Federal Court  Cour fédérale

Date: 20110222

Docket: T-808-10

Citation: 2011 FC 207

Ottawa, Ontario, February 22, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA AND CATHY MURPHY

Applicants

and

CANADA REVENUE AGENCY

Respondent

and

THE CANADIAN HUMAN RIGHTS COMMISSION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act* R.S., 1985, c. F-7) in respect of a decision of the Canadian Human Rights Tribunal (the Tribunal) dated April 23, 2010. The decision concerned a complaint in which it was alleged that the Canada Revenue Agency (CRA) breached sections 5 and 7 of the *Canadian Human Rights Act* (CHRA) in administering the provisions of the *Income Tax Act* (ITA) in respect of lump sum payments made to compensate for pay equity. By its decision, the Tribunal dismissed the applicants' complaints.

[2] For the reasons outlined below, I am of the view that the application for judicial review should be denied.

Facts

[3] The applicant, Cathy Murphy, was a federal public servant from 1981 to 1994. The other applicant, the Public Service Alliance of Canada (PSAC), was her union. In 1984 and 1990, PSAC filed pay equity complaints pursuant to section 11 of the CHRA against the Treasury Board of Canada. They maintained that employees in a number of female-dominated occupational groups, including Ms. Murphy (who worked most of her career with Revenue Canada), were paid less than employees in male dominated groups for work of equal value.

[4] By 1998, and before the Tribunal's decision, PSAC members had begun expressing concerns to their union regarding the tax implications of a presumed future favourable decision. One of the concerns was in relation to whether a lump sum compensation payment would put recipients into a higher tax bracket in the year that it would be paid. Representatives from PSAC met with Revenue Canada to ask questions about how the tax treatment of pay equity adjustments would be.

[5] On July 29, 1998, the Tribunal ruled that PSAC’s pay equity complaints were substantiated and concluded that the employees had been underpaid during the period in question. The Tribunal established a methodology for calculating the wage gap between female and male-dominated occupational groups. The Tribunal ordered Treasury Board to make the retroactive wage adjustment payments to the affected public service employees from 1985 to the date of the decision. It also

ordered the payment of simple interest calculated semi-annually at the Canada Savings Bonds rate on the wage adjustments.

[6] On October 19, 1999, the Tribunal's decision was upheld by the Federal Court following an application for judicial review by the Attorney General of Canada. The parties subsequently entered into negotiation in an effort to deal with various outstanding matters arising from the Tribunal's decision, including the determination of the actual wage adjustment amounts. It seems that the issue of tax implications had not been raised during these negotiations.

[7] The negotiations were ultimately successful and the parties settled all issues related to what were known as "Phase II and Phase III of the complaints". Phase III related to the determination of the wage adjustments. The parties agreed upon a formula for calculating lump sum wage adjustment amounts due to the affected employees and also on the interest payable at rates set by the Tribunal on 90 per cent of the lump sum wage adjustments.

[8] On November 16, 1999, a settlement agreement was presented to the Tribunal. The Tribunal members asked questions on certain parts of the agreement, approved it and issued an order that had been consented to by the parties.

[9] In 2000, the affected government departments made the wage adjustments and interest payments.

[10] In the meantime, the government introduced a new budget measure in an attempt to address concerns raised by various groups regarding the adverse tax consequences related to lump sum payments received for income earned in previous years. The Qualifying Retroactive Lump sum Payment (QRLSP) mechanism applied to lump sum payments over $3,000 and allowed income from qualifying lump sum payments to be taxed in the year that the income in question should have been received, if this was advantageous to the individual. The QRLSP included a calculation of "notional tax", which was composed of not only the value of the tax that ought to have been paid in those years, but also an interest component to reflect the delay in payment of the tax on the retroactive lump sum payment.

[11] CRA issued a 2000 notice of assessment to Ms. Murphy on April 18, 2001, advising her that she was eligible for the QRLSP tax calculation. On April 25, 2001, CRA sent a letter explaining that the calculation did not benefit her and that the regular tax calculation was more beneficial even though her marginal tax rate was now higher than when she worked for the public service.

