Date: 20150728

Docket: A-266-14

Citation: 2015 FCA 174

CORAM: **STRATAS J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Appellant

and

ATTORNEY GENERAL OF CANADA,
TREASURY BOARD OF CANADA,
NAV CANADA

Respondents

Heard at Ottawa, Ontario, on April 22, 2015.

Judgment delivered at Ottawa, Ontario, on July 28, 2015.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: STRATAS J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] The Public Service Alliance of Canada (PSAC) appeals from the April 28, 2014 judgment of the Federal Court (*per* Justice Kane): 2014 FC 393.

[2] PSAC had applied to the Federal Court for judicial review of the September 5, 2012 decision of the Canadian Human Rights Commission. In this decision, the Commission dismissed PSAC's complaint alleging that the respondents, Treasury Board of Canada and NAV Canada (NAV) had discriminated, and were discriminating, against NAV's female employees contrary to sections 7, 10, and 11 of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 (CHRA).

[3] The Federal Court dismissed PSAC's application.

[4] PSAC now appeals to this Court. Although the decisions below concern numerous parties, this appeal is restricted to the complaint made on behalf of NAV employees.

[5] For the reasons that follow, I would allow the appeal, and allow PSAC's application for judicial review in part. I would remit the complaint against NAV under section 11 of the CHRA to the Commission for further proceedings under the Act.

II. Background

A. The Legislative Scheme

[6] Individuals may file a complaint with the Commission if they have reasonable grounds to believe that a federally-regulated body has engaged or is engaging in a discriminatory practice (CHRA, ss. 2 and 40). Sections 5 to 14.1 of the CHRA define what constitutes a "discriminatory practice" (CHRA, s. 39).

[7] Sections 7 to 11 of the CHRA set out discriminatory practices within the employment context. Sections 7, 10, and 11 are the sections of the Act at issue in this appeal.

[8] Sections 7 and 10 define certain, more general, employment practices as discriminatory:

7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
10. It is a discriminatory practice for an employer, employee organization or employer organization	**10.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :
(*a*) to establish or pursue a policy or practice, or	*a*) de fixer ou d'appliquer des lignes de conduite;
(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,	*b*) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a	

prohibited ground of discrimination.

[9] These sections establish that it is a discriminatory practice to treat employees adversely based on a prohibited ground of discrimination, or to establish policies or practices that tend to deprive an individual or class of individuals of employment opportunities based on a prohibited ground. Subsection 3(1) of the CHRA lists the prohibited grounds of discrimination for the purposes of the Act; this list includes gender.

[10] Section 11 of the CHRA specifically addresses wage discrimination. Subsection 11(1) states that establishing and maintaining unequal wages between male and female employees performing work of equal value constitutes a discriminatory practice:

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.	**11.** (1) Constitue un acte discriminatoire le fait pour l'employeur d'instaurer ou de pratiquer la disparité salariale entre les hommes et les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

[11] The Commission must deal with any complaint filed with it (CHRA, s. 41(1)). This usually begins with an investigation under section 43 of the CHRA. In certain circumstances, however, the Commission is entitled to dismiss a complaint before proceeding to an investigation. These circumstances are listed in subsection 41(1) of the CHRA:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to	**41.** (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des

the Commission that	motifs suivants :
(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	*a*) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	*b*) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(*c*) the complaint is beyond the jurisdiction of the Commission;	*c*) la plainte n'est pas de sa compétence;
(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or	*d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	*e*) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[12] The Commission may dismiss a complaint if: the complainant ought to exhaust alternative procedures; the complaint could be more appropriately dealt with in another forum; the complaint is trivial, vexatious, or in bad faith; or the complaint is out of time. The Commission may also dismiss a complaint for being outside of its jurisdiction. This final ground was the basis for the Commission's decision, the subject of this appeal.

B. The Facts Underlying the Complaint

[13] The complaint at issue in this appeal concerns events dating back three decades.

[14] In 1984, PSAC filed a complaint with the Commission alleging that Treasury Board was engaging in wage discrimination contrary to section 11 of the CHRA.

[15] As a result of this complaint, a Joint Union-Management Initiative (JUMI) agreed to conduct a pay equity study within the core public administration, and to develop and carry out an action plan in response to the results of this study. The study evaluated job value and wage rates among female-dominated occupational groups, and compared them to job value and wage rates among male-dominated occupational groups.

