*
- *medical adjudicator positions at VAC were established in 1995, based on the job description of those adjudicators working for HRDC.*
- *Both VAC and HRDC are departments within the same Canadian Federal Government.*
- *medical adjudicators at both VAC and HRDC adjudicate on disability medical pension claims*
- *Due to the undeniable similarities in the two positions, it has to be more than a coincidence that medical adjudicators at VAC were thus classified as pm-4's, the same as those at HRDC.*
- *medical adjudicators at HRDC (predominately female group), as a result of a Walden court case, were found to have been discriminated against vis-à-vis the doctors at HRDC (predominately male group).*
- *medical adjudicators at VAC are also a predominately female group. treasury board conceded this discriminate and ultimately a settlement was reached in 2011.*
- *For some unknown reason, treasury board decided that medical adjudicators at VAC did not deserve the same type of package which was offered to medical adjudicator at HRDC.*
- *However, as a result of this case, the medical adjudicator positions at both VAC and HRDC were reclassified in a job classification (nu-ema) which was newly created in response to the Walden court case.*
- *So in essence, treasury board treated medical adjudicators at both VAC and HRDC the same from 1995 up until a settlement was reached in the Walden court case.*
- *A settlement was issued to the HRDC adjudicators. Then and up until now, treasury board has once again decided to treat VAC and HRDC adjudicators the same in the nu-ema classification.*
- *We, therefore, believe that the Walden settlement by its existence has created a wage/benefit discrepancy between to similar medical adjudicator positions within our same federal government.*

6. Do the Complainants allege that the VAC Disability Adjudicators comprise a predominately female group?

In 1995, all VAC disability adjudicators were female. Today (to the best of our knowledge…VAC should be able to clarify this further), there are roughly 55 disability adjudicators, of which 5 are male. So, yes, we allege VAC disability adjudicators comprise a predominately female group.

. . .

8. Confirm that the term "our doctors" in the Complaint refers to doctors who work as "medical advisors" at Veteran Affairs Canada ("VAC Medical Advisors") and that this is the group to which the Complainants are comparing the VAC Disability Adjudicators for their gender discrimination claim.

Yes, the term "our doctors" was meant to refer to doctors at VAC. Doctors at HRDC are also referenced.

9. Do the Complainants allege that "VAC Medical Advisors" are a predominately male group?

VAC Medical Advisors were predominately male in 1995 (the inception of the disability adjudicator position at VAC). Over the years, however, the percentage of male/female doctors at VAC fluctuates around 50%. VAC should be able to verify these assertions with their own personnel records.

10. Do the Complainants allege that VAC Disability Adjudicators and VAC Medical Advisors perform the same or substantially similar work?

Yes, we continue to allege that VAC disability adjudicators and VAC medical advisors perform substantially similar work.

11. Do the Complainants have any further facts or particulars to add to the information provided at pages 3-5 of the Complaint to explain the ways in which they say the work of these groups is the same or substantially similar and the ways in which the work of these groups differs?

We stand by the points we made in the Complaint.

12. Do the Complainants alleged that the VAC Disability Adjudicators and Service Canada / CPP medical adjudicators, who are referred to at pages 2-3 of the Complaint, perform the same or substantially similar work?

Yes, we allege that the VAC disability adjudicators and Service Canada Medical Adjudicators perform the same or substantially similar work.

13. Do the Complainants have any further facts or particulars to add to the information provided at pages 2-3 of the Complaint to explain the ways in which they say the work of these groups is the same or substantially similar and the ways in which the work of these groups differs?

We stand by the points which were made in our Complaint and mentioned in this document.

. . .

B. ***The "Equal Pay for Equal Work" Claim***

17. Are the Complainants advancing this claim under section 11 of the CHRA?

Yes we are advancing this claim under section 11 of the CHRA.

18 . . .

a. In what ways do the Complainants allege that the Respondents have maintained differences in wages between male and female employees who are performing work of equal value?

The respondents have already conceded gender pay inequality vis-à-vis the female CPP adjudicators and the male CPP doctors by the walden settlement. Female VAC adjudicators (the same as female CPP adjudicators) were therefore also performing work of equal value to the CPP adjudicators.

b. Identify the predominately male group of employees and the predominately female group of employees who the Complainants say are performing work of equal value for the section 11 complaint.

Male group, CPP doctors. Female groups , VAC and CPP adjudicators.

c. During what time period do the Complainants say a difference in wages existed between the predominately male group and predominantly female group?

The inequality existed from the 1995 inception of the VAC adjudicators to the effective date of the Walden settlement.

> ***d. With regard to the Complainants' allegation on page 3 of the Complaint that "regardless of gender, this should simply be a case of pay equity between the cpp medical adjudicators and medical adjudicators here at VAC", explain how this complaint falls under section 11, which requires the existence of a gender-based wage difference between a predominantly male group of employees and a predominantly female group of employees.***
>
> *Our allegation needed to be expanded to read that if the female CPP adjudicators and the VAC adjudicators are essentially the same, then the VAC adjudicators must, therefore, have been discriminated by the treatment of the CPP doctors as well.*
>
> . . .
>
> [*Sic* throughout]

[55] The complainants provided no documentary evidence to support the statements in the complaint or in their reply to the RFP. In both documents, they make allegations as to the number of male versus female VAC Disability Adjudicators and VAC Medical Advisors (doctors).

[56] Ms. MacKenzie is with the HR Systems Team (PeopleSoft) within the Corporate Business Initiatives and Systems Directorate, Information Technology, Information Management and Administration Division of VAC's Human Resources and Corporate Services Branch. That team is responsible for providing functional support to VAC's HR professionals as well as all its employees and end users. The HR Systems Team is responsible for managing and maintaining the PeopleSoft system to ensure functionality and data integrity, and they help with accessing and using it, facilitate requests for specialized ad-hoc reports, and work with the responsible programmers.

