

TAB 10

COURT FILE NO.: 03-CL-004932

DATE: 20040809

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Sean Dunphy* and *Shana Ivall*, for Air Canada

Peter J. Osborne and *Monique Jilesen*, for Ernst & Young Inc., Monitor

Larry Steinberg, for CUPE

Hugh O'Reilly, for IAMAW

Gregory Azeff, for GECAS

Howard A. Gorman, for the Ad Hoc Unsecured Creditors Committee

Lyle Kanee, for CAW

HEARD: August 9, 2004

ENDORSEMENT

(CUPE Appeal)

[1] CUPE appealed the decision of July 30, 2004, rendered by Geoffrey Morawetz as Claims Officer ("CO") with respect to CUPE's pay equity claim. At the end of the hearing today I dismissed the appeal and promised written reasons. These are those written reasons.

[2] At paragraphs 36 and 37 of his reasons, the CO stated:

(36) CUPE's pay equity claim is a contingent claim in that it has not been successful on its merits as of the date of the commencement of Air Canada's CCAA proceedings. The contingency in question is the resolution of the pay equity complaint process underway before the Tribunal (and possibly the courts via appeals of the Tribunal's decision). As with any contingent claim, there are two fundamental aspects to the determination of the claim; namely, (i) as assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If CUPE successfully discharges its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common in practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result). For the reasons that follow, I find that CUPE has failed to provide any evidence to substantiate the happening of the contingency in question and that the quantification of CUPE's contingent claim would in any event be negligible.

(37) There is, in these proceedings, a Claims Procedure Order of Farley J. dated September 18, 2003, as amended by Order of Farley J. dated July 9, 2004, which provides that all creditors (including CUPE with respect to its pay equity claim for the Relevant Period) must prove their claims in accordance with the procedures set out therein. In short, CUPE has to prove its claim now, and not at some future date, and the failure to do so results in CUPE being barred from asserting such a claim at a future date. If CUPE fails to adduce sufficient evidence to substantiate its contingent pay equity claim at the present time, it is not open to CUPE to assert that some weight ought to be given to the likelihood or possibility that it may, in the future, be able to adduce sufficient evidence so as to prove its claim in respect of the Relevant Period. That is to say, I cannot conclude that there is a 50% chance (or 40%, or 30%, etc.) that CUPE will be able to substantiate its claim in the future if it has not already done so in these proceedings and that some percentage of the value of its pay equity claim ought to be allowed at this time. CUPE cannot on the one hand admit that it has no evidence to substantiate its claim at the present time and on the other hand seek to have a claim admitted by the Monitor nonetheless on the basis that it might at some date find evidence to substantiate its claim. The merits of CUPE's contingent pay equity claim must be established in these proceedings.

He went on to observe at paragraph 39:

(39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

(40) ... As noted by counsel to Air Canada, there are three prerequisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. ... But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me that the outcome of such comparison establishes that there is work of equal value being performed.

[3] CUPE submitted that notwithstanding my views in *Re Olympia & York Developments Ltd.*, [1994] O.J. No. 1335 (Gen. Div.), that I should follow the Alberta practice as set out by Paperny, J. in *Re Canadian Airlines Corp.*, [2001] A.J. No. 226 (Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

(b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

[4] See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson v. Gowling Lafleur Henderson LLP*, [2004] O.J. No. 850 (C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

[5] The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable". He went on to say at paragraph 39:

(39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

(46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination...

The fact of the matter is that CUPE provided no evidence as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

[6] It is indeed troubling that a *Canadian Human Rights Act* / pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

[7] The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this

as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

J.M. Farley

Released: August 9, 2004