Air Canada loses in Supreme Court pay equity comparator decision

Date : March 1, 2006

In a case that began almost 15 years ago, the Supreme Court of Canada has issued an important decision that will affect many of Canada's federally-regulated employers. Canada (Human Rights Commission) v. Canadian Airlines International Ltd. (January 26, 2006) concerned a complaint filed in 1991 by the Canadian Union of Public Employees against Air Canada under the Canadian Human Rights Act.

The complaint alleged that Air Canada discriminated against flight attendants, a female-dominated group, by paying them differently for work that was of equal value to that performed by mechanical personnel and pilots, who were predominantly male. Air Canada, in response, argued that flight attendants could not be compared to pilots and mechanics because the three groups of employees belonged to three distinct bargaining units and were covered by three separate collective agreements.

Because of its position, Air Canada sought to block the investigation into the complaint by obtaining a ruling as to whether pilots and mechanics were in the same “establishment” as flight attendants and thus eligible comparators. At issue in this preliminary dispute was the interpretation of subsection 11(1) of the Act and section 10 of the Equal Wages Guidelines adopted under the Act. Subsection 11(1) provides:

> “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.”

Section 10 of the Guidelines provides:

> “For the purpose of section 11 of the Act, employees of an establishment include, notwithstanding any collective agreement applicable to any employees of the establishment, all employees of the employer subject to a common personnel and wage policy, whether or not such policy is administered centrally.”

The questions to be answered were, accordingly, whether the comparator groups were located in the same “establishment” and whether there was a common personnel and wage policy to which all the groups were subject.

THE COURTS BELOW

In 1998, the Canadian Human Rights Tribunal sided with Air Canada, holding that the three groups were not in the same “establishment”. The Tribunal emphasized that the vast majority of Air Canada's wage and personnel policies applicable to the employees in the three groups were found in separate collective agreements and in branch-specific manuals that applied only to a particular bargaining unit. The Federal Court – Trial Division upheld the Tribunal's decision.

However, the Federal Court of Appeal overturned the decision. It found that Air Canada treated all of its employees as part of a single, integrated business under a common personnel and wage policy and concluded that the flight attendants, pilots and mechanics at Air Canada were in the same establishment for the purpose of comparing their wages.

SUPREME COURT: COMPLAINT CAN PROCEED

By unanimous decision, the Supreme Court of Canada dismissed Air Canada's appeal and remitted the matter back to the Canadian Human Rights Commission to continue its investigation of the pay equity complaint. The Court began its analysis by tracing the history of federal pay equity legislation and the meaning of the word “establishment” in that legislation.

The Court noted that, between 1977 and the adoption of the Guidelines in 1986, “establishment” in section 11 had been understood to mean an integrated, geographically coherent business belonging to a specific employer, making it essentially a corporate definition limited only by geography.

However, statements by the Canadian Human Rights Commission leading up to the implementation of section 10 of the Guidelines had indicated that the intent of the new provision was to determine the meaning of establishment by reference to the personnel and compensation policies and practices of the employer rather than a geographic location or unit of organization. Moreover, the Commission had expressed the view that even employees in different geographic locations could be considered to be in the same establishment and that the scope of collective bargaining units and the contents of agreements would not be determinative of whether a common personnel and compensation policy existed.

The Court summarized its review of the evolution of the pay equity scheme and the role of section 10 of the Guidelines in the following terms:

> “This, therefore, is the key refinement polished by s. 10 of the Guidelines: regardless of regional or geographical differences, or of differences in collective agreements, employees may nonetheless be found to be in the same establishment pursuant to s. 11 of the Act if they are subject to a common wage and personnel policy.”

COMMON WAGE AND PERSONNEL POLICY

Given this interpretation of “establishment”, the issue was whether Air Canada had actually put in place a common policy. The Court held that the issue was not to be determined by inquiring into the contents of every collective agreement and employment contract to find either common or disparate terms. While the terms of collective agreements were not irrelevant to the inquiry, it stated, the employer's bargaining policy was of greater importance. Moreover, undue emphasis on the contents of collective agreements would undermine the very purpose of pay equity legislation:

> “The nature of the underlying bargaining policy and of its impact and constraint on the bargaining process is of more salience than the actual terms ultimately negotiated. This is so particularly since, by their very nature, the terms of employment contracts and collective agreements will vary with the imperatives of the particular employee or bargaining unit.
>
> If the inquiry were to focus on differences in the terms of collective agreements, as suggested by Air Canada, workplaces would be exempt from the very comparisons the Act contemplated. “Establishment” would be equated with “bargaining unit”, thereby undermining the purpose of the Act, namely to determine whether wages paid to women reflect an underevaluation based on systemic discrimination resulting not only in

occupational segregation, but also in diminished bargaining strength, and, likely, diminished wages and benefits.”

Based on this approach, the Court held that there were sufficient indications that a common wage and personnel policy applied to all three groups. The policy statements of Air Canada established a common set of general policies with respect to the management of its labour relations that informed the particular relations with each group of employees. These statements reflected a common approach to collective bargaining, the administration of labour contracts and methods of communication with unions and employees. Common policies may have been implemented in different ways but they remained in place and, as a result, there was an establishment made up of pilots, mechanics and flight attendants. The relevant comparators could properly be sought in this establishment.

Accordingly, the appeal was dismissed.

In Our View

This decision may have major implications for federal Crown corporations, the federal public service, and private companies in the transportation and public communications fields. For Air Canada and CUPE, the case will now deal with the central issue of determining whether the work performed by flight attendants is of equal value to that performed by the predominantly male comparator groups.

For further information, please contact Lynn Harnden at (613) 940-2731.