Federal Court  Cour fédérale

Date: 20160728

Docket: T-642-15

Citation: 2016 FC 882

Ottawa, Ontario, July 28, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CANADA POST CORPORATION

Applicant

and

CANADIAN POSTMASTERS AND ASSISTANTS ASSOCIATION (CPAA)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Canada Post Corporation [CPC or the applicant] employs postmasters and their assistants in rural and suburban post offices throughout Canada. These postmasters and their assistants are represented by the Canadian Postmasters and Assistants Association [CPAA or the respondent]. They form the Revenue Postal Operations Group within the CPAA. The majority of individuals

employed in the Revenue Postal Operations Group are female employees; it is a female-dominated group.

[2] For more than thirty years CPAA has alleged pay inequity between the Revenue Postal Operations Group [Complainant Group], and a group represented by the Canadian Union of Postal Workers [CUPW] which the respondent alleges is male-dominated and performs substantially the same work for CPC as the Complainant Group.

[3] More than twenty years ago CPAA initiated a complaint with the Canadian Human Rights Commission [CHRC] alleging pay inequity between the Complainant Group and the Postal Operations Internal and External Group within CUPW. After more than twenty years the substantive aspects of the complaint have not been addressed and in excess of 6,000 current and retired employees affected by the alleged discrimination have not received an answer to their complaint.

[4] In March, 2015, after considering a lengthy CHRC report [Section 41/49 Report or Report], the CHRC referred the Complaint to the Canadian Human Rights Tribunal [Tribunal] without further investigation.

[5] The issue of delay was a common thread that ran through the CHRC report. After finding CPC, rather than CPAA, was often responsible for the delays associated with the matter, the CHRC identified the issue of delay as a factor justifying its decision to deal with the complaint and refer it to the Tribunal rather than conducting further investigation.

[6] CPC seeks judicial review of the CHRC Decision to refer the complaint to the Tribunal.

[7] The applicant, CPC, advances the position that the CHRC acted in a procedurally unfair manner in failing to address their submissions identifying deficiencies in the CHRC report. The applicant further argues the CHRC's misapprehension of the evidence and reliance on bald assertions in alleging discrimination render the Decision unreasonable. I do not agree. The CHRC decision was reasonable based on the record before it and there was no breach of procedural fairness. I therefore dismiss the application for the reasons that follow.

II. Background

A. *The Complaint*

[8] This complaint has a long history rooted in a 1982 complaint the CPAA initiated with the CHRC that the parties agreed to resolve in 1985. However, the CHRC refused to approve the settlement agreement, reopening the investigation in 1989. The CHRC subsequently determined in 1991 that it would take no further steps and dismissed the 1982 complaint.

[9] In November, 1992, the respondent filed a second complaint with the CHRC [Complaint] alleging that from September 1, 1992 the applicant had discriminated against members of the female dominated Revenue Postal Operations Group. It is this Complaint that is subject of the application for judicial review.

[10] The applicant requested the CHRC not deal with the Complaint on the basis the CPAA had: (1) not exhausted alternative and reasonably available review and grievance procedures; and (2) the Complaint had been made in bad faith. In October, 1994 the CHRC refused to exercise its discretion to dismiss the Complaint [1994 CHRC Decision] and the applicant filed an application for judicial review with this Court.

B. *Judicial Review of 1994 CHRC Decision*

[11] Justice Rothstein dismissed the judicial review application (*Canada Post Corp v Canada (Canadian Human Rights Commissions*), [1997] FCJ No 578 at para 12, 130 FTR 241 (TD) [*Canada Post FC*]), a decision that was upheld by a unanimous Federal Court of Appeal (*Canada Post Corp v Canada (Human Rights Commission)*, [1999] FCJ No 705, 169 FTR 138 (CA)). On June 25, 1999, the Supreme Court of Canada dismissed the applicant's application for leave to appeal that decision (*Canada Post Corp v Canada (Canadian Human Rights Commission)*, [1999] SCCA 323).

C. *1997 Memorandum of Agreement*

[12] The Complaint was not advanced pending determination of the applicant's judicial review application of the 1994 CHRC Decision. However the parties did enter into a Memorandum of Agreement in December of 1997 [1997 MOA] in furtherance of the collective bargaining process. The 1997 MOA required the parties to: (1) implement a joint job evaluation plan; (2) negotiate the rates of pay in the collective agreement with the understanding those rates

were equitable and respected the CHRA as of March 20, 1997; and (3) review the matter of a wage gap with a pay equity expert and to address any gap through negotiation.

D. *The Petersen Report*

[13] Further to the 1997 MOA, the parties retained a pay equity expert, Mr. Petersen, to determine if there was a wage gap between a sub-group of the PO Internal and External Group [PO4] and the Complainant Group. Mr. Petersen prepared a report on April 8, 1998 [the Petersen Report].

[14] The comparator group identified in the Complaint was not the comparator group adopted in the Petersen Report. Rather the Petersen Report focused on the PO4 sub-group within the larger PO group. In addition, the Petersen Report focused solely on the issue of whether or not there was a wage gap between the Complainant Group and the PO4 sub-group. The Petersen Report did not consider whether the PO4 sub-group was male dominated and reached no conclusion on this issue.

E. *Efforts to Resolve the Complaint*

[15] The Section 41/49 Report describes numerous failed efforts to informally resolve the Complaint. These efforts included an attempt at formal mediation and subsequently the involvement of a conciliator. In 2006 the CHRC: (1) deferred the Complaint to allow the parties to pursue resolution as between them; and (2) provided if the parties failed to reach an agreement, the respondent could request the CHRC exercise its discretion to deal with the

Complaint [2006 CHRC Decision]. Neither party sought judicial review of the 2006 CHRC Decision.

[16] Subsequent to the 2006 CHRC Decision the parties entered into a second Memorandum of Agreement [2006 MOA]. The 2006 MOA acknowledged that the existing job evaluation plan was applicable to all positions in the bargaining unit and that it was free of gender bias or discrimination based on prohibited grounds under the CHRA. Like the 1997 MOA, the 2006 MOA did not address the question of gender bias or discrimination based on prohibited grounds under the CHRA for the period between the initiation of the Complaint in 1992, and the 1997 MOA.

[17] The respondent continued to pursue the Complaint and in November, 2009 advised the CHRC that an investigation was required. In expressing this view the respondent also advised the CHRC that a separate pay equity matter before the Federal Court of Appeal engaged issues relevant to the Complaint - that matter involved a pay equity dispute with CPC where the Comparator Group was the same Comparator Group identified in the Complaint (*Canada Post Corp v Public Service Alliance of Canada*, 2010 FCA 56, 15 Admin LR (5th) 157 [*PSAC FCA*]). On this basis the CHRC was asked to keep the file open pending a decision in the *PSAC FCA* matter. The CHRC responded it would leave the timing of any reactivation of the Complaint to the respondent.

