

# **GUIDE TO MAINTAINING PAY EQUITY RESOURCE GUIDE**

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## MAINTAINING PAY EQUITY

While much has been done at the provincial level in the area of pay equity, much remains to be done to ensure that those doing women's work in both the public and private sectors are able to achieve and maintain pay equity.

This Resource Guide gives an overview of employers' and unions' obligations in respect of maintaining pay equity in the workplace. The general focus of this Guide relates to maintaining pay equity in the unionized workplace, but most of the obligations referred to in this Guide apply to all employers, regardless of whether they engage in collective bargaining with their employees. This Guide is set-up to be a tool for unions and employees to understand the responsibilities and obligations of all parties involved in maintaining pay equity.

### Section 7

- There are two clear stages to pay equity to make it a reality in Ontario workplaces:

Step 1	Achieve Pay Equity
Step 2	Maintain Pay Equity

The obligations to achieve and maintain pay equity are set out in s. 7 of the *Pay Equity Act* as follows:

#### Section 7(1)

*Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.*

#### Section 7(2)

*No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).*

**Step 1: Achieving Pay Equity**

The initial stage in achieving pay equity consists of the process of identifying male and female job classes within the establishment, conducting gender neutral evaluations of the jobs, comparing the wages of female and male job classes of comparable value, developing a pay equity plan which identifies the extent of any discriminatory wage gap, and receiving pay equity wage adjustments that close any discriminatory wage gaps.

The *Pay Equity Act* sets out the various methods and time tables for achieving pay equity for different sectors and sizes of employers: See *Pay Equity Act*, Part II (public sector and large private sector employers), Part III (Small Private Sector Employers), Part III.1 (Proportional Value Comparisons) and Part III.2 (Proxy Comparisons). See also *CHSM&C Overview of the Pay Equity Act* and Pay Equity Commission Guidelines. For a history and overview of pay equity in the public sector, see Chapter 6 in Tim Hadwen et al, Ontario Public Service Employment & Labour Law (Toronto: Irwin Law, 2006) at pp. 378-383.

**Step 2: Maintaining Pay Equity**

Maintaining pay equity is an ongoing process of ensuring that female job classes are not subject to any systemic discrimination in their compensation. Maintaining pay equity is required to be a regular part of the compensation practices of an employer and the monitoring practices of trade unions. (See Ontario Pay Equity Commission publications - *Maintaining Pay Equity Using the Job-to-Job and Proportional Comparison Methods* and *Maintaining Pay Equity Using the Proxy Comparison Method*.)

The obligation to “maintain” under section 7 is an ongoing obligation of both employers and unions. It means that the parties must take the necessary steps to ensure that any identified gap in compensation between comparable male and female job classes identified in the “achievement” stage is not allowed to widen.

Unions and employers must monitor workplaces for any changes which would affect the validity of the posted pay equity plan. This includes changes to jobs, changes to the status of the bargaining agent and a reorganization of the business such as restructuring, sale of business, merger, acquisition or amalgamation.

Unions’ and employers’ maintenance obligations also include the responsibility to regularly review job classes to consider the impact of changes to job duties and gender dominance, to identify new comparators where appropriate, and to agree upon any necessary pay equity adjustments. See *Group of Employees v. Parry Sound District Hospital*, [1996] O.P.E.D. No. 10 (File No. 0496-94).

Where the pay equity plan is no longer appropriate, steps need to be taken to amend the pay equity plan which is done by the union negotiating the changes with the employer. Results of maintenance agreements form part of the collective agreement. Failing agreement, unions must take the dispute to the Pay Equity Commission for an order.

Section 7(2) obliges both the bargaining agents and the employers not to bargain to disrupt compensation practices that provide for pay equity throughout the employer's establishment. See *St. Joseph's Villa* (19 August 1993) 0345-92 (PEHT). The bargaining agent is prohibiting from condoning an employer's failure to maintain pay equity. See *York Region Board of Education* (CUPE) (1995), 6 P.E.R. 3.

