Reaching Out

Year-End Roundup

Date: December 21, 2021

Dear Friends,

We are back with another edition of *Reaching Out*.

With 2021 drawing to a close, we thought it appropriate to update you on some non-COVID-19-related developments.

We provide a short overview of the *Working for Workers Act, 2021* which will require employers to implement policies on disconnecting from work and will restrict the use of non-compete clauses in employment agreements.

Lucy Wu revisits a couple of Ontario Court of Appeal decisions that will have a significant impact on the proxy method of comparison under the *Pay Equity Act* now that the Supreme Court of Canada has denied leave to appeal. Those of you who use the proxy method will want to pay close attention to this issue going forward.

Scott Williams and Victoria McCorkindale provide a summary of the first decision of the Information and Privacy Commissioner under the privacy provisions of the *Child, Youth and Family Services Act.* The decision provides some guidance for service providers in the collection, use and disclosure of personal information under that legislation, as well as access to records of personal information.

Finally, we included a short reminder to those of you subject to the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124) that January 1, 2022 is the last date to implement your three-year moderation period for non-unionized employees.

We hope that you find these articles helpful. As always, if you have any comments, would like more information on any of these articles, or have any requests for future editions, please do not hesitate to contact us.

Please stay safe and have a relaxing and joyful holiday season.

Michael Smyth, Editor

Workplace Law Changes in Ontario

The Ontario government recently passed Bill 27, *Working for Workers Act, 2021*, which, among other things, amends the *Employment Standards Act, 2000* in a couple of significant ways.

First, it requires employers who employ 25 or more employees on January 1 of any year to ensure they have a written policy in place for all employees with respect to disconnecting from work by March 1 of that year. “Disconnecting from work” means not engaging in work-related communications including emails, telephone calls, video calls, or the sending or reviewing of other messages, so as to be free from the performance of work. The details of the content of the policy are to be set out by way of regulation, which at the time of writing has not yet been published. Employers will have six months from December 2, 2021, the date the Bill received Royal Assent, to implement this policy.

Second, the Bill prohibits employers from entering into employment contracts or other agreements with an employee that are, or that include, a non-compete agreement. A non-compete agreement is defined as “an agreement, or any part of an

agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends."

The prohibition will not apply to an "executive," which is defined as "any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position." There is also an exception in circumstances where there has been a sale of business. This provision is deemed to have come into force on October 25, 2021.

Please contact us if you have any questions regarding the amendments or if you would like assistance in preparing or reviewing your disconnecting from work policy.

Supreme Court of Canada Denies Leave to Appeal from Appellate Decisions Regarding Use of the Proxy Method in Maintaining Pay Equity

Overview

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

The leave to appeal stemmed from a pair of companion Ontario Court of Appeal decisions that arose from the same set of facts and which mark a significant departure from the approach enforced under the *Pay Equity Act* (*Act*) since the proxy provisions came into effect in 1994.

The decisions provide that the obligation to maintain pay equity requires seeking employers covered by the proxy method of comparison to return to their proxy employers to obtain job rate information, which will have a significant impact on the potential legal liabilities that affected employers currently face in maintaining pay equity. In effect, employers will be required to obtain new job rate and job content information from the proxy employer on some, yet identified, frequency.

In our *FTR Now* of March 30, 2021, Ontario Court of Appeal on Maintenance Obligations for Employers Utilizing the Proxy Method, we discussed in detail the Court of Appeal decisions as well as the legislative background to the proxy method of comparison.

Given the Supreme Court of Canada's dismissal on the leave application, we want to remind you of the significant impact the decisions will have on employers which were required to use the proxy method to meet their obligations under the *Act*.

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.

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*. Pay equity was achieved when the job classes in the organization were being paid the 1994 pay equity target rates established through the process prescribed under the *Act*.

Case Background

The Participating Nursing Homes (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 as the *Act* did not contemplate doing so at any point in time, or with any regular frequency, for new rates.

The Ontario Nurses Association (ONA) and the Service Employees International Union, Local 1 (SEIU), argued that the proxy method required the return to the proxy employer because otherwise there would be no ongoing access to male comparators to which the borrowed proxy job classes would have access.

In *Ontario Nurses' Association v. Participating Nursing Homes*, although the Pay Equity Hearings Tribunal (Tribunal) agreed with the PNH and the AGO, a majority of the Court of Appeal disagreed. It 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 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."

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 a brief companion decision (*Participating Nursing Homes v. Ontario Nurses' Association*), 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 gender-neutral comparison system for maintaining pay equity as it was within the Tribunal's power to order the employers to do so.

Impact on Employers Covered by the Proxy Method

The 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. As a result of the Supreme Court of Canada's denial of the application for leave to appeal, the Court of Appeal decisions are the final word. It is anticipated that these decisions will have a significant impact on the potential legal liabilities that affected employers currently face in maintaining pay equity.

For example, one of the anticipated implications in the absence of legislative clarification is that the pay equity targets for the employer's job classes will be in constant flux. Decisions on wages and benefits made by the proxy employer (generally larger public sector employers with large bargaining agents) will entirely undermine a seeking employer's ability to maintain pay equity for its own employees. Many affected seeking employers are social service sector employers which differ greatly in size, budget and funding from their proxy employer counterparts.

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.