[12] The lump sum payments were deemed for income tax purposes to be employment income in the year 2000 even though they related to employment that had occurred years earlier.

[13] On March 11, 2002, Ms. Murphy and PSAC filed human rights complaints on behalf of all pay equity recipients who were subject to the payments set out above. The complaints claimed that, in conducting its QRLSP analysis, CRA had discriminated against these individuals by charging compound interest on notional tax arrears which CRA had stated were owed to it from the date at which the income was earned. The Public Service Alliance of Canada maintained that this conduct

reduced the actual value of the payments ordered by the Tribunal, perpetuating the pay gap that had been the subject of the 1984 and 1990 complaints and was in violation of section 5 and paragraph 7(b) of the CHRA.

[14] On April 23, 2010, the Tribunal dismissed the applicants' human rights complaints. This decision is the subject of the present judicial review.

Impugned decision

[15] The Tribunal concluded that the applicants' evidence fell short of establishing a *prima facie* case of discrimination. The Tribunal also concluded that the applicants failed to demonstrate that the alleged discrimination resulted from the "provision of a service customarily available to the public" or "in the course of employment". It found rather that the assessment of the tax liability of the equity lump sum recipients came from the application of the ITA provisions. Accordingly, the Tribunal concluded that the complaints did not engage section 5 or paragraph 7(b) of the CHRA.

Issues

[16] The issues are as follows:

a. What is the applicable standard of review?

b. Did the Tribunal err in its appreciation of the evidence in regards to the application of sections 5 and paragraph 7(b) of the CHRA?

c. Did the Tribunal err in concluding that Ms. Murphy and other recipients of pay equity lump sum benefits did not suffer adverse differential treatment?

a. What is the applicable standard of review?

Applicants' Arguments

[17] The applicants submit that the jurisprudence establishes that questions of law involving the interpretation of section 5 and paragraph 7(b) of the CHRA are to be reviewed on a standard of correctness (*Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268, para. 23, *Hicks v. Canada (Attorney General)*, 2008 FC 1059, 334 F.T.R. 260, paras. 18-19, *Powell v. TD Canada Trust*, 2007 FC 1227, 320 F.T.R. 17, paras 20-21, *AZ Bus Tours Inc. v Tanzos*, 2009 FC 1134, 353 FTR 121, paras. 22-36).

Respondent's Arguments - Canada Revenue Agency

[18] The CRA argues that contrary to the applicant's submission, the standard of review for decisions of the Tribunal regarding the application of sections 5 and 7 of the CHRA is not well-established in the jurisprudence, for example in *Canada* (*Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555, 369 F.T.R. 84, para. 36, the Court applied the standard of reasonableness, while in *Brown v. Canada* (*National Capital Commission)*, 2008 FC 733, 330 F.T.R. 67, correctness was determined (para. 80).

[19] The respondent suggests that the *Hicks* and *Powell* cases cited by the applicants to support a correctness standard are inapplicable given that they concern decisions of the Canadian Human Rights Commission (CHRC), not the Tribunal. Furthermore, the respondent underscores that in contrast to *Watkin*, there is in this case, a substantial reasoning from the Tribunal to which this Court can defer.

[20] As such, the respondent submits that given that the jurisprudence does not clearly establish the applicable standard, a standard of review analysis is necessary.

Respondent's Arguments – The Canadian Human Rights Commission

[21] In its Memorandum of Fact and Law, The Canadian Human Rights Commission is of the view that the proper standard of review is reasonableness with deference and cites *Pankiw*, above. At the hearing, it filed *Canada Post Corporation v. Canadian Union of Postal Workers*, 2010 FC 154, in which Justice De Montigny relied on the correctness standard.