[57] PeopleSoft is a web based HR Management System used by federal government departments, including VAC, to capture and maintain information related to human resource activity within a department. It includes employee personal information; leave information, learning and career development information; organizational design and classification information; compensation information; grievance information; employee security clearance information; and, staffing and recruitment information. It is all stored in VAC's secure technical environment as part of the federal public administration. Entries in and extractions from PeopleSoft are made in the ordinary

course of business in the federal public administration of VAC. HR professionals like Ms. MacKenzie are granted certain access rights to PeopleSoft, depending on their work position and their need to know. VAC's technical programmers can make PeopleSoft generate certain reports but only if a request is submitted to an HR business analyst like Ms. MacKenzie.

[58] Ms. MacKenzie submitted a PeopleSoft request to obtain a breakdown of the number of employees by gender for both the VAC Disability Adjudicator position (both pre- and post-NU-EMA conversion) and the VAC Medical Advisor position. The request included both substantive employees and those who were acting or on assignment. In her affidavit sworn on March 18, 2015, Ms. MacKenzie attached a copy of this request as Exhibit "A". The ad-hoc reports generated in response to her request were attached to her affidavit as Exhibits "B" and "C".

[59] The ad-hoc report marked as Exhibit "B" sets out the number of male and female VAC Disability Adjudicators for each month of each year starting in January of 1995 through March of 2014, and it states as follows:

1. from January 1995 through June 2001, all VAC Disability Adjudicators were female and numbered from as few as 32 to as many as 60;

2. from July 2001 until September 2002, there were 1 male and between 54 and 56 female VAC Disability Adjudicators;

3. from October 2002 until December 2004, there were 2 male and between 49 and 58 female VAC Disability Adjudicators;

4. from January 2005 until July 2008, there were between 4 and 6 male and between 37 and 55 female VAC Disability Adjudicators;

5. from August 2008 until September 2010, there were between 7 and 9 male and between 46 and 60 female VAC Disability Adjudicators;

6. from October 2010 until December 2010, there were 10 male and 59 or 60 female VAC Disability Adjudicators;

7. from January 2011 until January 2013, there were between 7 and 9 male and between 46 and 58 female VAC Disability Adjudicators; and

8. from February 2013 until March 2014, there were 5 or 6 male and between 45 and 53 female VAC Disability Adjudicators.

[60] According to Exhibit "B", at all times between January of 1995 and March of 2014, more than 80% of the VAC Disability Adjudicators were female.

[61] The ad-hoc report marked as Exhibit "C" sets out the number of male and female VAC Medical Advisors for each month of each year from January of 1995 through March of 2014, and it states as follows:

1. from January 1995 until August 1997, there were one female and one male VAC Medical Advisors;

2. from September 1997 until June 2000, there were two or three female and only one male VAC Medical Advisors;

3. from July 2000 until July 2002, there were two or three female and two or three male VAC Medical Advisors;

4. from August 2002 until March 2007, there were two female and one male VAC Medical Advisors;

5. from April to June 2007, there were three female and one male VAC Medical Advisors;

6. from July 2007 to February 2009, there were three or four female and one or two male VAC Medical Advisors;

7. from March 2009 to April 2010, there were three each male and female VAC Medical Advisors;

8. in May and June 2010, there were three female and two male VAC Medical Advisors;

9. from July 2010 to July 2011, there were again three each male and female VAC Medical Advisors; and

10. from August of 2011 to March of 2014, there were two or three male and three or four female VAC Medical Advisors.

[62] According to Exhibit "C", at all times from January of 1995 until March of 2014, at least 50% of the VAC Medical Advisors were female. In fact, during the majority of that time, more were female than male.

[63] Section 13 of the *Equal Wages Guidelines, 1986* (*EWG*), defines predominance of sex as follows:

1. If the group has less than 100 members, then 70% must be of one sex.

2. If the group has between 100 and 500 members, then 60% must be of one sex.

3. If the group has more than 500 members, then 55% must be of one sex.

[64] At no time between January of 1995 and March of 2014 did either the VAC Disability Adjudicator group or the VAC Medical Advisor group have more than 100 members.

[65] A copy of the VAC Disability Adjudicators' work description, which appears to be dated April of 2011 and specifies the classification as PM-04, was included in the material attached as part of the complaint. No other work descriptions of any other positions were provided.

[66] No other affidavits were filed.

C. <u>The PIPSC's involvement</u>

[67] Attached to the complaint were a number of documents, including email chains sent and received by the complainants and individuals working at the PIPSC.

[68] Attached to the complaint is an email dated March 28, 2013, and sent at 9:00 a.m. by Mr. Kelly to Ms. Roy of the PIPSC, with a copy sent to others, including Mr. Carter. Its relevant portion states as follows:

. . .

> *Our basis of claim is that we feel that we (VAC medical Adjudicators) have been discriminated against in two ways:*

> *1. We feel that the Walden settlement by its existence has created a wage/benefit discrepancy between to* [*sic*] *similar medical adjudicator positions within our same federal government.*
>
> *2. We feel that in the Walden gender discrimination case, the work wasn't totally the same – there were some differences, but the core function was the same; the work if not the same was substantially similar, and the minor differences didn't explain the wide disparity in treatment.*
>
> . . .

[69] Included as part of an email chain attached to that email is an email that Mr. Kelly sent to the PIPSC on March 25, 2013, at 8:29 a.m., which states as follows:

> . . .
>
> *Our grievance, however, has evolved into a 2 prong approach. While one argument does involve gender, the other argument is that "We feel that the Walden settlement by its existence has created a wage/benefit discrepancy between to* [*sic*] *similar medical adjudicator positions within our same federal government" (which we don't feel is a gender argument).*
>
> . . .