### **Test for Maintaining Pay Equity**

- The Tribunal has referred to the following test for whether the pay equity obligations set out in a pay equity plan have been maintained:
  - (i) Are the job rates for the female job classes at least equal to those of the male job classes identified under the pay equity plan as performing work of equal or comparable value to them and has this consistently been the case from the date that pay equity was achieved under the plan?
  - (ii) If the answer to (i) is negative, is there any justification in the *Pay Equity Act* for this difference in job rates?"

See *BICC Phillips Inc.* (1997), 8 P.E.R. 142.

- Where parties exceed their obligation under the *Act* in the "achievement" stage, this does not relieve the employer or the union from the statutory section 7 obligation of "maintaining" the agreement that was reached. The parties must ensure that the wage gap identified in the achievement process is not widened. See *CUPE Local 1776 v. Brampton Public Library* [1994] O.P.E.D. No. 37.

### **Process for Maintaining Pay Equity**

- The Tribunal in *Ottawa Board of Education* (1995), 6 P.E.R. 45 set out the following process to be followed by the employer and bargaining agent in carrying out their maintenance obligations:
  - 1) The obligation to maintain pay equity is a joint responsibility.

- 2) Section 14.1 [the provisions dealing with “changed circumstances”] applies to maintenance.
- 3) A Part II employer, i.e., an employer who is required to or elects to do a pay equity plan, looks to Part II for guidance on pay equity maintenance just as it did for achieving.
- 4) Under s. 7(2), the Union is obligated not to agree to compensation practices that fail to provide for the maintenance of pay equity for any of the bargaining units it represents.
- 5) Section 14(1) allows a subjective determination of when negotiations may be necessary on the part of either party.
- 6) If there is a disagreement, there is a procedure for seeking the Commission's assistance in settling, deciding or adjudicating the dispute.

### **Maintenance Committee**

- The Pay Equity Commission recommends that a pay equity Maintaining Committee be established in each bargaining unit in order that there is a systematic process for monitoring change in the workplace. The Commission states that employers should do a comprehensive review each year of their compensation practices to ensure that they have maintained pay equity and make any necessary retroactive adjustments required.

### **Choosing the Method of Comparison to Maintain Pay Equity**

- Employers and bargaining agents **who used the job-to-job or proportional comparison method** have three choices for what comparison method to use in maintaining pay equity:
  - 1) if only one of those methods was used to achieve, then use the original method used;
  - 2) if both methods were used, then maintain using both methods; or
  - 3) use only proportional value comparisons but make sure that the advantages to the female job classes are equal or greater under the proportional value method than under the job-to-job method.

**See section below for process where the proxy comparison method used.**

## Maintaining Pay Equity and Change of Circumstances

- The specific sections in the *Act* which address the situation of a sale of business or changed circumstances provide specific obligations for ensuring the wage gap does not widen but do not detract from the wider obligation to maintain pay equity found in section 7. See section on Change in Circumstances below.
- The *Act* does not clearly set out the relationship between the section 7 maintenance obligation and section 22(2)(b) which sets out the right of an employee, group of employees or bargaining agent to file a complaint where due to a “change in circumstances” the pay equity plan is not appropriate. The Tribunal has indicated that section 22(2)(b) is available to deal with some kinds of workplace changes occurring after the posting of a plan, and also after full achievement of pay equity. For example, the vacancy over a significant period of time in a male comparator job class could be either a section 7 maintenance issue and/or “changed circumstances” under s. 22(2)(b): See *Niagara No. 2* (1998-99), 9 P.E.R. 25 (PEHT).
- The employer cannot use the “change of circumstance” as a defence to a failure to maintain” pay equity between comparable male and female job classes. See *BICC Phillips Inc. case*.
- In a unionized workplace, an employer cannot unilaterally fail to maintain pay equity between comparable male and female job classes on the basis that there has been a change in circumstances. The employer is required to negotiate the necessary changes to the pay equity plan caused by the alleged change in circumstance and if no agreement, the plan cannot be changed until amended by a Review Officer or Tribunal Order. The original plan must be maintained until a new plan is agreed to or ordered.
- If there is no bargaining agent, the employer can unilaterally amend and post the revised pay equity plan but this is then subject to challenge by the unrepresented employees.
- A change in pay practice does not necessarily give rise to a change in circumstance. For example, when a collective agreement increased the threshold at which part-time employees could receive premium/overtime pay, but did not change the employees’ hourly pay rate, the Tribunal found this change did not contravene the *Act* even though it may have reduced employees’ take-home pay: (*Children’s Aid Society of the County of Lanark and the Town of Smiths Falls* September 7, 2005 and January 5, 2006, 3565-04-PE (P.E.H.T.)). In that case, the increase in the threshold for premium pay applied to all job classes. It was not

