

Federal Court



Cour fédérale

Date: 20140313

Docket: T-2126-12

Citation: 2014 FC 247

Ottawa, Ontario, March 13, 2014

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CANADIAN MUSEUM OF CIVILIZATION

Applicant

and

**PUBLIC SERVICE ALLIANCE OF CANADA
& HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AS REPRESENTED BY TREASURY
BOARD**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission (the Commission) to deal with a complaint against the Canadian Museum of Civilization Corporation (CMCC or the Applicant) under subsection 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA). The decision by Acting Chief Commissioner, David Langtry, is dated September 5, 2012, and was received on October 25, 2012.

I. Background

[2] The subject of the Commission's decision under review is one of two longstanding gender discrimination based pay equity complaints filed by the Public Service Alliance of Canada (PSAC), and involving the CMCC as the Applicant in this matter.

[3] The first complaint (Complaint T915/3504, or Complaint One), was filed in 2000 and names the CMCC as the sole Respondent. The complaint alleges pay inequity in conduct alleged to have occurred from April 1999 and ongoing. Eventually, the parties in 2008 entered into Minutes of Settlement with a release that specifically mentions that the Complaint T915/3504 is released.

[4] A second complaint was filed by PSAC in 2002 (Complaint 20010943, or Complaint Two). In this complaint, the Treasury Board was named as the Respondent along with 29 (in some materials 28) other Respondents & Co-Respondents. The Respondents consisted of 21 organizations, under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Labour Code), and seven others including CMCC under Part II of the *Public Service Staff Relations Act* (SC 2003, c 22, s 2) (PSSRA) and (Canada) Treasury Board (TB). Complaint Two alleges pay inequity in conduct alleged to have occurred from March 1985 and onwards. This complaint is the subject matter of the decision that is before the Court with PSAC and TB as Co-Respondents.

A. *Legislative Context*

[5] The CHRA establishes the framework that the Commission is to follow when handling complaints filed with it. At the first step, under subsection 41(1), the Commission is obliged to deal

with any complaint filed with it, unless it appears to the Commission that the complaint amounts to one of five enumerated exceptions. Subsection 41(1) is attached as Appendix A.

B. Complaint One: PSAC Complaint Filed Against CMCC

[6] On March 6, 2000, PSAC filed Complaint One.

[7] PSAC in Complaint One submitted that CMCC's "new job evaluation plan" (the Wyatt plan) resulted in underpayment of predominantly female jobs in comparison to predominantly male jobs of equal value and thus contravened sections 10 and 11 of the CHRA. Allegedly, the Applicant's conduct that occurred from April 1999 onwards gave rise to the complaint.

[8] The subject matter of Complaint One pertained to the CMCC's Wyatt plan, drafted following its creation in 1990 as a crown corporation. The plan was implemented on March 10, 1998, with the signing of a memorandum of understanding between the parties. As part of this memorandum, the parties agreed to form a committee to ensure the plan met the requirements of section 11 of the CHRA and the Equal Wages Guidelines of 1986.

[9] The Commission referred this complaint to the Canadian Human Rights Tribunal but prior to any decision; the parties resolved it on May 14, 2008. The parties entered into Minutes of Settlement and executed a release (the Release).

[10] The Minutes of Settlement state that the parties agreed to the settlement following a discussion of the issues in Canadian Human Rights Tribunal File Number T915/3504. In the settlement was a release reproduced below:

“The Public Service Alliance of Canada (“PSAC”) (...) hereby releases and forever discharges the Canadian Museum of Civilization (...) from any and all actions, causes of action, suits, claims and demands, (...) arising out of the design or implementation of the Wyatt Job Evaluation Plan (“Plan”) or the revisions to the Plan as contemplated by the Minutes of Settlement, and (...) particularly, it releases the Releasees from any and all claims that were advanced or which could have been advanced in Complaint T915/3504 before the Canadian Human Rights Tribunal (“Complaint”).

(...)

FOR THE SAID CONSIDERATION, THE RELEASOR covenants, represents and warrants that it has no further claims against the Releasees for, or arising out of matters that are the subject of this Full and Final Release. In the event that it should make any further claims or demands or commence or threaten to commence any actions, claims or proceedings or make any complaints against the Releasees, arising out of matters that are the subject of this Full and Final Release, this Release may be raised as an estoppel, and complete bar to any such claims, demands, actions, proceedings or complaints.”

