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Federal Pay Equity Commissioner Denies Application by the Treasury Board of Canada Secretariat to Establish Multiple Plans

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On June 22, 2023, the Interim Pay Equity Commissioner (Commissioner) denied a request by the Treasury Board of Canada Secretariat, on behalf of the Treasury Board as employer (TBS), for authorization to establish three pay equity plans for employees in the core public administration (CPA).

The establishment of multiple plans is an exception to the rule under the *Pay Equity Act* (*Act*) that an employer must create a single pay equity plan for its entire workforce. TBS, as the applicant, bore the burden of satisfying the threshold question that there would be enough male comparators under the proposed plans for a comparison of compensation to be made to female job classes, and then demonstrating that the proposed multiple plans are appropriate to proactively redress systemic pay-based gender discrimination and achieve pay equity in its workplace.

Under TBS's proposal, Plans 1 and 2 would each contain only one bargaining agent, with the remaining 14 bargaining agents and all the non-unionized employees included in Plan 3.

On the threshold question, the Commissioner accepted that there would be enough male comparators in each of the three proposed plans such that the application would not be denied at the first stage. As a result, the Commissioner's analysis turned on whether or not the three proposed plans would be appropriate to proactively redress systemic pay-based gender discrimination in the TBS workplace.

Analysis

Section 107 of the *Act* gives the Commissioner the authority to authorize the establishment of multiple pay equity plans where:

- the application has not been denied on the threshold question of whether there are enough male comparators
- the Commissioner is of the opinion that it is appropriate in the circumstances

The Commissioner set out several guiding principles in its earlier decision *Canadian National Railway Company and Unifor, United Steelworkers, International Brotherhood of Electrical Workers, and Teamsters Canada Rail Conference – Multiple Plans* (December 8, 2022), Ottawa ARDA-2022-0002 (PEC-CHRC) (*CN decision*), including the following:

- there are no fixed categories in which multiple plans will be appropriate and each application turns on its merits
- the impact multiple plans will have on reinforcing occupational gender segregation is an important consideration
- it is crucial to assess whether the proposed multiple plans will proactively redress systemic pay-based gender discrimination in the workplace

In its application, TBS offered six grounds to support why the multiple plans it proposed for the CPA should be approved. The bargaining agents did not support the request for multiple plans. Each ground was addressed in the Commissioner's decision to deny the request.

(i) *Will a single pay equity committee be extremely challenging and require a significant amount of dispute resolution?*

TBS stated that developing multiple plans would be the most effective option given the size of a single committee for the CPA and the contentious nature of multilateral negotiations.

The Commissioner noted that TBS did not substantiate its claim that the proposed approach would decrease the need for dispute resolution. To the contrary, the bilateral nature of Plans 1 and 2 would mean that any disagreement in the process would result in a tie vote between the employer and all of the employees/bargaining agents such that it would be a “matter in dispute” in need of resolution by the Commissioner.

In a single committee, the *Act* provides that an employer’s vote will prevail in the face of any disagreement among the employee representatives, leaving only those situations where there is a tie vote in need of dispute resolution. The Commissioner found that speculation that achieving consensus may be more difficult on a single committee is not a sufficient reason to override the *Act’s* presumption of a single plan.

(ii) *Is a single plan likely to significantly increase the time required to implement a proactive pay equity?*

TBS claimed that three plans would take less time to negotiate than one. TBS also took the position that a single pay equity plan in the CPA would lack specificity, be less accurate, and make the results less reliable. The bargaining agents argued that there was no evidence that negotiating a single plan would be less efficient and that TBS’s proposed three plans would also take significant time to administer. They also argued the parties should have the opportunity to attempt to implement a single plan before concluding it is not feasible.

The Commissioner concluded that TBS had not presented any compelling evidence that the three pay equity committees proposed would be able to create three pay equity plans more quickly than a single committee could.

(iii) *Will a single job evaluation tool lead to decreased accuracy and reliability of pay equity results?*

TBS argued that using a single job evaluation tool for the entire CPA may lead to decreased accuracy and reliability of results. Several of the bargaining agents alleged that the proposed multiple plans would not lead to a more accurate and reliable pay equity plan, according to their experts.

The Commissioner agreed with the bargaining agents’ experts that TBS did not satisfactorily explain how the problems of accuracy and reliability stemming from the heterogeneity of the CPA would be addressed under TBS’s proposal and could not conclude that the three proposed plans would result in greater accuracy and reliability than would be achieved by a single plan.

(iv) *Will a single pay equity plan lead to decreased acceptance of results?*

TBS advanced the position that a large, single pay equity committee could lead to a lack of employee acceptance of the pay equity plan, leading to employee complaints contesting the plan.

The Commissioner found that this argument was speculative and that employees are at least as likely to reject the results of a process that departs from the requirements of the *Act* as they are likely to reject one that is created using the mechanisms of the legislated regime.

(v) *Will a single plan contradict the existing community of interest structure and cause disruption in current labour relations?*

TBS argued that the *Act* effectively creates a second mechanism for wage-setting in the CPA, and that developing a single plan would disrupt labour relations and contradict the existing community of interest structure. Several bargaining agents responded that the proposal for three plans did not even reflect the existing community of interest structure.

The Commissioner noted that the *Act* consciously disrupts collective bargaining; therefore, such disruption is not a

justification to deviate from the requirements of the *Act.* On this issue, the Commissioner did not accept that TBS's proposal would align the pay equity exercise with the existing community of interest structure given the way the bargaining units were grouped under the three proposed plans. The Commissioner did not accept the proposal would decrease disruption to future rounds of collective bargaining for the CPA.

(vi) *Is developing a single plan for an employer as large and complex as TBS unprecedented?*

TBS asserted there was no precedent for developing a single pay equity plan for an employer of its size and complexity, relying on the requirements under the Ontario *Pay Equity Act* and the option under the Québec *Pay Equity Act* to establish multiple plans in certain situations involving certified bargaining agents.

The Commissioner accepted that a single plan of this magnitude is likely unprecedented, but noted that an earlier exercise undertaken in the 1980s (the JUMI exercise) produced a significant number of comparative value decisions over a two-year period. The Commissioner held that a single pay equity plan for the CPA being "unprecedented" does not mean that the multiple plans as proposed are appropriate in the circumstances.

(vii) *Would TBS's proposed multiple plans be gender neutral?*

Several bargaining agents also raised concerns about the gender neutrality of TBS's proposed plans. The Commissioner determined that the proposed three plans, structured as they were around bargaining units, cut across departments in such a way that employees who work in similar job classes would be divided into separate plans. The Commissioner concluded, therefore, that TBS did not demonstrate that the proposed three plans would be gender neutral and would not reinforce occupational gender segregation.

Takeaways

Following on the heels of the *CN decision*, this decision reinforces that the granting of multiple plan requests will be exceptional, and it may be challenging for employers to obtain approval for multiple pay equity plans.

Significantly, in rejecting the employer's arguments around the challenges of a single committee composed of non-union and bargaining agent members, the Commissioner commented that the pay equity process is meant to be collaborative and is not intended to function like collective bargaining. Notably, the unions' lack of support for the proposed plan was not, in and of itself, a key determining factor but rather, regardless of bargaining agent support, the focus will clearly be on the substantive analysis of whether the proposed plans meet the second part of the legal test in redressing systemic pay-based gender discrimination in the workplace. Further, the Commissioner helpfully noted that an employer is not required to attempt to establish a single pay equity plan prior to applying for multiple plans.

For any questions on the decision or the application process, please contact Carolyn Kay, Lauri Reesor, Lucy Wu or your regular Hicks Morley lawyer.