[16] The results of the job evaluations that were conducted under the JUMI study were provided to the Commission, who was participating in the study as an observer. However, the JUMI eventually broke down. The action plan agreed to by the JUMI Committee, which called for system-wide correction of gender-based wage disparities, was never completed. Instead, in early 1990, the government unilaterally provided three occupational groups with equalization payments calculated using the JUMI job evaluation results. That same year, PSAC filed a separate complaint with the Commission on behalf of six female-dominated occupational groups that were surveyed during the JUMI study.

[17] The Commission ultimately referred the issue of possible wage discrimination within the core public administration – including PSAC's 1984 and 1990 complaints – to the Canadian Human Rights Tribunal for determination.

[18] In 1998, the Tribunal determined that Treasury Board had breached section 11 of the CHRA. The Tribunal ordered Treasury Board to retroactively adjust the wages of certain occupational groups in the core public administration (the Tribunal Order).

[19] In 1999, PSAC and Treasury Board entered into a pay equity settlement, approved by the Tribunal by means of a consent order. This settlement set out the precise wage gap calculations and entitlement by occupational group and level, but applied only to certain groups of Treasury Board employees. It did not apply to employees of separate agencies, Crown corporations, or other organizations not listed in what are now Schedules I and IV to the *Financial Administration Act*, R.S.C. 1985, c. F-11.

[20] The settlement did not apply to NAV. NAV is a private, non-share capital corporation legislatively constituted by the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20. NAV became responsible for Canada's civil air navigation services in place of Transport Canada on November 1, 1996. An agreement dated April 1, 1996 details this transfer of responsibility, including the transfer of employees from the core public administration to the corporation (the Transfer Agreement).

[21] The only compensation that NAV employees received in connection with the Tribunal Order was retroactive pay for the period before NAV was carved out from the core public administration. In other words, NAV employees only received compensation for the period during which they were still Transport Canada (*i.e.* Treasury Board) employees.

C. The Complaint

[22] On January 9, 2002, PSAC filed the complaint at issue in this appeal. PSAC complained that Treasury Board, or alternatively, NAV – as an individual respondent or as a co-respondent with Treasury Board – had:

- discriminated against female NAV employees on the basis of gender by not extending to them pay equity adjustments, contrary to sections 7 and 10 of the CHRA; and

- discriminated, and continued to discriminate, against female NAV employees by maintaining differences in wages between employees performing predominantly female work and employees performing predominantly male work of equal value in the same establishment, contrary to section 11 of the CHRA.

D. The Commission's Decision

[23] The Commission determined that all aspects of PSAC's complaint fell outside of its jurisdiction. Accordingly, the Commission dismissed the complaint under paragraph 41(1)(*c*) of the CHRA.

[24] I will discuss the Commission's decision in more detail below. However, in brief, the Commission found that PSAC's allegations did not contain all of the elements necessary to constitute valid complaints under sections 7, 10, or 11 of the CHRA. It determined that the allegations against Treasury Board could not proceed because Treasury Board was not an employer or co-employer of NAV employees at the relevant time. The Commission also

determined that the allegations against NAV individually must fail because they were lacking the necessary links to prohibited acts of discrimination.

E. Decision of the Federal Court

[25] The Federal Court dismissed PSAC's application for judicial review of the Commission's decision. The Federal Court Judge determined that it was reasonable for the Commission to have dismissed PSAC's complaint.

III. Standard of Review

[26] This Court must determine whether the Federal Court correctly identified and properly applied the standard of review to the Commission's decision (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at para. 47, [2013] 2 S.C.R. 559 [*Agraira*]).

[27] The Federal Court Judge correctly identified the standard of review as reasonableness (Federal Court Decision, at para. 46).

[28] Reasonableness is presumed to be the standard of review applicable to the Commission's decision, which involved the application of the legal standards set out in the CHRA – its home statute – to a set of facts (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 53-54, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at para. 10, 444 N.R. 120).