[18] In February, 2010, the Federal Court of Appeal issued a divided decision in *PSAC*, the majority finding in favour of CPC with Justice Evans in dissent. Justice Evan's dissent was

upheld by a unanimous Supreme Court of Canada in *Public Service Alliance of Canada v Canada Post Corp*, [2011] 3 SCR 572 [*PSAC SCC*] on November 17, 2011.

F. *Reactivation of the Complaint*

[19] In 2010 the respondent undertook efforts to obtain information relevant to reactivation of the Complaint. In response the applicant initially took the position it needed more time to review and respond. However, in December, 2011 the applicant advised the respondent it considered the file closed and would not formally respond or provide the information requested. The respondent requested that the CHRC exercise its discretion to deal with the Complaint.

[20] In October, 2012 the CHRC wrote to the applicant advising that: (1) the respondent had returned to the CHRC for reactivation of the Complaint; (2) the matter will be resubmitted to the CHRC to decide whether to proceed with the Complaint under section 41 of the CHRA; (3) the CHRC invited CPC to provide its position on the issues for decision; and (4) the CHRC attached information on the factors to be considered by the CHRC in making its decision. The CHRC further advised it would not be addressing the substance of the Complaint at that time but would be limiting its review to the issues raised under subsection 41(1), and in particular referenced paragraphs 41(1)(a) and 41(1)(d).

[21] The CHRC received submissions from the parties and issued the Section 41/49 Report finding that the Complaint required further inquiry. The Report found that the Complaint was not frivolous, vexatious or made in bad faith and the CHRC should exercise its discretion to deal with the Complaint and not refer it to another procedure. The Report further concluded it would

not be in the public interest for the CHRC to conduct further investigation on a number of grounds: (1) there was sufficient information to warrant referral to the Tribunal; (2) the long delay associated with the Complaint; (3) it was in the public interest that the Tribunal deal with allegations of systemic discrimination affecting upwards of 6,000 employees requiring expert evidence; and (4) all the matters warranted a full inquiry best addressed by the Tribunal rather than further investigation from CHRC.

[22] Based on the above noted conclusions the Report recommended the CHRC: (1) deal with the allegations raised by Complaint for the period between the initiation of the Complaint and March 20, 1997; and (2) that it request the Tribunal to institute an inquiry into the Complaint pursuant to subsection 49(1) of the CHRA.

[23] After receiving submissions from the parties on the Section 41/49 Report, the Acting Chief Commissioner of the CHRC adopted the recommendations of the Section 41/49 Report. In adopting the Section 41/49 Report, it became the reasons of the CHRC (*Canada (Attorney General) v Davis*, 2009 FC 1104 at para 52, 356 FTR 258 [*Davis FC*]).

III. Relevant Legislation

[24] For ease of reference, relevant extracts from the CHRA are set out in Appendix A of these Reasons.

IV. Issues

[25] The application raises the following issues:

A. Was there a breach of procedural fairness?

B. Was the CHRC Decision reasonable? This requires consideration of the following sub-issues:

1. Was the decision to deal with the complaint reasonable?

2. If the decision to deal with the complaint was reasonable, was it also reasonable to refer the complaint directly to the Tribunal?

V. Standard of Review

[26] The reasonableness standard of review will be applied when considering the CHRC's interpretation of its home statute and to issues of fact and mixed fact and law. Issues relating to procedural fairness will be reviewed on a standard of correctness.

[27] The role of the CHRC is not adjudicative. The adjudicative role is reserved to the Tribunal appointed under the CHRA (*Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at para 53, 140 DLR (4th) 193). Instead the CHRC screens and investigates complaints. It determines whether a particular complaint should be considered by the Tribunal. The role has been identified as involving: (1) the performance of an administrative and screening function with respect to complaints of discriminatory practices; (2) the acceptance, management and processing of those complaints; and (3) where a complainant is to be referred to a human rights tribunal, the CHRC performs a screening function similar to that of a judge in a

preliminary inquiry. In reviewing a decision of the CHRC, the Court only considers the reasonableness of the "screening" decision (*O'Grady v Bell Canada*, 2012 FC 1448 at paras 37 and 38, 423 FTR 18).

[28] The CHRC's interpretation of subsection 41(1) of the CHRA, its home statute and the CHRC's decisions under that provision are reviewed on a reasonableness standard, subject to the exceptions identified in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*] (*Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 174 at paras 28-29, 475 NR 232 [*NAV Canada*]). No such exception applies here.

[29] The decision of the CHRC to refer a complaint to the Tribunal for a determination on the merits under subsection 49(1) of the CHRA is also a discretionary decision attracting the reasonableness standard of review. In *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364 at para 43 [*Halifax*], Justice Cromwell writing for a unanimous Supreme Court of Canada held that "The reviewing court's approach must reflect the appropriate level of judicial deference to both the substance of the administrative tribunal's decision and to its ongoing process." Applying that principle, Justice Cromwell stated at paragraph 45 that "the reviewing court should ask whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to a board of inquiry." This reflects judicial reluctance to intervene in ongoing administrative proceedings (*Halifax* at paras 49-52).

[30] Where a question of procedural fairness arises the matter is to be reviewed on a standard of correctness. Procedural fairness concerns may arise where it is alleged the CHRC failed to consider the submissions of a party (*Canadian Museum of Civilization Corp v Public Service Alliance of Canada*, 2014 FC 247 at para 40, 450 FTR 161 [*Canadian Museum of Civilization*]). However, in the subsection 41(1) context: "Procedural fairness dictates that the parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that the parties be provided the opportunity to respond to this evidence and make all relevant representations in relation thereto" (*Deschênes v Canada (Attorney General)*, 2009 FC 1126 at para 10).

VI. Analysis

A. *Was There a Breach of Procedural Fairness?*

[31] In preparing the Report, the CHRC undertook a review of the Complaint under subsection 41(1) of the CHRA in advance of making recommendations to the CHRC. In conducting the review the CHRC interviewed Mr. Petersen in respect of the wage gap analysis he conducted pursuant to the 1997 MOA. The Report states that Mr. Petersen made the following statements:

A. The 1997 MOA demonstrated that the parties were aware of a pay equity problem up to that time;

B. The pay equity problem was addressed moving forward, however the 1997 MOA did nothing to address/settle the pay equity allegations leading up to the 1997 MOA;

C. Although the parties took opposing views on whether the Petersen Report was final, Mr. Petersen confirmed his Report was final; and

D. On the issue of the gender composition of the different groups Mr. Petersen explained:

> [I]t was already established/recognized by the parties that CUPW was male-dominated while CPAA was female-dominated. That is to say, neither party objected to the effect that the complainant group was not female-dominated or that the comparator group was not male-dominated i.e. they accepted that the complainant group was female dominated while the comparator group was male-dominated. For that reason, his study did not conduct a gender analysis but instead went directly to assessing whether a wage gap existed using the CPAA job plan to measure both the complainant and the comparator group (the PO4 group).

[32] The applicant argues that the author of the Report "mistakenly heard Mr. Petersen to say that the parties accepted that the PO4 comparator group was male dominated." The applicant further argues the Report also fails to appreciate that the wage gap analysis conducted by Mr. Petersen did not establish a wage gap with the PO group, the comparator group identified in the Complaint.

