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Ontario Court of Appeal on Maintenance Obligations for Employers Utilizing the Proxy Method

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In a pair of related decisions, the Ontario Court of Appeal ruled in favour of the bargaining agents for the Participating Nursing Homes (PNH) in their dispute regarding maintenance obligations under the *Pay Equity Act* (Act) when using the proxy method of comparison.

In one of the decisions, the majority of a five-member panel of the Court agreed with the assertion of the Unions that in order to maintain pay equity, seeking employers are required to return to their proxy employers to obtain up-to-date information including job rates.

In this *FTR Now*, we review the two decisions and the significant impact they will have on employers which were required to use the proxy method to meet their obligations under the Act.

Background

Legislative Background

With the 1993 amendment of the Act, broader public sector employers without sufficient male job classes to allow them to use the job-to-job or proportional value methods of comparison were required to use the proxy method of comparison. Broader public sector employers include those that provide services in community health, child treatment, healthcare and social services.

Affected employers were required to obtain an order from the Pay Equity Commission (Commission) declaring them to be a "seeking employer." The seeking employer would then identify its "key female job class(es)" and be provided with job information, including job rates and benefits, for a similar female job class from a "proxy employer," as outlined in Schedule A to the Act. Generally speaking, the result was that the proxy employer from whom the broader public sector employer had to borrow information was a hospital or municipality which typically negotiated with large, sophisticated bargaining agents for considerably higher wages and benefits.

Once in receipt of that information, the seeking employer was then required to evaluate the proxy employer's similar job class(es), and its own key female job class(es) using the seeking employer's gender neutral comparison system (GNCS). The proxy employer's job classes were treated as "deemed male comparators" in this first step.

Using the proportional value (PV) method, the compensation/value relationship of the key female job class(es) to the proxy job classes was established and pay equity target rates for the key female job class(es) set. Using the key female job classes now as the "deemed male comparators," all other female job classes in the seeking employer's establishment were then compared, using the PV method, to the key female job classes to establish pay equity target rates for those job classes.

For the purposes of achieving pay equity, the Act required seeking employers to spend 1% of their previous year's 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 1994 pay equity target rates established through the process described above.

Employers which were dutifully expending the required 1% of previous year's 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 affected broader public sector employers, they have yet to achieve pay equity even based on the original 1994 exercise.

Case Background

The companion decisions arose from the same set of facts. The Appellants, PNH – employers who operate up to 143 nursing homes in Ontario – and the Attorney General of Ontario (AGO), submitted that the proxy method did not require a seeking employer to return to the proxy employer in order to maintain pay equity. Maintenance of pay equity, they argued, is based on maintaining the internal PV analysis between the employer's key female job classes and its other female job classes as that relationship changes over time based on decisions made by the employer with respect to its own jobs and compensation. This position was consistent with the approach taken by the Commission since the Act's inception of the proxy provisions in 1993. In the Appellants' submission, the Act did not contemplate returning to the proxy employer at any point in time, or with any regular frequency, for new rates. To do so would result in pay equity being a constantly moving target for the seeking employer.

The Respondents, the Ontario Nurses Association (ONA) and the Service Employees International Union, Local 1 (SEIU), disagreed, arguing that the proxy method required the return to the proxy employer because otherwise there would be no ongoing access to male comparators which the borrowed proxy job classes would have access to. In their cross-appeal, ONA and SEIU submitted that if the Act is not interpreted as requiring the proxy method to be used in maintaining pay equity in the manner they advocated, then the Act contravenes section 15 of the *Charter*.

Originally, the matter came before the Pay Equity Hearings Tribunal following applications by ONA and SEIU. The Tribunal's lengthy decision in January 2016 largely agreed with the position of the Appellants, and ONA and SEIU sought judicial review.

The Divisional Court subsequently concluded that the Tribunal's decision was unreasonable and held that a proper interpretation of the Act requires ongoing access to male comparators at the proxy employers to maintain pay equity.

The decision of the Divisional Court was then appealed by the PNH and the AGO to the Court of Appeal.

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In this decision, a majority of the Court of Appeal upheld the Divisional Court decision, with two members of the five-member panel dissenting. The majority found that the decision of the Pay Equity Hearings Tribunal was unreasonable. With respect to the Tribunal's maintenance method, the majority found that "there is nothing in the Act that would justify eliminating a male comparator for maintaining pay equity in establishments where the proxy method was used to establish pay equity." Accordingly, the majority found that the only reasonable interpretation of the Act is that "it requires the use of the proxy method in maintaining pay-equity-compliant compensation practices in such establishments."