C. Complaint Two: PSAC Complaint Against Treasury Board and Other Organizations

[11] Complaint Two was filed on January 9, 2002.

[12] PSAC submitted that employees employed by “separate employers” were similarly entitled to pay equity adjustments that had been awarded by a decision of the Canadian Human Rights Tribunal in 1998 to employees employed directly by the TB. In Complaint Two, PSAC alleged that separate employers had maintained differences on wages between employees performing work of equal value. PSAC alleged that the conduct that gave rise to the complaint occurred from March 8, 1985 and ongoing.

[13] The Commission's Investigator Girish Parekh's report dated October 31, 2003, recommended that pursuant to paragraph 41(1)(e) of the CHRA that they deal with the complaint because the alleged discriminatory act was ongoing. He also recommended that pursuant to paragraph 41(1)(b) they not deal with it at this time.

[14] The parties filed further submissions in response to this October 2003 report.

In a decision dated March 16, 2004, the Commission informed CMCC it would deal with the complaint pursuant to subsection 41(1) of the CHRA, since the alleged discriminatory act was ongoing. However, the Commission explained it would not deal with the complaint under paragraph 41(1)(b) of the CHRA at that time because (1) the complaint could be dealt with more appropriately under the *Federal Courts Act*, RSC, 1985, c F-7, and (2) the complainant was pursuing a civil action against the TB in PSAC in *Nycole Turmel v Her Majesty the Queen in Right of Canada*. The letter says "Accordingly, the file on this matter has now been closed." The Commission informed the Applicant it had 30 days to contest the decision by judicial review before the Federal Court.

[15] On February 2, 2011, Fiona Keith (Resolution Services Team Leader) of the Commission updated the parties regarding the status of its decision to deal with the Complaint Two by saying:

- Complaint Two had been reactivated on October 17, 2008 at the request of PSAC, prior to which the claim had been in **abeyance** (emphasis added) while PSAC pursued a claim in the Federal Court, a claim which was ultimately discontinued September 24, 2008;

- They discussed who the current Respondents were and that it retained jurisdiction to deal with the complaint against the TB and the separate employees regulated under the Labour Code;
- They acknowledged an objection by the TB requesting that the Commission not deal with the complaint pursuant to paragraph 41(1)(e) since it was over 1 year old. But said it would not be considered since the Commission had already made a determination on March 16, 2004, that the complaint would be dealt with because of the alleged discrimination is ongoing.

[16] Further the correspondence from the Commission's Resolution Services Team Leader informed the CMCC of the process that would be followed. This process included giving the CMCC opportunities to make submissions on paragraphs 41(1)(c) and (d) of the CHRA. Namely whether the TB is the employer, whether the employees work in the same establishment, and whether the complainant did not exhaust the other procedure.

[17] The letter set out the factors that the Commission will consider when it makes its determination under paragraph 41(1)(d) regarding the TB. They also said they were not addressing the substance of the complaint and the review will be limited to the issues set out above.

[18] Once they had the parties' submissions they would prepare a report and the parties would have an opportunity to comment on the report by making written submissions. Following which, any submissions received and a copy of the report would be placed before the Commission for them to make their decision.

[19] CMCC responded on April 15, 2011, to the eventual author of the decision, Marion Van de Wetering of the Commission (Resolution Services Division). These written submissions set out the CMCC's position on why the Commission should decline to deal with the complaint:

- First, it submitted the May 2008 release was a complete bar to the complaint as it amounted to a release of all past pay equity claims;
- Second, if the scope of the Release was found to only apply to matters subsequent to April 1997, then the residual discrimination alleged would have occurred prior to 1997, and would be out of time;
- Third, the TB and the Applicant are separate employers thus no basis to attribute historical pay equity findings against the TB to the Applicant.

[20] On or about January 12, 2012, by letter, Glen St. James, A/Early Resolution Team Leader of the Commission informed CMCC that following its letter of February 2, 2011, a report had been prepared based on the issues raised under paragraphs 41(1)(c) and (d). The letter directed that they could provide to Marion Van de Wetering of the Commission submissions limited to the issues under paragraph 41(1) (c) and (d) of the CHRA. It instructed that submissions were due by February 22, 2012, and would be put to the Commission when it reviews the report and made its decision.