Analysis

[22] Based on the above case law, I am of the opinion that the questions should be reviewed on a standard of reasonableness. Although there have been cases where these questions were reviewed on a standard of correctness, *Pankiw* established that the Canadian Human Rights Tribunal is specifically empowered to determine questions of law, and moreover that when reviewing the Canadian Human Rights Tribunal's interpretation of a provision of its enabling statute, the Act, the standard of review is reasonableness.

[23] I refer also to *Vilven v. Air Canada*, 2009 FC 367, [2010] 2 F.C.R. 189, in which a standard of review analysis was conducted (paras. 61-74) and arrived at the same conclusion on this question. In *Canada Post*, the Federal Court had to analyze if an Appeal Officer's interpretation of s.146(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (CLC) was correct or not. The question at issue in that case is not the same as in the case at bar.

[24] Therefore, in the present instance, the Court's intervention will not be warranted unless the decision does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47).

b. Did the Tribunal err in its appreciation of the evidence in regards to the application of sections 5 and 7(b) of the CHRA?

Section 5 Arguments

Applicants' Arguments

[25] The applicants maintain that the Tribunal erred in concluding that the complaint was beyond the jurisdiction of the CHRA. They argue first that the Tribunal failed to find that the CRA's administration of the QRLSP constituted a service customarily available to the public pursuant to section 5 of the CHRA. The applicants state that in failing to find that the respondent's conduct was a service pursuant to section 5 of the Act, the Tribunal interpreted this section in a restricted manner and misunderstood the discretion available to the CRA in performing its functions.

[26] The applicants assert that the respondent's actions in the present case are properly characterized as services customarily available to the public. The applicants argue that the amendments to the ITA and the creation of the QRLSP provisions came about as a result of Parliament's recognition of the inherent unfairness of taxing a retroactive lump sum wage payment at a higher marginal rate in the year it was received. As such, the applicants advance that the determination as to whether or not the taxpayer would benefit from the application of the QRLSP

provisions was intended to provide a benefit to the public, and that accordingly, the respondent was providing a service to pay equity recipients.

[27] The applicants refer to *Watkin* in stating that although this decision overturns the broad holding in *Bailey* that all government actions in the performance of statutory functions were services, it does not overturn the specific finding that the Minister's functions in assessing taxes constitute a service pursuant to section 5 of the CHRA (*Bailey v. Canada (Minister of National Revenue)*, (1980), 1 C.H.R.D/193, *Canada (Attorney General) v. Canada (Human Rights Tribunal)* ("Cumming"), [1980] 2 FC 122 at paras. 20-21, see also *Wignall v. Canada (Department of National Revenue (Taxation))*, [2001] CHRD No. 9, at paras. 25, 29).

[28] The applicants underscore the fact that based on CRA's application of the provisions, the QRLSP calculation was more advantageous to only 7% of all QRLSP claimants in the 2000 tax year and generally did not assist recipients of lump sum payments that relates back beyond six years (Testimony of S. Barnard, Applicants' Application Record, Vol. IV, Exhibit E, Tab 5 at 1487, 1493, 1538-1543).

[29] The applicants further argue that the Tribunal's conclusion that the CRA could not exercise any discretion pursuant to sections 110.2 and 120.31 of the *ITA* is directly contradicted by case law from the Tax Court of Canada, which identified CRA's discretion to waive the interests pursuant to subsection 220(3.1) (*Fetterly v. Canada*, 2006 TCC 94 at para 13).

[30] The applicants also contend that the human rights dimension in the present situation required the respondent to interpret the ITA in a manner that would avoid a discriminatory result.

[31] Finally, the applicants submit that the *Forward v. Canada (Citizenship and Immigration Canada)*, 2008 CHRT 5 case, relied upon by the Tribunal is distinguishable from the case at bar. First, the applicants state that the Court concluded in *Forward* that there was no discretion available in that case and that the "sole source of the alleged discrimination […] was the legislative language in the 1977 *Act*". Second, the applicants point out that the Tribunal in that case emphasized the unique circumstances surrounding the granting of citizenship. The applicants add that these considerations do not apply in the present case, and that this case is more factually analogous to *Druken v. Canada* 9 CHRRD/5359 (4th) 29 in which the Federal Court of Appeal upheld a Tribunal order to cease applying certain sections of the *Unemployment Insurance Act* (UIA) and *Unemployment Insurance Regulations* (UIR).

