Canadian Human
Rights Tribunal

Tribunal canadien
des droits de la personne

BETWEEN:

RICHARD HARKIN ET AL.

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL (CANADA)

Respondent

DECISION

MEMBER: Athanasios D. Hadjis

2010 CHRT 11
2010/05/17

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[1] The Complainants were all at one time employed by the Public Service Staff Relations Board (PSSRB), an agency that was replaced by the Public Service Labour Relations Board (PSLRB) on April 1, 2005. While the Treasury Board of Canada (Treasury Board) is the employer for most federal public servants, the PSSRB had, since 1968, been a "separate employer" of its staff.

[2] In 1999, the Treasury Board agreed to make payments to its federal public service employees who had been employed in the Clerical and Regulatory (CR), Library Science (LS), Secretarial, Stenographic and Typing (ST), Personnel Administration (PE), and Data Processing – Conversion (DA-CON) occupational groups, among others. These payments were made in relation to several human rights complaints that had been filed with the Canadian Human Rights Commission (CHRC) between 1984 and 1991. Those complaints alleged that differences were being maintained between the wages of male and female employees who were performing work of equal value, within the same establishment, a discriminatory practice within the meaning of s. 11 of the *Canadian Human Rights Act* (*CHRA*), commonly referred to as the pay equity provision of the Act.

[3] The Complainants claim that they have held positions at the PSSRB in occupational groups with the same classifications as those referenced in the s. 11 complaints. However, the Complainants did not receive the same pay equity payments, specifically the sums representing wages owed retroactively for the period ranging between 1985 and 1999. The Complainants allege that by not extending these payments to them, the Treasury Board and the PSSRB discriminated against them, in breach of ss. 7 and 10 of the *CHRA*.

[4] In the following decision, I first set out the factual background of the case, describing how the PSSRB came to be designated a separate employer. I then proceed to explain how a number of pay equity adjustments paid to employees of the core federal public service over the years were ultimately extended to PSSRB employees as well, with the notable exception of the above mentioned 1985 to 1999 retroactive payments that form the basis for the present complaint. In my analysis of the case, I ultimately determine that the complaint has not been substantiated.

I. FACTUAL BACKGROUND

[5] The parties filed a fairly extensive Agreed Statement of Facts in this case, and it forms the basis for most of the facts recited in this decision.

A. The establishment of the PSSRB and its relationship with the Treasury Board

[6] In order to understand what led to the filing of this complaint, it is important to consider the organizational history of the PSSRB and its relationship with the Treasury Board.

[7] The PSSRB was established in 1967 with the enactment of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*), to serve as an independent quasi-judicial tribunal mandated by Parliament to administer the collective bargaining and grievance adjudication systems in the federal public service. Pursuant to the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.), it was also given a similar mandate in respect of the employees of the institutions of Parliament. In 2005, the *PSSRA* was repealed and the PSSRB was replaced by the PSLRB in accordance with the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2.

[8] The PSSRB was funded through appropriations made by Parliament that came through the Treasury Board. The Treasury Board is a committee of the Queen's Privy Council for Canada (i.e., a Cabinet committee) established by s. 5 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*). It is comprised of the President of the Treasury Board, the Minister of Finance and four other members of the Queen's Privy Council for Canada. Providing assistance to the Treasury Board is the Treasury Board Secretariat (TBS), a government department consisting of a Secretary appointed by the Governor in Council together with officers and employees.

[9] The Treasury Board was responsible for the management of personnel in the departments, agencies, boards and commissions listed in Part I of Schedule I of the *PSSRA*, commonly referred to as the "core public service". This list was wide-ranging and included, as of 1984 for instance, entities such as the Privy Council Office, Statistics Canada, the Royal Canadian Mounted Police,

the Canadian Labour Relations Board and the CHRC. The Treasury Board's powers in relation to personnel management were enumerated in s. 11(2) of the *FAA*, and included the classification of positions and the determination of wage rates, work hours and leave entitlements.

[10] The authority of the Treasury Board over personnel management did not extend to personnel working in the agencies, commissions and boards listed in Part II of Schedule I of the *PSSRA*, identified as "separate employers". According to s. 11(2) of the *FAA*, the exercise by the Treasury Board of its powers in relation to personnel management was "subject to the provisions of any enactment respecting the powers and functions of a separate employer". The group of separate employers encompassed, for example, the National Film Board, the Atomic Energy Control Board, the Office of the Auditor General of Canada and, of particular relevance to this case, the PSSRB.

[11] According to s. 12(2) of the *FAA*, responsibility for the management of personnel of separate employers could be delegated by the Governor in Council, to the minister of the Crown responsible for the agency or the minister's deputy, or to the separate employer's chief executive officer.

B. How did the PSSRB come to be a separate employer?

[12] In the first year following its inception in 1967, the PSSRB formed part of the core federal public service. Accordingly, the Treasury Board was responsible for the management of the PSSRB's personnel, including the classification of positions and the determination of wage rates, work hours and leave entitlements.

[13] On July 8, 1968, the Chairperson of the PSSRB, Jacob Finkelman, wrote to the Treasury Board Secretary, requesting that the PSSRB be exempt from the personnel management powers of the Treasury Board. Mr. Finkelman pointed out that certain parties appearing before the PSSRB had begun questioning its independence and objectivity, due to the fact that the Treasury Board was the main employer falling within the PSSRB's jurisdiction. The Treasury Board Secretary was sympathetic to these concerns but proposed, as an alternative solution to the complete

exemption sought by Mr. Finkelman, that the PSSRB become a separate employer. This proposal was ultimately implemented and thus, on October 28, 1968, the Governor in Council designated the PSSRB as a separate employer under the *PSSRA* (P.C. 1908-2302), pursuant to s. 5 of that Act, and authorized the PSSRB Chairperson (P.C. 1968-18/1998) to exercise and perform the powers and functions of the Treasury Board in relation to employees of the PSSRB, effective November 1, 1968, pursuant to s. 12(2) of the *FAA*.

[14] Although the PSSRB had been designated as a separate employer, in regard to staff relations, its situation was different in some respects from that of other separate employers regarding staff relations. PSSRB employees were excluded from collective bargaining, under the *PSSRA*. Consequently, while many other separate employers negotiated wage rates with the bargaining agents of their employees, the PSSRB was in a position to unilaterally set the terms and conditions of employment, including wage rates. Therefore, in furtherance of the authority he acquired by order-in-council to perform the functions and powers of the Treasury Board, Mr. Finkelman simply directed that the terms and conditions of employment of the core public service would apply "*mutatis mutandis*" to PSSRB employees, effective November 1, 1968.

[15] As a result of Mr. Finkelman's directive, the PSSRB effectively adopted for each of its occupational groups the same pay scales that were established through the collective bargaining process in the core public service for those occupational groups. Yvon Tarte, who chaired the PSSRB and subsequently the PSLRB between 1996 and 2006, was called as a witness by the CHRC. He testified as to his understanding of why Mr. Finkelman issued this directive. Given the PSSRB's role as a neutral arbiter of complaints arising from collective agreements, it would have been inappropriate for the terms of employment of the PSSRB's staff to either "lead or follow" those of the employees who were subject to its jurisdiction. In this manner, neither unions nor employers who appeared before the PSSRB would be able to support their respective positions by pointing to similarities with or differences from the pay scales and other employment conditions of PSSRB employees.