[33] The applicant's counsel provided submissions to the CHRC setting out the applicant's view that Mr. Petersen's statements had been misunderstood in the Section 41/49 Report noting, "The Petersen analysis was performed using a female dominated group (the complainants) and a neutral or female dominated group (the PO4s). As such, it does not reveal any hint of gender bias" and thus the Petersen Report could not be relied upon to conclude a wage gap existed between the CPAA and the comparator PO Group as alleged in the Complaint. The applicant further argued there was no information demonstrating that members of the PO group, outside the PO4 sub-group, performed work comparable to CPAA members.

[34] The applicant submits the CHRC was obligated to address the submissions it made when adopting the Report. The applicant submits the CHRC's failure to do so renders the reasons deficient and "constitutes a violation of the principles of fundamental justice." The applicant cites jurisprudence which it recognizes involves situations where the CHRC decision resulted in the dismissal of the complaint and where an investigation occurred (*Egan v Canada (Attorney General)*, 2008 FC 649, 341 FTR 1; *Dupuis v Canada (Attorney General)*, 2010 FC 511, 368 FTR 269; *Public Service Alliance v Canada (Treasury Board)*, 2005 FC 1297, 279 FTR 242). However, the applicant submits "there is no reason why the requirement to refer to submissions regarding substantial omissions and errors would not apply at the Section 41 and/or Section 49 stage", in the referral context.

[35] I cannot agree. Even if the issue the applicant raises is one of procedural fairness, the content of the duty of procedural fairness is lower in a referral decision than in a dismissal decision and the CHRC met that duty here.

[36] I begin with *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], where Justice L'Heureux-Dubé reaffirmed that the content of the duty of procedural fairness varies based on the context of the case. Justice L'Heureux-Dubé set out five non-exhaustive factors for determining the content of the duty of procedural fairness owed: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) "the choices of procedure made by the agency itself" (*Baker* at paras 23-27). The *Baker* list is non-exhaustive

and reflects "the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[37] The jurisprudence on the CHRC has considered the *Baker* factors and has distinguished between the content of the duty of procedural fairness in situations where the CHRC dismisses a complaint and the content of that duty where, as in this case, a complaint is referred to the next stage in the process. A referral by the CHRC to the Tribunal is not a final determination of a complaint and the CHRC's duty to give reasons is less onerous than where the decision results in the dismissal of a complaint (*Davis FC* at paras 56 and 57).

[38] In *Canada (Attorney General) v Davis*, 2010 FCA 134, 403 NR 355 Justice Layden-Stevenson, speaking for a unanimous Federal Court of Appeal, states at paragraphs 5-7 :

> [5] This Court has repeatedly stated that the Commission enjoys considerable latitude when performing its screening function on receipt of an investigator's report and that the courts must not intervene lightly in its decisions at this stage. See: *Bastide et al. v. Canada Post Corporation*, 2006 FCA 318, 365 N.R. 136 (citations to supporting authorities omitted), leave to appeal refused, [2006] C.S.C.R. no. 466.
>
> [6] The Commission must act in accordance with natural justice. This requires that the investigation report upon which the Commission relies be neutral and thorough and that the parties be given an opportunity to respond to it: *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.) applying *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
>
> [7] While we do not endorse the entirety of the application judge's reasons for judgment, we are satisfied that he reached the appropriate conclusion based on the record before him. The record

> discloses a true debate: there is evidence in support of each side's position that is capable of being believed, and if believed, could be determinative of the merits of the complaint.

[39] Hence even where the issue is one of procedural fairness, the Court accords latitude to the CHRC in the performance of its screening function. The duty imposed on the CHRC is to provide a fair process within the context of the decision being rendered.

[40] The applicant relies on *Herbert v Canada (Attorney General)*, 2008 FC 969, 169 ACWS (3d) 393 [*Herbert*], where Justice Russel Zinn held that the CHRC's failure to consider a complainant's submissions that an investigation report contained substantial and material omissions constituted a reviewable error. However, the result of the CHRC decision in *Herbert* was to screen out the complaint which Justice Zinn described as having "very significant consequences for a complainant, who will most often have no other remedy for the alleged discrimination" (*Herbert* at paras 17, 26 and 30).This case is distinguishable. Here the CHRC Decision allows the Complaint to proceed to the next stage.

[41] In addition, the statutory scheme supports the proposition that the content of the duty of procedural fairness in relation to the CHRC's duty to give reasons differs depending on the context. Subsection 42(1) of the CHRA states that when the CHRC decides not to deal with a complaint it shall send a written notice of its decision to the complainant "setting out the reason for its decision." Similar provisions exist under subsections 17(4) and 18(3) of the CHRA. However, no such provision exists when the CHRC decides to deal with a complaint and refer the matter to the Tribunal under subsection 49(1). Hence, the CHRC is under an explicit

statutory duty to give reasons in the context of a dismissal decision, but not if it decides to deal with a complaint or when the CHRC decides to refer a complaint to the Tribunal for an inquiry.

[42] While it may have been preferable had the CHRC expressly addressed the applicant's submissions, the CHRC's failure to do so does not equate to a breach of procedural fairness in the circumstances. In this case the CHRC provided the parties with an opportunity to review and respond to the Report it relied upon, and provided reasons for its decision. In this regard I am in agreement with the respondent; the issue the applicant raises is not one of procedural fairness but rather relates to the substance of the CHRC's decision, reviewable on the reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 22 [*Newfoundland Nurses*]). The applicant's real issue is with the adequacy of the CHRC's reasons. On a reasonableness review, the adequacy of reasons is not an independent ground for setting aside a decision (*Newfoundland Nurses* at para 14). The question to be answered is whether the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at para 16).

[43] Even if I am wrong, and the failure to explicitly refer to the applicant's submissions engages a procedural fairness issue, no breach of procedural fairness occurred here. The CHRC provided reasons and "an investigator is not required to refer to everything" (*Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 76, 255 ACWS (3d) 955 [*Bergeron*]).

[44] It is true that in *Bergeron* Justice Stratas for a unanimous Federal Court of Appeal held at paragraph 67 that: "The law concerning the standard of review for procedural fairness is currently unsettled." However, *Bergeron* is distinguishable for the same reason as the cases cited above; *Bergeron's* holding that the correctness standard applies also arises in a dismissal not a referral context.

[45] I conclude that the CHRC discharged its procedural fairness obligations by providing the parties a meaningful opportunity to provide submissions prior to the issuance of the Report, on the Report itself, and providing reasons for its decision. Since the CHRC Decision was a referral decision under subsection 49(1) without further investigation under subsection 43(1) of the CHRA that decision did not constitute a final determination on the merits of the Complaint.

B. *Was the CHRC Decision Reasonable?*

[46] I next consider the reasonableness of the CHRC's decision to: (1) deal with the Complaint pursuant to subsection 41(1) of the CHRA; and (2) refer the matter directly to the Tribunal pursuant to subsection 49(1) of the CHRA without further investigation. There is some overlap in these two areas as the CHRC frequently relies on the same factual basis to support its conclusions in relation to these two distinct decisions.