Respondent's Arguments

Commission Human Rights Commission

[32] The Commission submits that at issue in the hearing was the service performed by the CRA when it assesses taxes. The Commission believes that this can only be described as a service.

[33] It further states that while the assessment of the taxes owed may have offered formal equality, the rules applied by the CRA did not offer substantive equality to the applicants. The Commission goes on to say that by assessing the tax owing in a way that forces Ms. Murphy (and others in her situation) to pay more tax as a result of receiving a lump sum payment, she is worse off

than she would have been if she had just received a non-discriminatory wage in each of the relevant years during which she worked for the federal public service. Accordingly, the Commission states that as a result of the tax assessment carried out by the CRA, the applicant has paid more taxes than her Federal Public Service Counterparts in male-dominated occupational groups.

[34] The Commission argues that the CHRA does not define what is a "service customarily available to the public", and that most of the case law has looked at the meaning of "customarily available to the public" and rarely at whether a particular act constituted a service or not.

[35] The Commission refers to *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at paras 49, 50 and 59, and suggests that this case dictates that the wording of the CHRA must be interpreted generously, and must ensure that the underlying objects of the CHRA are given full effect.

[36] Finally, the Commission argues that the actions of the CRA, calculating the tax payable by a party and the assessment of income, do constitute a "service" under the CHRA. It therefore could not apply discriminatory legislation. It cites also the Saskatchewan Court of Appeal's decision "In the Matter of Marriage Commissioners Appointed Under *The Marriage Act*, 1995, S.S. 1995, c. M-4.1, 2011 SKCA 3".

[37] Based on the above, the Commission contends that it was within the Tribunal's jurisdiction to make an order that the discriminatory practice of the respondent cease pursuant to subsection 53(2) of the CHRA.

Respondent's Arguments

Canada Revenue Agency

[38] The CRA refers to *Watkin*, where the Court expressly clarified that not every government activity is a service within the meaning of section 5. In that case, the Court held that a "service" within the meaning of section 5 contemplates a benefit being "held out" as services and "offered" to the public in the context of a public relationship. The Court determined that, administration and enforcement pursuant to a statute did not constitute services. The Court specifically "disavowed" the old broad approach to section 5 including the approach taken by *Bailey*, in which the Tribunal had found administration of the ITA to be a service (see *Bailey*).

[39] The CRA submits that the obiter suggestions of the Tax Court in *Fetterly* relied upon by the applicants, which discuss an application of the *ITA*'s fairness provision, have no bearing on the present case since Ms. Murphy never argued those provisions. As such, according to the CRA, even if it did have any discretion under the fairness provisions of the *ITA*, it is irrelevant. The CRA says, *Fetterly* was an informal procedure appeal that pursuant to the *Tax Court of Canada Act*, R.S., 1985, c. T.-2, s. 18.28, it has no precedential value.

[40] The CRA also alleges that the applicants' reliance on the Tribunal's *Wignall* decision is misplaced, since that case predated *Watkin* from the Federal Court of Appeal. It is therefore unsurprising that the "service" issue was not raised. Furthermore, in the judicial review of *Wignall*, the Federal Court found that the complaint was not made out and that that the source of the alleged adverse treatment was the ITA itself.

[41] The CRA advances that even if the Tribunal erred in finding that it was the ITA rather than CRA's actions that were impugned by the complaint, those actions would not constitute services within the meaning of section 5. The activity here is the assessment of taxes actually owed by taxpayers under the ITA and it is not an optional prospective planning tool; rather, it is the ultimate application of the ITA in furtherance of collection and is not a service unlike for example: advance tax rulings offered to taxpayers for a fee.