[21] This initial "Section 40/41 Report" (the Report) by Marion Van de Wetering, Resolution Services Division, recommended to the Commission that the complaint against CMCC not be dealt with.

[22] With respect to CMCC, the Report recommended not dealing with the complaint because it appeared the settlement and Release covered pay equity issues arising after the formation of the CMCC that could have been raised in the settlement negotiations.

[23] The letter accompanying the Report said after further submissions the Report would be submitted to the Members of the Commission for a decision on the complaint issues under paragraphs 41(1)(c) and (d) of the CHRA. The letter reiterated that the Commission's ultimate decision as to whether to deal with the complaint would be based on both the Report and further submissions by the parties of which they were invited to do by sending information to Marion Van de Wetering of the Early Resolution Team of the Commission.

[24] On April 16, 2012, PSAC responded to the Report with further submissions though they relied heavily on past submissions. In a specific appendix pertaining to CMCC, PSAC disagreed with the Report's finding that the pay equity issues could have been raised in the Release. PSAC submitted that based on the language of the Release, the compensation settlement under the Wyatt plan was payable based on conduct as of April 1 1997. The time period of the January 2002 complaint was between July 1, 1990 to March 31, 1997, which was prior to the commencement of the Release. PSAC's position was it was not plain and obvious the Release did not apply.

[25] CMCC's response on July 6, 2012 to PSAC's comments they received on June 11, 2012, said their position did not change from their submissions of April 15, 2011. That position was that the Release is an unrestricted "full and final release" and is complete bar to the PSAC complaint as it pertains to CMCC. CMCC's submission spoke of another settlement in a File T979/9904 that

specifically mentioned it did not impact Complaint Two and that other carve outs for this claim were included in other parties' Letter of Intent. Moreover, CMCC submitted that if PSAC wanted to exclude their 2002 complaint from the Release, it should have asked for that during the negotiations, and that Schedule 1 of the Minutes of Settlement included a negotiated cut-off date of 2005.

[26] The TB made submissions on July 19, 2012, and was in full agreement with the Report dated January 10, 2012.

[27] On September 5, 2012, the Commission decided to deal with the section 7, 10, and 11 allegations that PSAC had brought against the TB, with CMCC named as Co-Respondents, but declined to deal with allegations against CMCC as an individual Respondent under paragraph 41(1)(c) of the CHRA.

II. Issues

[28] The issues in the present application are as follows:

- A. Did the Commission err in failing to consider whether the complaint against the CMCC was out of time?
- B. Did the Commission fail to consider CMCC's April 15, 2011 submissions?
- C. Was the Commission's decision to deal with the complaint against the CMCC reasonable?

III. Standard of Review

[29] The parties disagree on the applicable standard of review.

[30] The Applicant (CMCC) submits the issue before the court is whether the Release estopped the Respondent from pursuing its complaint against the Applicant and should be reviewed on a correctness standard.

[31] The Respondent (PSAC) submits the issue is to review the Commission's conclusion that it was not plain and obvious that paragraph 41(1)(d) applied to the complaint. It submits this involves assessment of facts, interpretation of the Commission's home statute, and a review of the exercise of the Commission's discretion. Thus it submits this matter is reviewable on a reasonableness standard.

[32] Decisions by the Commission to deal with complaints under subsection 41(1) of the CHRA are subject to review on a standard of reasonableness (*Ayangma v Canada (Attorney General)*, 2012 FCA 213, at para 56 (*Ayangma*); *Exeter v Canada (Attorney General)*, 2012 FCA 119, at para 6 (*Exeter*); *Canada (Attorney General) v Maracle*, 2012 FC 105, at paras 19-22 (*Maracle*)).

[33] This includes the review of decisions by the Commission to deal with complaints under paragraph 41(1)(e) of the CHRA (*Bredin v Canada (Attorney General)*, 2008 FCA 360, at paras 5, 16; *Richard v Canada (Attorney General)*, 2010 FCA 292, at para 9).

[34] The Applicant submits the issue before the Commission here amounted to a legal question that required interpreting the Release to determine whether it rendered the complaint beyond the jurisdiction of the Commission, time barred, or in bad faith. It relies on *Keith v Correctional Service*

of Canada, 2012 FCA 117 (*Keith*), as authority that where the scope of the Commission's jurisdiction is at issue, the applicable standard of review to their decisions is correctness.