[16] The PSSRB was facilitated in its decision to adopt the Treasury Board pay scales by the fact that the PSSRB had, in regard to most of its employees, applied many of the same job

classification standards for its staff as those set by the Treasury Board for the core public service, a practice that began at its inception in 1967 and continued until its dissolution in 2005, with respect to most PSSRB employees. The evidence does show, however, that the PSSRB had used at least five classification groups that were not in common with those used in the core public service. Mr. Tarte testified that during his tenure, the PSSRB considered developing its own complete system of classification standards, and hired a consultant to conduct some preliminary studies into the matter. The PSSRB did not ultimately go through with its adoption, due in part to resistance by some managers regarding the resources required to effect the change, as well as concerns that the change may impede the PSSRB's employees' ability to move into other positions within government. Mr. Tarte pointed out, however, that although it made it easier for PSSRB employees who wished to move within the federal public service to have the same classification as the jobs being advertised, such mobility would not have been impossible had the classification system been different. Methods existed for the determination of comparable classification when conducting staffing actions.

[17] Mr. Tarte added that the degree of employment mobility enjoyed by the PSSRB's staff, as things stood, was "acceptable". PSSRB employees could participate in competitions that were internal to the public service (both within the core and amongst separate employers). A special arrangement had been struck with smaller agencies, whereby the pool for some competitions would be limited to these agencies. Mr. Tarte explained that some of these agencies were separate employers, while others came within the core public service.

[18] Mr. Tarte was asked to compare the work performed by PSSRB employees whose jobs were classified within the CR group with the work performed by CRs in the core public service. He testified that based on his experience in the public sector, the work of CR employees at the PSSRB was basically the same as that performed by CR employees in the core public service. He admitted, however, that his assessments were only based on his personal observations. He did not conduct any formal comparative assessment of CR employees, nor does he hold a degree in human resource management or have any expertise in job evaluation.

[19] One of the Complainants, Richard Harkin, was employed as the PSSRB's librarian between 1985 and 2002. He testified that he had occasion to write the job descriptions of several of the PSSRB's CR-level employees whom he supervised. As evidence of the similarity in the work performed by these CRs with those employed in the core public service, he recalled that in preparing these job descriptions, he relied upon the Treasury Board classification standards and consulted the job descriptions of CRs employed in libraries of departments and agencies belonging to the core public service.

C. The 1984 pay equity complaints regarding the core public service

[20] In 1984, the Public Service Alliance of Canada (PSAC) complained to the CHRC that the Treasury Board, as the employer of the core public service, had discriminated against members of the female-dominated CR occupational group of the core public service, contrary to ss. 7 and 11 of the *CHRA*. The complaint alleged that the CR employees were being paid lower wages than those paid to members of the male dominated PM (program administration) occupational group who were performing work of equal value, within the same establishment. Section 11(1) provides that it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees in the same establishment who are performing work of equal value.

[21] The Commission held the 1984 complaint in abeyance pending the outcome of a Joint Union Management Initiative on Equal Pay for Work of Equal Value ("JUMI") undertaken by the TBS in cooperation with eight bargaining agents, including the PSAC, in March 1985.

[22] The employees of the separate employers, including those of the PSSRB, were not parties to the complaint, and the complaint did not contain any allegation that separate employers, including the PSSRB, discriminated against their employees in the CR occupational group contrary to s. 11 of the *CHRA*.

[23] The JUMI was directed by a joint committee (the JUMI Committee) that agreed to conduct a study to determine the degree of sex discrimination under s. 11 of the *CHRA* and devise methods of system-wide correction in order to eliminate sexually based wage disparity.

[24] Using data of March 1985, the JUMI Committee ultimately identified nine (9) female dominated and fifty-three (53) male-dominated occupational groups, as defined in the *Equal Wages Guidelines, 1986*, (SOR/86-1082) (*Guidelines*), in respect of s. 11 of the *CHRA*, in that portion of the public service for which the Treasury Board represented the employer. The JUMI Committee agreed that these occupational groups would comprise the parameters of the study. The *Guidelines* had been issued by the CHRC pursuant to its power under s. 27(2) of the *CHRA* to issue guidelines setting out the extent to which and the manner in which, in its opinion, any provision of the Act applies in a class of cases.

[25] The JUMI Committee agreed to use a job evaluation plan to evaluate positions from male and female dominated occupational groups using a representative sample of positions. The sample size was 3,185 positions. The job evaluation process, including the gathering of job data, commenced in the fall of 1987 and concluded in the fall of 1989. Questionnaires were sent out to employees occupying positions included in the sample. The questions were aimed at assessing the skill, effort, responsibility and working conditions of the positions sampled. The answers given by the employees were reviewed by their supervisor and signed to confirm the accuracy of the answers.

[26] The positions sampled were evaluated by evaluation committees set up by the JUMI Committee. The JUMI study broke down in 1990. Several phases of the study had been concluded by then, but a final determination as to the degree of wage disparity and any recommendations had not been reached yet.

[27] Nevertheless, on January 26, 1990, the President of the Treasury Board, the Hon. Robert De Cotret, rose in the House of Commons to announce that although the final phase of the study had not been completed, the Government had concluded that any further determinations that might be made would not be significant enough to prevent it from taking

action to immediately implement some corrective measures. He therefore declared that unilateral pay equity wage adjustments would be made to members of the CR and ST occupational groups for which the Treasury Board was the employer.

[28] These equal pay adjustments or equalization payments paid to employees of the CR and ST occupational groups consisted of:

- A lump sum retroactive payment, for the period starting April 1, 1985, and ending March 31, 1990, to be paid in accordance with the time the employees were employed in the CR and ST groups during the retroactive period; and

- Ongoing annual salary adjustments effective April 1, 1990, for employees in the CR and ST group.

D. The impact of the 1990 adjustments on the PSSRB and other separate employers

[29] On February 28, 1990, representatives of the separate employer agencies, including the PSSRB, met with TBS officials and advised them that because of the close relationship between the core federal public service's and the agencies' rates of pay, the employees of the agencies and their bargaining agents were exerting pressure to obtain similar equalization adjustments as the employees of the core public service. The Treasury Board's initial response was that given the agencies' separate employer status, the Treasury Board would not provide funding for any "salary adjustments".

[30] An internal report prepared within the PSSRB following up on this meeting concluded that two options were available to the PSSRB - either petition the Program Branch of the Treasury Board for an increase in budget to pay the PSSRB's staff pay adjustments similar to the core public service, or have the PSSRB conduct its own internal pay equity study. The report pointed out that if an internal study resulted in salaries being adjusted to levels below those of core public service employees, the PSSRB risked having "dissatisfied" employees.