[70] Attached to the complaint is a letter dated June 3, 2013, which the PIPSC wrote to the complainants. Its subject was "Request for reconsideration of your ERO's recommendation not to proceed with your grievance re: *Walden* gender discrimination case". The relevant portions of the letter are as follows:

> . . .
>
> *We understand that it is your position that the Institute should support the VAC Disability Adjudicators in an effort to be treated in a similar manner as the CPP Medical Adjudicators in the* Walden *settlement. You have been expressing that view for a number of years and have discussed it with several Institute staff members, including Section Head of Negotiations, Lyne Morin; your ERO, Barry Hebert; and Legal Counsel, Linelle Mogado.*
>
> *In the fall of 2011, we initiated an investigation into the facts of the VAC Disability Adjudicators' employment situation to examine whether your claims of gender discrimination had any merit. You and other colleagues provided background information by sharing documents and other information via*

> *email and a telephone conference. Ms. Mogado inquired several times whether you or any of your colleagues had initiated a complaint with the appropriate body, the Canadian Human Rights Commission, and it is our understanding that you never answered in the affirmative. In July 2012, we informed you, in an email by Ms. Mogado, that we did not find any merit to the gender discrimination claim that you advocated. We indicated at that time that the Institute would not be advancing this claim on your behalf.*
>
> . . .
>
> *In your submissions, you claim that the* Walden *gender discrimination settlement actually discriminates against the VAC Disability Adjudicators in two ways: (1) that by its existence, a wage/benefit discrepancy exists between two similar positions; and (2) that the core functions of the work that you and the CPP medical adjudicators carry out is substantially similar such that similar treatment is warranted.*
>
> *With respect, we disagree with your view – the situation for VAC adjudicators is significantly different than the situation that persisted for the complainants in the* Walden *settlement.*
>
> *1. The type of work done and how it relates to the work of medical advisors is different and distinguishable, as you set out in your email;*
>
> *2. Many of the VAC adjudicators were and are not nurses. It cannot be said therefore that they needed to apply their professional medical expertise to the files they were tasked to review. In fact, the VAC adjudicators were converted to the NU-EMA classification under a "grandfathering" clause, recognizing that many of the individuals occupying the positions do not possess the require [sic] nursing certification to properly form part of the NU classification.*
>
> *3. The medical advisors (doctors) at VAC are not a "male-dominated group". Your point that the doctors were all male in 1995 is irrelevant, as any complaint filed today cannot be based on circumstances that existed more than one year from the date of a complaint, or, in the case of a grievance, more than twenty-five (25) days.*
>
> . . .

[71] On June 10, 2013, Mr. Kelly replied in email to the PIPSC's letter (with a copy sent to Mr. Carter on June 18, 2013) and stated as follows:

> . . .

Case Summary

There are too many similarities to reasonably argue that VAC adjudicators should not have been entitled to the same settlement as the adjudicators at Service Canada.

The Walden settlement establishes that the medical adjudicators at Service Canada were underpaid dating back to the 70's.

The VAC medical adjudication position wasn't created until 1995.

The Service Canada adjudicator position would have been used as the main comparison for determining the classification of the VAC adjudicator position in 1995.

Due to the undeniable similarities in the two positions, it has to be more than a coincidence that VAC adjudicators were classified at the PM-04 level (the same level as the Service Canada adjudicators).

Then with the creation of the new very specific nu-ema [sic] classification, adjudicators at both Service Canada and VAC met the standards for this new classification.

The Walden settlement, however, by way of retroactive pensionable earnings and pain and suffering payments for the Service Canada adjudicators has created an [sic] historic imbalance between these two positions.

. . .

[72] Also attached to the complaint was a copy of the final-level grievance decision dated June 14, 2013, which has the following comments:

On October 16, 2012, your grievance was received by Human Resources stating that you feel that the VAC Medical Adjudicators have been discriminated against in two ways. You believe that the Walden settlement, by its existence, has created a wage/benefit discrepancy between two similar medical adjudicator positions within the same Federal Government. You also believe that in the Walden gender discrimination case, while the work of the HRSDC Medical Adjudicators wasn't totally the same, as that of the Veteran [sic] Affairs Canada Disability Adjudicators the core functions were. The work, if not the same was substantially similar and the minor differences didn't explain the wide disparity in treatment and warrants a similar remedy settlement.

. . .

> *I will, however, speak to the merits of your argument. As a result of the settlement reached on the Walden Canadian Human Rights Complaint that you have referenced, your position has been re-classified [sic] to the NU-EMA (Medical Adjudicator Nursing) subgroup of the SH occupational group effective November 25, 2010. The environment that VAC Medical Adjudicators were working in and continue to work in is very different than the environment that was described at HRSDC in the Walden settlement. As such, I do not believe compensation due to pain, suffering and wage losses due to discrimination is appropriate for medical adjudicators working at VAC.*
>
> . . .

III. Summary of the arguments

A. For the respondents

[73] *Walden* is restricted to ss. 7 and 10 of the *CHRA*.

[74] The complainants did not raise s. 11 of the *CHRA* until they responded to the employer's RFP.

[75] The question to answer in this motion is whether, if the facts are examined, the complainants have made out a *prima facie* case. Bald assertions are not sufficient. The respondents' position is that the complainants have not made one out and that the complaint should be dismissed. They referred me to *Hagos v. Canada (Attorney General)*, 2014 FC 231, *Hérold v. Canada Revenue Agency*, 2011 FC 544, *Chan v. Canada (Attorney General)*, 2010 FC 1232, *Canada Post Corporation v. Barrette*, [2000] 4 F.C. 145 (C.A.), *Hartjes v. Canada (Attorney General)*, 2008 FC 830, and *Love v. Office of the Privacy Commissioner of Canada*, 2014 FC 643.

[76] *Walden No. 1* determined that a discriminatory practice existed within SDC that breached ss. 7 and 10 of the *CHRA*. The essence of that determination is that the core function of both groups, the predominantly female group of nurses (roughly 95% female), who held positions classified PM, and the predominantly male group of doctors (roughly 80% male), who held positions classified SH (and who were paid substantially more, received more benefits, and received elevated professional recognition and status) was substantially the same. That determination, which the Federal Court upheld on judicial review, was that the identified practice was discriminatory and that it had to cease.

[77] To remedy the discriminatory practice, the CHRT ordered the creation of a new occupational subgroup for those complainants — the CPP Medical Adjudicators, who were nurses. They were removed from the PM group and placed in the SH group in the "nurses" category. Those new SH-converted positions, as nurses, eliminated the discriminatory practice.