[35] The Federal Court of Appeal reviewed that decision on a correctness standard because the underlying issues involved the division of powers between Parliament and the provinces, and the jurisdiction of two or more competing specialized Tribunals, issues necessarily subject to correctness review (*Keith*, above, at para 53).

[36] The correctness standard applied in *Keith*, at para 53, to the review of a Commission's decision to decline to deal with a complaint under paragraph 41(1)(c), amounts to an exception to the general standard stated above, and is not applicable here

[37] The issue before the Commission was not whether the Applicant's complaint was governed by the CHRA, a question that raised the jurisdiction of competing federal and provincial human rights bodies, nor did it involve the division of powers between the provinces and Parliament.

[38] The Commission at this stage is not required to interpret the scope of the Release. At this preliminary stage, the Commission screens the complaints to identify those requiring further investigation. They screen out only those complaints where it is plain and obvious that the complaint falls into one of the 5 exceptions in subsection 41(1) (*Keith*, at para 50; *Maracle*, at paras 38-41).

[39] These amount to questions of mixed fact and law, that are well within the Commission's jurisdiction, expertise, and familiarity, for which the standard is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 51, 53).

[40] Questions of procedural fairness are to be reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43 (*Khosa*)). This includes questions involving whether the April 15, 2012 submissions by CMCC were considered by the Commission (*Ayangma*, at para 56; *Exeter*, at para 6).

IV. Analysis

A. *Did the Commission Err in Failing to Consider Whether the Complaint Against CMCC was Out of time?*

[41] Timeliness objections under paragraph 41(1)(e) were not before the Commission for its September 5, 2012 decision. This issue was addressed and had already been decided by the Commission.

[42] In the February 2, 2011 letter that reactivated the complaint, Fiona Keith, Resolution Services Team leader, with the Commission informed CMCC that timeliness objections based on paragraph 41(1)(e) would not be placed before the Commission since those objections had already been decided by the Commission in a March 16, 2004 letter. In contrast, they did invite submissions on paragraphs 41(1)(c) and (d) of the CHRA.

[43] Despite being told that timeliness objections would not be considered by the Commission, the CMCC raised an objection on the timeliness of the complaint and the applicability of paragraph 41(1)(e) in their April 15, 2011 submission to the Commission.

[44] The CMCC's April 15, 2011 objection pursuant to paragraph 41(1)(e) was both acknowledged, and addressed in the Section 40/41 Report. The Report rejected the Applicant's objection since it considered the issue had been decided in the March 16, 2004 decision.

[45] CMCC's counsel, David Law, responded to the March 16, 2004 decision by stating that they were not bringing a Judicial Review of that decision but if it was re opened they would bring an application for an extension of time to the Federal Court. There have been no applications for extension of time of the 2004 decision

[46] Consequently, I agree with the Respondent that this it is not an issue before this court and I find the Commission did not err by failing to address CMCC's objection under paragraph 41(1)(e).

B. Did the Commission fail to consider the CMCC's April 15, 2011 submissions?

[47] CMCC submits the Commission erred in failing to consider their April 15, 2011 submissions. In support, CMCC points to the certified tribunal record that did not include the April 15, 2011 submissions to the Commission.

[48] I find the CMCC's April 15, 2011 submissions were considered and for the reasons below there was no unfairness or error in the manner in which they were considered.

[49] The Commission is master of its own procedure in determining whether to deal with complaints (*Canada (Attorney General) v Sketchley*, 2005 FCA 404, at para 119). The Commission followed the procedure that had been explained to CMCC and did not commit a reviewable error.

[50] In the February 2, 2011 letter informing CMCC that the complaint had been reactivated, Fiona Keith, explained the procedure that would be followed by the Commission in making its decision. Included in the letter was that the Commission would not deal with timeliness objections based on paragraph 41(1)(e).

[51] The parties were invited to make submissions on paragraphs 41(1)(c) and (d) and were told those submissions would form the basis of a Report to be submitted to the Commission. They were told they would have an opportunity to comment on the Report by making further written submissions. Then a copy of the Report and any written submissions received would be placed before the Commission for its ultimate decision on whether to deal with the complaint.

[52] When the Commission received the PSAC's submissions, on June 11, 2012, Marion Van de Wetering, Early Resolution Advisor, provided CMCC with PSAC's submissions dated April 16, 2012. The correspondence explained CMCC could make submissions and that those submissions, PSAC's submissions and the Report, would be placed before the Commission, to be considered. On July 6, 2012, CMCC filed submissions to be considered.