asserted that female job classes were denied a benefit that remained available to either a male job class or their proxy comparator.

### **Closing the Maintenance Gap: Immediate Movement to Target Rate or Phase-In?**

- The only wage gap which can be phased in at 1% of payroll is the wage gap identified in the “achievement” phase. Any wage gap which is created after the effective date of the employer’s initial pay equity obligations must be immediately eliminated and cannot be redressed out the of 1% of payroll set aside. This includes the cost of pay equity for new job classes or changes to existing job classes which are so significant as to result in a new job class. See *Regional Municipality of Peel* (1992), 3 P.E.R. 191 (PEHT).

### **Retroactivity**

- Employers who are late doing their plan, must make all adjustments as if they were paid on time and this may require significant retroactive adjustments. See: *Renfrew County and District Health Unit (No. 3)* (2001 - 02), 12 P.E.R. 114 (PEHT).

### **No Time Limit for Filing Complaints**

- There is no time limit for filing complaints under the *Act*. This applies to complaints against unions and employers. This includes complaints that a deemed approved plan does not meet the basic standards of the *Act*. If a complaint is upheld, the adjustments are retroactive to the date of the violation of the *Act*.

### **Which Prior Wage Increases Count as Pay Equity Adjustments?**

- Only past pay increases that are clearly identified as pay equity adjustments can be counted as pay equity adjustments for the purpose of meeting the obligation to achieve pay equity. Other increases must be added to the pay equity target rate.

### **Maintaining Pay Equity using the Proxy Comparison Method**

- The Commission has issued a Fact Sheet which addresses this issue: “Maintaining Pay Equity Using the Proxy Comparison Method”.

### Five Requirements According to The Pay Equity Commission

- In summary, the Commission states that employers using the proxy comparison method are required to do the following:
  - 1) Each January 1, give the necessary pay equity adjustment required until the wage gap is closed using a minimum 1% of annual payroll;
  - 2) Give any non-pay equity increase on top of the pay equity adjustments required by the proxy pay equity plan and increase the target rates by the same amount;
  - 3) Do not allow the wage gap to widen, eg. by negotiating or permitting percentage wage increases;
  - 4) Do not reduce pay equity target rates; and
  - 5) Establish or negotiate where a union exists, a regular maintenance review process to deal with changed circumstances that may occur in the organization. eg. new job classes, changes in duties or responsibilities of job classes, organizational restructuring, mergers, amalgamations and unionization or decertification. Prepare and post amended plans as necessary.

### Further Obligation

- It is also arguable that the employer and the bargaining agent have an obligation to maintain proxy pay equity by continuing to keep the appropriate relationship between the female job class in the workplace and the comparator female job classes originally used in the seeking employer's workplace. While this obligation is not referred to in the Commission's publication, it follows from the employer's ongoing maintenance obligations under section 7. This means that unions should track the compensation increases which have been received by the relevant female job classes in the employer originally used as the "proxy" and identified in the proxy pay equity plan. The Schedule in the Proxy Comparison Method Regulation, identifies which employer is the "proxy employer" for each kind of "seeking employer" using the proxy method.
- While the *Act* does not contain any requirement for the comparison employer to provide any further information to the "seeking" employer after the initial process during the achievement phase, in the public sector much of this information is



already public with collective agreements filed with the Ministry of Labour and many unions represent the employees of both the seeking and proxy employers.