[31] Despite the TBS's refusal to fund salary adjustments for separate employers, on March 23, 1990, the Chairperson of the PSSRB at the time, Ian Deans, issued a memo to the staff of the PSSRB informing them that he had decided to approve equal pay adjustments for CR and ST employees commensurate with those being given by the Treasury Board to core public service employees in those occupational groups. Mr. Deans underscored, however, that these payments to PSSRB employees were conditional on "receiving the necessary funds" from the Treasury Board, pursuant to a submission that he had made to that effect.

[32] Apparently in response to the requests of the PSSRB and other separate employers, the Treasury Board eventually modified its position on the salary adjustments. On June 15, 1990, the Treasury Board informed Mr. Deans and other separate employers that it would authorize separate employers to make ongoing annual relativity payments to employees of the CR and ST occupational groups equivalent to the annual equalization payments being made by the Treasury Board to employees of the CR and ST groups in the core public service. However, this authorization came on condition that the individual separate employers conduct a pay equity study within each of their organizations. The ongoing payments were to cease when the separate employer completed its own pay equity study, or on March 31, 1992, whichever was earlier. In granting this authorization to the separate employers, the Treasury Board explicitly stated that its consideration in making this decision was to maintain an "approximation of salary relativities" between the core public service employees and the staff of separate employers. The Treasury Board stated that its objective was not to authorize adjustments representing "equal pay for work of equal value".

[33] The Treasury Board's decision did not apply any differently to the PSSRB than to other separate employers. Mr. Deans disagreed with this uniform approach and he made his views known in a letter that he addressed to the Treasury Board Secretary on June 20, 1990. He argued that the PSSRB's status was distinct from that of other separate employers. He pointed out that the PSSRB was the only separate employer whose employees were barred from collective bargaining and that as a result, since its inception in 1967, the classification standards of the core public service were consistently applied to the positions established by the PSSRB.

[34] Mr. Deans added in his letter that pay scales and benefits established through the collective bargaining process in the core public service were also consistently applied to the PSSRB's employees. He argued that it was essential for the PSSRB to assign the same terms, conditions and benefits to its employees as to the core public service, in order to prevent any party before it from using the PSSRB as an example during the resolution of a dispute. Mr. Deans concluded that for these reasons, the PSSRB had "historically followed in lock-step the classification and compensation plan" of the core public service, and that "accordingly, its pay equity relationships must be considered to exist within the context of that universe". He therefore advised the Treasury Board that he intended to adjust the salaries of the PSSRB's CR and ST occupational groups to conform with those authorized by the Treasury Board for its employees in these groups. This presumably would have included the retroactive payments as well.

[35] On August 20, 1990, Mr. Deans wrote again to the Treasury Board Secretary, contending that the equal pay adjustments, including the retroactive portion, that were being paid to CR and ST employees in the core public service, had "disrupted the historical relativity" between PSSRB employees and the core public service. He added that the fact that PSSRB employees had not received similar adjustments on an indefinite basis had had a "disastrous effect upon their morale" and that this would impair the PSSRB's ability to recruit and retain competent staff. Mr. Deans claimed that it is "artificial in the extreme" for the Treasury Board to argue that PSSRB employees would only be entitled to pay equity adjustments beyond 1992 if it was found that inequities existed between male and female dominated occupational groups within the PSSRB. He asserted that it "could not be seriously argued" that pay scales that are based upon "discriminatory rates of pay" in the core public service are not themselves "tainted by the discrimination".

[36] It should be noted here, however, that in an earlier memo to PSSRB staff (July 20, 1990), Mr. Deans had indicated that PSSRB management had conducted an informal internal comparison of male and female dominated occupational groups within the PSSRB, which had not revealed the existence of any "internal pay equity problem".

[37] Mr. Deans further advised the Treasury Board Secretary in his August 20th letter that despite the TBS's position, he intended to "restore pay relativity" to the PSSRB's CR and ST employees (presumably on an indefinite basis), by forwarding a submission for funding approval directly to the members of the Treasury Board.

[38] On August 29, 1990, the PSSRB submitted a Briefing Note to the Minister (i.e. the President of the Treasury Board), setting out the same arguments that Mr. Deans had previously raised with the Treasury Board Secretary and requesting approval of the PSSRB's submission for the allotment of funding required for the payment of a relativity allowance.

[39] These efforts appeared to have had some impact on the TBS and, on September 15, 1990, the Treasury Board Secretary advised Mr. Deans that the TBS staff had been asked to re-examine the PSSRB proposal for the allotment of funding. On November 1, 1990, the Treasury Board wrote to Mr. Deans and other heads of separate employer agencies, acknowledging that many of those agencies had made representations to the Treasury Board seeking approval for the funding of retroactive (lump sum) adjustment payments. The Treasury Board was now informing them of its decision to permit the making of these payments on condition that each employer "launch initiatives within its own organization to eliminate differences in wages, if any, in compliance of s. 11 of the *CHRA*". Consequently, on Novemer 6, 1990, Mr. Deans approved the implementation of the revised rates of pay, including both the retroactive payments and the ongoing salary adjustments.

[40] The evidence indicates that although the PSSRB did not ultimately ever conduct an internal pay equity study, it continued and never ceased paying the ongoing relativity adjustments, beyond the deadline of March 31, 1992, which the Treasury Board had set down in its June 15, 1990, letter to Mr. Deans and the other separate employers.

E. The 1990 PSAC Human Rights Complaint

[41] In February 1990, the PSAC had filed a second s. 11 complaint with the CHRC against the Treasury Board alleging that the results obtained through the JUMI process demonstrated that

employees of six (6) female-dominated occupational groups earned lower wages than those earned by the employees of the fifty-three (53) male-dominated occupational groups included in the study performing work of equal value.

[42] The six (6) female-dominated groups named in the complaint were the CR, ST, DA-CON, LS, Educational Support (EU), and Hospital Services (HS) occupational groups. The PSAC also alleged that the equalization adjustments to the CR and ST groups announced by the Treasury Board President in January 1990 were insufficient to correct the breach of s. 11. The PSAC sought compensation for the affected employees for all direct and indirect losses since March 8, 1984.

[43] On October 6, 1990, the CHRC referred a portion of the PSAC's 1984 complaint (the allegation of the violation of s. 11 of the *CHRA*) as well as the entirety of the 1990 complaint, to the Tribunal for determination. The Tribunal ultimately concluded, in its decision dated July 29, 1998, that the Treasury Board had engaged in a discriminatory practice within the meaning of s. 11 of the *CHRA* and ordered the Treasury Board to make payments in respect of its employees of the CR, ST, DA-CON, LS, HS and EU occupational groups in the core public service in accordance with the terms set out in the order. These payments consisted of:

- Annual lump sum equalization payments for the period from March 8, 1985, to July 29, 1998, to be calculated using the 1987-88 job evaluation data from the JUMI study and the contemporary wage rates for the applicable fiscal year, (i.e. retroactive payments); and

- Pay equity adjustments for wages for periods after July 29, 1998, which were to be folded into and become an integral part of wages (i.e., ongoing payments).