[29] Moreover, this Court has consistently applied the standard of reasonableness to decisions of the Commission under subsection 41(1), except in circumstances where correctness review was explicitly required under *Dunsmuir* (see, for example, *Khaper v. Air Canada*, 2015 FCA 99 at para. 16, [2015] F.C.J. No. 491 (QL); *Exeter v. Canada (Attorney General)*, 2012 FCA 119 at para. 6, [2012] F.C.J. No. 489 (QL); *Keith v. Canada (Correctional Service)*, 2012 FCA 117 at para. 53, 431 N.R. 121). In this case, nothing in the Commission's decision requires correctness review.

[30] In order to determine whether the Judge properly applied the reasonableness standard, this Court must "step into the shoes" of the Federal Court and conduct a reasonableness review itself (*Agraira* at para. 46).

IV. Issues

[31] This Court must determine:

- Was it reasonable for the Commission to dismiss the complaints against Treasury Board as a co-employer with NAV?

- Was it reasonable for the Commission to dismiss the sections 7 and 10 complaint against NAV as an individual employer?

- Was it reasonable for the Commission to dismiss the section 11 complaint against NAV as an individual employer?

V. Analysis

A. The Role of the Commission at the Section 41 Stage

[32] In order to properly assess the reasonableness of the Commission's decision, a greater understanding of the Commission's role at the pre-investigation stage is required.

[33] The jurisprudence has established that the Commission may only dismiss complaints under subsection 41(1) in "plain and obvious" cases (*Canada Post Corp. v. Canada (Canadian Human Rights Commission*), 130 F.T.R. 241, [1997] F.C.J. No. 578 (QL) at para. 3, (T.D.), aff'd 245 N.R. 397, [1999] F.C.J. No. 705 (QL) (C.A.)).

[34] Although the Commission must make its decisions according to the "plain and obvious" standard, the language of subsection 41(1) affords the Commission some discretion. The provision states that the Commission shall deal with the complaint unless "it appears to the Commission" that one of the listed grounds applies. This Court has emphasized that screening under subsection 41(1) is a duty imposed upon the Commission by law, and that the Commission must "do its work diligently", even at this preliminary stage (*Canada Post Corp. v. Barrette*, [2000] 4 F.C. 145 at para. 25, [2000] F.C.J. No. 539 (QL) (C.A.)).

[35] This has led to some confusion about the Commission's role at the pre-investigation stage. In particular, confusion appears to exist about whether the Commission may assess evidence when making decisions under subsection 41(1).

[36] This Court recently addressed this issue in another case involving a decision of the Commission under paragraph 41(1)(*c*): *McIlvenna v. Bank of Nova Scotia*, 2014 FCA 203, 466 N.R. 195 [*McIlvenna FCA*], rev'g 2013 FC 678 [*McIlvenna FC*].

[37] In *McIlvenna*, the Commission had dismissed a complaint as being outside of its jurisdiction for failing to disclose a link to a prohibited ground of discrimination (at para. 7, *McIlvenna FCA*; at para. 1, *McIlvenna FC*). This Court found the Commission's decision to be unreasonable (*McIlvenna FCA*, at paras. 14-19). This was because the Commission had resolved a live contest going to the merits of the complaint by weighing evidence. This Court held that such evidentiary weighing is not part of the Commission's task where such a live dispute exists. This Court distinguished such disputes from other decisions the Commission might make under subsection 41(1), such as whether a complaint appears to be frivolous or vexatious.

[38] In this case, the Commission determined that PSAC's complaint fell outside of its jurisdiction because the allegations contained within it did not have all of the elements necessary to make out claims of discrimination under sections 7, 10, or 11 of the CHRA. Applying this Court's holding from *McIlvenna*, for its decision to be reasonable, the Commission must have reached its conclusions without resolving factual disputes going to the merits of the complaint.

B. Was it reasonable for the Commission to dismiss the complaints against Treasury Board as a co-employer with NAV?

[39] The Commission determined that it was plain and obvious that Treasury Board was not a co-employer with NAV, and had not been since at least November 1, 1996, when employees were transferred from the public service to the corporation.

[40] The Commission reached this conclusion based upon the Transfer Agreement and the fact that the legal regime relating to government financial accountability in no way applies to NAV: the corporation is neither subject to the *Financial Administration Act*, nor reliant on appropriations from Parliament.