[78] *Walden No. 1* did not deal with a monetary remedy. It was eventually dealt with in the *Walden* settlement, which was incorporated into consent orders filed with the CHRT (see the Employer's Motion Record, Tab E). The complainants in this case were not part of the *Walden* proceedings; nor were they part of the *Walden* settlement. No one who did not work as a CPP Medical Adjudicator (at ESDC or its predecessors) has any entitlement to the *Walden* settlement. Specifically, the complainants have no legal right to the financial compensation provided in that settlement.

[79] The CHRT rejected the complainants' "me too" argument. In *Harkin v. Attorney General*, 2010 CHRT 11, it held that when one group of employees establishes that it has been discriminated against, it does not necessarily or automatically follow that another group of employees was also discriminated against.

[80] It is insufficient to complain about abstract concepts of fairness. The issue is whether, on the evidence, there was a discriminatory practice under s. 7, 10, or 11 of the *CHRA* on the basis of gender (see *Harkin*).

1. <u>Claim under s. 7 of the *CHRA*</u>

[81] The complainants failed to identify a *prima facie* case of discrimination under s. 7 of the *CHRA*. Paragraph 7(b) makes it a discriminatory practice to differentiate adversely between individuals in employment on the basis of a prohibited ground of discrimination. To establish a complaint under section 7, the complainants had to show with evidence that they have been differentiated adversely in the course of their employment on a prohibited ground. The only adverse differentiation they identified is that they have not received the retroactive financial compensation package that was part of the *Walden* settlement. They claim that VAC Disability Adjudicators have been treated differently from CPP Medical Adjudicators and that that constitutes discrimination on the basis of gender.

[82] This complaint must fail for a number of reasons, as follows:

1. The complainants are strangers to the *Walden* settlement. They have no legal basis to claim benefits from it.

2. The *Walden* settlement was not an action taken in the course of the complainants' employment; it was a settlement of civil proceedings involving other parties that did not relate to the complainants or their employment.

3. Even if the *Walden* settlement could be construed as being in the course of the complainants' employment, it did not result in adverse differentiation on the basis of gender as the comparator is the CPP Medical Adjudicators group, who are predominately female, as is the complainants' group, the VAC Disability Adjudicators. To the extent that the *Walden* settlement treated the CPP Medical Adjudicators differently than it did the complainants, it was not based on gender, and the complainants have not identified any other prohibited ground to support their allegation of a discriminatory practice under s. 7 of the *CHRA*.

2. Claim under s. 10 of the *CHRA*

[83] Paragraph 10(a) of the *CHRA* makes it a discriminatory practice to establish or pursue policies or practices that deprive or tend to deprive an individual or class of individuals of employment opportunities on the basis of a prohibited ground. To demonstrate a *prima facie* case of discrimination under this section, it is sufficient if the complainants could show that the effect of the employer's policy or practice was to withhold or limit access to opportunities, benefits, or advantages to one group that were made available to another. The complainants failed to identify a *prima facie* case under s. 10. They failed to demonstrate how not extending the benefits of a compensation settlement under separate litigation that did not involve them constituted a "policy", "practice", or "agreement" that deprived them of "employment opportunities" on a prohibited ground of discrimination.

[84] The complainants have already received a benefit; their positions were converted, which put them on par with the CPP Medical Adjudicators and any other

adjudicators whose positions meet the definition of the new NU-EMA subgroup. Their complaint relates to the one-time retroactive payment covered by the *Walden* settlement that was not extended to them and that has nothing to do with employment opportunities going forward as contemplated by s. 10 of the *CHRA*.

[85] The terms "practice" and "policy" refer to repetitive acts or decisions that have wide application to employees. They do not capture the one-time settlement of a civil proceeding with specific individual parties.

[86] The *Walden* settlement is not an "agreement" as that term is used in s. 10 of the *CHRA* and does not affect hiring or promotions or other such matters that would affect the complainants' employment. The only claim they made was about the opportunity to receive the retroactive compensation payment, which is not an employment opportunity. The Federal Court of Appeal defined that term in *Mossop v. Canada (Attorney General)*, [1991] 1 F.C. 18 (C.A.), affirmed in [1993] 1 S.C.R. 554; and *Stevenson v. Canada (Canadian Human Rights Commission)*, [1984] 2 F.C. 691 (C.A.).

[87] The CHRT has rendered decisions confirming that the term "employment opportunities" in s. 10 of the *CHRA* refers to hiring, recruitment, referral, promotion, training, or apprenticeships or to a benefit that offers access to an employment opportunity. Counsel for the respondents referred to *Walden No. 1*; *Walden No. 2*; *Gauthier v. Canada (Canadian Armed Forces)*, [1989] C.H.R.D. No. 3 (QL); *O'Connell v. Canadian Broadcasting Corporation*, [1988] C.H.R.D. No. 9 (QL), affirmed in [1990] C.H.R.D. No. 6 (QL); *Green v. Canada (Public Service Commission)*, [1998] C.H.R.D. No. 5 (QL), varied in [2000] 4 F.C. 629 (T.D.), additional reasons given in 2002 FCT 664; *Hay v. Cameco*, [1991] C.H.R.D. No. 5 (QL); *Harkin*; *Lavoie v. Canada (Treasury Board)*, 2008 CHRT 27; *Seeley v. Canadian National Railway*, 2010 CHRT 23, affirmed in 2013 FC 117 and 2014 FCA 111; and *Hughes v. Canada (Attorney General)*, 2010 FC 963.

3. Claim under s. 11 of the *CHRA*

[88] Section 11 of the *CHRA* is intended to address systemic discrimination resulting from long-standing societal undervaluation of work performed by female-dominated occupational groups. This "pay equity concept", as s. 11 has become known as, and as the Federal Court set out in *Walden No. 2*, allows for comparing different types of work being performed by groups of employees working within the same establishment, to determine if wage discrimination has occurred. This is done by measuring the value of

the work performed by each group against certain specified criteria, namely, skill, effort, responsibility, and working conditions. The complainants have not identified any basis for a claim under s. 11.

[89] Determining if pay equity issues exist requires the use of gender-neutral job evaluation methods and tools, which are intended to assess the relative value of male and female jobs within a workplace based on a common set of factors and based on a composite of skill, effort, responsibility, and working conditions.