[44] The Treasury Board applied for judicial review of the Tribunal's order, but on October 19, 1999, the Federal Court dismissed the judicial review application with costs. On October 29, 1999, the representatives of the TBS and the PSAC concluded an agreement for the purpose of implementing the Tribunal's decision of July 29, 1998. The terms of the agreement were ultimately incorporated in a Consent Order issued by the Tribunal and dated November 16, 1999.

F. To what extent were separate employers involved and affected by the 1984 and 1990 PSAC complaints?

[45] In its complaints filed with the Commission in 1984 and 1990, the PSAC did not name any of the separate employers, including the PSSRB, as respondents. In the particulars of the complaints filed by the PSAC with the CHRC in 1984 and 1990, there is no allegation that separate employers, including the PSSRB, discriminated against their employees in the CR, ST, DA-CON and LS groups within the meaning of s. 11 of the *CHRA* or any other provision of this statute.

[46] The parties in the present case all concur that the JUMI study was neither intended to, nor did it apply to employees of separate employers. There were no separate employer representatives on the JUMI Committee. Separate employers did not have any input in the choice of the job evaluation system selected by the JUMI Committee to evaluate positions or any input into how the job evaluation system was modified. No positions of employees of separate employers were included in the population that was sampled for the JUMI study and no such positions were evaluated by the evaluation committees for skill, effort, responsibility and working conditions (which are the four criteria set out in s. 11(2) of the *CHRA*). There were no management representatives from any of the separate employers on any of the fifteen evaluation committees.

[47] The Tribunal's decision of July 29, 1998, and the Consent Order of October 29, 1999, only applied to employees of the departments, agencies, boards and commissions listed in Part I of Schedule I of the *PSSRA*, that is, those portions of the public service for which the Treasury Board was the employer. The decision and the Consent Order did not apply to employees of separate employers.

[48] On July 28, 1998, just prior to the release of the Tribunal's decision, the Secretary of the Treasury Board had written to all separate employers to advise them that the ruling would apply only to that part of the public service for which Treasury Board is the employer and that it did not "automatically" extend to separate employers.

[49] On November 16, 1999, the Secretary of the Treasury Board wrote to all separate employers again, reiterating that the original complaint by the PSAC, the Tribunal ruling of July 29, 1998, and the Consent Order applied only to that part of the public service for which the Treasury Board is the employer and not to separate employers.

[50] This position was repeated by TBS officials at a meeting for separate employer representatives hosted by the TBS on January 21, 2000. While the TBS officials indicated that no retroactive payments would be made to the separate employers, they offered and agreed to consider requests for salary relativity adjustments on a case by case basis based on the amended rates of pay for Treasury Board employees, and to consider requests for pay equity adjustments based on pay equity studies conducted by separate employers within their own "establishments". The TBS undertook to continue providing technical support and advice to separate employers that carried out reviews of their respective pay equity situations.

[51] On February 25, 2000, Mr. Tarte, who had replaced Mr. Deans as PSSRB chair in 1996, wrote to the Assistant Secretary of the TBS. Mr. Tarte submitted that the PSSRB's situation was different than that of other separate employers and that consequently, the TBS should reconsider its position that the Consent Order did not apply to the PSSRB. Mr. Tarte advanced arguments that were similar to those put forward by Mr. Deans back in 1990 when he sought to reverse the TBS's position on the funding to the PSSRB for relativity payments. Mr. Tarte reiterated that the PSSRB was distinct from other separate employers, highlighting the fact that its employees were precluded from collective bargaining, as well as the operational necessity for the PSSRB not to adopt wages and benefits for its staff that differed from those provided to core public servants. Mr. Tarte submitted that due to these circumstances, PSSRB staff formed part of the group that was subject to the pay equity order. He posited that since the PSSRB was paying its staff wages identical to those that had been found by the Tribunal and the Federal Court to be "discriminatory", then it was unsupportable to contend that the PSSRB's wages were not discriminatory as well.

[52] Mr. Tarte also affirmed in his letter that given the "traditional" relativity that had been maintained with the core public service for the terms and conditions of employment, including

rates of pay, there was no reason for the PSSRB to undertake a pay equity study of its own. At the hearing into the present complaint, Mr. Tarte testified that in his view, conducting a separate pay equity study would have been a "futile exercise" and a "waste of money", as it would not have proven the existence of wage discrimination within the organization. He added that he had been advised at the time that some of the female dominated occupational groups referenced in the PSAC's pay equity complaints were either neutral or male dominated within the PSSRB. Mr. Tarte testified that for him, the key issue in this dispute with the TBS was fairness. It was simply inequitable that given the special circumstances of the PSSRB, its employees not receive the same treatment as core public servants employed within the same occupational groups.

[53] On July 10, 2000, the TBS replied to Mr. Tarte's February 25th letter, advising him that in its determination, no valid grounds existed to justify the extension of the Consent Order to PSSRB staff. The TBS maintained that the PSSRB was no different than other separate employers and as such, was a separate "establishment", within the meaning of s. 11 of the *CHRA* and s. 10 of the *Guidelines*. The TBS reiterated its undertaking that it would support the PSSRB if it opted to conduct its own pay equity study. If the study determined that its pay rates were discriminatory, the TBS would be prepared to consider and analyze any requests for additional funding, should the PSSRB be unable to remedy the discriminatory practice from its existing financial resources.

[54] Mr. Tarte testified that aside from these communications in writing with the TBS, he had engaged in numerous conversations with TBS representatives regarding the matter, but their position was always unyielding.

[55] In light of the TBS's July 10th letter, Mr. Tarte issued a memo to PSSRB staff on July 28, 2000, in which he advised that in spite of the PSSRB's "numerous efforts", he was sorry to inform them that the TBS had refused to give PSSRB employees "the right to the provisions of the pay equity agreement made between the Treasury Board and PSAC".

[56] It would seem, however, that the Treasury Board later reversed its position in part, by authorizing and providing funding to the PSSRB solely for the adjustment of the ongoing rates of

pay for its CR, ST and LS occupational groups, based on the post-July 29, 1998 amended rates of pay for the Treasury Board employees. No evidence was led before me to explain how or why this change came about.

[57] As a result of this adjustment, the only respect in which the remuneration of PSSRB employees in those occupational groups has differed over the years from that of Treasury Board employees employed in the core public service is in relation to the lump sum retroactive equalization payments for the period from March 8, 1985, to July 29, 1998. It was to address this differentiation as well as the one regarding the retroactive payments for PE employees, discussed below, that the present human rights complaint was filed.

G. The pay equity complaints involving the PE occupational group

[58] Between 1991 and 1994, several complaints were filed with the CHRC against the Treasury Board, alleging that it was paying lower wage rates to employees in the predominantly female Personnel Administration (PE) occupational group than employees in five predominantly male occupational groups who were performing work of equal value in the same establishment, a discriminatory practice within the meaning of s. 11 of the *CHRA*. The complaints pertained only to employees classified in the PE occupational group in the portion of the public service referred to in Part I of Schedule I of the *PSSRA* (i.e., the core public service). Since the employees classified in the PE occupational group were excluded from collective bargaining, the PE National Assembly or PENA was constituted to represent the interests of the PE employees for the purpose of the complaints.