[42] The CRA further contends that the ingredient common to the examples of services given by the Court of Appeal in *Watkin*, is advice or information offered to the public. Members of the public are free to decide whether and how to use the information provided. The CRA adds that its assessment of taxes owing is neither advice nor information offered that a taxpayer can take or leave.

[43] The CRA says that determining taxpayers' tax liabilities is a first and integral step in enforcing the provisions of the ITA. It points out that in *Watkin*, the impugned actions found to fall outside of section 5 included not only Health Canada's "enforcement" actions in the narrow sense of its call on the complainant to "recall, cease and desist" selling its products, but also included Health Canada's original determination that the complainant's products not be approved for sale in the first place. The CRA submits that in this case, its assessment of tax was part of its administration and enforcement of the ITA.

Analysis

[44] *Watkin* has established that not every government activity is a service within the meaning of s. 5 of the CHRA. The contention therefore, lies in whether the Court in *Watkin* completely disavowed the finding in *Bailey* and in *Wignall* that the administration of the ITA is a service.

[45] In *Watkin* at paras. 31, the Court stated :

> [31] Addressing this question, I agree that because government actions are generally taken for the benefit of the public, the "customarily available to the general public" requirement in section 5 will usually be present in cases involving discrimination arising from government actions (see for example *Rosin, supra* at para. 11, and *Saskatchewan Human Rights Commission v. Saskatchewan (Department of Social Services)* (1998), 52 D.L.R. (4th) 253 at 266-268). However, the first step to be performed in applying section 5 to determine whether the actions complained of are "services" (see *Gould, supra,* per La Forest J., para.60). In this respect, "Services" within the meaning of section 5 contemplate something of benefit being "held out" as services and "offered" to the public (*Gould, supra,* per La Forest J. para. 55). Enforcement actions are not "held out" or "offered" to the public in any sense and are not the result of a process which takes place "in the context of a public relationship" (*Idem,* per Iacobucci J., para. 16). I therefore conclude that the enforcement actions in issue in this case are not "services" within the meaning of section 5.

[46] Further at paragraph 32 it determined:

> [32] Given this conclusion, the opinion expressed by the Canadian Human Rights Tribunal in *Bailey et al v. Minister of National Revenue* (1980), 1 C.H.R.R. D/193 at D/212 – D/214 ("*Bailey*") (applied in *LeDeuff v. The Canada Employment and Immigration Commission* (1987), 8 C.H.R.R. D/3690 at D/3693 (aff'd on this issue by a Review Tribunal without discussion (1989), 9 C.H.R.R. D/4479) that all government actions in the performance of a statutory function constitute "services" within the meaning of section 5 because they are undertaken by the "public service" for the public good, must be disavowed. The same comment applies to the decision of the *Canadian Human Rights Tribunal in Anvari v. Canada* (*Canadian Employment and Immigration Commission*) (1989), 10

> C.H.R.R. D/5816 at para. 42271, aff'd by a Review Tribunal (14 C.H.R.R. D/292 at D/297, para. 19) (applied in *Menghani, supra*, at D/244, para. 26 which decision was later confirmed by the Federal Court on other grounds (*Canada (Secretary of State for External Affairs) v. Menghani*, 1993 CanLII 3018 (F.C.), [1994] 2 F.C. 102)), insofar as it holds that all actions of immigration officials under the *Immigration Act* are "services" because the performance of a statutory duty is "by definition" a service to the public (see also *Bailey, supra* at p. D/214). (my underline)

[47] Given these comments, one can deduce that had the reasoning in *Watkin* been applied in *Bailey*, the result would not necessarily have been the same. The finding in *Bailey* that income tax assessment was a "service" was made based on a completely different set of factors. As such, I cannot find that the conclusions in *Bailey* can be applied here.

[48] The applicants also raise the issue of discretion by the CRA based on *Fetterley* from the Tax Court. The comments made in that case were made with regards to the fairness provisions of the ITA, which are governed under a different set of rules, and thus cannot be presumed to apply in this case.