[53] Submissions were made on July 19, 2012 on behalf of Treasury Board Secretariat that stated they were in full agreement with the Investigator in the Report dated January 10, 2011 and relied on its submissions dated April 14, 2011 and April 16, 2012, with regards to the relationship with the Labour Code, Respondents to the complaint.

[54] In addition to the paragraph 41(1)(d) issues common to all the Respondents, the issue of whether the complaint against the CMCC was trivial, frivolous, vexatious or made in bad faith, because the Release was to be dealt with.

[55] The Report says they did not ask for the parties' submissions on this issue as they had them on the general paragraph 41(1)(d) issue and that CMCC could comment on them when the Report was sent to them.

[56] CMCC's position is that the Commission deciding to deal with the claim meant they must not have considered the April 15, 2011 submissions. They submit that the Commission needs no more evidence to determine what they say is purely a question of law regarding the Release and should have done it at the screening stage. To do otherwise means they did not consider the April 15, 2011 submissions.

[57] The response by CMCC, dated July 6, 2012, is two pages and says they are relying on their April 15, 2011 submissions regarding the Release.

[58] In the Report, the CMCC's position is set out at points 190 -198. Note that they are the Respondent in the Report. CMCC's position is set out in detail that could only have been garnished from the April 15, 2011 nine page long detailed submissions. My review of the Report and CMCC's April 15, 2011 submissions confirm that CMCC's position is garnished directly from the April 15, 2011 submissions.

[59] When a Commission provides brief reasons for adopting recommendations from an investigator's report, the investigator's report forms part of the Commissioner's reasoning, and is subject to judicial review along the same highly deferential standard (*Canada (Attorney General) v Sketchley*, 2005 FCA 404, at paras 37-38; *Bergeron v Canada (Attorney General)*, 2013 FC 301, at paras 28, 35).

[60] Though the Commission's reasons were not brief, this same reasoning applies as all of the submissions over the years were substantial and it would be unreasonable to expect them to recite each on in their decision. In this case the Report sets out in great detail the CMCC's April 15, 2011 submissions thus making it not necessary for the decision of the Commission to recite those same arguments.

[61] Another explanation is that the Commission at the start of the decision does say that he read all of the material including the jurisprudence that had been submitted by the parties. Just as the submissions were not physically in the CTR nor was the jurisprudence. A possible explanation is that it could have been a clerical error in preparation of the CTR. Or that it was not necessary to include them as Federal Courts Rule 317 provides "the material relevant to an application...and not

in the possession of the party....” In this case CMCC is referring to material that they are in possession of as it was correspondence from them. This error could have been dealt with by the parties by Federal Courts Rules in advance of this hearing.

[62] I find there was no breach of procedural fairness as the April 15, 2011 submissions by CMCC were considered by the Commission.

C. Was the Commission’s decision to deal with the complaint against the CMCC reasonable?

[63] Justice Rothstein (as he was then) in *Canada Post Corp v Canada (Canadian Human Rights Commission) (re Canadian Postmasters and Assistants Assn)*, [1997] FCJ 578, aff’d [1999] FCJ No 705 (*Canada Post Corp*) established the legal test, and the Federal Court of Appeal and Federal Court both continue to apply this test in reviewing decisions of complaints under subsection 41(1) of the CHRA (*Keith*, at para 50; *Maracle*, at paras 38-41).

[64] The threshold is high and “The Commission should decline to hear the case at this stage in plain and obvious cases” (*Canada Post Corp*, at paras 3-4).

[65] In *Canada Post Corp v Barrette*, [2000] 4 FC 145 (FCA) (*Barrette*), the Federal Court of Appeal held that parties do have the right to seek an early brushing aside of complaints that fall into one of the exceptions. The Commission is asked no more than to examine on a *prima facie* basis whether the grounds set out in subsection 41(1) and the Commission can still decide to deal with the complaint (*Barrette*, at paras 22-25).

[66] CMCC submits the Commission do an early brushing aside of a complaint because of the Release and the Minutes of Settlement. They rely on *Barrette* and *Keith*, above.

[67] It is true that the CHRA at subsection 44(3) has a broad discretion to decide whether to screen out a complaint at this stage or whether it should go before a tribunal.