### New Job Classes

- Pay equity for new job classes is established through the proportional value comparison method by comparing the values to the values and pay equity target rates of existing job classes.
- Every new female job class created after January 1, 1994 must be paid immediately at the pay equity rate.
- A new position may fit into an existing job class and therefore be paid at the phased in rate if the position has similar duties and responsibilities and requires similar qualifications, is filled by similar recruiting proceeds and has the same compensation schedule, salary grade or range of salary rates. It may also fit in if it is part of a group of jobs. New positions which cannot fit into existing job positions must be paid at the target rate immediately.

### Changed Jobs

- Changed jobs must be re-evaluated and compared to pay equity target rates of the representative female job classes within the establishment. If the re-evaluation reveals that the change is so significant it is a new job, then the job must reach the target rate immediately. Otherwise, the increased amount can be phased in.

## **CHANGED CIRCUMSTANCES**

### **If Employees Are Represented by a Bargaining Agent**

Two sections in the *Pay Equity Act* set out procedures in relation to “changed circumstances”. Section 14.1 addresses the obligations to bargain and section 22(2)(b) deals with the right to file a complaint in respect of changed circumstances.

#### **Section 14.1 (1) applies:**

- If the employer or bargaining agent is of the view that because of changed circumstances in the establishment, the pay equity plan for the bargaining unit is no

longer appropriate, the employer or bargaining agent may give written notice to the other to enter into negotiations to amend the plan. The language of the provision indicates that a subjective test applies to determine when notice to bargain should be given - it is when either party “is of the view” that this is necessary.

- If an agreed amendment is not reached before 120 days from the date the notice to bargain a new plan was given, the employer must give notice of the failure to the Commission.
- The bargaining agent may also give notice to the Commission of failure reach an agreement.
- If the plan is amended, any applicable compensation adjustments shall not be less than the adjustment that would have been made under the plan, before it was amended.

**Section 22(2) (b) applies:**

- Any employee or group of employees, or the bargaining agent representing them, may file a complaint with the Commission with respect to a pay equity plan applying to the employee(s) where, because of changed circumstances in the establishment, the plan is no longer appropriate for the female job class to which the employee or employees belong.
- The language of the provision indicates that an objective view that the plan is no longer appropriate is necessary to succeed.

**What Kind of “Changed Circumstance” Renders a Plan Inappropriate?**

The **Pay Equity Commission** states that the following may constitute changed circumstances that could render the plan inappropriate under the *Act*:

- Issues pertaining to job classes:
  - new job classes (creation of an entirely new job class in the establishment or significant changes to an existing job class)
  - vanishing job classes
  - changes to the value of job classes
  - changes to the gender of job classes
  - changes to job rates

- Certification of a bargaining agent after a deemed approved plan; and
- Restructuring within the organization.

There are a wide range of situations which may amount to “changed circumstances” which render a pay equity plan inappropriate. The following are some that the **Pay Equity Hearings Tribunal** has addressed to date:

### **Certification of a Bargaining Unit**

- Where a group of employees is unionized after a pay equity plan is signed, the union certification constitutes a changed circumstance (*St. Joseph’s Villa and Ottawa Board of Education (No. 2)* (1995), 6 P.E.R. 45).
- However, certification may not necessarily render the plan inappropriate: *Parry Sound District General Hospital (No. 2)* (1996), 7 P.E.R. 73. If the certification results in some employees of the employer, who had previously been covered by one pay equity plan, being in the bargaining unit and some employees being outside the bargaining unit, the plan must be split for the two groups, in order to comply with s. 14 of the *Act* which requires that there be a separate pay equity plan for each bargaining unit and a pay equity plan any part of the establishment not in the bargaining unit (*St. Joseph’s Villa*).
- The newly certified union may not have the ability to negotiate any part of the plan that will apply to the new bargaining unit - the plan may simply be split and deemed approved. This will depend however, on whether there is any evidence that the plan contravenes the *Act* or whether the changed circumstance renders the plan no longer appropriate. A change in the composition of the unit following certification may cause the plan to be inappropriate (*Ottawa Board of Education*).