[49] I therefore find that the Tribunal's findings with regards to its assessment on whether or not the actions by the CRA could be described as "services" under the meaning of s. 5 were reasonable.

Section 7 Arguments

Applicants' Arguments

[50] With regards to s. 7(b) of the CHRA, the applicants submit that the Tribunal erred in concluding that the applicants' complaint did not arise in the course of employment as the respondent CRA had not "utilized" the employee's services.

[51] The applicants rely on *Canadian Pacific Limited v Canada (Human Rights Commission)* [1990] FCJ No 1028 at paras. 5-6, where the Court held that even where an entity was not an employer of an individual, it could, nonetheless, have a discriminatory impact on the employment of that individual.

[52] The applicants also refer to jurisprudence from British Columbia for the proposition that discrimination "with respect to employment or any term or condition of employment" includes discrimination by a licensing authority that impacts on an individual's ability to gain employment in a particular field. The applicants argue that accordingly, there is no requirement that the discriminatory treatment in the course of employment be the actions of an employer or an individual in a position akin to that of an employer.

[53] The applicants contend that the use of the word "indirectly" in section 7 of the *CHRA* is demonstrably broader than the one used in British Columbia: "refuse to employ or refuse to continue to employ a person" (*Mans v. British Columbia Council of Licenced Practical Nurses*, [1990] BCCHRD No. 38 at paras 74-77, 83-87; aff'd: [1991] BCJ No. 2666 (BSSC) and [1993] BCJ No. 371 (BCCA).

[54] The applicants contend that the decision relied on by the Tribunal in *Canada (Attorney General) v. Bouvier*, [1998] FCJ No. 176, 98 CLLC para. 230-016 does not detract from the conclusion set out above. The applicants state that in *Bouvier*, the department had no discretion in

the application of the regulations in question. The applicants believe that this is not the case in the present instance, as the respondent maintains discretion in the application of the provisions.

[55] Finally, the applicants ascertain that the QRLSP treatment by the CRA perpetuated the wage discrimination in the female dominated groups still retaining a lower percentage of their earned employment income than male dominated groups who receive their income in the year in question.

Respondent's Arguments: Canada Revenue Agency

[56] The CRA submits that the Tribunal's conclusion with respect to section 7 is reasonable.

[57] It says that *Bouvier* is the authority for the argument that section 7 does not extend the concept of an "employer" beyond the "utilizer" of an employee's services. In that case, notwithstanding the purposive interpretation granted to quasi-constitutional human rights legislation, the Federal Court of Appeal refused to extend section 7 to a government department simply because it was responsible for administering a statutory scheme connected with the complainant's employment. Similarly, in the assessment of lump sum pay equity recipients, the CRA was not acting as an employer, nor was it the "utilizer" of their services. Rather, it was simply administering the provisions of the ITA which were enacted by Parliament.

Analysis

[58] I am of the view that the Tribunal's analysis of *Bouvier* and its determination that the Federal Court of Appeal in that case was far more relevant and persuasive is reasonable with regards to section 7 in the present instance (Tribunal's decision, paras 66-68).

[59] Its conclusion at para.71 that "…the Complainant's allegations .., even if believed, cannot engage the liability of the CRA under paragraph 7(b) of the *CHRA*" stems from the application of para. 4 in *Bouvier* in which it was said that a Government cannot be held accountable to the Commission for a questionable provision of a Regulation simply because it has been given by Parliament the responsibility of administering the Act on the authority of which the Regulation was validly enacted by the Governor in Council.

[60] As such, I agree with the principle enunciated at paragraph 79 of the CRA's Memorandum of Fact and Law: "…. Although the CRA does have pay equity recipients among its employees and Ms. Murphy was herself a CRA employee, the CRA did not assess their tax returns in its capacity as an employer…..".