[41] The Commission rejected PSAC's argument that an extensive and complex evidentiary record was required to determine whether NAV was a co-employer with Treasury Board. The Commission was satisfied that it had before it sufficient information to make this determination at the section 41 stage.

[42] In my view, the Commission's conclusion on this issue was reasonable.

[43] The question for this Court is whether the Commission's decision falls within the range of possible, acceptable outcomes, having regard to the decision as a whole (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708). In my view, it does.

[44] The Commission based its decision upon uncontested facts and law – namely, the relevant legislation and the Transfer Agreement. This basis is sufficient to support the Commission's decision.

[45] As the Commission noted in its decision, the legal regime relating to government financial accountability does not apply to NAV.

[46] In addition, section 2 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 defines "employer" as being Treasury Board "in the case of a department named in Schedule I to the *Financial Administration Act* or another portion of the federal public administration named in Schedule IV to that Act". Moreover, section 8 of the *Air Navigation Services Commercialization Act* establishes that NAV is not an agent of the Crown, and section 68 of that Act states that the Crown ceased to be responsible for the terms and conditions of employment at NAV as of the transfer date.

[47] The Commission also had before it relevant excerpts from the Transfer Agreement, Article 3.01.06 of which stipulates that NAV is solely responsible for the payment of employment claims arising from NAV employees (Appeal Book Vol. I, p. 244).

[48] PSAC submits that the Commission should not have decided whether Treasury Board was a co-employer at the section 41 stage, because doing so requires considering both factual and legal arguments. In support, PSAC cites *Canada (Attorney General) v. Mohawks of the Bay of Quinte First Nation*, 2012 FC 105 at para. 43, [2012] F.C.J. No. 121 (QL). PSAC further

submits that, even if the Commission were permitted to make such a determination at the section 41 stage, the Commission's decision is unreasonable for failing to identify or apply the legal test for determining the employer in a pay equity complaint, that from *Reid v. Vancouver Police Board*, 2005 BCCA 418, [2005] B.C.J. No. 1832 (QL) [*Reid*].

[49] I do not accept these arguments. Making a finding on this issue – determining the employer for the purposes of a human rights complaint – required the Commission to apply a legal standard to a set of facts in an area in which it has specialized expertise. Such an exercise is part of the Commission's mandate at the section 41 stage, so long as the Commission does not engage in evidentiary weighing contrary to *McIlvenna*. The Commission's role is to determine whether the alleged facts, taken as true, give rise to a sustainable complaint.

[50] Before making its decision, the Commission considered the parties' submissions, as well as the report prepared by its early resolution staff that explicitly referenced *Reid*, above. Contrary to PSAC's assertion, this Court must presume that the Commission charged itself on the test from *Reid* because the Commission considered a report that referenced this test. Because such reports are prepared for the Commission, the staff completing them are considered to be an extension of the Commission (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 37, [2006] 3 F.C.R. 392). Given that the Commission located the appropriate law, this Court must defer to the Commission's application of this legal standard to the uncontested facts before it, so long as the result is supportable on the record.

[51] The Commission had sufficient information before it to come to the legal conclusion that Treasury Board was plainly and obviously not a co-employer for the purposes of PSAC's complaint. The Commission did not need to weigh or assess evidence to reach this conclusion. I would therefore not interfere with this decision.

C. Was it reasonable for the Commission to dismiss the sections 7 and 10 complaint against NAV as an individual employer?

[52] After concluding that Treasury Board was not a co-employer with NAV, the Commission determined that PSAC's sections 7 and 10 complaint could not continue against NAV as an individual employer.

[53] The Commission recognized that the discriminatory practice that PSAC had alleged in its sections 7 and 10 complaint appeared to be broader than the practice of wage discrimination described in section 11 of the CHRA. The discriminatory practice that PSAC had alleged was NAV's failure to adjust wages already found to be discriminatory. The Commission concluded, however, that there were no reasonable grounds to support a finding that this practice arose during the relevant time period.

[54] The Commission found it to be plain and obvious that, in 1996, when Transport Canada employees became NAV employees, the wages of employees in female-dominated occupational groups had not yet been found to be discriminatory. The Commission also found it to be plain and obvious that, in 1998, when the finding of wage discrimination within the public service was made, NAV was a separate employer with no legal obligation to apply the Tribunal Order.

