

Court File No.: T-

FEDERAL COURT

B E T W E E N:

PUBLIC SERVICE ALLIANCE OF CANADA

Plaintiff

and

HIS MAJESTY THE KING

Defendant

STATEMENT OF CLAIM

FACTS

Overview

1. The Public Service Alliance of Canada challenges the discriminatory and arbitrary limits on damages under the *Canadian Human Rights Act* (“CHRA”). Since its first enactment, this legislation has prevented federally regulated employees and other human rights claimants from obtaining full compensation for their experience of discrimination. Regardless of the level of pain and suffering experienced, or the level of wilfulness or recklessness of the discriminatory conduct, damages are statutorily capped.
2. This limitation is not present for those seeking compensation for similar harms or injuries due to other wrongful acts that are not linked to a prohibited ground of discrimination. In this way, the limits on damages under the CHRA create a distinction based on enumerated or analogous ground, that serves to reinforce, perpetuate, and exacerbate the disadvantage of those experiencing discrimination.

The Plaintiff

3. The Public Service Alliance of Canada (“PSAC”) is the largest federal public sector union in Canada, representing nearly 230,000 workers in every province and territory in Canada as well as in locations around the world. Most employees represented by PSAC are federally regulated, including employees of the federal public service whose labour relations are governed by the *Federal Public Sector Labour Relations Act* (“FPSLRA”), as well as employees of Crown Corporations, airports, and other entities governed by the *Canada Labour Code*.
4. Any claims by federally regulated employees represented by PSAC (hereafter, “federal employees”) that they have been discriminated against in the course of their employment are governed by the *CHRA*.

The *Canadian Human Rights Act*

5. The *CHRA* is the anti-discrimination legislation enacted by federal Parliament. It applies to federally regulated entities, such as the federal government, First Nations, and companies under federal jurisdiction, including banks and airlines.
6. The *CHRA* prohibits discrimination by those federally regulated entities in, among other things, employment and employment applications. Discrimination in these contexts is prohibited on grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
7. A discriminatory practice within the meaning of the *CHRA* may be the subject of a complaint to the Canadian Human Rights Commission (“Commission”). The Commission is tasked with pre-screening complaints to decide whether to deal with them. If a complaint is not dismissed at the pre-screening stage, the Commission may investigate the complaint before determining whether to refer the complaint to the Canadian Human Rights Tribunal (“Tribunal”) for an inquiry.

8. After its inquiry, if the Tribunal finds that a complaint is substantiated, the Tribunal may order a host of potential remedies against the respondent pursuant to section 53 of the *CHRA*. Those remedies include damages for pain and suffering experienced as a result of the discriminatory practice, as well as special damages if the respondent engaged in the discriminatory practice wilfully or recklessly (hereinafter referred to collectively as “*CHRA* Damages”). The maximum quantum of *CHRA* Damages is capped in the statute, as follows:

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

[...]

(e) that the person compensate the victim, **by an amount not exceeding twenty thousand dollars**, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[...]

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation **not exceeding twenty thousand dollars** to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly. [Emphasis added.]

9. A limit on *CHRA* Damages has been in place since the *CHRA* was first enacted. Initially, *CHRA* Damages were subject to a global cap of \$5,000, before being increased to \$20,000 for each head of damages in 1998.
10. The Supreme Court has held that the remedies available under section 53 of the *CHRA* do not include compensation for legal costs.

Application of the *CHRA* by labour boards and arbitrators

11. In its pre-screening of complaints, the Commission may decline to deal with a complaint if it appears the complainant ought to exhaust grievance or review procedures available to them. The Commission routinely declines to deal with complaints filed by unionized federal employees and directs them to exhaust their

grievance procedures before proceeding with a complaint.

12. Labour boards and arbitrators adjudicating grievances presented by federal employees have the authority to interpret and apply the *CHRA* and to award *CHRA* Damages:
 - a. Employees of the federal public service, whose labour relations are governed by the *FPSLRA* may present a grievance alleging discrimination contrary to the *CHRA*. Pursuant to subsection 226(2) of the *FPSLRA*, the Federal Public Sector Labour Relations and Employment Board has authority to interpret and apply the *CHRA*, and to give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the *CHRA*.
 - b. Unionized employees in the broader federal public sector and the federal private sector, whose labour relations are governed by the *Canada Labour Code*, may present a grievance under their collective agreement alleging discrimination contrary to the *CHRA*. A labour arbitrator adjudicating the grievance has the authority to interpret, apply, and award remedies pursuant to the *CHRA*.

Limitation on *CHRA* Damages

13. The limits on *CHRA* Damages have been found to apply regardless of whether the claim of discrimination is adjudicated by the Tribunal, a labour board or an arbitrator. Accordingly, all federal employees who experience discrimination are statutorily limited in the compensation they may receive for the pain and suffering that they experience as a result of the discrimination, as well as the special compensation they may receive if their employer engaged in the discriminatory practice wilfully or recklessly.
14. Decision-makers typically reserve the maximum award of *CHRA* Damages for the most serious cases of discrimination. As a result, most complainants under the *CHRA*, if successful in their complaints, are awarded amounts below the maximum.

