FTR Now

Divisional Court Affirms Pay Equity Wage Grids and Restricts Tribunal's Use of *Human Rights Code*

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In a recent decision that will have implications for employers and service providers across Ontario, the Ontario Divisional Court has upheld an important 2010 ruling of the Pay Equity Hearings Tribunal ("PEHT"). In *Canadian Union of Public Employees, Local 1999 v. Lakeridge Health Corporation*, the Court held that the decision of the PEHT regarding the focus of the *Pay Equity Act* ("*PEA*") and the *PEA's* consistency with the *Human Rights Code* ("*Code*") was reasonable. The Court also clarified the very limited circumstances under which an administrative tribunal such as the PEHT can lawfully entertain claims of *Code* violations. This *FTR Now* discusses this significant decision and its implications for Ontario employers and service providers.

BACKGROUND

The *PEA* was enacted to address systemic gender discrimination in compensation received by female employees. Under the *PEA*, "pay equity" is assessed by comparing the "job rates" (i.e., top wage rates) of an employer's comparably valued female and male job classes. If the job rate of a female job class is lower than the job rate of all comparable male job classes, the employer must make appropriate adjustments to the female job rate to achieve pay equity. The PEA requires employers to establish and maintain compensation practices in the form of a Pay Equity Plan that provides for pay equity in the workplace. The important fact is that "pay equity" as defined in the *PEA* focuses on top rates. It does not compare the wage grid structures that may fall below the top rates in the employer's compensation system.

CUPE Local 1999 represents two bargaining units of employees employed by Lakeridge Health Corporation ("Lakeridge Health"), a large hospital. One is a "service" unit, while the other is a "clerical" unit. Every job class within these bargaining units has a negotiated wage grid. Over time, an employee's hourly rate increases as he or she progresses up the applicable grid to the top rate. CUPE and Lakeridge Health reached a Pay Equity Plan ("Plan") covering both bargaining units. The "job rates" (i.e., the top rates) for comparable female- and male-dominated job classes were equalized under the Plan. However the collective agreement wage grids for the male-dominated job classes were more compressed than the collective agreement grids for the comparable female-dominated job classes. As a result, employees in the "male" jobs often had higher start rates and progressed more quickly through their grids to the top wage rate. This allowed employees in those jobs (whether male or female) to earn considerably more money in their first years of employment than did employees in the comparable female-dominated jobs, even though the work was

evaluated as being of the same value.

DECISION OF THE PAY EQUITY TRIBUNAL

CUPE applied to the PEHT for an order that the *PEA* itself requires, as part of "pay equity", that wage grids for comparably valued female and male job classes be "harmonized" so as to provide for precisely the same hourly rates and rates of progression through the applicable grids. CUPE also took the position that the situation before the PEHT constituted "discrimination" contrary to section 5 of the *Code*.

Lakeridge Health (represented by Hicks Morley's Carolyn Kay) persuaded the PEHT that it should refuse to eliminate the negotiated differences in the rates of progression through wage grids of comparable male and female job classes. The PEHT concluded that the *PEA* does not require the harmonization of wage grids to achieve pay equity. Rather, it requires pay equity to be achieved by adjusting job rates until the highest rate of compensation is equal for comparable female and male job classes.

Regarding CUPE's reference to the *Code*, the PEHT held that the *PEA* was a comprehensive scheme for addressing wage discrimination. Accordingly, the PEHT found no violation of the *Code*.

DECISION OF THE DIVISIONAL COURT

CUPE then commenced an Application for Judicial Review of the PEHT's decision in the Divisional Court. In a decision dated May 31, 2012, the Divisional Court dismissed this Application, holding that the decision of the PEHT was reasonable. In terms of the interpretation of the *PEA*, the Court concluded that the PEHT had reviewed all of the relevant provisions of the *PEA*. Although the *PEA*, in its "purpose" clause, speaks generally of the need to "redress systemic gender discrimination in compensation", the more specific, technical provisions of the *PEA* make it clear that "pay equity" is to be "achieved" through comparisons of and (if necessary) adjustments to job rates. The Divisional Court held that the PEHT's focus on job rates (and its refusal to evaluate sub-maximal rates) was reasonable in light of the legislative scheme.

The Divisional Court also found that it was reasonable for the PEHT to conclude that the *PEA* is not inconsistent with the *Code*. Nothing in the *PEA* expressly favours or hinders one gender over another. Although the *PEA* may not address every type of alleged "discrimination" that might be dealt with under the *Code*, that fact alone did not make the *PEA* "inconsistent" with the *Code*. Rather, its purpose and mechanisms were simply of a different, more limited nature.

Finally, CUPE had argued that even if the *PEA* was not "inconsistent" with the *Code*, the PEHT was nevertheless obliged to apply the *Code* independently to the facts before it, much like a labour arbitrator exercising powers under section 48(12)(j) of the *Labour Relations Act*. CUPE relied upon the 2006 decision of the Supreme Court of Canada in *Tranchemontagne v. Ontario (Director,*

Disability Support Program) , in which the Social Benefits Tribunal was directed to apply the *Code* to discriminatory aspects of the issues before it.

Lakeridge Health (represented before the Divisional Court by Hicks Morley's Michael Hines) argued that the *Tranchemontagne* decision only applies to situations where the tribunal in question encounters a *Code* issue in the actual application of its home statute, but that neither the *Code* nor *Tranchemontagne* gives administrative tribunals a free-standing, independent jurisdiction to deal with human rights violations in general. The Divisional Court agreed, stating that any human rights issues unconnected to the actual administration of the *PEA* would have to be addressed elsewhere.

IMPLICATIONS OF THE DECISION GOING FORWARD

The Divisional Court decision has two enormous implications for provincial employers and service providers. First, the decision establishes that the primary focus of the *PEA* is on "job rates" and that it permits different sub-maximal compensation structures as between comparable job classes. Importantly, the decision confirms for all provincial employers that they do not have to harmonize wage grids to achieve pay equity.

Second, this case establishes that the Supreme Court's decision in *Tranchemontagne* does not confer a free-standing jurisdiction on administrative tribunals to apply the *Human Rights Code* to any human rights issue raised before them. This aspect of the decision may be helpful to Ontario employers and service providers appearing before administrative tribunals where general human rights issues are raised.

If you have any questions regarding this decision, please contact Michael A. Hines at 416.864.7248, Carolyn L. Kay at 416.864.7313, Lauri A. Reesor at 416.864.7288, Carolyn Cornford Greaves at 416.864.7460 or your regular Hicks Morley lawyer.