[61] Therefore, the Court's intervention on this issue is not warranted.

c. Did the Tribunal err in concluding that Ms. Murphy and other recipients of pay equity lump sum benefits did not suffer adverse differential treatment?

Applicants' Arguments

The Tribunal's Assessment of the Expert Evidence

[62] The applicants contend that the Tribunal erred in concluding that the evidence advanced by PSAC and Ms. Murphy failed to demonstrate adverse differential treatment.

[63] With respect to the Tribunal's analysis of the expert evidence, the applicants submit that while this evidence assisted in understanding the impact of discrimination, it was not filed necessarily to support the applicants' case but it illustrated the negative impact of the CRA's actions on lump sum pay equity recipients (Applicant's Memorandum of Fact and Law, paras. 49-63). Accordingly, the applicants believe that the Tribunal erred in using this evidence to undermine the basis for the applicants' complaint.

The Legal Role of Interest

[64] The applicants submit that given that the Tribunal determined that the amount of interest received adequately compensated the individual for the additional tax burden, then if it can be demonstrated that interest was not intended to compensate for this amount, it must follow that the *prima facie* case of discrimination stands.

[65] The applicants submit that it is well established that when Tribunals order in the same case, remedies for the income tax consequences of receiving payments in a lump sum in a single year (i.e. in the form of a gross-up), to account for tax differences, it add interests to compensate for the time use of money which is distinct (*Green v. Canada (Public Service Commission)*, 2003 CHRT 34 at paras. 4, 24).

[66] The applicants point out that when the respondent's expert was asked expressly in cross-examination whether she was suggesting that the Tribunal intended that interests be compensation for the fiscal impact, she confirmed that she was not. The applicants allege that given their area of

expertise as accountants, neither expert was in the position to provide evidence regarding the legal basis for the Tribunal's determination on that point.

[67] The applicants also highlight that although the Tribunal implied that PSAC ought to have negotiated damages for the tax implications with Treasury Board, the CRA was not a party to the proceedings before the Tribunal, nor was it present during the negotiation process.

[68] The applicants also say that *Burrow v. The Queen*, 2005 TCC 761 relied upon by the Tribunal do not address a situation where legislation was changed expressly to address a negative tax impact. That decision from the Tax Court dealt with different issues.

[69] Finally, the applicants contend that the Tribunal's statement that the complaint was not the "kind of inconsistency" that should be addressed under the CHRA was unfounded. The applicants argue that the CHRA does not allow for degrees of discrimination, some of which is acceptable and some of which is not. The applicants further state that the Federal Court of Appeal in *Sveinson v. Canada (Attorney General)*, 2003 FCA 259, 4 FC 927, was not suggesting that if the differential treatment was discriminatory, then there would be no remedy available. Rather, the Court was focusing on the nature of the distinction which it did not think represented a violation of the *CHRA*. Therefore, its analysis does not apply in this case.

Respondent's Arguments

Canada Revenue Agency

[70] The CRA submits that the Tribunal reasonably applied the logic used in *Burrows* to the present case, in stating that if the PSAC did not find the amounts proposed under the settlement to be enough, taking into account that its members would be taxed in accordance with the ITA, it should have negotiated higher amounts, structured the settlement to attract different tax consequences, or ultimately not have settled.

No Reliable Evidence of Adverse Effect

[71] The CRA contends that contrary to the applicants' argument, the evidence of Ms. Murphy was not sufficient in itself to make out a *prima facie* case of discrimination. The CRA points out that the Tribunal did accept that if Ms. Murphy had "actually received the wage adjustments in the years to which they related, she would have paid tax at a lower marginal rate". However, the CRA states that this fact alone did not establish that Ms. Murphy, or any other pay equity recipient, was financially disadvantaged. Accordingly, CRA submits that the Tribunal properly focused on expert evidence in determining whether there was reliable evidence of adverse treatment.