Equality guarantee under subsection 15(1) of the *Charter*

15. Subsection 15(1) of the *Charter* guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
16. A law will violate subsection 15(1) where it draws a distinction based on an enumerated or analogous ground of discrimination, and where that distinction imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
17. It is irrelevant to the analysis under subsection 15(1) that the legislation did not cause the underlying discrimination or the accompanying pain and suffering. A law violates subsection 15(1) if it perpetuates the disadvantage of a protected group by denying full access to remedial relief in a discriminatory manner.
18. It is also irrelevant to the analysis under subsection 15(1) if the legislation has an ameliorative purpose. The focus of the analysis under subsection 15(1) is on the impact of, and not the motive for, the impugned law.

Limits on *CHRA* Damages violate subsection 15(1) of the *Charter*

19. The limits on *CHRA* Damages violate the equality guarantee in subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, by denying federal employees who experience discrimination on prohibited grounds the equal protection and equal benefit of the law. Indeed, these limits amount to discrimination reinforced by law.
20. The limits on *CHRA* Damages create a distinction between federal employees seeking compensation for discrimination and those seeking compensation for other wrongful acts of their employers. Federal employees face a limitation on the compensation available for their experience of discrimination that is not present for employees whose claims do not relate to discrimination.
21. This distinction is plainly based on an enumerated or analogous ground of

discrimination. The limit on *CHRA* Damages applies solely because the wrongful act being compensated is based on the individual's sex, race, disability, or other prohibited ground of discrimination. Thus, in every case, the federal employee is treated differently in the remedial relief available to them because of their protected characteristic.

22. The purpose of damages for pain and suffering, whether for discrimination or another wrongful act, is the same—namely, to make the individual whole. However, if a federal employee seeks those damages because of a discriminatory practice, they are denied a make-whole compensatory remedy due to the statutory cap on *CHRA* damages.
23. The purpose of special damages for wilful or reckless discrimination is similar to the purpose underlying punitive or aggravated damages available for other wrongful acts. Courts have confirmed that these special damages are punitive in nature and are intended to provide a deterrent and to discourage those who deliberately discriminate. However, if a federal employee seeks special damages because of a discriminatory practice, those damages are limited in a manner that undermines their purpose and deprives them of their full deterrent effect.
24. This distinction has the effect of reinforcing, perpetuating, and exacerbating the historic disadvantage of federal employees that experience discrimination. Employees with characteristics protected by the *CHRA* are particularly vulnerable and disproportionately experience stereotyping and prejudice in their employment. Human rights legislation like the *CHRA* exists because of the notorious and well-established historic disadvantage of individuals from protected groups.
25. The limit on damages for pain and suffering arbitrarily denies employees who experience discrimination full compensation for their pain and suffering, for the sole reason that the pain and suffering was the result of a discriminatory act. This limit trivializes the harm they suffered and sends the message that their pain and suffering is less worthy of compensation. Instead of vindicating and redressing the injury to their dignity, the award of damages compounds that injury by

undercompensating them for their experience. In this way, the compensation scheme under the *CHRA* perpetuates and reinforces the pre-existing disadvantage of victims of discrimination.

26. The limit on damages for wilful and reckless discrimination also reinforces, perpetuates, and exacerbates the existing disadvantage of federal employees that experience discrimination. The arbitrary limit on special damages severely undermines their underlying objective of deterrence and discouraging deliberate discrimination. This limit trivializes the seriousness of wilful or reckless discrimination and effectively amounts to a license to discriminate.

Violation of subsection 15(1) cannot be demonstrably justified in a free and democratic society

27. The above-noted violation of subsection 15(1) of the *Charter* does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.
28. The limits on *CHRA* Damages are not imposed pursuant to any pressing and substantial objective. Absent extraordinary circumstances, financial considerations or controlling expenditures will not amount to a pressing and substantial objective. The sole apparent objective of the cap on *CHRA* Damages is to limit the liability of respondents to human rights complaints, including the federal government.
29. Further, and in the alternative, the limits on *CHRA* Damages fail to meet the proportionality requirements of section 1 of the *Charter*, including for the following reasons:
 - a. The limits on *CHRA* Damages are not rationally connected to any pressing and substantial government objective. Indeed, those limits are arbitrary and out of step with compensation awarded for similar harms and injuries in other contexts, as well as compensation awarded to human rights complainants in other jurisdictions.
 - b. The limits on *CHRA* Damages are not minimally impairing of the equality

guarantee in subsection 15(1) of the *Charter*, as demonstrated by the vast majority of human rights regimes in Canada that operate without any problem despite having no statutory limit on the quantum of damages.

- c. The limits on *CHRA* Damages are not indexed to inflation, meaning the real value of a damages award under the *CHRA* has decreased, and continues to decrease, over time.
- d. The deleterious effects of the limits on *CHRA* Damages outweigh any salutary effects of those limits.