[47] I conclude there was a reasonable basis in the law and evidence for the CHRC to determine it was not plain and obvious that the reactivation of the Complaint was trivial, frivolous or vexatious or in bad faith under paragraph 41(1)(d) of the CHRA, or that an alternative means of redress should be pursued under paragraph 41(1)(a). I also conclude it was

reasonable for the CHRC to refer the Complaint to the Tribunal under subsection 49(1) of the CHRA without further investigation.

(1) Was the decision to Deal with the Complaint Reasonable?

(a) *The Plain and Obvious Test*

[48] *Canada Post FC* is routinely cited as setting out the test to be applied by the CHRC in the context of subsection 41(1) of the CHRA. Justice Rothstein held at paragraph 3:

> [3] A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.

[49] The plain and obvious test requires that "the allegations of fact contained in the complaint must be taken as true" (*Keith v Canada (Correctional Service)*, 2012 FCA 117 at paras 50-51, 431 NR 121). Similarly in applying the plain and obvious test, the CHRC does not engage in a weighing of the evidence (*NAV Canada* at para 34-37). The threshold for meeting the plain and obvious test is high (*Canadian Museum of Civilization* at para 64).

[50] As noted by Justice Kane "the focus of the Commission is whether there is sufficient evidence before it to refer the complaint for further inquiry. It is not the role of the Commission at the section 40/41 stage to look behind the facts and to determine if a complaint is made out." (*Khapar v Air Canada*, 2014 FC 138 at para 64, 449 FTR 1).

[51] In this case the CHRC reasonably concluded that none of the exceptions set out in subsection 41(1) applied to the reactivation of the complaint and as a result it should not be brushed aside.

(b) *Alleged Discrimination*

[52] The applicant does not dispute that factual assertions made in a complaint must be taken as true in the context of subsection 41(1). However, the applicant argues in this case the allegations of (1) the existence of a wage gap between the complainant group and the comparator group and; (2) that the comparator group is male dominated are nothing more than bald assertions. The applicant submits the CHRC cannot rely on bald assertion in deciding to deal with the Complaint.

[53] Although the CHRC may dismiss a complaint on the basis of bald assertions or allegations, the Federal Court of Appeal has cautioned the CHRC should not do so where the record reflects a live contest as between the parties (*McIlvenna v Bank of Nova Scotia*, 2014 FCA 203 at paras 14-16, 466 NR 195). The CHRC's role when conducting a subsection 41(1) analysis is not to concern itself with evidentiary disputes going to the merits of the complaint.

Where the CHRC does engage in a consideration of contradictory factual submissions at the section 41 stage it will have acted unreasonably (*NAV Canada* at paras 38, 74-75).

[54] In this case the respondent not only asserted discrimination in the form of pay inequity on the basis of gender, but advanced material facts in support of the alleged discrimination. Those material facts include: (1) the Petersen Report conclusion that there was a wage gap between the respondent complainant group and the PO4 sub-group; (2) the *PSAC FCA* decision found that the PO group, the very comparator group identified in the Complaint, was male dominant; and (3) the long history of a "live contest" as between the parties.

[55] The Report acknowledged the parties take substantially different positions on how these facts are to be interpreted and whether or not they ultimately support the respondent's allegations of discrimination. However, taken at face value these facts reasonably establish a link to claimed discriminatory conduct for the purpose of the CHRA. This is not a case where the complainant merely asserted that such a link existed (*Love v Canada (Privacy Commissioner)*, 2014 FC 643 at para 69, 459 FTR 11). It was reasonable for the CHRC to conclude based on the record that it was not plain or obvious that there was no reasonable basis for the complaint or the complaint had been settled.

(c) *Frivolous, Vexatious or Pursued in Bad Faith*

[56] Similarly it was reasonable for the CHRC to conclude it was not plain and obvious that the respondent's request to reactivate the Complaint was trivial, frivolous, vexatious or made in bad faith for the purpose of paragraph 41(1)(d) of the CHRA.

[57] It has been the respondent's position that the 1997 MOA had not been fully implemented, and that the Petersen Report failed to facilitate a resolution of any inequities in this regard. Neither the 1997 MOA nor the 2006 MOA purported to address pay equity concerns retrospectively. As such, they did not address the issue of pay equity between September 1, 1992, and March 20, 1997, the earliest date to which the 1997 MOA applied.

[58] The CHRC also concluded much of the delay experienced in dealing with the Complaint was attributable to the applicant. This included repeated refusals to provide the CHRC and the respondent with requested and relevant information. I discuss these issues further in the section on delay below.

[59] The CHRC also considered the respondent's decision to await the Supreme Court of Canada's decision in *PSAC SCC* before pursuing reactivation of the Complaint, a fact the applicant took issue with at the CHRC. In its November, 2009 letter to the CHRC the respondent advised that it was of the preliminary view the Complaint should be reactivated. The respondent then expressed a preference to await the Federal Court of Appeal decision in the *PSAC* matter if the CHRC agreed. In response, not only did the CHRC not take issue with this further delay in reactivation but it left the timing fully in the hands of the respondent. While the CHRC might well have adopted a more proactive approach to the possibility of reactivation, the failure to do so does not undermine the CHRC finding that "it is not plain and obvious that the complainant's decision to wait for the conclusion of the litigation in *PSAC* rendered the request to reactivate the complaint one of bad faith given the important parallels between *PSAC* and the present complaint."

[60] Finally, and as noted above, the CHRC also recognized the continuing dispute between the parties as to what the Petersen Report represented in respect of the issues of a comparator group wage gap and male dominance. Succinctly put, and without assessing the merits of the parties' respective positions, the CHRC recognized that the Petersen Report and the 1997 and 2006 MOAs had failed to facilitate a resolution of the Complaint. This was the key take away in the subsection 41(1) context, a take away the CHRC understood and appreciated. The merits of the parties' respective positions have been left for the Tribunal.

(d) *Misapprehension of the Evidence and the Applicant's Submissions*

[61] The applicant advances two arguments relating to the CHRC's substantive findings under paragraph 41(1)(d) of the CHRA. The applicant argues the CHRC erred in adopting the Report without referencing the applicant's submissions that the Report misconstrues Mr. Petersen's evidence. The applicant further argues "there is simply insufficient information to provide reasonable grounds for believing that there was a violation of section 10 or 11 of the *CHRA*".

(i) Did the Report Misconstrue Mr. Petersen's Evidence?

[62] I conclude there was no error in the Report's discussion of Mr. Petersen's evidence. However, even if I am wrong in reaching that conclusion any error did not render the decision unreasonable.

[63] The error the applicant alleges is reflected in the following passage from the Report [Passage]:

> Mr. Petersen explained that it was already established/recognized by the parties that CUPW was male-dominated while CPAA was female-dominated. That is to say, neither party objected to the effect that the complainant group was not female-dominated or that the comparator group was not male-dominated i.e. they accepted that the complainant group was female-dominated while the comparator group was male dominated. For that reason, his study did not conduct a gender analysis but instead went directly to assessing whether a wage gap existed using the CPAA job plan to measure both the complainant and comparator group (the PO4 group).