[72] CRA also underscores that as the possibility of disadvantage in only two of five hypothetical scenarios presented by Ms. Murphy is far from convincing evidence that the QRLSP had an adverse impact on the finances of Ms. Murphy, or the other recipients, or constituted adverse differential treatment on the basis of the prohibited ground of sex. The fundamental issue before the Tribunal was whether the applicants were worse off than others in society who had received lump sum payments as a result of CRA's tax treatment.

Interest properly considered in adverse effect analysis

[73] CRA urges that the principal lump sum payments and the interest sums were inexorably linked as part of the remedy ordered by the Tribunal and further negotiated by the parties. CRA points out that neither the settlement agreement nor the Consent Order specified the purpose of the interest paid.

[74] Furthermore, CRA highlights that both experts agreed that the interest payments more than offset the effects of inflation and any increased tax liability resulting from receiving the principal lump sums in 2000. As such, CRA believes that it was open to the Tribunal to conclude that the interest payments should factor into its analysis of whether the QRLSP had an adverse financial impact on the complainants.

Analysis

[75] The Tribunal's finding that Ms. Murphy and other recipients of pay equity lump sum benefits did not suffer adverse differential treatment was reasonable.

[76] The Tribunal did accept that if Ms. Murphy had actually received wage adjustments in the year to which they related, she would have paid tax at a lower marginal rate. However, this did not establish that the applicant was financially disadvantaged.

[77] As stated in paragraph 61 of the CRA's Memorandum of Fact and Law, "There was evidence, however, that the interest payments more than offset the effects of inflation and any

increased tax liability resulting from receiving the principal lump sum in 2000. Both experts agreed on this point". I verified this statement and I have to say that it is supported by the evidence (CRA Memorandum of Fact and Law, footnotes No. 53 and 54, para. 61).

[78] It was therefore reasonable for the Tribunal to take into consideration all the factors that related to the question of whether or not the applicants had been financially disadvantaged. One of these factors was the interest awarded, whether or not it was initially intended for this specific purpose. As stated by the Tribunal at para 97, regarding Ms. Murphy, "If her loss had been more than entirely covered by the interest (in Ms. Murphy's case, by an excess of over $1,500), how can she assert that she has been disadvantaged? It just does not make any sense".

[79] Another factor was the evidence of the applicants' expert, which was not able to demonstrate that the QRLSP had an adverse impact on the applicants, especially in light of the problems highlighted by the CRA's expert.

[80] Finally, I have to agree with the Tribunal's observations at para 101, where it states " … According to Ms. Jaekl, the PSAC is one of Canada's largest unions with offices nationwide and staff lawyers. The union has been involved in numerous lawsuits and settlements related to employment, pay equity and human rights. It has sought and obtained verification of this tax information from Revenue Canada over a year earlier, before the Tribunal decision had even been issued. This is the tax rule that was ultimately applied to Ms. Murphy's lump sum payments. <u>This tax consequence was thus neither unforeseen nor unforeseeable</u>". (My underline)

[81] Finally, I find that the Tribunal's determination and conclusions in dismissing the applicants' complaint are supported by the evidence and meet the test in *Dunsmuir*.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. The applicants shall pay costs by way of a lump sum for an amount of $4,000 to the respondent, Canada Revenue Agency. No costs are awarded against the Canadian Human Rights Commission.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-808-10
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA AND CATHY MURPHY AND CANADA REVENUE AGENCY AND THE CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 11, 2011
REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	February 22, 2011

APPEARANCES:

David Yazbeck Andrew Astritis	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Per: Catherine A. Lawrence	FOR THE RESPONDENT (CANADA REVENUE AGENCY)
Me Daniel Poulin	FOR THE RESPONDENT (THE CANADIAN HUMAN RIGHTS COMMISSION)

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Per: David Yazbeck / Andrew Astritis Ottawa, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Per: Catherine A. Lawrence Ottawa, Ontario	FOR THE RESPONDENT (CANADA REVENUE AGENCY)
Me Daniel Poulin Ottawa, Ontario	FOR THE RESPONDENT (THE CANADIAN HUMAN RIGHTS COMMISSION)