[55] The Commission stated that NAV must be under some legal obligation to address the Tribunal Order for PSAC's sections 7 and 10 complaint to have reasonable grounds. The Commission determined that no such legal obligation existed since NAV was not a co-employer with Treasury Board, and was not a party to the Tribunal Order. As such, without any other basis, the complaint lacked reasonable grounds.

[56] PSAC submits that its complaint under sections 7 and 10 is not that the Tribunal Order was legally binding on NAV. Rather, PSAC argues the Tribunal Order constitutes the factual basis for the complaint, which is that NAV failed to rectify a classification and wage structure it knew to be discriminatory. The allegation, simply put, is that the Tribunal Order said that wage discrimination was present in NAV's workplace, and the failure to address this situation is a violation of sections 7 and 10 of the CHRA.

[57] PSAC argues that the factual and legal basis for its allegation is the same whether or not Treasury Board is listed as a co-respondent. PSAC also submits that, contrary to the Judge's finding (at paragraph 110, Federal Court Decision), it did provide evidence – a letter from counsel for NAV – indicating that NAV was aware that the classification and wage structure that it had inherited from Treasury Board was discriminatory.

[58] Again, I cannot accept PSAC's arguments.

[59] A fair reading of the Commission's reasons does not lead to the conclusion that the Commission misinterpreted PSAC's sections 7 and 10 complaint as being that the Tribunal

Order was binding *per se* on NAV. Rather, the Commission decided that the allegations put forward by PSAC based upon the Tribunal Order could not form the basis of a complaint under sections 7 and 10 of the CHRA against NAV as an individual employer. Given the legal nature of this decision, whether or not PSAC tendered evidence to support its factual allegations is not relevant to the reasonableness of the Commission's decision.

[60] Turning now to that question, it is my view that the Commission's decision was reasonable.

[61] As NAV indicated in its submissions, the Commission implicitly decided that an employer is not obliged under the CHRA to address wage rates found to be discriminatory in another establishment. This decision is one of statutory interpretation. In order to reach its ultimate conclusion on this issue, the Commission had to interpret the CHRA to determine what constitutes a "discriminatory practice" under sections 7 and 10.

[62] The Commission determined that failing to address wage rates already found to be discriminatory may constitute a discriminatory practice under sections 7 and 10, separate from the practice of wage discrimination itself, which is considered under section 11. However, the Commission concluded that this was only possible where the employer impugned in the finding of wage discrimination and the employer allegedly failing to address this discrimination are the same. Applying this interpretation to the facts that PSAC had alleged, the Commission determined that the sections 7 and 10 complaint against NAV as an individual employer was not sustainable. This, in my view, was reasonable.

[63] The Commission's interpretation is consistent with the broader scheme of the CHRA. Subsection 11(1) of the Act, reproduced above at paragraph 10, clearly indicates that a finding of wage discrimination must be based upon a comparison of employees from within the same establishment. This is further reinforced by the *Equal Wages Guidelines, 1986*, S.O.R./86-1082, the guidelines established under the CHRA concerning the application of section 11. Among other things, the *Equal Wages Guidelines* set out how the value of work of employees within the same establishment may be assessed and define the term "employees of an establishment" (ss. 9 and 10, respectively).

[64] Accordingly, a wage cannot be labelled "discriminatory" in the abstract. A finding of wage discrimination under section 11 of the CHRA is necessarily tied to the establishment from which employees' wages were compared. This is the reason NAV was not a party to the Tribunal Order. This explanation also supports the reasonableness of the Commission's decision that PSAC's sections 7 and 10 lacked reasonable grounds because NAV was under no legal obligation to address the Tribunal Order. The Commission reasonably concluded that PSAC was required to do more than simply assert such an obligation in order for its claim under these sections to be sustainable. PSAC has not referred the Court to any authority that demonstrates why this conclusion falls outside the range of possible, acceptable outcomes.

[65] I would therefore decline to interfere with the Commission's decision on this ground.

D. Was it reasonable for the Commission to dismiss the section 11 complaint against NAV as an individual employer?

[66] Finally, the Commission determined that the section 11 complaint against NAV as an individual employer fell outside of its jurisdiction because it lacked reasonable grounds, one of the prerequisites for a section 11 complaint.