[68] Correctly the Commission said its' role under subsection 41(1) is to apply a high threshold in screening complaints and limit the exercise of its discretion to screening out complaints to situations where it established that it is plain and obvious that the complaint should not be dealt with. Unless this decision was unreasonable or there was a breach of the duty of fairness then the Court will not interfere.

[69] CMCC argues that starting the present litigation five months after executing the Release, when the correspondence regarding the claim says the file was closed in 2004 makes the complaint "vexatious and made in bad faith" and should be screened out and not heard.

[70] The argument advanced is that a release is a contract and that "parties who reach a settlement should be held to their bargains". CMCC's position is that a broad release for all past pay equity claim in connection with the settlement of a 2000 pay equity complaint must cover the current complaint as that is the subject matter of the release. They rely on *Exeter v Canada (Attorney General)*, 2011 FC 86, at para 12 (*Exeter 2*) as authority that the Commission can decline to deal with complaints under paragraphs 41(1)(d) and 41(1)(e).

[71] I note though it was not argued by the parties that the Minutes of Settlement were approved by the Commission pursuant to section 48 of CHRA on May 28, 2008. The Commission may have further information regarding the scope of the release as they approved it.

[72] CMCC submits that enforcing a release mirrors the policies of the doctrines of *res judicata* and issue estoppel and rely on *Apotex Inc v Merck and Co*, 2002 FCA 210, at paras 26-29.

Encouraging parties to settle disputes and to rely on releases has a strong public policy interest.

[73] The decision says that the Commission can deal with complex issues if they have a sufficient record before them but in this case they do not.

[74] The Commission concluded that it was not plain and obvious whether the allegations underlying the complaint before it was covered by the Release. Resulting in, PSAC not being barred at the preliminary stage from proceeding with Complaint Two.

[75] I find the Commission was reasonable in its application of those principles for the reasons that follow.

[76] The Commission based this conclusion on its findings made on the language of the Release itself, and its review of the record before it. The general clause in the Release releasing CMCC from “any and all claims that were advanced of which could have been advanced in Complaint T915/3504” left open the question as to whether the allegations in the Complaint 20010943 before

the Commission could have been advanced as it was not mentioned in the Release and yet had been advanced already.

[77] More specifically the Commission found that:

The Record currently before the Commission does not fully address this issue. For example, the parties have not explained whether and if so, how the current allegations could have been advanced in complaint T915/3504 if the Treasury Board was not a party to that complaint. For these reasons, it is not plain and obvious that the PSAC should be barred at this preliminary stage from proceeding with the complaint against the CMCC because of the release. During the course of the investigation the parties may provide additional information and submissions regarding the effect of the release and the impact, if any of the Treasury Board as a party to this complaint.

[78] When the Release was being negotiated in 2008, both parties knew of the status of this complaint, and that no decision with respect to any other subsection 41(1) exception had been made. Consequently, when the Release was signed, the complaint remained before the Commission and it was open to either party to negotiate for an explicit reference to this complaint in the Release.

[79] The Federal Court of Appeal has held that a release is a relevant consideration to the issue of the reasonableness of the Commission's decision on whether to deal with complaints (*Exeter*, above, at paras 25, 34). In my view, the Release was a relevant consideration in the Commission's conclusion that is supported by reasonable findings made regarding the release. The Commission did not determine if the release was valid or not as this was a screening only and that is left to be investigated.

[80] Complaint One and Complaint Two are separate complaints. While gender based pay equity is at issue in both complaints, each complaint alleges separate discriminatory events covering different time periods, and names different respondents.

[81] It was a reasonable decision that the Commission did not find it plain and obvious that the Release applied to Complaint Two that was revived. Further support that it was not plain and obvious is found in the discussion below regarding the TB.

[82] The Commission noted that because the TB was named as a Respondent in only one of the two complaints, it was possible the claims underlying the complaint before it could not have been addressed by the complaint subject to the Release. It found the record from the parties did not address this possibility, and consequently amounted to a topic that could be addressed in an investigation.

[83] Complaint One names the CMCC as the sole Respondent and alleges the Application of CMCC's new job evaluation plan, first implemented in 1997, resulted in underpayment of predominantly female jobs in comparison to predominantly male jobs of equal value and thus contravened sections 10 and 11 of the CHRA. CMCC's conduct giving rise to the complaint was alleged to have occurred from April 1999 and onwards.