[64] Relying on Mr. Petersen's affidavit, the applicant argues Mr. Petersen did not advise the CHRC the parties had accepted the PO4 sub-group was male-dominated. However, that is not what the Passage states. The Passage states the parties recognized CUPW as being male-dominated. While this statement might be viewed as ambiguous in a context where it is unclear whether the reference to CUPW is a reference to the PO4 sub-group or the PO Group, identified as the comparator group in the Complaint or CUPW as whole, it is not necessarily inconsistent with Mr. Petersen's affidavit statements. This is highlighted by Mr. Petersen's cross-examination where he states:

> 28. Q. At some point in early 1998 is it fair to say that you were given an indication that there was a CUPW position that was male dominated?
>
> A. I wouldn't say that was true. As far as I remember, the issue of male dominance really didn't come up. At the time it was a feeling that we're doing this because CUPW is male dominated [emphasis added]. That's kind of the feeling out there. There were no figures.

[65] Hence I find that the Report did not contain a misstatement of Mr. Petersen's interview evidence.

[66] Even if I were to accept that the CHRC incorrectly interpreted Mr. Petersen as stating the parties agreed the PO4 jobs were male-dominated, that alleged error and misstatement in one part of the Report does not taint the entire Report's analysis or render the ultimate decision of the CHRC unreasonable.

[67] The subsection 49(1) decision demonstrates the CHRC unquestionably understood that the parties continued to dispute the findings of the Petersen Report and the question of whether the Complaint's comparator group, the PO group was male-dominated. The CHRC also understood the parties had agreed not to have Mr. Petersen address the issue of gender dominance in completing his wage gap analysis. In effect the Report did not base its conclusion on the flawed premise that the parties agreed that either the comparator PO group or the PO4 sub-group was male-dominated, but rather considered, as one factor only, that the parties may agree that the comparator group was male-dominated. Indeed, the CHRC was careful to qualify its language as "the parties may now agree", in recognition of the history of this matter. Finally, and appropriately the CHRC did not attempt to reconcile the different position of the parties or address the merits of the evidence and render a final determination to the effect that the elements of a section 10 and/or 11 complaint were made out. Instead the CHRC relied on the Petersen Report as a factor in deciding not to dismiss the Complaint at the subsection 41(1) stage and to refer the Complaint to the Tribunal under subsection 49(1) of the CHRA.

[68] I also note that the alleged error is not reproduced in the CHRC Decision The omission of the portion of the Report which the applicant alleged was in error arguably demonstrates that the issue was not viewed by the CHRC as necessary to the outcome of the final decision. This

absence from the CHRC Decision implies that the CHRC considered the applicant's submissions on the alleged error in the Report and did not rely on it, instead focusing on the real issue: the Petersen Report failed to do what it was supposed to do, facilitate a settlement of the matter.

[69] It would be inappropriate to quash the CHRC Decision merely due to some potential defects in the Complaint as well as the Petersen Report which the CHRC has recognized are in dispute, a dispute the Tribunal is mandated to address and determine on a fuller record (*Emmett* at para 51; *Canada (Attorney General) v Skaalrud*, 2014 FC 819 at para 39, 462 FTR 134 [*Skaalrud*]).

(ii) Did the CHRC err by not Explicitly Addressing the Applicant's Submissions?

[70] The applicant argues "Given the significance of CPC's submissions on the Section 41/49 Report, CPC was entitled to detailed reasons beyond the adoption of the Section 41/49 Report."

[71] The applicant's expectation that the CHRC should have provided more reasons referring to the applicant's submissions is not persuasive and is not a standalone ground for judicial review (*Newfoundland Nurses* at para 14). In effect the applicant submits the CHRC was required to address the merits of the dispute between the parties and resolve aspects of the factual dispute before being in a position to adopt the Report.

[72] Justice Campbell's decision in *Canadian National Railway Co v Casler*, 2015 FC 704 at para 28 [*Casler*] demonstrates that the CHRC should not pre-empt the Tribunal's process by

effectively assuming an adjudicative role seeking to resolve a dispute between the parties. The CHRC is focused on the question of whether there is sufficient evidence to refer a complaint not resolving disputes on findings of fact (*Casler* para 29).

[73] This view was also expressed by Justice Roy at para 29 of *Skaalrud* where he notes in the subsection 49(1) context that "The role of the Commission is very limited and its discretion is quite broad. One has to be careful and come back to what the Commission is actually doing. It merely decides that, 'having regard to all the circumstances of a complaint, an inquiry is warranted.'"

[74] This reasoning applies here. The applicant's opportunity to advance its arguments relating to the interpretation, sufficiency and weight of the evidence will arise before the Tribunal, it is not a matter to be addressed by the CHRC (*Emmett* at para 52).

(e) *Failure to Exhaust Grievance or Review Procedures*

[75] Here again the CHRC undertook a comprehensive review of the history of the Complaint and the positions advanced by the parties. It concluded it is unclear if the grievance process can deal with a complaint dating back to 1992. It further notes it has discretion to refuse to refer parties to a collective bargaining process (*Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1998] FCJ No 1609 at para 51, 167 DLR (4th) 432 (CA)).

[76] It is apparent that the history of the Complaint and the challenges the CHRC had encountered gathering key information were relevant to the decision reached under paragraph 41(1)(a) of the CHRA. The CHRC noted:

> In the course of the complaint, the commission has been unable to obtain key information to proceed with further investigation: throughout the period from 1992 to 2002, the commission was unable to fully investigate the merits of the complaint in part because necessary job information to conduct a wage gap analysis (job evaluation plans, breakdown of the employees in the relevant groups and explanation of the wage differences) was not provided despite numerous requests.

[77] Once again the CHRC was aware of the diametrically opposed positions of the parties in respect of the Petersen Report and also recognized it was not its role in the context of subsection 41(1) to address those opposing views. Rather it simply acknowledged the Petersen Report and the 1997 and 2006 MOAs had failed to settle the matter. It considered the circumstances surrounding the Complaint, including the number of individuals potentially impacted, the delays involved and the resources invested, in concluding the CHRC should deal with the Complaint. This decision was reasonable.

(2) Was the Decision to refer the Complaint to the Tribunal Reasonable?

[78] Subsection 49(1) provides that "At any stage after the filing of a complaint the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted." This provision provides the CHRC with broad discretion (*Halifax* at para 21; *Skaalrud* at paras 23-24). In concluding that a referral to the Tribunal is

warranted based on the information or evidence before it, the CHRC only concluded the evidence and information requires consideration and weighing by the Tribunal.

[79] There was a rational basis in the law and evidence for the CHRC to decide to refer the Complaint to the Tribunal under subsection 49(1) of the CHRA (*Halifax* at para 45).