In addition to the anticipated significant liability associated with having to match the annual rates of a much larger and differently funded proxy employer, to avoid ongoing liability employers may very well be required to incur additional cost to perform regular maintenance such as re-mapping the proxy line with each wage increase of the proxy employer. Employers using the proxy method may also have to obtain new job evaluation information on a regular basis from the proxy. While we await guidance from the Tribunal on how to maintain proxy going forward, this will no doubt greatly impact employers in the social services sector given existing budgetary constraints.

The Court of Appeal decisions remitted the issue of how to perform the proxy comparison back to the Tribunal for determination. Now that the Supreme Court of Canada has denied leave to appeal, that process can take place. Until the Tribunal develops the necessary procedures to implement maintenance as the Court of Appeal has prescribed, prudent employers will continue to meet their current proxy obligations (whether for achievement or maintenance) using the internal regression analysis method to ensure that any wage gaps are, at the very least, not widened further.

Please contact any member of Hicks Morley's pay equity team for assistance with respect to your pay equity situation and the potential implications for your organization.

IPC Issues First Decision Under *CYFSA* Confirming Who May Access Records

On November 30, 2021, the Information and Privacy Commissioner (IPC) released *Children's Aid Society of Toronto (Re)*, its first decision under the privacy provisions of the *Child, Youth and Family Services Act* (*CYFSA*) which provides some guidance on interpreting Part X of the *CYFSA*.

Part X of the *CYFSA* contains provisions for the collection, use and disclosure of personal information by service providers.

The requester in this decision is a teacher who asked the Children's Aid Society of Toronto (CAST) for access to "records of service" relating to himself. CAST refused the request and denied access to the responsive records. CAST advised the requester that while he was named in two reports of a child in need of protection, and described as the alleged wrongdoer, its records indicated that no investigation occurred in either case. CAST stated it did not have a record of service in relation to the requester and advised that he would require a court order to obtain a copy of the responsive records. CAST relied on the definition of "service" in section 281 of the *CYFSA* in addition to section 312(1) in order to deny access. These provisions state in part:

2(1) "service" means a service or program that is provided or funded under this Act or provided under the authority of a licence; [..]

312(1) An individual has a right of access to a record of personal information about the individual that is in a service provider's custody or control and that relates to the provision of a service to the individual unless….

The requester filed a complaint with the IPC arguing he was entitled to access the records containing his personal information. He asserted he required the responsive records to defend himself against his current employer, a school board.

The matter proceeded to adjudication in accordance with section 317 of the *CYFSA*. In the analysis, the adjudicator noted there was no dispute that CAST was a "service provider" and a "society" within the meaning of section 2(1) of the *CYFSA*.

The issue to be determined was whether the requester had a right of access to the records at issue under section 312(1) of the *CYFSA*. This section provides a right of access to a record of personal information about the individual that "relates to the provision of service to the individual," subject to exemptions which were not relevant to the appeal.

Section 312(1) sets out three requirements for an individual to have access to a record under Part X:

1. The record must be a record of personal information about the individual,

2. The record must be in the service provider's custody or control, and

3. The record must relate to the provision of service to that individual.

All three requirements need to be satisfied to confer a right of access. While the first two requirements were met, the third was not. The analysis focused on whether the record at issue related to the provision of service to the requester.

The adjudicator agreed with CAST that the records did not relate to the "provision of service" by CAST to the requester. The IPC held that the interpretation of the *CYFSA*, including 312(1), must be guided and informed by its paramount purpose: the best interests, protection and well-being of children. The adjudicator determined that providing access to the records—which named the requester as the teacher who is alleged to have had inappropriate or harmful interactions with a child in need of protection—was not consistent with promoting the paramount purpose of the *CYFSA*.

Furthermore, the term "service" is defined as including services for children and their families related to child protection, residential care, physical or mental disabilities, mental health, adoption, counselling, community support and prevention, and services or programs under the *Youth Criminal Justice Act* and the *Provincial Offences Act*. All of CAST's duties relate exclusively to the protection of children and the provision of service to those children and their families. The requester was neither a child in need of protection nor a family member. Therefore, he was not a beneficiary of the "provision of service" within the meaning of section 312(1) of the *CYFSA*.

The adjudicator upheld the refusal by CAST of the requester's access request as the records at issue did not relate to the provision of service to him and, therefore, he had no right of access to them under 312(1).

This decision provides clear guidance to services providers that access requests under the *CYFSA* will be limited to those in receipt of services as contemplated by the *CYFSA*.

Protecting a Sustainable Public Sector for Future Generations Act, 2019

Finally we wanted to remind those of you who are subject to the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, commonly referred to as Bill 124, that the last date to implement your three-year moderation period for non-unionized employees is January 1, 2022.

As you will recall, in 2019 the provincial government passed Bill 124, enacting the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, with the stated intention of moderating public sector compensation over a three-year period. Bill 124 applies to many parts of the public sector, including children's aid societies.

Not-for-profit social services agencies should be aware that Bill 124 applies to them if they received at least $1,000,000 in funding from the government of Ontario in 2018, or such later year as may be specified by regulation (although to date no later years have been prescribed).

We set out more detail on Bill 124 and its requirements in our *FTR Now* of November 8, 2019 Update on Ontario Government Wage Restraint Initiatives.

If you are unsure as to whether Bill 124 applies to your organization, or if you have any questions regarding your obligations, please do not hesitate to reach out to your regular Hicks Morley lawyer.