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Pay Equity Hearings Tribunal Clarifies Maintenance Obligations for Employers Utilizing the Proxy Method

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The Ontario Pay Equity Hearings Tribunal (the "Tribunal") recently issued a long-awaited decision in Ontario Nurses' Association v Participating Nursing Homes ("*Nursing Homes*").

At issue in this case was the Unions' assertion that in order to maintain pay equity using the proxy method, employers were required to return to their proxy employer to obtain up-to-date information, including job rates, with respect to the job classes used to develop the original pay equity plan. The Tribunal rejected that argument but confirmed that employers covered by the proxy methodology are nevertheless required to maintain pay equity once they had achieved pay equity.

In this *FTR Now*, we review this decision and the impact it has on employers which were required to use the proxy method to meet their obligations under the *Pay Equity Act* (the "Act").

ACHIEVING PAY EQUITY UNDER THE PROXY METHOD

For broader public sector employers which did not have sufficient male job classes to allow them to use the job-to-job or proportional value methods of comparison, such as social service agencies, the Act, when it was amended in 1993, required the use of the proxy method of comparison.

Affected employers were required to obtain an order from the Pay Equity Commission declaring them to be a "seeking employer." Schedule A to the Act set out the various types of seeking employers and the proxy employers that were required to be used depending on how the service of the organization was characterized. Typically, the proxy employers were hospitals and municipalities.

The seeking employer was required to identify its "key female job class(es)" which was either the female job class with the greatest number of employees or the female job class whose duties were most essential to service delivery. Employers could choose a single key female job class or several of them. The proxy employer was required to provide the seeking employer with job information, including job rate and benefit information, for jobs it had that were similar to the identified key female job class(es).

Once in receipt of that information, the seeking employer was then required to evaluate the proxy employer job classes using a gender neutral comparison system ("GNCS"). The same GNCS was

then used to evaluate the key female job class(es) of the seeking employer. The key female job classes of the seeking employer were then to be compared to the similar job classes from the proxy employer using the proportional value ("PV") method to establish the pay equity target rates for the key female job classes. PV establishes the relationship between the value of a job class and the rate of compensation to be paid for that value.

For all other female job classes in the seeking employer, their pay equity target rates were similarly established through application of the proportional value methodology which would set the relationship between the value of the job classes and the compensation or job rates to be paid for that value by reference to the key female job classes.

For the purposes of achieving pay equity, the Act required seeking employers to spend 1% of previous years' payroll towards the achievement of pay equity, ensuring that the female job classes with the lowest value received a greater adjustment than other female job classes (even if only by one cent). Pay equity was achieved when the job classes in the organization were being paid the pay equity target rates established through the process described above.

Employers which were dutifully expending the required 1% of previous years' payroll, however, still had to be mindful of the provisions of the Act which operate to deem the pay equity target rates to have been increased in certain circumstances.

For many employers covered by the proxy method, pay equity was not achieved for years following 1994, and, in some cases, pay equity has still not been achieved. For those still struggling to achieve pay equity, the recent decision of the Tribunal has no impact on their current obligations and liabilities.

For those which were, however, successful in achieving pay equity, the Tribunal has confirmed, not surprisingly, that employers covered by the proxy method are thereafter required to maintain pay equity.

BACKGROUND TO THE CASE

In the *Nursing Homes* case, ONA and SEIU (the "Unions") had originally agreed to centrally bargain their pay equity plans with a group of employers that operate up to 143 nursing homes across the province (the "Employers"). The parties agreed that the gap between the average Health Care Aide rate in unionized municipal Homes for the Aged and that of the Participating Nursing Homes was approximately $1.50 per hour. Pursuant to a negotiated agreement, pay equity was achieved by the Employers in 2005 when they agreed to close that gap under what the Tribunal referred to as the "$1.50 plans".

In 2009 and 2010, the Unions sent notices to the Employers asserting that pay equity had not been maintained and that there were changed circumstances which rendered the $1.50 plans

inappropriate, thereby requiring their renegotiation. For the most part, the changed circumstances relied on by the Unions were related to changed job duties and responsibilities. The parties attempted to negotiate a resolution, but ultimately the Unions both filed complaints with the Pay Equity Commission. The orders of the Commission, dismissing the Unions' complaints, were then pursued before the Tribunal.

MAINTAINING PAY EQUITY UTILIZING THE PROXY METHOD

In *Nursing Homes*, the main issue before the Tribunal was what the obligation to maintain pay equity requires for employers covered by the proxy method of comparison.

The Unions argued that the Act requires ongoing comparisons between the compensation of the key female job class(es) of the seeking employer and the female job classes of the proxy employer. The Unions further argued that if the Act did not require maintenance based on ongoing comparisons with the proxy employer, the Act was in violation of the *Charter*.

The Employers and the Province of Ontario, an intervenor in the case, argued that the Act contemplated a one-time only comparison with the proxy establishment rates in 1994 and that maintenance ought to be based solely on internal comparisons within the seeking employer's own establishment.

The Tribunal agreed with the Employers and the Province that the Act does **not** require seeking employers to continually compare themselves with the proxy employer. Pay equity is an internal exercise based on comparisons between job classes *within* an establishment. Pay equity is to be maintained through the application of the same methodology used initially to achieve pay equity – with the exception of having to "borrow" rate information from the proxy employer.

Essentially, the Tribunal confirmed that the obligation to maintain pay equity requires maintenance of the relationship between the value of a job class to the employer and the compensation that the employer attaches to that value.

If the job rates of the key female job classes have increased, that will have changed the relationship between the value of the job classes and what they are paid. Similarly, if the value of the job class has increased, but the job rate has not, that too will have altered the relationship between value and compensation. Other female job classes, therefore, must continue to be paid on the basis of the relationship between value and compensation set by the key female job classes and as may be changed over time.

In addition, the Tribunal dismissed the Unions' *Charter* arguments, as well as the Unions' argument that changed job duties and responsibilities constituted "changed circumstances" that would render the original plan inappropriate. The Tribunal noted that changes in job duties and responsibilities are maintenance issues that must be monitored by employers.

Given the manner in which pay equity was originally achieved, the Employers and Unions were given nine months to negotiate and agree on any required amendments that would allow pay equity to be maintained.

IMPACT ON EMPLOYERS COVERED BY THE PROXY METHOD

The *Nursing Homes* decision confirms that the obligation to maintain pay equity does not require employers to go back to their proxy employers to obtain job rate information at any point after 1994. Consequently, any legal liabilities that employers may currently have for failing to achieve and maintain pay equity remain exactly as they were before, and now after, the decision.

Pay equity maintenance can be difficult to navigate, even for employers not covered by the proxy method. Should you require assistance with your pay equity obligations, please contact Carolyn L. Kay at 416.864.7313, who argued the case for the Province, Lauri A. Reesor at 416.864.7288, Craig R. Lawrence at 416.864.7532 or Stephanie N. Jeronimo at 416.864.7350.