[80] Once again the CHRC recognized the parties' failure to resolve the Complaint for over two decades, including with the assistance of the CHRC. The CHRC's referral of the Complaint to the Tribunal constitutes an implicit recognition of the futility of the matter remaining at the CHRC stage. Indeed the delay, the balance of which the CHRC did not attribute to the respondent, was evidence that resolution would not occur at the CHRC stage. The long-standing protracted dispute between the parties formed the context for the CHRC's referral decision from a factual, legal and policy perspective. The CHRC reasonably found that there was a public interest in referral to the Tribunal in light of the delays.

[81] Furthermore the CHRC identified the following facts which demonstrate sufficient information of a live dispute on pay equity and underscore the reasonableness of the decision to refer the matter to the Tribunal:

A. No dispute appears to exist that the CPAA group is female-dominated;
B. The CHRC had previously determined that the complainant and comparator groups were part of the same establishment and the applicant did not pursue a review of that decision;

C. The Petersen Report provided evidentiary support that the complainant and comparator groups performed work of the same or similar value;

D. The Petersen Report identified a wage gap, and "the evidence currently available to the Commission suggests that a wage gap existed prior to the signing of the 1997 MOA between the complainant and comparator group"; and

E. With respect to the question of whether the comparator group was male-dominated:

   i. *PSAC FCA* held at paragraph 180 "It is undisputed that the PO group as a whole and each of the three sub-groups meet the requirements of being predominantly male"; and

   ii. The CHRC recognized that whether the comparator group (PO) was male-dominated may still be in dispute "although the parties may now agree that Mr. Petersen and/or *PSAC* has settled this question."

[82] The applicant relied on the CHRC's alleged misapprehension of the Petersen Report to argue that the allegation of section 10 and/or 11 discrimination is nothing more than a bald assertion, an issue that is addressed above. The applicant also argued there is no information to conclude a wage gap exists between the PO Group, and the CPAA group. I simply cannot agree. The findings set out above demonstrate that there was sufficient information for the CHRC to refer this pay equity dispute to the Tribunal for the purpose of subsection 49(1) of the CHRA. The reasons show the CHRC understood the parties continued to disagree, and that the matter would be one which the Tribunal would need to resolve. It did not refer the matter forward on the assumption that the PO and PO4 group was male-dominated or that a wage gap actually

existed, but on the basis that sufficient information existed to support those propositions. This was reasonable.

[83] The applicant argues that "there is simply no reasonable basis in law or in fact to refer the Complaint to Tribunal." This is simply not so. The CHRC reasonably relied on the *PSAC FCA* for finding evidence existed that the PO group was male-dominated. Based on the Petersen Report, there was evidence of a wage gap between the PO4 sub-group and CPAA. The record documents the applicant's consistent refusal to provide the relevant information to the CHRC or the respondent that would have more clearly addressed the wage gap question, notwithstanding repeated requests for such information. The record also reflects the applicant's unilateral conclusion that the 1997 MOA and the 2006 MOA's coupled with the Petersen Report had resolved the issue and its resultant refusal to engage further on the issues. The applicant simply cannot rely on its unilateral determination that the Complaint has been resolved to submit the decision was unreasonable. In my view the applicant's reluctance to engage in the fact finding process reinforces the reasonableness of the CHRC's Decision to refer the matter to the Tribunal.

[84] The CHRC also reasonably determined it more appropriate for the Tribunal to investigate the matters in dispute as they required the hearing of expert and other evidence. The CHRC recognized this Complaint continues to raise complex questions which the parties vigorously dispute and the Tribunal is in the best position to answer those questions.

[85] In its submissions the applicant argues that instead of a referral to the Tribunal that "At the very least, the Commission should have referred the Complaint to investigation to resolve the

issues raised by the Corporation in its submissions about Mr. Petersen's statements and the wage gap analysis", counsel for the applicant repeated this assertion in oral argument. This position ignores the record, which demonstrates a failure to advance the Complaint and suggests that the Tribunal will not investigate or inquire into the applicant's allegations. The CHRC referred the matter to the Tribunal because it was of the opinion the Tribunal was best placed to conduct any further investigation or inquiry on the factual and legal issues the applicant raised in its submissions.

[86] Once the CHRC decided to deal with the Complaint under subsection 41**(**1**)** it then had two options. It could refer the Complaint for further investigation at the CHRC stage, or refer the matter directly to the Tribunal, as it did.

[87] While the applicant may disagree with the option adopted by the CHRC in this case, the CHRC's discretionary decision was not unreasonable. The issues are complex; there has been little substantive progress in resolving the Complaint over two decades despite the engagement of the CHRC complaint process, the collective bargaining process, and the involvement of a conciliator. More than 6,000 individuals have been impacted by the alleged discrimination. In addition, the CHRC attributed much of the delay in dealing with this matter to the applicant. The applicant acknowledged in oral submissions it may have at least appeared intransigent in pursuing a meaningful resolution of the Complaint, a position the applicant justifies based on its conclusion that the Complaint has been resolved.

[88] The applicant argues the jurisprudence establishes a referral to the Tribunal without investigation is exceptional. In support of this position the applicant relies on the decisions of this Court in *Air Canada Pilots Assn*, and *Skaalrud*, noting that in both decisions it was more appropriate to refer matters directly to an inquiry because almost identical cases raising similar issues about the same employer policies were already before the Tribunal. Upon review of the decisions cited I find nothing that supports the applicant's view that this Court viewed the exercise of the CHRC's authority under subsection 49(1), as exceptional. Instead Justice Roy in *Skaalrud* at paragraph 23 discusses the significant degree of deference to be afforded to the CHRC in the exercise of its broad discretion to refer matters to the Tribunal. Moreover, while this is not a case where identical complaints are already before the Tribunal, the CHRC here relied on the finding in *PSAC FCA* that the PO group was male-dominated for the purpose of justifying referring the matter to the Tribunal. In addition, even if a referral under subsection 49(1) without investigation is exceptional, a view I do not ascribe to, this would be one of those exceptional cases.

[89] The applicant also relied on this Court's decision in *Canada (Attorney General) v Grover*, 2004 FC 704, 252 FTR 244 [*Grover*], where Justice Harrington found that a referral to the Tribunal was unreasonable. However, as noted by Justice Russell in *Canadian Museum of Civilization Corp v Public Service Alliance of Canada, Local 70396*, 2006 FC 703 at para 69, 294 FTR 163, *Grover* does not consider a decision under subsection 49(1) of the CHRA but rather involves a decision made under subsection 44(3) of the CHRA and is distinguishable on that basis alone.

[90] In addition, while the Court holds in *Grover* that there was an onus on the CHRC to investigate the complaint before deciding either to refer it to the Tribunal or to dismiss it, that decision was made in the context of multiple related complaints where the CHRC failed to turn its mind to the specific merits of the complaint, relying instead on previous investigations to refer the complaint to the Tribunal. No such circumstance arises here.

[91] The jurisprudence coupled with the factual circumstances underscore that the CHRC's Decision not to engage in further investigation where the parties have adopted diametrically opposed positions that would serve to potentially further delay a substantive determination of the Complaint was reasonable. The applicant's arguments in this regard reflect nothing more than a disagreement with the Decision. Disagreement is not basis for this Court to intervene (*Dunsmuir* at paras 47 - 49).

