**FTR Now**

# Supreme Court of Canada Upholds Finding of Wage Discrimination

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In a federal sector pay equity complaint that stretched on for nearly 30 years, the Supreme Court of Canada has upheld a finding of the Canadian Human Rights Tribunal of gender-based wage discrimination. The result is an order to compensate employees for lost wages over a 20 year period.

This *FTR Now* discusses the Supreme Court of Canada decision, its implications for federally regulated employers and the distinctions between the federal and provincial pay equity processes.

## THE COMPLAINT

This case arose out of a complaint filed by the Public Service Alliance of Canada ("the Alliance") against Canada Post, alleging that employees in the male-dominated Postal Operations Group were paid more than employees in the female-dominated Clerical and Regulatory Group for work of equal value, contrary to section 11 of the *Canadian Human Rights Act.*

The Clerical and Regulatory Group included benefits clerks, accounting clerks and accounts payable clerks. The Postal Operations Group included letter carriers, mail handlers and mail sorters. This latter group accounted for approximately 80% of Canada Post's workforce and, although male-dominated, it included a significant number of highly paid women.

## CASE HISTORY

The complaint was originally filed in 1983. Following an investigation by the Canadian Human Rights Commission ("Commission"), the complaint was referred to the Canadian Human Rights Tribunal ("CHRT") in 1992, which did not render a decision until 2005. This significant delay was incurred for a number of reasons, including the parties' failed attempts to agree on a job evaluation method, the Commission's (flawed) job evaluation, further professional job evaluations, expert opinions on behalf of both parties, ten years of hearings and a two year wait for a decision by the CHRT. The case has been described as "another example of the marathon litigation that has plagued the resolution of pay equity claims at the federal level" (per Evans J.A., dissenting in the Federal Court of Appeal decision).

## CHRT DECISION

In its 2005 decision, the CHRT upheld the union's complaint, finding that wage discrimination had occurred between 1982 and 2002 (the point at which a new job evaluation plan was implemented at Canada Post). It made this finding based on job evaluations which it acknowledged were at the lower end of reasonable reliability.

The CHRT then ordered Canada Post to compensate the Clerical and Regulatory Group members for the wage gap during the entire twenty-year period. However, it discounted this award by 50%: in the CHRT's view, evidence that was at the higher end of reasonable reliability would warrant 100% liability, but evidence at the lower end only warranted 50%.

## JUDICIAL REVIEW AND APPEALS

Canada Post commenced judicial review proceedings in Federal Court, where the CHRT's decision was overturned. On appeal to the Federal Court of Appeal, the majority agreed with Canada Post that the CHRT decision was unreasonable,

finding in part that it revealed that the job evaluations could not have been reliable enough to meet the standard of proof. Therefore, the evidence did not support a finding that wage discrimination had taken place.

The appeal decision was not unanimous. The dissenting judge, Evans J.A., agreed with the CHRT and would have restored its findings. First, he found it reasonable for the CHRT to use the Postal Operators group as the male-dominated comparator, even though this group included a large number of highly paid women.

Second, Evans J.A. supported the CHRT's reliance on the job evaluations. Because the CHRT correctly identified the standard of proof as the "balance of probabilities", one could presume that it was satisfied that the job evaluations met that standard. Evans J.A. found that this presumption could be made even though some of the CHRT's reasoning suggested that it applied a lower standard. Along the same lines, Evans J.A. found no error in the CHRT's conclusion that a wage gap existed between the two groups, despite acknowledged deficiencies in its reasons.

Finally, Evans J.A. would have upheld the CHRT's 50% reduction in compensation. He found it reasonable for the CHRT to decide that the job evaluations were good enough to establish the existence of a wage gap, but not good enough to measure the amount of the gap precisely.

The Alliance appealed to the Supreme Court of Canada. In a rare oral judgment, rendered immediately following the parties' submissions, the top Court allowed the appeal and endorsed the dissenting reasons of Evans J.A. Therefore, the decision of the CHRT was restored, requiring Canada Post to compensate for 50% of the wage gap between the two groups over the twenty year period.

## IMPLICATIONS

In judicial review proceedings, courts give specialized tribunals considerable deference on findings of fact, in part because they are viewed as being in the best position to assess credibility and reliability of evidence. Decisions in pay equity complaints tend to fall into this category. The present case is no exception; here, the CHRT made significant findings on credibility and reliability of the job evaluation evidence. The reasons of Evans J.A. demonstrate the deference accorded to a tribunal's factual determinations, even if they are based on evidence of questionable reliability. His reasons suggest that courts should be willing to forgive a poorly articulated decision if, on the whole, the outcome seems reasonable.

As an aside, Evans J.A. complained of the delay incurred in this case, and commented that it was a "mistake" for Parliament to entrust pay equity to the complaint-driven, adversarial process under the *Canadian Human Rights Act*. The Act prohibits gender-based wage discrimination in federally regulated establishments, but does not include proactive requirements. Complaints about wage gaps between the genders are resolved through the usual human rights complaints process, including a Commission investigation and a CHRT hearing. This can be a lengthy process, the complexity of which is compounded when the parties cannot agree on a plan to evaluate and compare the value of work.

In contrast, the *Ontario Pay Equity Act* sets out very specific steps that provincially regulated employers are required to follow in order to develop pay equity plans for their respective employee groups, including cooperation with their unions. It is the absence of identifiable steps in the federal pay equity legislation that has led to the volume of litigation and the undue delays in that sector. Federally regulated employers might find it helpful to undertake the processes contemplated by provincial pay equity legislation as a means to reduce the risk of ongoing liability, limit the period of compensation (if any), and limit the time and expense of defending against complaints.

Should you require further information about this decision or any other pay equity matter, please contact Carolyn L. Kay at 416.864.7313 or any other member of our Pay Equity Group.

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