[67] The Commission noted that a complaint under section 11 of the CHRA must meet certain requirements. The complaint must name female-predominant and male-predominant jobs within the same establishment for which the named employer is responsible. It must also contain reasonable grounds for believing that comparing the value of work and the wages of these groups would suggest discrimination.

[68] The Commission concluded:

> …[I]t is difficult to see how the basis of the [Tribunal Order], specifically, the female predominant jobs, the male comparators and the wage/value analysis all of which are derived from the same establishment over which [Treasury Board] is the employer, can be used to provide reasonable grounds for section 11 allegations against different and separate employers.
>
> (Appeal Book Vol. I, p. 317)

[69] The Commission acknowledged that PSAC had listed specific employee groups in its April 16, 2012 submissions. The Commission noted, however, that according to NAV's submissions, certain groups were no longer female-dominated, and other groups no longer existed. The Commission remarked that these differences in the parties' submissions demonstrate why "… reasonable grounds for filing a section 11 complaint must be based on the circumstances of an employer within one establishment" (Appeal Book Vol. I, p. 318).

[70] The Commission did not accept PSAC's argument that these differences demonstrate that an investigation is needed. Instead, the Commission stated that reasonable grounds must be based on something more than mere assertion or speculation. The Commission also noted that a complaint under section 11 cannot be filed using proxy or surrogate comparators.

[71] In my view, the Commission's decision on this issue was not reasonable.

[72] The Commission found, and the parties agree, that a section 11 complaint must meet certain requirements: it must name female-predominant and male-predominant jobs within the same establishment, and must provide reasonable grounds that a comparison of the value of their work and wages suggests discrimination (*Deschênes v. Canada (Attorney General)*, 2009 FC 1126 at para. 16, [2009] F.C.J. No. 1374 (QL)).

[73] In its submissions to the Commission dated April 16, 2012, PSAC listed specific female-predominant groups from within NAV that it alleged were being paid discriminatory wage rates compared to specific male-predominant groups at NAV (Appeal Book Vol. I, p. 125). In its complaint, PSAC had: referenced the Tribunal Order (and its underlying facts); had alleged that employees were transferred out of the public service to NAV at existing Treasury Board wage rates; and had alleged that NAV employees perform duties that are essentially the same as those performed by the individuals in the occupational groups whose wages were in issue in the Tribunal Order (Appeal Book Vol. I, pp. 282-283).

[74] Nevertheless, the Commission found that PSAC's complaint lacked reasonable grounds. It determined that reasonable grounds for a section 11 complaint must be based on the circumstances of an employer within one establishment. In reaching this conclusion, the Commission pointed to the parties' contradictory factual submissions. However, at the section 41 stage, PSAC's factual assertions must be taken to be true. The Commission is not to be concerned with evidentiary disputes that go to the merits of the complaint in an analysis under paragraph 41(1)(*c*).

[75] In my view, it was not reasonable for the Commission to conclude that PSAC's complaint plainly and obviously did not contain reasonable grounds to suggest that wages at NAV are discriminatory. Of course, given the length of time that has passed since the pay equity study conducted by JUMI, and given the different context within which the listed occupational groups are now operating, PSAC must now establish in evidence the many facts it alleged for its section 11 complaint to continue. However, such considerations are not the concern of the Commission at the section 41 stage.

VI. Disposition

[76] For the foregoing reasons, I would allow the appeal and set aside the judgment of the Federal Court. Giving the judgment that the Federal Court should have given, I would allow the application for judicial review in part. Having concluded that it was unreasonable for the Commission to have dismissed the section 11 complaint against NAV as an individual employer under paragraph 41(1)(*c*), I would remit this portion of PSAC's complaint to the Commission for

further proceedings under the CHRA. I would dismiss all other aspects of the application for judicial review.

[77] Given the parties' mixed success, I would not award any costs.

"David G. Near"

J.A.

"I agree.

David Stratas J.A."

"I agree.

Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE KANE OF THE FEDERAL COURT, DATED APRIL 28, 2014, DOCKET NO. T-2123-12.

DOCKET:	A-266-14
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA v. ATTORNEY GENERAL OF CANADA, TREASURY BOARD OF CANADA, NAV CANADA
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CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.
DATED:	JULY 28, 2015

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