[90] Section 11 of the *CHRA* establishes the legal framework for applying pay equity principles to employment relationships governed by federal law. It provides that it is a discriminatory practice for an employer to establish or maintain wage differences between male and female employees of the same establishment who perform work of equal value.

[91] The CHRC established the *EWG*, which elaborate many of the elements found in s. 11 of the *CHRA*, such as defining what constitutes an establishment or a gender-predominant group and assessing the value of work. To establish a *prima facie* case of pay inequity under s. 11, a complainant must prove the following four things:

1. that the complainant's occupational group is predominantly of one gender and that the comparator group is predominantly of the other gender;

2. that the two occupational groups being compared are composed of employees employed in the same establishment of the same employer;

3. that the values of the work being compared have been assessed reliably on the basis of the composite skill, effort, and responsibility required in the performance of the work and the conditions under which the work is performed; and

4. that the comparison of the wages being paid demonstrates the existence of a "wage gap" between the female-dominated and male-dominated groups.

[92] In the complaint, the complainants submit that the compensation paid in the *Walden* settlement created a historic imbalance between the VAC Disability Adjudicator and CPP Medical Adjudicator positions and that regardless of gender, this should be a case of pay equity between the two groups. Their claim for pay equity between the VAC Disability Adjudicator and CPP Medical Adjudicator positions cannot succeed as there is no evidence of a gender-based wage difference between a predominantly female and predominantly male group of employees. There is no gender difference between the two groups. Both are predominantly female groups of employees.

[93] There also cannot be a basis for a pay equity complaint under section 11 of the *CHRA* between the VAC Disability Adjudicators and the VAC Medical Advisors because the required element of s. 11 cannot be established as neither is a predominately male group. Section 13 of the *EWG* defines predominance of sex as follows:

1. If the group has less than 100 members, then 70% must be of one sex.

2. If the group has between 100 and 500 members, then 60% must be of one sex.

3. If the group has more than 500 members, then 55% must be of one sex.

[94] The VAC Medical Advisors have never comprised a predominantly male group in comparison to the VAC Disability Adjudicators.

[95] For the first time, in their response to the RFP, the complainants identify the CPP Medical Advisors as the predominantly male comparator group allegedly performing work of equal value to the VAC Disability Adjudicators. This was not part of the complaint as filed, and is long outside the limitation as set out to file a complaint under the *CHRA*.

[96] In addition to *Walden No. 1*, the respondents referred me to *Melançon v. Treasury Board*, 2014 PSLRB 7; *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1; *Canada Post Corporation v. Public Service Alliance of Canada*, 2008 FC 223, affirmed in 2010 FCA 56 and reversed in part in 2011 SCC 57; and *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 393.

B. For the complainants

[97] The complainants state that this issue is a matter of fairness. They submit that there are two identical groups, the VAC Disability Adjudicators and the CPP Medical Adjudicators, and both are in the federal public service. *Walden* established that there was discrimination between the CPP Adjudicator position and the CPP Medical Advisor position.

[98] There has been discussion about nurses. The complainants state that they were all supposed to be nurses, yet the VAC Disability Adjudicators were never required to be nurses. All adjudicators, be they CPP or VAC, are not nurses.

[99] The complainants submit that this is a disservice to the adjudicators who have been doing the work from 1995 to the present. The VAC Disability Adjudicators must have knowledge in many different areas; essentially, they have to have the nursing qualifications. Saying they are not nurses is simplistic.

[100] The complainants asked why they are paid so much less. They submit that it dawned on them that if the CPP Medical Adjudicators were discriminated against, then that must also be true for the VAC Disability Adjudicators.

[101] The complainants submit that there is only one employer, the Treasury Board.

[102] The complainants submit that they waited so long to submit their complaint because until *Walden* was settled, no one would tell them anything.

[103] The complainants do not see anything frivolous or vexatious about their complaint. If they are to be treated the same as the CPP Medical Adjudicators have been going forward, then it makes sense that they should have been treated the same in the past. They submit that from 1995 to 2011, they would have been paid substantially more had they been in a different department doing a different job.

[104] The complainants submit that they do not understand why they are not part of the *Walden* settlement and why they are not part of the group it covers, which was identified as containing non-complainant victims.

[105] The complainants submit that they all have the same job description and all do the same job; the core function is the same. The CPP Medical Adjudicators and VAC

Disability Adjudicators were all converted to the same new classification, NU-EMA, which means that the positions must be similar enough. It is difficult to understand why they do not fall under the *Walden* settlement. If non-complainant victims were reimbursed under the *Walden* settlement, the complainants' position is that they too should have been compensated.

C. <u>For the PIPSC</u>

[106] This complaint is not the place or process in which to apply the *Walden* settlement.

[107] The complainants have not made out a *prima facie* case of discrimination.

[108] The PIPSC became actively involved in *Walden* in 2011 and was part of the process that led to the settlement ultimately reached in July of 2013, which was incorporated into the CHRT's consent order found at Tab E of the Motion Record.

[109] The PIPSC submits that in *Walden*, it brought a motion to include similarly situated individuals who were not named complainants in that matter, so that they could benefit from the remedies that could flow from an award or settlement. They would have been non-complainant medical adjudicators employed to conduct CPP disability medical adjudications.

[110] The *Walden* settlement ultimately provided compensation to cover not only the originally named complainants (who were CPP Medical Adjudicators) but also more broadly non-complainant victims who met the "eligibility criteria" set out in its MOA. According to the MOA, the CHRT remained available to make determinations as to the implementation of that settlement, including eligibility for money to flow from it until March of 2015.

[111] The complainants have sought the PIPSC's assistance on several fronts since 2011, including determining eligibility for settlement amounts under that MOA.

D. <u>The respondents' reply</u>

[112] The respondents made no reply to the submissions of the complainants or the PIPSC.

E. The complainants' reply to the PIPSC's submission

[113] Mr. Carter submitted that he was not aware of the opportunity to become a non-complainant victim in the *Walden* settlement MOA.