VII. Delay as a Common Thread in the Report

[92] As noted above, delay is a theme in the Report. The applicant argued before the CHRC that the twenty-three year delay constituted a ground for dismissing the Complaint: "it is submitted that based on the significant delay and the serious prejudice that would be caused to the Corporation, the 1992 Complaint must be dismissed."

[93] The CHRC was not persuaded by the applicant's arguments, and instead found the issue of delay supported dealing with the Complaint and referring it to the Tribunal.

[94] For the purpose of paragraph 41(1)(d), the Report found the reactivation of the Complaint was not vexatious due to delay: "The complainant argues that the respondent is responsible for much, if not most, of the delays with the complaint. The complainant's position appears to be supported by a review of the file's history." The CHRC set out many incidents from the filing of the Complaint to the 2006 CHRC Decision where (1) the CHRC would request relevant documents from the applicant but the applicant would refuse to provide them; (2) the applicant refused to participate in the process; and (3) where the applicant would simply delay responding to the CHRC.

[95] The CHRC also noted neither party filed a judicial review application of the 2006 CHRC Decision to decline to deal with the Complaint at that time, while leaving open the possibility for the respondent to seek to reactivate the matter.

[96] In addition, the CHRC also appears to have accepted the respondent's submissions that the further delays between 2006 and 2012 occurred in part due to the respondent's difficulties in dealing with the applicant "including as it relates to the sharing of information."

[97] Indeed, the record demonstrates the respondent continued to pursue resolution of the Complaint between 2006 and 2012, until requesting the CHRC reactivate the Complaint in 2012. Throughout that period the record also demonstrates little if any willingness on the part of the applicant to engage on the issues. In December, 2011, after repeatedly advising the respondent more time was needed to review and respond to the requests for relevant information, the applicant advised the respondent it considered the file closed. In doing so the applicant also

advised it would not provide information the respondent had been seeking for years or formally respond to the respondent's requests.

[98] The conclusion that the delay was largely attributable to the applicant was reasonably open to the CHRC. Neither before the CHRC nor on judicial review did the applicant argue the CHRC misconstrued the factual events. Rather in its reply to the Report, the applicant strongly objected to the CHRC's characterization "that the delay in the proceeding with this matter is largely the fault of CPC because it refused to provide necessary information." Instead, the applicant emphasized its right to make a preliminary objection and "it was entirely appropriate for Canada Post to refuse to provide documentation to the Commission" while the appeal of *Canada Post FC* was ongoing.

[99] Disagreement with the characterization of the factual events does not alter the occurrence of those events, nor does it prevent the CHRC from drawing reasonable inferences from those facts and relying on those inferences to justify its conclusions. By finding delay was substantially not the fault of the respondent, the CHRC was in a position to rely on delay as a factor justifying its final conclusions.

[100] Indeed, the CHRC also relied on delay as a factor for the purpose of paragraph 41(1)(a) of the CHRA and in the exercise of discretion to refer the matter to the Tribunal for an inquiry rather than conducting further investigation.

[101] In its Memorandum filed in support of this application, the applicant submitted the Court should dismiss the application due to inordinate delay. In oral argument, counsel for the applicant advised CPC was no longer relying on delay as a standalone ground for judicial review. Instead counsel for the applicant submitted delay formed part of the context of this matter.

[102] The Court agrees, delay was and is essential to the context of this matter. The applicant's change of position on judicial review does not alter that delay was a theme in the Report that informed the final decision, and it was open to the CHRC to rely on delay as a factor for deciding to deal with the Complaint and refer the same to the Tribunal.

[103] I find it necessary to briefly address some of the applicant's arguments on the issue of delay, arguments which were also advanced before the CHRC, even though the applicant withdrew reliance on these arguments as a standalone basis for this Court's intervention.

[104] The applicant argued the passage of time would undermine its ability to defend the matter at the Tribunal because of alleged faded memories of the key witnesses. I disagree with this argument for two reasons. First, it was open for the CHRC to determine the key evidence in this pay equity matter is the raw data rather than witness testimony. Second, I agree with Justice Campbell's reasoning in *Casler* at paras 32-36 that the Tribunal is in the best position to make a finding on prejudice arising from faded memory since the Tribunal, not the CHRC, nor this Court hears the witnesses and decides whether the faded memory is significant enough to make a finding of prejudice.

[105] In written submissions, the applicant relied on *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 to argue the delay in this matter would bring the human rights system into dispute. However, I find the CHRC reasonably addressed this issue in the Report after accepting the respondent's submissions that much of the delay occurred due to the applicant's conduct and that "It would appear more likely that a negative impact on the human rights system could occur if the Commission decided not to deal with the complaint given the complexity of the issues, the complexity of a pay equity investigation and the issues between the parties that remain unresolved." While the applicant had the right to make the preliminary objections under subsection 41(1) that contributed to prolonging this matter, this does not mean the time expended on those objections can support an argument for dismissal of the Complaint for delay.

VIII. Conclusion

[106] While I have concluded that the CHRC Decision was reasonable, I cannot leave this matter without addressing the serious impact the delay in this case has on the repute of the administration of justice.

[107] In *Canada Post FC*, Justice Rothstein addressed what he described as "extraordinary delay" at paragraph 20. When considered almost twenty years later his words stand as an indictment of the effectiveness of the pay equity complaint process in this case:

> [20] From the ongoing litigation, it is apparent that the pay equity issue has not yet been resolved and that there is no prospect of an early resolution on the horizon. For whatever reason, the parties have not moved the matter forward more rapidly. It would be presumptuous of me to attribute motives or fault on either of

> them without more information. However, the Commission has allowed itself to become a participant in this extraordinary delay of a matter which arose some fifteen years ago and which the parties agreed, twelve years ago, that resolution was necessary and would take place.

[108] Justice Rothstein goes on to address the importance of the timely resolution of complaints, noting that competent and efficient management includes moving complaints to conclusion on a timely basis (*Canada Post FC* paras 22-24).

[109] Despite Justice Rothstein having flagged the importance of timely resolution, this complaint remains unresolved nineteen years later. The system has failed over 6,000 individuals who have been waiting for over twenty years for a determination of a complaint that alleges they have been financially impacted as the result of systemic gender discrimination. This case is an unfortunate example of the Pay Equity Complaint Process not serving the individual members of the claimant group, the parties, the broader public or the interests of justice.

[110] In the Section 41/49 report the CHRC, in analysing the impact of delay concludes that "it would appear more likely that a negative impact on the human rights system could occur if the Commission decided not to deal with the complaint". While that conclusion was reasonably available to the CHRC, the simple fact is the damage has already been done. As noted by Justice Evans in *PSAC FCA* at paragraphs 166-167:

> [166] [T]he underlying purpose of section 11 of the Act is to eliminate the financial consequences of systemic gender discrimination in the labour market resulting from occupational segregation. However, with the benefit of hindsight, it now seems to have been a mistake for Parliament to have entrusted pay equity to the complaint-driven, adversarial, human rights process of the *Canadian Human Rights Act*.