[59] The PE occupational group was not part of the JUMI study. Rather, the TBS and the PENA undertook a joint study to examine the allegations of pay inequity raised in the pay equity complaints filed with the CHRC.

[60] Based on the results of the study, the parties settled the complaints on November 26, 1999, pursuant to a memorandum of agreement concluded between the PENA and the TBS. The settlement provided an increase in the rates of pay effective October 1, 1999, and the payment of

a retroactive lump sum to the affected employees for the period October 1, 1991, to September 30, 1999.

[61] The settlement applied to former and current PE employees who were in a department or agency listed in Part I of Schedule I of the *PSSRA* (i.e., the core public service) during the relevant time, commencing on October 1, 1991.

[62] These pay equity complaints did not allege that the employees of separate employers occupying positions classified in the PE occupational group were victims of discrimination. Separate employers did not participate in the PE study undertaken by the TBS and the PENA, nor did they have any input in the choice of the job evaluation system or in the manner in which it was applied. No positions from separate employers formed part of the study. Employees of the separate employers, who were occupying positions classified in the PE occupational group were not parties to the settlement, nor did they receive any compensation under the settlement in respect of their employment with separate agencies. However, the PSSRB made a request, and was ultimately authorized, to adjust the rates of pay for its PE occupational group to match the amended rates of pay for the core public service employees, effective October 1, 1999. On the other hand, the Treasury Board did not authorize funding for the payment of any retroactive sums to persons employed in the PSSRB as PEs between October 1, 1991, and September 30, 1999.

H. Mr. Harkin's expectations regarding equalization payments

[63] As I indicated earlier, one of the 66 complainants, Richard Harkin, was the PSSRB's librarian from 1985 to 2002. He was the only complainant to testify at the hearing. His position came within the LS occupational group. He testified that in 1979, the PSAC filed a human rights complaint with the CHRC against the Treasury Board, alleging that core public service employees employed within the LS occupational group, comprised primarily of women, were receiving wages that were lower than the wages earned by a male dominated comparator group that was performing work of equal value. In 1980, a settlement was reached, according to which an additional sum (identified as an "equalization payment") was to be paid annually to

LS employees. The settlement was incorporated into the collective agreement between the PSAC and the Treasury Board.

[64] When Mr. Harkin was hired by the PSSRB in December 1985, his offer of employment indicated that his salary had been determined in accordance with the "Public Service Terms and Conditions of Employment legislation", which Mr. Harkin understood to be the wage rates and other conditions negotiated by the PSAC with the Treasury Board regarding core public service employees. In addition, the offer of employment stated that the LS "equalization adjustment" formed part of his "rate of pay". Mr. Harkin testified that he continued to receive the LS equalization payment throughout the course of his employment at the PSSRB as an LS, despite the fact that the foundation for this payment was an agreement that had been reached between the PSAC and the Treasury Board, to which the PSSRB was not a party.

[65] According to Mr. Harkin, this practice further demonstrated that the PSSRB employees' salaries were always in "lock-step" with the core public service. He testified that given the PSSRB's uninterrupted payment to him of the LS equalization payments during his tenure, he reasonably assumed the same practice would be adopted if any further equalization payments were ordered or consented to with respect to core public service librarians. Thus, when he learned that his employer would not pay him the retroactive payments arising from the 1999 Consent Order, he felt as if his employment contract, dating back to December 1985, had simply been "shredded" to pieces.

I. The present complaint

[66] On November 27, 2001, Mr. Harkin, along with 65 other PSSRB former or current employees, reacted to the decision not to provide them the retroactive payments by filing the present complaint against the Treasury Board and the PSSRB, alleging a breach of ss. 10 and 11 of the *CHRA*. After the CHRC referred the complaint to the Tribunal, the Complainants abandoned the s. 11 component of the complaint and on February 18, 2009, the Tribunal allowed them to amend the complaint to include s. 7 as an additional alleged discriminatory practice.

[67] This was not the first complaint ever launched by PSSRB employees regarding wage discrimination. In April 1991, 32 employees filed a s. 11 complaint against the Treasury Board and the PSSRB alleging that the predominantly female CR and ST occupational groups at the PSSRB were being discriminated against on the basis of sex, as their salaries were lower than those paid to the male dominated groups. The complaint alleged that the Treasury Board and the PSSRB were the same employer, and that the employees of the core public service and the employees of the PSSRB were employed in the same establishment. This complaint was dismissed by the CHRC on December 19, 1994, on the basis that, for pay equity purposes, the PSSRB and the Treasury Board are not part of the same establishment and, as such, the conditions required by s. 11(1) of the *CHRA* had not been met.

J. How have other separate employers dealt with the pay equity issue?

[68] Over the years, some of the separate employers have examined their compensation practices for compliance with pay equity principles. For example, the Office of the Superintendent of Financial Institutions (OSFI) and the Medical Research Council conducted their own pay equity studies. The Canadian Security Intelligence Service, the Social Science and Humanities Research Council, the Canadian Institute for Health Research (CIHR) and the OSFI implemented gender-neutral classification plans to deal with the matter of pay equity. The PSSRB, as I already mentioned, never conducted any pay equity study of its own.

II. ANALYSIS

[69] In the adjudication of human rights complaints, the complainant must first typically establish a *prima facie* case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")). A *prima facie* case, in this context, is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable, non-discriminatory explanation for the impugned conduct.

[70] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors influencing the respondent's conduct (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.)).

A. Has a *prima facie* case been established?

[71] The CHRC and Mr. Harkin, speaking on behalf of the other complainants, argued that this case is essentially a matter of fairness. From their perspective, it is unfair that clerks, administrative assistants and librarians, for instance, who worked in the core public service, received retroactive pay equity adjustments, while PSSRB staff working in jobs that were similarly classified, did not.

[72] However, the precise question with which this Tribunal is actually seized is not whether the denial of these payments to the Complainants and other PSSRB employees was fair, but whether the decision to deny the payments constituted a discriminatory practice under ss. 7 or 10 of the *CHRA*. I will first deal with s. 7 and leave my consideration of s. 10 for later.

B. Section 7 of the *CHRA*

[73] Section 7(*b*), which is the relevant portion of s. 7 that has been invoked by the CHRC and the Complainants in this case, states that it is a discriminatory practice to directly or indirectly, in the course of employment, differentiate adversely in relation to an employee on a prohibited ground of discrimination. What is the alleged "adverse differentiation" in this case? In answer to this question, the CHRC submitted that the 66 complainants were all employed in female dominated jobs or occupational groups and that their wage rates had been "found to be depressed" compared to the wages of male dominated occupational groups. They had therefore been underpaid. In essence, the CHRC contends that persons employed at the PSSRB in female dominated jobs were paid less than persons employed in male dominated jobs for doing work of equal value.