IV. Reasons

[114] Paragraph 41(1)(d) of the *CHRA* states as follows:

> ***41 (1)*** *Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> . . .
>
> ***(d)*** *the complaint is trivial, frivolous, vexatious or made in bad faith ….*

[115] Section 21 of the *PSLREBA* states that the Board may dismiss summarily any matter that in its opinion is trivial, frivolous, vexatious, or was made in bad faith.

[116] In *Hagos*, the Federal Court stated as follows at paragraph 38:

> *[38] … "Frivolous" is a term of art whose meaning is well known. The motion to strike under the* Federal Court Rules, *SOR/98-106, uses language quite similar to that of paragraph 41(1)(d). The case-law [sic] is abundant to the effect that the test applicable in that context is whether it is plain and obvious that the claim cannot succeed because, for instance, there is no reasonable cause of action. For instance, our Court has ruled in* Hérold v. Canada Revenue Agency, *2011 FC 544 [*Hérold*] that:*
>
> > *[35] Third, the test for determining whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the* Act *is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.*

[117] The facts that exist satisfy me that the complaint meets the definition of "frivolous" and that there has been no breach of any of ss. 7, 10, and 11 of the *CHRA*. As such, for the reasons that follow, the respondents' motion to dismiss the complaint is granted, and the complaint is dismissed.

[118] For the complaint to be successful, it has to be rooted in discrimination based on a prohibited ground set out in the *CHRA*. On a review of it, the only prohibited

ground that the complainants allege is gender.

[119] Paragraph 7(a) of the *CHRA* states that it is a discriminatory practice to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. As there is no allegation or any evidence that this occurred, the complaint therefore cannot be sustained under this section.

[120] Paragraph 7(b) of the *CHRA* states that it is a discriminatory practice to differentiate adversely in relation to an employee on a prohibited ground of discrimination. The only adverse differentiation that the complainants identified is that they have not received the retroactive financial compensation package that was part of the *Walden* settlement.

[121] The complainants state that they based the complaint on *Walden No. 1*, in which the CHRT found that, based on the facts put forward in that proceeding, a situation existed in which the core function of both the CPP Medical Advisors (predominantly male doctors) and the CPP Medical Adjudicators (predominantly female nurses) was the same and that, as such, a discriminatory practice existed over an extended period. The CHRT stated that it had to cease; it did.

[122] Neither complainant has ever been a CPP Medical Adjudicator.

[123] In the complaint, the complainants state that they have been discriminated against because the *Walden* settlement differentiated between them as VAC Disability Adjudicators and the CPP Medical Adjudicators.

[124] In both the complaint and in their reply to the employer's RFP, the complainants clearly state that the employer discriminated against them because they belong to a work group (VAC Disability Adjudicators) that is predominately female.

[125] However, both groups, the VAC Disability Adjudicators and the CPP Medical Adjudicators (at least at the time of the *Walden* litigation and settlement), were predominantly female. Therefore, the employer's wage differentiation between these two groups, if it exists, is not rooted in gender discrimination, as at no time was one group predominately male.

[126] In their complaint, the complainants also allege that the VAC Disability Adjudicators and the VAC Medical Advisors perform the same work. They allege that in 1995, all VAC Medical Advisors were male and that as of the hearing, there were four male and four female VAC Medical Advisors. They also submit that as of the hearing, the gender breakdown of VAC Disability Adjudicators was 43 female and 8 male. At paragraph 5b of their reply to the RFP, the complainants state the following: "That the situation at VAC with predominately female adjudicators and historically male doctors at VAC is more similar than not to the situation which existed in the Walden case." They remade that statement verbatim on April 9, 2015, in their written response to the respondents' motion to dismiss. They identified doctors in their reply to the RFP as VAC Medical Advisors.

[127] Neither complainant worked at VAC in 1995. Each started as a VAC Disability Adjudicator sometime in 2005. They provided no evidence in support of their allegation that all VAC Medical Advisors in 1995 were male or, from 1995 to June of 2013, of the gender ratio of VAC Medical Advisors in relation to VAC Disability Adjudicators. They merely relied on the bald statement in the complaint, in their RFP reply, and in their response to the motion, that VAC Disability Adjudicators are predominately female and VAC Medical Advisors are predominately male. The evidence before me discloses that this allegation is false.

[128] The HR business records set out the monthly number of VAC Disability Adjudicators and VAC Medical Advisors employed from January of 1995 to March of 2014. This evidence was not challenged; nor do I have any reason to doubt its authenticity. According to the records, over a period of slightly more than 18 years, by month, the percentage breakdown between male and female VAC Medical Advisors varied but almost always favoured female. While it was never 100% female and 0% male, when it favoured males, at the most it was a 50-50 split; at the least, it was 25% male and 75% female. During periods when the female VAC Medical Advisors outnumbered the males by more than 70%, the VAC Medical Advisor group was also a female-dominated group as defined by the *EWG*.

[129] This critical evidence goes to the very heart of the complaint and clearly demonstrates that there is no evidence whatsoever of gender discrimination as alleged by the complainants between their work group, the VAC Disability Adjudicators, and the VAC Medical Advisors, as the male VAC Medical Advisors have never outnumbered

the females, let alone the VAC Medical Advisors meeting the definition of a male-dominated group.

[130] In *Hartjes*, at paras. 23, 24, 25, and 27, the Federal Court addresses the *prima facie* threshold that a complainant must meet, stating as follows:

> *23 Although the threshold may be low, there is a burden on a complainant to put sufficient information or evidence forward to persuade the Commission that there is a link between complained-of acts and a prohibited ground.*
>
> *24 Ms. Hartjes identifies herself, in her complaint, as an Aboriginal person. She alleges that she received "grossly inadequate medical care and experienced discrimination in the provision of medical services on the basis of race, colour, national or ethnic origin, and disability". The complaint set out a description of two incidents as the "basis of the complaint". Ms. Hartjes then describes the history of her medical treatment and her interactions with various medical and non-medical personnel. Having read the submission carefully and assuming that her medical care was inadequate (which, of course, I am not deciding), I can see nothing that would lead me to link her alleged mistreatment to her alleged discrimination. Nowhere in her complaint does Ms. Hartjes provide any evidence to suggest that non-Aboriginal persons receive better or different medical care.*
>
> *25 As noted above, Ms. Hartjes was advised of the shortcomings of her complaint in the letter from the Commission Officer dated April 12, 2007.*
>
> . . .
>
> *27 Absent a link, the allegations of Ms. Hartjes are based solely on a claim that she received "grossly inadequate" medical care. Such a claim is not one that is based on a prohibited ground and is thus beyond the statutory authority of the Commission.*