### **Vacant Job Class Subsequently Filled**

- If a job class cannot be evaluated because it was vacant at the time of pay equity negotiations, and the job class is subsequently filled, this might constitute a changed circumstance (*Barrie Public Library*, (1991), 2 P.E.R. 93)

### **Workplace Restructuring**

- Restructuring of the workplace or the elimination of jobs would likely qualify, as would the merger of job classes (*Parry Sound District General Hospital*).
- A vacant male comparator job class may not result in a plan not being appropriate if a widening wage gap does not occur as a result of unequal general wage increases (*Niagara (No. 2)* (1998-99), 9 P.E.R. 25).
- The demolition of a plant, the rebuilding of a plant, relocation of employees to other facilities, renaming of two job titles and a change to a team management style within an establishment would constitute changed circumstances which may or may not have an impact on the plan (*Ford Motor Co. of Canada, (No.3)* (2002-03), 13 P.E.R. 49 ).

### **Effective Date of Changes/Amendments to the Plan**

- Any amendments will be effective as of the date of the triggering event - the changed circumstance (*Ottawa Board of Education*).
- The obligation to maintain pay equity in accordance with the old plan will exist until the new plan is posted (*BICC Phillips Inc.*).

<b>SALE OF A BUSINESS</b>
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**The *Pay Equity Act's* Sale of Business Provisions are set out in s. 13.1 as follows:**

**13.1 (1)** *Sale of a business - If an employer who is bound by a pay equity plan sells a business, the purchaser shall make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser and shall do so on the date on which the adjustments were to be made under the plan.*

*Plan no longer appropriate*

**(2)** *If, because of the sale, the seller's plan or the purchaser's plan is no longer appropriate, the seller or the purchaser, as the case may be, shall,*

*(a) in the case of employees represented by a bargaining agent, enter into negotiations with a view to agreeing on a new plan; and*

*(b) in the case of employees not represented by a bargaining agent, prepare a new plan.*

*Same*

*(3) Clause 14 (2) (a), subsections 14.1 (1) to (6) and 14.2 (1) and (2) apply, with necessary modifications, to the negotiation or preparation of a new plan.*

*(4) Repealed: 1997, c. 21, s. 4 (1).*

*Application to certain events*

*(4.1) This section applies with respect to an occurrence described in sections 3 to 10 of the Public Sector Labour Relations Transition Act, 1997. For the purposes of this section, the occurrence shall be deemed to be the sale of a business, each of the predecessor employers shall be deemed to be a seller and the successor employer shall be deemed to be the purchaser.*

*Definitions*

*(5) In this section,*

*"business" includes a part or parts thereof;*

*"sells" includes leases, transfers and any other manner of disposition.*

## **What Constitutes a Sale?**

The Act defines a "sale of a business" very broadly. It can include all of the following:

- Sale;
- Lease;
- Transfer;
- Merger;
- Acquisition;
- Amalgamation; and
- Any other manner of disposition.

## **Post-sale**

- After the sale of a business, unions and employers must examine all pay equity plans and determine whether they are still appropriate.

### **Is a New Plan Necessary After the Sale?**

- The sale may result in the plan no longer being appropriate;
- Bargaining agents may initiate the process for negotiations for a new plan if this is the case or they may file a complaint claiming that the plan is no longer appropriate;
- Non-union employees may also file a complaint; and
- The new plan will be effective as of the date of the sale.