[74] But what evidence has been led to establish that the wages were depressed? Ordinarily, complaints alleging this form of discrimination are brought under s. 11 of the *CHRA*, which provides 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. This appears to be the type of discrimination alleged by the Complainants in this case, to the effect that the CR, ST, LS and PE occupational groups employed at the PSSRB should be considered to be "female jobs", that these female jobs are undervalued to "male jobs" with the result that those individuals employed in the female jobs (including men, such as Mr. Harkin) are entitled to a wage adjustment as a remedy.

[75] The Complainants originally alleged a breach of s. 11 in their complaint, but after the CHRC referred the complaint to the Tribunal, they abandoned their claim under this provision. No reason or explanation was given for this decision. We know, however, that no comparative study of the female and male dominated groups within the PSSRB to assess the value of the work performed by these employees, in accordance with the criteria and definitions set out in s. 11 and the *Guidelines*, was ever conducted. Thus, the sort of evidence ordinarily led in such cases was not available. Why was such a study not initiated in this case? Mr. Tarte, whom the CHRC called as a witness, testified that he had been advised that a pay equity study would not have proven the existence of wage discrimination at the PSSRB within the meaning of s. 11. Dr. Nan Weiner, whom the CHRC called to testify as an expert in pay equity principles, among other topics, stated that in her opinion there were not enough male dominated occupational groups within the PSSRB to compare to female dominated groups in a pay equity study. On the other hand, an expert in job evaluation in the pay equity context, Bob Bass, who was called to testify by the Respondent, stated that there were sufficient job classes with unique enough functions at the PSSRB to conduct a pay equity study.

[76] Whatever the reason may have been for not engaging in such a job evaluation exercise, given the absence of this form of study, there was no evidence available to support or substantiate a claim of wage discrimination pursuant to s. 11, had such a complaint been made.

[77] The CHRC argues, however, that nothing in the *CHRA* prevents it from establishing that this type of wage discrimination has occurred by means other than those contemplated in s. 11. The CHRC proposes what on its face appears to be a simple method for establishing that the Complainants' wages were "depressed" and undervalued. It asks the Tribunal to consider what took place within the core public service. After all, contends the CHRC, the Complainants were in jobs with the same classifications and were receiving the same salaries as the s. 11 complainant group in the core public service. Consequently, if the core public servants' salaries were "depressed", the PSSRB's must be too.

[78] This argument cannot stand, in my view. The outcome of the Consent Order and the PE Settlement was not that the salaries of the occupational groups in issue were inherently discriminatory because they were female dominated or comprised of what has traditionally viewed by society as "female work", but rather as the result of a pay equity exercise as contemplated by s. 11 of the *CHRA*. A pay differential between male and female dominated groups of employees doing work of equal value employed in a single organization can only be found to be discriminatory, within the meaning of the *CHRA*, if it is has been determined to be so pursuant to an assessment of the work done in accordance with the definitions and criteria articulated in the *CHRA* and the *Guidelines*. The pay differential is not inherently discriminatory under the federal legislative framework, it is only determined to be so once the exercise contemplated by s. 11 and the *Guidelines* has been completed.

[79] In the present case, the core public service's wage rates were only found to be discriminatory following a pay equity study conducted in accordance with the precepts of s. 11, one of which is that the alleged discrimination relate to a single establishment. As the Respondent points out, Parliament chose to limit an employer's obligation to ensure equal pay for work of equal value among men and women to the employer's establishment. Under the *Guidelines*, an establishment is constituted of all employees of the employer subject to a common personnel and wage policy. It was on this basis that in April 1991 the CHRC determined, in dismissing the complaint filed by 32 PSSRB employees, that the PSSRB constitutes a separate establishment from the core public service. In the early 1980's, the CHRC had made a similar decision with respect to another separate employer, the National Research Council, a decision that was upheld

by the Federal Court of Canada (*Professional Institute of the Public Service of Canada v. Canadian Human Rights Commission*, A-844-81 (FCA), motion for leave to appeal to the SCC denied [1983] S.C.C.A. No. 452).

[80] Dr. Weiner suggested in her evidence that since, in her opinion, there were insufficient male comparators within the PSSRB to conduct a study following the method contemplated in s. 11 and the *Guidelines*, it would be legitimate to use another method, such as relying on the comparisons to male occupational groups that had been made pursuant to s. 11, in the context of the JUMI study and ultimately, the Consent Order. This exercise could be accomplished by comparing the female PSSRB jobs directly to the male jobs in the core public service or alternatively, by conducting a "surrogate" or "proxy" comparison. This latter approach is suited to highly female oriented organizations where there are insufficient male comparators. These "female jobs" would be compared to female dominated jobs in a proxy organization that had sufficient male comparators and where pay equity has already been achieved. If the female jobs from both organizations are found to be of equal value then the wages of the seeking organization should be adjusted to be the same as well. Apparently, Quebec's and Ontario's pay equity legislative schemes explicitly permit the use of this approach in certain circumstances.

[81] Dr. Weiner's suggestions, however, do not accord with the regime that is in place at the federal level. Section 11 and the *Guidelines* prescribe an internal analysis based solely on the assessments of work performed by employees employed within the same establishment. External surrogate or proxy comparisons are not contemplated therein.

[82] Dr. Weiner's proposal, however, begs the question of whether a complaint of unequal pay for work of equal value can be resolved under ss. 7 or 10, rather than s. 11, by calling upon an analysis or methodology that is not contemplated in s. 11, such as the ones advanced by her.

[83] In my view, it cannot. As was noted in the final submissions of the Respondent, in enacting s. 11, Parliament sought to identify and ameliorate wage discrimination that resulted from the undervaluation and underpayment of women's work as compared to men's work. In the Federal Court decision regarding the 1990 PSAC complaints (*Canada (Attorney-General) v.*

Public Service Alliance of Canada, [2000] 1 F.C. 146 (T.D.)), the Court pointed out that the mischief at which s. 11 is principally aimed is the existence of a wage gap that disadvantages women, as a result of gendered segregation in employment and the systemic undervaluation of the work typically performed by women (see also *Canada (Attorney-General) v. Walden*, 2010 FC 490 at para. 90).

[84] Parliament specifically dealt with this issue in s. 11 and articulated the means by which this form of discrimination is to be determined. If a party perceives that it is unable to prove the undervaluation and underemployment of women's work by the means set out in s. 11, can it under the guise of the general *CHRA* provision for employment related discrimination (s. 7 (*b*)), establish its existence through the use of another pay equity method than that which was contemplated in s. 11, such as a proxy or surrogate analysis? Not in my opinion, as this approach would be at variance with the explicit intent of the legislator that complaints of unequal pay for work of equal value be resolved having resort to the analysis provided in s. 11.

[85] I agree with the Respondent's submission that this construction is supported by the rule of statutory interpretation *generalia specialibus non derogant*, more commonly known as the implied exception rule. According to the rule, where there is a conflict between a statutory provision that deals specifically with the matter in question and another provision that has a more general application, the conflict is to be resolved by applying the specific provision to the exclusion of the more general one. It is evident that Parliament has specified the method by which pay equity is to be determined at the federal level. To depart from this method and import others, even though some of these methods may have been adopted by some provinces, would be inappropriate in my view.

