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"Far too long, at far too great a cost": Federal government loses long-running pay equity battle

January 1, 2000

In the past few months, two high profile legal setbacks appear to have forced federally regulated employers to come to terms with the pay equity provisions in the *Canadian Human Rights Act*. First, the Supreme Court of Canada refused to hear Bell Canada's appeal against a ruling by the Federal Court of Appeal, clearing the way for a pay equity hearing before the Canadian Human Rights Tribunal. Bell decided to attempt to settle the complaint brought by some 20,000 mostly female current and former employees.

Then, on October 19, 1999, Mr. Justice John Evans of the Federal Court of Canada handed employees another major pay equity victory, this time against the Federal government. The Court's decision in *Public Service Alliance of Canada v. Canada (Treasury Board)* appears to be the last legal chapter in a complaint that dates back to 1984. In this case, the government was seeking, not to block the appointment of a Tribunal as in Bell's case, but to overturn a decision by the Tribunal, reached after some 250 days of hearings, upholding the union's complaint.

FLAWED METHODOLOGY?

The government argued that the Tribunal had misinterpreted section 11 of the Act by adopting the wrong statistical methodology for measuring the differences in the wages paid to male and female employees who were performing work of equal value. At the core of the dispute was the selection of the appropriate male comparators for the groups of employees making the complaint. Section 11(1), the key provision in dispute, provides that: "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."

The Court rejected all of the government's arguments, noting that nothing in the legislation prescribed the adoption of the government's preferred method for determining comparator groups. Rather, the statutory language was broad and purpose-oriented, with specifics largely being left to the Human Rights Commission to sort out: "Section 11 provides only a broad legal framework within which problems of wage discrimination between men and women are to be tackled in light of the facts of the particular employment situation, the evidence of expert witnesses, and the underlying purposes of the statute. In my view it would be inconsistent with … the underlying purpose of section 11 … to interpret the section as impliedly prescribing with the particularity suggested by [the government] the characteristics of the permitted comparative methodologies. Much must inevitably

be left to be decided by the Commission and the Tribunal case-by-case, with the assistance of experts."

"OCCUPATIONAL GROUPS"

The government also argued that the comparators chosen by the Tribunal were not an actual occupational group, and that this violated the Canadian Human Rights Commission's Equal Wage Guidelines, issued under the Act. The Tribunal's method had been to base the comparison on employees from predominantly male occupational groups, sampled by position, and not differentiated by actual occupational groups in the federal public service.

The Court held that the government's interpretation placed more importance on its occupational groups than they deserved and that, in any event, choosing this interpretation was unlikely to lead to a greatly different end result. Further, the Court held that, even if the Tribunal had erred, the error would not warrant quashing its decision. Courts have discretion to grant or withhold relief depending on which result would advance the public interest. In this case, there were several reasons for refusing to quash the decision, including the unreasonable delay this would add to an already epic dispute: "[E]ven if theoretically possible, re-sampling the male comparators by occupational group would involve considerable expense and entail further delay in the resolution of this dispute. This is a matter that has also dragged on for far too long, and at far too great a cost for all concerned. … Justice unduly delayed in this context is indeed likely to be justice denied."

LIP SERVICE

In concluding, the Court chastised the government for attempting to elevate into principles of general law what were really factual or technical issues in the implementation of pay equity under the Act, and for its less than whole-hearted support for the purposes of the legislation: "[The government] paid only lip service to the regular admonitions from the Supreme Court of Canada that … human rights statutes are to be interpreted in a broad and liberal manner. …

[It] too often seemed to regard the relevant provisions of the Act as a straitjacket confining the Tribunal, instead of as an instrument for facilitating specialist agencies' solution of long standing problems of systemic wage differentials arising from occupational segregation by gender and the under-valuation of women's work."

In Our View

In the wake of its settlement with the over 200,000 complainants in this case, the government has announced its intention to change the pay equity provisions of the Act. Given that it has indicated that it remains committed to the principle of equal pay for work of equal value (as opposed to equal pay for equal work), this decision may give some clues as to the changes the government is contemplating.

The main problem facing the government in this case was the fact that section 11 was more a statement of principle, with significant scope granted to the Commission and Tribunal to implement the principle, than a complete prescription for how equal pay for work of equal value was to be achieved. It is quite likely that the government will now attempt to legislate the methodological approaches it argued for in this case.

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