[131] In *Love*, at para. 69, the Federal Court stated as follows:

> *69 While a complainant is not expected to put forward evidence at the pre-investigation state, the requirement to establish reasonable grounds for the complaint means that they cannot rely on bald allegations either (*Hartjes, *above, at para 23). Analogies have frequently been made to the test for striking a court pleading or a preliminary inquiry (see* Maracle, *above, at para 42;* Cooper v Canada (Canadian Human Rights Commission), *[1996] 3 SCR 854 at para 53, 140 D.L.R. (4th) 193). The complainant does not need to prove*

> *that what they say is true, but they must allege facts that, if believed, would establish a link to a prohibited ground of discrimination. He or she cannot merely assert that such a link exists. Otherwise, no complaint could ever be screened out at the s. 41 stage.*

[132] As in *Hartjes,* while there is an allegation based on a prohibited ground, the complainants have provided no actual link. The allegation is that as VAC Disability Adjudicators, they have been discriminated against on the basis that the group they are part of is female-dominated, as opposed to the VAC Medical Advisors, which is, according to their allegation, male-dominated. However, the evidence is that in fact, that is not the case.

[133] At the first case conference in September of 2014, I set out a process under which the parties were to set out in more detail the particulars of their positions. As part of that process, the employer made an RFP, which the complainants replied to.

[134] The employer's response to the complainants' reply to its RFP stated at paragraph 62 as follows:

> *It is equally clear that there is no basis for a complaint under section 11 of pay inequity between VAC Disability Adjudicators and VAC Medical Advisors. Again, the required elements of section 11 cannot be established because neither of these groups is a predominately male group.*

[135] The complainants were well aware that the employer's position was that the VAC Medical Advisors are not a predominately male group. This position was reinforced and made clear when the employer tendered historical documentary evidence as part of its motion to dismiss the complaint that discredited the complainants' allegation that the VAC Medical Advisors are a predominately male group and in fact indicates that if anything, more often than not, there were more females than males in that group. Despite this documentary evidence, the complainants put forward no evidence in their response to the motion material and no argument on this point.

[136] And for the first time in their reply to the RFP, the complainants identify the CPP Medical Advisors as a predominantly male comparator group allegedly performing work of equal value to the VAC Disability Adjudicators. This allegation was not only not part of the complaint as filed, but also, the documentation that accompanied the

complaint never alluded to it.

[137] The complainants reiterate this new position at paragraph 15 of their response to the motion, where they state as follows: "VAC adjudicators (female group) were discriminated vis-à-vis the CPP doctors (male group), based on the fact that CPP and VAC adjudicator positions are essentially the same within the Canadian Federal Public service." The complainants have changed their complaint and allege for the first time that they are being discriminated against because their group of predominately female VAC Disability Adjudicators does the same work as the CPP Medical Advisors.

[138] At paragraph 78 of the judicial review of *Walden No. 1*, the Federal Court stated as follows:

> *[78] Equality is an inherently comparative concept. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, it is therefore necessary to compare the situation of the complainant group with that of a different group.*

[139] At paragraph 74, the Federal Court stated as follows: "The determination of the relevant comparator group in a specific case depends heavily on the facts of the particular case at hand."

[140] The CHRT's decision in *Walden No. 1* dealt with any adverse discrimination based on gender between CPP Medical Adjudicators and the CPP Medical Advisors in 2007. The CHRT dealt with the remedy in *Walden No. 2* in 2009 by creating the new NU-EMA group. The CHRT stated at paragraph 60 of *Walden No. 2* as follows:

> *[60] . . . that the most appropriate way to redress the discriminatory practice identified in the Tribunal's December 2007 decision is to create a new Nursing subgroup for the medical adjudication position(s). I order that such a subgroup be created and that the adjudicator work be placed in this subgroup. I further order that work on the creation of the new NU subgroup commence within 60 days of the date of this decision.*

[141] The complainants were certainly well aware of the *Walden* decisions when they filed their complaint, as they refer specifically to them and to the *Walden* settlement. Indeed, attachments to the complaint refer to the following:

1. An email dated March 25, 2013, at 9:00 a.m., which Mr. Kelly sent to the PIPSC, states as follows:

. . .

Our grievance, however, has evolved into a 2 prong approach. While one argument does involve gender, the other argument is that "We feel that the Walden settlement by its existence has created a wage/benefit discrepancy between to [sic] similar medical adjudicator positions within our same federal government" (which we don't feel is a gender argument).

. . .

2. An email dated March 28, 2013, at 9:00 a.m., which Mr. Kelly sent to the PIPSC, states as follows:

. . .

Our basis of claim is that we feel that we (VAC medical Adjudicators) have been discriminated against in two ways:

1. We feel that the Walden settlement by its existence has created a wage/benefit discrepancy between to [sic] similar medical adjudicator positions within our same federal government.

2. We feel that in the Walden gender discrimination case, the work wasn't totally the same – there were some differences, but the core function was the same; the work if not the same was substantially similar, and the minor differences didn't explain the wide disparity in treatment.

. . .

3. A letter dated June 3, 2013, from Ms. Roy, the PIPSC's general counsel, to the complainants, which states in part as follows:

. . .

In the fall of 2011, we initiated an investigation into the facts of the VAC Disability Adjudicators' employment situation to examine whether your claims of gender discrimination had any merit. You and other colleagues

> *provided background information by sharing documents and other information via email and a telephone conference. Ms. Mogado inquired several times whether you or any of your colleagues had initiated a complaint with the appropriate body, the Canadian Human Rights Commission, and it is our understanding that you never answered in the affirmative. In July 2012, we informed you, in an email by Ms. Mogado, that we did not find any merit to the gender discrimination claim that you advocated. We indicated at that time that the Institute would not be advancing this claim on your behalf.*
>
> . . .