In coming to this conclusion, the majority stated that the scheme of the Act is built on the fundamental premise that in order to redress systemic gender discrimination in compensation, there must be a comparison between male and female job classes. The proxy method was therefore added to provide for "deemed" male comparators for establishments where no male job classes exist.

The majority emphasized that the overriding principle or purpose of the Act is not internal comparison but rather redressing systemic discrimination in compensation for work performed by employees in female job classes. The majority found that the Tribunal's maintenance method failed to provide a means to redress systemic discrimination on an ongoing basis. It cautioned that an outdated comparison would lead to re-emerging systemic discrimination that would not be identified and addressed. The majority stated that not using the proxy method to maintain pay equity-compliant compensation practices

would undermine the purpose of the Act as “a 1994 ratio cannot account for any devaluation that has taken place since that date.”

Additionally, in coming to this conclusion, the majority found that it was unnecessary to deal with the *Charter* argument advanced by the SEIU and questioned the utility in resorting to a *Charte*r values analysis in situations where the *Charter* value in question—equality—is consistent with the purpose of the legislation.

As a result, the Court of Appeal ordered that the matter be remitted to the Tribunal to specify what procedures should be used to ensure that ONA and SEIU members will continue to have access to male comparators to maintain pay equity.

In coming to its conclusion, however, the majority appears not to have dealt with the fact that the key female job classes become “deemed male comparators” under the Act, to which all female job classes in a seeking employer’s organization would have access, and through which the value/compensation ratio could be maintained by the seeking employer internally.

Chief Justice Strathy and Justice Huscroft provided a strong dissenting opinion, stating that the Tribunal’s decision was thorough, cogent, reflected its considerable expertise in pay equity as well as in the diverse labour relations contexts in which pay equity disputes arise. Thus the decision was entitled to deference from the Court.

Specifically, the dissent pointed out that the pay equity obligation established by the Act is specific to each employer’s establishment as the Act is not intended to redress differences in pay across employers *per se*; rather, it is intended to address only those differences that are the result of systemic discrimination *within* the employer’s organization. The dissent further noted that differences arising in the compensation/value relationship in a proxy employer may be attributable to non-discriminatory reasons, such as to bargaining strength rather than systemic discrimination.

Accordingly, the dissenting justices would have allowed the appeal, stating that contrary to the majority’s decision, the Tribunal did not ignore anything in its reasoning, let alone the scheme of the Act.

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In a brief companion decision, the Court of Appeal dismissed the PNH’s appeal of the decision of Divisional Court that upheld the Tribunal’s directive that the parties negotiate a GNCS for maintaining pay equity. The Court of Appeal held that the parties failed to determine the gender-neutral value of the work performed by the female job classes at either the PNH or Municipal Homes during their 1995 process. As the employers did not prepare a pay equity plan compliant with the Act, it was within the Tribunal’s power to order the employer to comply.

Both the PNH and the AGO are currently determining whether leave to appeal will be sought to the Supreme Court of Canada. As a result, the final word on the proxy method of maintaining pay equity may not have been rendered. (***See note below***)

Impact on Employers Covered by the Proxy Method

As it currently stands, the two companion Court of Appeal decisions provide that the obligation to maintain pay equity requires seeking employers to return to their proxy employers to obtain job rate information. While the Court of Appeal remitted the issue of “how” to maintain the proxy method to the Tribunal, it is anticipated that the Court’s decision will have a significant impact on the potential legal liabilities that affected employers currently face in maintaining pay equity. In effect, employers would be required to obtain new job rate and job content information from the proxy employer on some, yet identified, frequency. Practically speaking, the pay equity targets will therefore constantly change and maintenance will constantly be in flux. Decisions made by another employer, the proxy employer, will forever undermine a seeking employer’s ability to maintain pay equity for its own employees.

For employers who thought they had achieved pay equity for their workplace, these decisions undermine the maintenance of

pay equity. For employers who had not yet achieved pay equity targets, even based on the 1994 rates of the proxy employers, the achievement of pay equity will be a distant prospect.

Until such time as a final court decision is rendered, and the Pay Equity Hearings Tribunal develops the necessary procedures to implement maintenance as the Court of Appeal has prescribed, we recommend that employers using the proxy method continue to maintain pay equity as they have been – by using the internal regression analysis. This is consistent with how the Pay Equity Commission continues to interpret and apply the *Pay Equity Act*.

(Editor's Note: On October 14, 2021, the Supreme Court of Canada denied leave to appeal from** Ontario Nurses' Association v. Participating Nursing Homes, 2021 ONCA 148 ***)

Any questions about the *Pay Equity Act* or the proxy method of comparison in particular, can be directed to any member of our Pay Equity Practice Group including Carolyn Kay, Lauri Reesor, Stephanie Jeronimo, Grant Nuttall and Lucy Wu.