[86] A similar issue was dealt with by the Queen's Bench for *Saskatchewan in University of Saskatchewan v. Dumbovic*, 2007 SKQB 182, in relation to provincial human rights legislation. The Court noted that while Saskatchewan has legislation requiring equal pay between male and female employees for equal work and for similar or substantially similar work, there is no specific provision in any provincial Act requiring equal pay for work of equal value. The complainant women in that case consequently filed a complaint under the general discrimination provision

(s. 16(1)) of the *Saskatchewan Human Rights Code* (*Code*), which stipulates that no employer shall discriminate against a person or class of person with respect to employment on a prohibited ground. This provision is similar to s. 7(*b*) of the *CHRA*. The Court held that the Saskatchewan Human Rights Tribunal lacked the jurisdiction under s. 16 of the *Code* to hear complaints of unequal pay for work of equal value.

[87] The Court referred to the complex structures necessary to implement, administer and enforce a regime of equal pay for work of equal value, citing some of the conclusions and findings from the final report of Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* – (Ottawa: Public Works and Government Services Canada, 2004). The Court pointed out that the introduction of pay equity structures into the *Code* would raise issues of incompatibility with other provincial legislation and took note of the Task Force's recommendation that pay equity legislation should contain specific criteria, structures, methodologies and processes. The Court concluded that these latter components of a pay equity analysis could not be created by a statutory interpretation of s. 16's general terms. Focussed legislation is required.

The Court went on to add, at para. 108, that:

> Adjudicators must understand the difference between interpretation and application of the law, on the one hand, and creation of the law, on the other. In this case, the legal and regulatory structures necessary to implement, administer and enforce a regime of equal pay for work of equal value in Saskatchewan workplaces can only be created by appropriate legislation. Any attempt to construct them under the guise of interpreting subsection 16(1) of the *Code* would go well beyond acceptable limits of statutory interpretation. It would intrude into the role and responsibility of the legislature.

[88] While I am mindful that this decision related to a question of the provincial human rights tribunal's jurisdiction rather than an exercise in the interpretation of a statute, as in the present case, I think the Court's reasoning can be extended by analogy to efforts aimed at introducing into the *CHRA*, by means of s. 7, alternate forms of pay equity analysis than those contemplated in s. 11 and the *Guidelines*.

[89] The CHRC argued that Parliament's intent to require that complaints of unequal pay for work of equal value be dealt with solely under s. 11 is not necessarily as obvious as the Respondent contends. The CHRC referred to the recently enacted *Public Sector Equitable Compensation Act*, S.C. 2009, c. 2, s. 394 (*PSECA*), pursuant to which the PSLRB was assigned the jurisdiction to deal with claims involving equitable compensation within the public sector. The transitional provisions of the Act provide, at s. 396(1), that any of the following types of complaints that may have been pending before the CHRC prior to the coming into force of the Act shall be referred by the CHRC to the PSLRB:

a) Complaints based on s. 7 or 10 of the *CHRA*, 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 s. 11 of the *CHRA*.

[90] The CHRC contends that by grouping all three *CHRA* provisions together in this fashion, Parliament demonstrated its intent that matters of pay equity can be addressed under any or all of these *CHRA* provisions. I do not agree. The first paragraph does not make reference to differences in wages between male and female employees who are performing work of equal value.

[91] As was pointed out in *Dumbovic* at para. 86, gender-based wage discrimination can arise in other forms as well. For instance, paying unequal wages to male and female employees who are doing identical work would constitute adverse differentiation with the meaning of s. 7(*b*). Paying males and females differently for the performance of similar or substantially similar work may also constitute a discriminatory practice under s. 7(*b*). This situation arises where employees have different job titles but perform substantially the same work. For instance, in *Walden* (previously cited), a predominantly male group of medical advisers (or doctors) who worked alongside a predominantly female group of medical adjudicators (or nurses), in the administration of the Canada Pension Plan Disability Program, were found to be performing the same or substantially similar work. Yet, only the medical advisors were classified as health professionals,

which enabled them to receive the additional benefits and recognition that flow from that designation.

[92] These forms of gender-based wage discrimination must be distinguished from claims of *unequal pay for work of equal value*, which are established through an assessment of the relative value of jobs based on specific criteria. Federally, the framework for making these assessments is articulated in s. 11 of the *CHRA* and the *Guidelines*.

[93] In addition, the Respondent proffered that the terms of *PSECA*'s transitional provision may also be indicative of Parliament's intent to have all s. 11 complaints (including complaints that have invoked s. 7 or s. 10, as well) dealt with entirely by the PSLRB, rather than having the Canaidan Human Rights Tribunal run a parallel process to deal with the ss. 7 and 10 components of a complaint relating to the same set of facts.

[94] In either instance, I am not persuaded that the *PSECA* and its transitional provisions have any impact on my finding that Parliament's intent was and remains that human rights claims alleging the discriminatory practice of *unequal pay for work of equal value* be resolved solely through the application of s. 11 of the *CHRA*.

[95] The CHRC referred in its arguments to the principle that human rights laws are to be given a large and liberal interpretation to ensure that the objects of these laws are attained. This principle is intended, however, to apply where there are ambiguities in the Act (*Bell Canada v. Canadian Telephone Employers Association*, 2003 SCC 36 at para. 26). In my view, there is no ambiguity present here. Parliament has stated its method for determining the existence of unequal pay for work of equal value through its enactment of s. 11, and the ensuing issuance by the CHRC of the *Guidelines*, as contemplated by the *CHRA*.

[96] The CHRC advanced an alternate argument for establishing that the Complainants had been adversely differentiated within the meaning of s. 7 (*b*). The result of the Consent Order and the PE Agreement was that the wage rates of certain female dominated occupational groups within the core public service were underpaid. They were thus earning "female wages".

Knowing that PSSRB staff in jobs that are similarly classified were being paid the same "female wages", the PSSRB and, more importantly, the Treasury Board, should have "addressed their minds" to the "great likelihood" that PSSRB employees were being subjected to the same discrimination. According to the CHRC, the Treasury Board's failure to rectify this discrimination by approving funding for the retroactive equalization payments constitutes adverse differentiation on the basis of sex.

[97] I fail to see how the PSSRB's and the Treasury Board's failure to consider or "address their minds" to the possibility raised by the CHRC constitutes adverse differentiation. The Complainants were not receiving inherently discriminatory "female wages". Under the *CHRA*, the determination of whether unequal wages are being paid for work of equal value is made pursuant to s. 11 and the applicable *Guidelines*. Dr. Weiner testified that she disagrees with the federal scheme for pay equity, and in her preferred methodology, a wage should be deemed to be female if by ordinary societal norms, the job attached to the wage is considered female. This may be a legitimate and appropriate method for conducting a pay equity analysis, but it is inconsistent with the approach articulated in the *CHRA* and the *Guidelines*.