[84] Complaint Two names the TB as Respondent, and 29 (originally) as either Respondents or Co-Respondents. In that complaint PSAC alleged (1) that employees of "separate employers" of the TB were similarly entitled to pay equity adjustments that had been awarded by a decision of the

Canadian Human Rights Tribunal in 1998 to employees employed directly by the TB, and (2) the employers had maintained differences on wages between employees performing work of equal value. In this complaint the conduct giving rise to the complaint was alleged to have occurred from March 8, 1985 and onwards.

[85] The underlying facts of these complaints are not analogous to *Exeter*, where a single complaint was at issue and the release named the same single individual and covered the same time periods subject to that complaint (*Exeter 2*, above, at paras 2, 6-7) and is distinguishable on our facts.

[86] CMCC's asserts that the Commission closed Complaint Two completely with its March 16, 2004 letter to the parties. Contrary to that submission, when the substance of that and subsequent correspondence between the parties is reviewed, it is clear that a determination had been made that they would deal with the complaint pursuant to subsection 41(1) as "the alleged discriminatory act is alleged to have been on-going." In 2004, the Commission decided pursuant to paragraph 41(1)(b) that they would not deal with the complaint at that time because:

- The complaint could be more appropriately be dealt with according to a procedure provided for under another Act of Parliament, i.e. the *Federal Courts Act*;
- The complainant in this complaint is pursuing civil action against one of the major respondents, the Treasury Board, in PSAC and *Nycole Turmel v Her Majesty the Queen in Right of Canada*;
- Accordingly the file on this matter has now been closed.

[87] It is a concern that the letter says the file is closed rather than saying the matter is held in abeyance. But in later correspondence such as February 2, 2011 from the Commissioner to the parties it says “The Commission decided to hold the complaint in abeyance which the” and in the submission of the CMCC by David Law writes they are not bringing a judicial review now in case the complaint is ultimately resolved. But if it is re-opened then they would bring an extension of time to bring a Federal Court application regarding the timeliness decision. It is reasonable to determine that the entire matter was not closed but that it was in abeyance while other matters proceeded though they had made one final determination regarding timeliness.

[88] It was reasonable for the Commission to find this complex historical dispute not to be plain and obvious in order to screen it out without further investigation.

[89] Given these differences, the Commission’s finding that it was not plain and obvious whether allegations in the complaint before it could have been advanced in the complaint before the Tribunal and named in Release amounts to a reasonable finding and was not made in bad faith.

[90] The Commission found the section 7 and 10 allegations in the complaint before them appears broader than the claim of wage discrimination and may disclose an allegation that may be a prohibited practice.

[91] They found that based on the record before them it was not plain and obvious that the CMCC was not a co-employer with the TB in the complaint and that issue could be presented under

subparagraph 44(3)(b)(ii). The Commission determined they would not deal with the Section 11 part of the complaint pursuant to paragraph 41(1)(c) of the CHRA against the CMCC.

[92] This matter is fraught with issues and at this screening phase it is not plain and obvious the Release covers Complaint Two or even if it could as there are different parties to the two complaints.

[93] The Release contains no explicit reference to the current complaint and the Commission found it was not clear from the language of the Release whether the current claim was contemplated by the Release. The Applicant has failed to persuade me that under these circumstances, the Commission's decision was unreasonable.

[94] At the full investigation stage it can be determined why the Commission said the file was closed instead of being held in abeyance. These are complicated issues and both parties were well represented when the Release was executed with the Commission's approval of the Settlement as required by the CHRA.

[95] In sum, I cannot conclude that the decision is unreasonable. The Commission applied the correct test, considered all of the evidence and submissions of the Applicant and rendered a decision that falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). There is no reviewable error.

[96] The parties were given an opportunity to determine costs but were unable to agree.

[97] No costs were sought by and therefore none are awarded to the TB.

[98] I order costs to the Respondent, PSAC to be determined at Tariff B Column III and payable forthwith.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed;
2. Costs are awarded to the Respondent, PSAC in accordance with Tariff B Column III and payable forthwith.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2126-12

STYLE OF CAUSE: Canadian Museum of Civilization v PSAC et al

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 5, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Justice McVeigh

DATED: March 13, 2014

APPEARANCES:

Kirsten Crain FOR THE APPLICANT

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