4. On June 10, 2013, in an email response to the PIPSC's June 3, 2013, letter to the complainants, Mr. Kelly stated as follows:

> . . .
>
> *There are too many similarities to reasonably argue that VAC adjudicators should not have been entitled to the same settlement as the adjudicators at Service Canada.*
>
> *The Walden settlement establishes that the medical adjudicators at Service Canada were underpaid dating back to the 70's.*
>
> *The VAC medical adjudication* [VAC Disability Adjudicator] *position wasn't created until 1995.*
>
> *The Service Canada adjudicator* [CPP Medical Adjudicator] *position would have been used as the main comparison for determining the classification of the VAC adjudicator position in 1995.*
>
> *Due to the undeniable similarities in the two positions, it has to be more than a coincidence that VAC adjudicators* [VAC Disability Adjudicators] *were classified at the PM-04 level (the same level as the Service Canada adjudicators)* [CPP Medical Adjudicators].
>
> *Then with the creation of the new very specific nu-ema [sic] classification, adjudicators at both Service Canada and VAC met the standards for this new classification.*
>
> *The Walden settlement, however, by way of retroactive pensionable earnings and pain and suffering payments for the Service Canada adjudicators* [CPP Medical Adjudicators] *has created an [sic] historic imbalance between these two positions.*

. . .

5. In the final-level reply to the complainants on June 14, 2014, the respondent stated as follows:

. . .

> *On October 16, 2012, your grievance was received by Human Resources stating that you feel that the VAC Medical Adjudicators* [VAC Disability Adjudicators] *have been discriminated against in two ways. You believe that the Walden settlement, by its existence, has created a wage/benefit discrepancy between two similar medical adjudicator positions within the same Federal Government. You also believe that in the Walden gender discrimination case, while the work of the HRSDC Medical Adjudicators* [CPP Medical Adjudicators] *wasn't totally the same, as that of the Veteran [sic] Affairs Canada Disability Adjudicators* [VAC Disability Adjudicators] *the core functions were. The work, if not the same was substantially similar and the minor differences didn't explain the wide disparity in treatment and warrants a similar remedy settlement.*
>
> . . .
>
> *I will, however, speak to the merits of your argument. As a result of the settlement reached on the Walden Canadian Human Rights Complaint that you have referenced, your position has been re-classified [sic] to the NU-EMA (Medical Adjudicator Nursing) subgroup of the SH occupational group effective November 25, 2010. The environment that VAC Medical Adjudicators* [VAC Disability Adjudicators] *were working in and continue to work in is very different than the environment that was described at HRSDC in the Walden settlement. As such, I do not believe compensation due to pain, suffering and wage losses due to discrimination is appropriate for medical adjudicators working at VAC* [VAC Disability Adjudicators].
>
> . . .

[142] Until the complainants were asked to provide particulars of the complaint, they never alleged a s. 11 claim under the *CHRA* involving as a comparator group the CPP Medical Advisors. The complaint and all the documentation attached to it suggested only that the VAC Disability Adjudicator position should be compared to the CPP Medical Adjudicator or the VAC Medical Advisor position.

[143] It is clear from the material before me that the complainants were well aware of the *Walden* decisions and *Walden* settlement from as early as 2011. Indeed, the original grievance raises the same issues as the complaint, which are the same issues that the complainants discussed with the PIPSC.

[144] Paragraph 41(1)(e) of the *CHRA* states as follows:

> ***41 (1)*** *Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> . . .
>
> ***(e)*** *the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.*

[145] According to paragraph 21 of *Walden No. 1*, Ms. Walden filed her human rights complaint in 2004, and between 2004 and 2007, 412 other CPP Medical Adjudicators filed their complaints, which led to the *Walden* group of cases. The complainants in this case made their first inquiry with the CHRC in August of 2012, four-and-a-half years after the decision in *Walden No. 1* and more than three years after the decision in *Walden No. 2*.

[146] It is clear to me based on the complaint and the documents forwarded with it that the complainants were well aware of the *Walden* decisions and settlement for a significant period before they made their complaint. If they really believed that their VAC Disability Adjudicator positions should be compared to the CPP Medical Advisor position (which was the subject matter of the *Walden* decisions), then that allegation would have been raised at some point long before they filed their reply to the RFP and their response to the employer's motion to dismiss.

[147] Therefore, the complainants are well outside the one-year period referenced in s. 41(1)(e) of the *CHRA* and there is nothing to suggest that any longer period would be appropriate. As such, their allegation vis-à-vis the comparison against the CPP Medical advisor positions is out of time.

[148] They also had a significant period in which to put forward some evidence in support of their position; they did not. In addition, they provided no argument on this point whatsoever.

[149] If I am incorrect in my assessment of the timeliness of the complainants' allegation with respect to the CPP Medical Advisors, I have addressed it in my assessment that follows with respect to s. 11(1) of the *CHRA*.

[150] Subsection 11(1) of the *CHRA* states that 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.

[151] The complainants have not produced any evidence whatsoever that there are wage differences between male and female employees employed in the same establishment and performing work of equal value. With respect to the actual allegation contained in their complaint, which is that the VAC Disability Adjudicators and the VAC Medical Advisors should be compared, their material discloses and they concede that these two groups do not do the same work. I was provided with no evidence that their work was of equal value. That said, given that both are female-dominated groups, there cannot be discrimination based on gender.

[152] With respect to the VAC Disability Adjudicators and the CPP Medical Advisors, I was provided absolutely no evidence that any of the criteria set out in the jurisprudence have been met. The VAC Disability Adjudicators work in a different department than do the CPP Medical Advisors, who, according to the *Walden* decisions, were doing work comparable to the CPP Medical Adjudicators.

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

(The Order appears on the next page)

V. Order

[154] The respondents' motion to dismiss is granted.

[155] The complaint is dismissed.

April 26, 2017.

John G. Jaworski,
a panel of the Public Service Labour Relations and Employment Board