> [167] There is now much to learn from the experience of provincial pay equity regimes, which seem not to have been plagued with the same problems of protracted litigation as the federal scheme. In the interests of all, a new design is urgently needed to implement the principle of pay equity in the federal sphere. For criticisms of the present arrangements, and recommendations for reform, see the Final Report of the Pay Equity Task Force, Pay Equity: A New Approach to a Fundamental Right (Ottawa: Public Works and Government Services Canada, 2004).

[111] As did Justice Rothstein in *Canada Post FC,* I conclude, without commenting on the merits of the Complaint, by imploring the parties and future decision-makers to ensure this matter proceeds as expeditiously as possible.

[112] In oral argument, the parties advised that they had come to an agreement on costs and did not require the Court to address the issue.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No costs are awarded.

"Patrick Gleeson"

Judge

APPENDIX "A"

Canadian Human Rights Act, RSC, 1985, c H-6:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**2.** La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
[…]	[…]
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

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

a) de fixer ou d'appliquer des lignes de conduite;

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.

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.

(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

(2) Le critère permettant d'établir l'équivalence des fonctions exécutées par des salariés dans le même établissement est le dosage de qualifications, d'efforts et de responsabilités nécessaire pour leur exécution, compte tenu des conditions de travail.

(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the

(3) Les établissements distincts qu'un employeur aménage ou maintient dans le but principal de justifier une disparité salariale entre hommes et femmes sont réputés, pour l'application du présent article, ne constituer qu'un seul et

purposes of this section to be the same establishment.

même établissement.

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

(4) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) la disparité salariale entre hommes et femmes fondée sur un facteur reconnu comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne en vertu du paragraphe 27(2).

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

(5) Des considérations fondées sur le sexe ne sauraient motiver la disparité salariale.

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

(6) Il est interdit à l'employeur de procéder à des diminutions salariales pour mettre fin aux actes discriminatoires visés au présent article.

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

(7) Pour l'application du présent article, « salaire » s'entend de toute forme de rémunération payable à un individu en contrepartie de son travail et, notamment :

(a) salaries, commissions, vacation pay, dismissal wages and bonuses;

a) des traitements, commissions, indemnités de vacances ou de licenciement et des primes;

(b) reasonable value for board, rent, housing and lodging;

b) de la juste valeur des prestations en repas, loyers, logement et hébergement;

(c) payments in kind;

c) des rétributions en nature;

(d) employer contributions to pension funds or plans, long-

d) des cotisations de l'employeur aux caisses ou régimes de pension, aux

term disability plans and all forms of health insurance plans; and

(e) any other advantage received directly or indirectly from the individual's employer.

[…]

17. (1) A person who proposes to implement a plan for adapting any services, facilities, premises, equipment or operations to meet the needs of persons arising from a disability may apply to the Canadian Human Rights Commission for approval of the plan.

[…]

(4) When the Commission decides not to grant an application made pursuant to subsection (1), it shall send a written notice of its decision to the applicant setting out the reasons for its decision.

18. (1) If the Canadian Human Rights Commission is satisfied that, by reason of any change in circumstances, a plan approved under subsection 17(2) has ceased to be appropriate for meeting the needs of persons arising from a disability, the Commission may, by written notice to the person who proposes to carry out or maintains the adaptation contemplated by the plan or

régimes d'assurance contre l'invalidité prolongée et aux régimes d'assurance-maladie de toute nature;

e) des autres avantages reçus directement ou indirectement de l'employeur.

[…]

17. (1) La personne qui entend mettre en oeuvre un programme prévoyant l'adaptation de services, d'installations, de locaux, d'activités ou de matériel aux besoins particuliers des personnes atteintes d'une déficience peut en demander l'approbation à la Commission canadienne des droits de la personne.

[…]

(4) Dans le cas où elle décide de refuser la demande présentée en vertu du paragraphe (1), la Commission envoie à son auteur un avis exposant les motifs du refus.

18. (1) La Commission canadienne des droits de la personne peut, par avis écrit à la personne qui entend adapter les services, les installations, les locaux, les activités ou le matériel conformément à un programme approuvé en vertu du paragraphe 17(2), en annuler l'approbation, en tout ou en partie, si elle estime que, vu les circonstances nouvelles, celui-ci ne convient plus aux

any part thereof, rescind its approval of the plan to the extent required by the change in circumstances.

[…]

(3) Where the Commission rescinds approval of a plan pursuant to subsection (1), it shall include in the notice referred to therein a statement of its reasons therefor.

[…]

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 the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(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;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on

besoins particuliers des personnes atteintes d'une déficience.

[…]

(3) Dans le cas où elle annule l'approbation d'un programme en vertu du paragraphe (1), la Commission indique dans l'avis y mentionné les motifs de l'annulation.

[…]

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 motifs suivants :

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) 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) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

e) la plainte a été déposée

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.

[…]

42 (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.

(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.

43. (1) The Commission may designate a person, in this Part referred to as an investigator", to investigate a complaint.

[…]

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

[…]

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.

[…]

42 (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.

(2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la Loi sur l'équité en matière d'emploi.

43. (1) La Commission peut charger une personne, appelée, dans la présente loi, «l'enquêteur», d'enquêter sur une plainte.

[…]

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

[…]

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

[…]

47. (1) Subject to subsection (2), the Commission may, on the filing of a complaint, or if the complaint has not been

(a) settled in the course of investigation by an investigator,

(b) referred or dismissed under subsection 44(2) or (3) or paragraph 45(2)(a) or 46(2)(a), or

(c) settled after receipt by the parties of the notice referred to in subsection 44(4), appoint a person, in this Part referred to as a "conciliator", for the purpose of attempting to bring about a settlement of the complaint.

[…]

(4) Après réception du rapport, la Commission:

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

[…]

47. (1) Sous réserve du paragraphe (2), la Commission peut charger un conciliateur d'en arriver à un règlement de la plainte, soit dès le dépôt de celle-ci, soit ultérieurement dans l'un des cas suivants :

a) l'enquête ne mène pas à un règlement;

b) la plainte n'est pas renvoyée ni rejetée en vertu des paragraphes 44(2) ou (3) ou des alinéas 45(2)a) ou 46(2)a);

c) la plainte n'est pas réglée après réception par les parties de l'avis prévu au paragraphe 44(4).

[…]

48. (1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.

[…]

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

48. (1) Les parties qui conviennent d'un règlement à toute étape postérieure au dépôt de la plainte, mais avant le début de l'audience d'un tribunal des droits de la personne, en présentent les conditions à l'approbation de la Commission.

[…]

49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celleci, que l'instruction est justifiée.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-642-15
STYLE OF CAUSE:	CANADA POST CORPORATION v CANADA POSTMASTERS AND ASSISTANTS ASSOCIATION (CPAA)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 2016
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JULY 28, 2016

APPEARANCES:

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Sean McGee and Alison McEwan	FOR THE RESPONDENT

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