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Hope renewed for female workers at Nav Canada

Court ruling could settle historic wage discrimination claim

By Sabrina Nanji

A recent court decision has renewed a wage discrimination fight for female employees at Canada's civil air navigation system.

The decision from the Federal Court of Appeal came down at the end of July and addresses a 15-year-old historic settlement between the Public Service Alliance of Canada (PSAC) and the federal government.

Back in 1999, the parties reached a \$3.6-billion deal that settled pay discrimination for thousands of workers in female-dominated positions going back decades. However, one group of employees was only compensated for the years they worked at Transport Canada, until 1996, when Nav Canada was created to take over the country's air navigation system.

There was no adjustment for any work done at Nav Canada, which the union alleges continued to use discriminatory practices until 2011, when it adopted a non-discriminatory wage scheme.

PSAC took the case to the Canadian Human Rights Commission in 2002, arguing the shared governance corporation violated the rights of those workers by only paying them for the time they worked under Transport Canada.

That case was dismissed without an investigation in 2012 on the basis it fell outside the commission's jurisdiction.

On July 28, the federal appeals court overturned the commission's ruling, dismissing its conclusion that PSAC's allegations against Nav Canada as an individual employer, and separate from the Treasury Board, were unfounded.

"The commission's role is to determine whether the alleged facts, taken as true, give rise to a sustainable complaint," said the decision.

"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."

For PSAC, the decision has revived the fight for equal pay and will hopefully lead to a full investigation. That could mean retroactive pay amounting to thousands of dollars for 75 to 100 female employees who held positions between 1997 and 2011.

"PSAC started fighting pay equity cases as soon as it became federal law back in the late 1970s. What we've experienced consistently is the reluctance of employers to accept pay equity as a human right, under the law," said Robyn Benson, PSAC's national president.

She added that, in the case of lengthy pay equity disputes, a victory can be bittersweet.

"Nav Canada is just one more example of employers resisting the law and dragging out pay equity complaints in the courts — all to the detriment of the women who are entitled to pay equity," Benson said.

"This case isn't over yet and could end up back in court. We're getting tired of seeing retroactive pay equity payments made to the estates of women who were entitled to the money during their lifetimes."

Nav Canada declined an opportunity for comment as the case is currently before the courts.

Litigation lag

The Nav Canada decision shows it is not uncommon for pay equity claims to drag on, said Sundeep Gokhale, a labour lawyer at Sherrard Kuzz in Toronto.

And that can have implications for both the employer and employees.

"This shows employers everywhere — provincially or federally regulated — that the clock doesn't stop. And the damages are continuing to accrue," Gokhale said.

"In this case, you're looking at 14 years of potential damages for failure to abide by the increases and that includes people who have retired, people who have quit, people who have been terminated. And you have to go back to not just one person — it could be multiple people who had done that job for the last 14 years."

The challenge is then relying on the employer's job evaluation system. Gokhale said the method by which the employer created a pay equity plan and attached value to the job function can oftentimes be challenged by a union or party conducting an investigation.

"The human rights commission or union at this point will come in and say, 'No, that wasn't a fair assessment' and oftentimes you get into litigation of what is a fair assessment," he explained, adding that employers would do well to strengthen their job evaluation tools to avoid further dispute.

Because of the amount of time and resources spent on wage discrimination claims, there is always a question of liability, said Alison McEwen, a labour and employment lawyer at Nelligan O'Brien Payne in Ottawa.

But it's not just about the money, McEwen said. Settling claims can also be a way for an employer to evaluate and ensure it won't be back in courts in another decade.

"For sure, it's partially about the money, but it's also partially about equality going forward," she said.

"Especially in workplaces where the pay equity hasn't been resolved, I think parties should look at not only what they can pay to settle the past, but also really turn their minds to what they need in the future to make it an equitable workplace — so that they're not just doing this exact same thing again in five years."

Closer look by unions

When high-profile cases such as the Nav Canada decision come into the spotlight, it brings awareness that could prompt unions to look at pay equity with a more discerning eye, said Gokhale.

"Unions are going to realize that there's potentially money out there and it may cause them to start to critically analyze existing pay equity plans," he said.

"In collective bargaining, a lot of unions simply want to cross off the box, to say, 'Yes there's a pay equity plan in place.' But when these types of high-profile pieces of litigation arrive, I think unions may now start to look deeper into pay equity plans to make sure they're accurate."

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