Severance is the appropriate remedy

- 30. Where the *Charter*-offending words in legislation can be removed without otherwise jeopardizing the operation of the underlying statutory scheme, the remedy of severance is appropriate.
- 31. In this case, the offending words imposing the maximum quantum of *CHRA* Damages can be severed from the remedial provisions in the statute without otherwise affecting the application of the legislation. Therefore, severance is the appropriate remedy to this violation of subsection 15(1) of the *Charter*.

PSAC satisfies the test for public interest standing

- 32. PSAC satisfies the test for public interest standing. The three factors to be considered in granting public interest standing, which must be applied in a flexible and generous manner, all militate in favour of granting public interest standing to PSAC.

Serious justiciable issue

- 33. The present action raises a serious justiciable issue. The question of whether the limits on *CHRA* Damages violate the equality guarantee in subsection 15(1) of the *Charter* is a serious, substantial issue that is appropriate for this Court to decide.

Real stake or genuine interest in the issues raised

34. PSAC has a real stake and a genuine interest in the issues raised in the present action. PSAC is the exclusive bargaining agent of approximately 170,000 federally regulated employees, whose claims of discrimination are subject to the limits on *CHRA* damages. PSAC has a clear and obvious interest in the legality and constitutionality of the limits on damages available to its members who experience discrimination contrary to the *CHRA*.
35. PSAC has a duty to represent its members in all matters related to collective bargaining, including in the grievance and arbitration process. Additionally, PSAC provides certain voluntary services to members in accordance with its mandate, including representation in human rights complaints. PSAC thus routinely advances claims of discrimination contrary to the *CHRA* on behalf of its members, including through complaints to the Commission and Tribunal, and through grievances adjudicated before arbitrators and the Federal Public Sector Labour Relations and Employment Board. In those proceedings, the compensation available to PSAC's members for pain and suffering and for wilful and reckless discrimination is constrained by the limits in section 53 of the *CHRA*.
36. PSAC has a demonstrated record of advocating for human rights. It has been at the forefront of many significant and successful campaigns to advance workplace and human rights. PSAC is mandated by its membership to work towards a compassionate and inclusive society free of sexism, racism, homophobia and all other forms of discrimination. A dedication and commitment to social justice and human rights is a core part of PSAC's institutional structure and is reflected in its Constitution. PSAC thus has a real stake and a genuine interest in the issues raised by this action.

Reasonable and effective means of bringing the issue before the Court

37. The present action is a reasonable and effective means of bringing the issue before the Court, including for the following reasons:

- a. As the largest federal public sector union in Canada, PSAC has the resources and expertise to advance the present action. PSAC will be able to draw on its extensive experience advancing claims of discrimination under the *CHRA* on behalf of its members, in order to ensure that the issue is presented in a sufficiently concrete and well-developed factual setting. PSAC also has decades of experience in human rights and *Charter* litigation, including advancing constitutional challenges to legislation in the courts.
 - b. The present action is of public interest. The limits on *CHRA* damages apply to all individuals or groups experiencing discrimination at the hands of any federally regulated entity. The case thus transcends the interests of PSAC and its members and extends to all existing or potential federal human rights complainants.
 - c. Individuals who experience discrimination contrary to the *CHRA* face significant barriers in access to justice and are unlikely to have the resources and expertise necessary to advance the present claim. Moreover, advancing the present claim in the context of an individual grievance or human rights complaint is not a reasonable or effective means of adjudicating this issue, particularly because administrative decision-makers cannot make binding declarations of invalidity and because no legal costs can be awarded in those processes.
38. Granting PSAC public interest standing in this matter will serve the underlying purposes behind public interest standing, including by giving effect to the principle of legality and ensuring access to justice.

Legislative provisions

- 39. *Constitution Act, 1982*, sections 1, 15(1), 52(1).
- 40. *Canadian Human Rights Act*, RSC 1985, c H-6, sections 3, 7, 41, 53.
- 41. *Federal Courts Act*, RSC 1985, c F-7, sections 17, 48.

RELIEF SOUGHT

The plaintiff therefore claims as follows:

- (a) A declaration that the statutory limit on damages for pain and suffering and on special damages for wilful and reckless discrimination in paragraph 53(2)(e) and subsection 53(3) of the *Canadian Human Rights Act* violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, and that this violation is not saved by section 1;
- (b) An order, pursuant to subsection 52(1) of the *Constitution Act, 1982*, severing the words “by an amount not exceeding twenty thousand dollars” in paragraph 53(2)(e) and the words “not exceeding twenty thousand dollars” in subsection 53(3) of the *Canadian Human Rights Act* and declaring those words to be of no force or effect;
- (c) The costs of this action; and,
- (d) Such further and other relief as counsel may request and this Honourable Court may deem just and appropriate.

Dated at Ottawa this 29th day of November, 2022.



**Per: Andrew Astritis
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