[98] The fact is that the PSSRB was a separate employer pursuant to the *PSSRA* and the *FAA*, as well as a separate establishment within the meaning of s. 11 of the *CHRA*, as the CHRC itself so determined in 1991. The Consent Order and the PE Agreement did not apply to the PSSRB. I am not persuaded by the argument that the separate employer's alleged failure to consider the "likelihood" that its pay scales are also discriminatory constitutes adverse differentiation on the basis of sex. There certainly was differentiation on the basis of where the complainants worked (at the PSSRB rather than in one of the core public service's departments or agencies). Employees employed at the PSSRB ended up earning wages that did not incorporate a retroactive adjustment that employees in the core public service received. This may seem unfair, but it does not demonstrate that the Complainants were adversely differentiated on the basis of sex.

[99] Besides, the Treasury Board did address its mind to the possibility of a pay equity problem by recommending that separate employers, including the PSSRB conduct their own pay equity

studies, undertaking to support them in these efforts and ultimately, being willing to consider funding any requests for wage adjustments arising from these studies.

[100] In its final submissions, the CHRC highlighted numerous indicators in the evidence suggesting that the Treasury Board should be considered the effective employer of the PSSRB's staff, including the Complainants. After all, the jobs of most (but not all) PSSRB employees were classified according to the Treasury Board's classification standards and Mr. Tarte testified that he felt the PSSRB's CRs did similar work to CRs in the core public service. Personnel bulletins issued by the PSSRB that were filed in evidence directed that job classification decisions within the organization were to be made according to the classification standards in use in the core public service. The Complainants' salaries moved in lock-step with those of core public servants, including the 1990 relativity payments and the 1980 LS equalization payments. Staffing actions at the PSSRB were subject to the *Public Service Employment Act*, R.S.C. 1985, c. P-33, just as those in the core public service. PSSRB staff could transfer in and out of positions in the core public service with relative ease. The Treasury Board exercised control over the release of funds to the PSSRB and other separate employers, which effectively meant that the Treasury Board controlled the separate employers' wages. Historically, but for the need to maintain the PSSRB's neutrality, as first expressed by Mr. Finkelman, the PSSRB would have remained part of the core public service and never become a separate employer. In sum, the CHRC contends that the Treasury Board exercised *de facto* control over the personnel management of the PSSRB. The CHRC therefore argued that, as Mr. Tarte had stated in his February 25, 2000, letter to the TBS, even if the PSSRB is a separate employer and not a party to the human rights complaints, the PSSRB employees formed part of the group that was subject to the Consent Order.

[101] However, irrespective of whether or not the *de facto* employer is the Treasury Board, I fail to see how this alters or impacts on my earlier findings regarding the application of s. 7 (*b*) to the present case. Whether the employer is the PSSRB, the Treasury Board, or as the CHRC also pointed out, ultimately Her Majesty the Queen, the fact remains that discrimination at the PSSRB in the form of unequal pay for work of equal value has not been established using the methodology that Parliament has chosen, as articulated in s. 11 of the *CHRA*.

[102] I made no distinction between the roles of the PSSRB and the Treasury Board in my previous discussion regarding the s. 7 (*b*) claim, and any findings are essentially interchangeable between the two possible employers, regarding the issue of whether a *prima facie* case of discrimination under s. 7 (*b*) can be made in the circumstances alleged in this complaint.

[103] Besides, even if the Treasury Board is considered the employer of both the PSSRB and the core public service, the PSSRB still constitutes a separate establishment from the core public service within the meaning of s. 11, as the CHRC had already found back in 1991. As I have already discussed, the PSSRB's wage scales cannot be automatically determined to be discriminatory based on the pay equity study and findings of distinct entity or establishment, the core public service.

[104] The suggestion that PSSRB employees are *de facto* Treasury Board employees may perhaps support the argument that they are directly entitled to receive the retroactive equalization payments set out in the Consent Order and the PE Agreement in their capacity as Treasury Board employees. This, however, would be a question of execution of the Tribunal Order or non-compliance with the PE Settlement. The means for dealing with such matters is to have the Tribunal Order or the PE Settlement filed with the Federal Court, and thereby render them orders of the Court, as provided for in ss. 48(3) and 57 of the *CHRA*.

[105] For all the above reasons, I find that even if the allegations and evidence of the Complainants and the CHRC are believed, a *prima facie* case of adverse differentiation within the meaning of s. 7(*b*) has not been established.

C. Section 10 of the *CHRA*

[106] Section 10 (*a*) of the *CHRA*, which is the portion of s. 10 that is relevant to the Complainants' allegations, provides that it is a discriminatory practice for an employer or employer organization, to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. The CHRC's submissions regarding s. 10 (*a*) were predicated on the assumption

that the Complainants were earning "discriminatory wages", adding that the discriminatory wages were paid in furtherance of a policy or practice established by the PSSRB and/or the Treasury Board. For the reasons that I have given with respect to the s. 7(*b*) allegation of discrimination, I have found that the allegation that the wages paid by the PSSRB constituted adverse differentiation, and thereby discriminatory under the *CHRA*, has not been established. On this basis alone, therefore, the s. 10 (*a*) claim cannot be established, even on a *prima facie* basis.

[107] In addition, however, I am not persuaded that any evidence has been led to support the claim that the Complainants were denied an employment opportunity, even if it was established that they were paid in an adversely differential manner based on their sex. The CHRC argued that had the Complainants known that they would ultimately not have received the same retroactive adjustments to their salaries as the core public service thereby denying them an "equitable wage", they could "arguably" have chosen not to remain in the employ of the PSSRB and sought employment within the core public service instead, in order to maintain an "equitable salary". Given the relativity and equalization payments provided in the past to the PSSRB's LS, CR and ST employees, it was reasonable for the Complainants to expect that any future adjustments awarded to core public servants would apply to them as well.

[108] This argument, however, is entirely hypothetical. No evidence was led of any PSSRB employee for whom the presumption of pay relativity was a factor in their decision not to seek employment in the core public service. Furthermore, even if such evidence had been adduced, I am not convinced by the CHRC's argument that an employee's decision not to seek other employment for the reasons alleged would deprive or tend to deprive the employee of an "employment opportunity" within the meaning of s. 10. However, given the above mentioned absence of evidence supporting the s. 10 allegation, I need not comment any further on this latter point.

[109] For these reasons, I find that a *prima facie* case of a discriminatory practice pursuant to s. 10 has also not been established.

III. CONCLUSION

[110] I therefore conclude that the complaint has not been substantiated and it is consequently dismissed.

Signed by

Athanasios D. Hadjis

OTTAWA, Ontario
May 17, 2010

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1266/7807
STYLE OF CAUSE:	Richard Harkin et al. v. Attorney General (Canada)
DATE AND PLACE OF HEARING:	April 20, 21, 23, 24, 27, 28 and 30, 2009 May 4, 8 and 12, 2009 Ottawa, Ontario
RULING OF THE TRIBUNAL DATED:	May 17, 2010
APPEARANCES:	
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