### **Circumstances Which May Give Rise to a Claim that the Plan is No Longer Appropriate Post-Sale**

- The addition or subtraction of jobs from a pay equity plan;
- Restructuring of existing departments or creating new ones;
- New jobs in new areas;
- New products, services or manufacturing processes;
- Changes in job duties or responsibilities which are sufficient to alter the value of jobs in the pay equity plan;
- Changes to the composition of the bargaining unit or non-union group;
- The gender neutral comparison system (GNCS) no longer adequately captures the work of the female and male job classes which may necessitate an amendment to the GNCS or selection or negotiation of a new GNCS (See: Pay Equity Commission fact sheet on Sale of a Business); and
- A new plan would likely be necessary where there was a sale of part of a business and the seller's business contracts and the purchaser's business expands, with an accompanying loss or gain of employees. Once the sale has occurred and the consequences of the transaction are apparent, a determination should be made

about whether a new plan is required *The Child's Place* (February 28, 2002) 0730-01 (PEHT)).

### **Binding Effect of the Old Plan**

- The purchaser will be bound by the plan in place;
- The seller will continue to be bound by the plan if they continue the business in some part and have employees; and
- The old plan will continue to be effective until a new plan is developed, if necessary.

### **Who is Responsible for Outstanding Pay Equity Obligations at time of the Sale?**

- Neither the purchaser nor the seller may opt out of their obligations under the *Act*.
- However, the Tribunal has stated, in *obiter*, that it is difficult to construe s. 13.1 as absolving the seller of liability for outstanding adjustments at the point of the sale. In fact, it is possible to construe s. 13.1 as holding the seller and purchaser jointly and severally liable for payments that the seller failed to make in a timely way (*Child's Place*).

## **NEW EMPLOYERS**

- The Act recognizes two categories of employers:
  - \* employers that were in existence on the date that the *Pay Equity Act* came into effect (i.e. employers who existed on January 1, 1988); and,
  - \* new employers established after that date.
- These groups are treated differently because when the *Act* was introduced, it allowed employers who were then in existence a period in which they could gradually move their compensation practices into compliance with the new law by phasing-in pay equity adjustments over a period of time (although they could not create new wage gaps or widen existing ones). Employers who came into existence after the *Act* took effect had to achieve pay equity immediately and are not entitled

to a phase-in period. See Pay Equity Commission Guideline #2 on “Determination of Employer and Employee”.

- New employers, created after January 1, 1988, are not required to post pay equity plans as they are required to achieve pay equity immediately. In order to achieve pay equity, though, these employers must still compare male and female job classes and pay female job classes at least as much as the male job classes of comparable value.
- In addition, employers that were in existence prior to January 1, 1988 but had fewer than 10 employees will become subject to the *Act* and be required to achieve pay equity as of the date that they have 10 or more employees.
- When an organization is involved in a merger or an acquisition, it is not always clear whether is a “new employer” or a successor employer under the sale of business provisions for purposes of the *Act*. In those situations, whether an employer is a new employer will need to be determined on the facts of the case.

## **PAY EQUITY SETTLEMENTS AND RELEASES**

### **Contracting out of Pay Equity Obligations?**

- Unions and employees must be very careful in drafting releases or settlements to ensure that they protect employees’ pay equity entitlements. This issue has been addressed twice recently in circumstances where individual employees have been terminated and have signed settlements with general language releasing their employers from future legal claims. See *Bucyrus Blades of Canada v. McKinley* (2005), 250 D.L.R. (4<sup>th</sup>) 316 (Ont. Div. Ct.); *Better Beef Ltd. v. MacLean* (2006), 80 O.R. (3d) 689 (Div. Ct.).
- In both situations, at the time they were terminated the employees had outstanding concerns with respect to their pay equity entitlements which were not addressed in the subsequent monetary settlement on termination. In both cases the Pay Equity Hearings Tribunal looked at the underlying facts to determine whether the employer had complied with its pro-active obligation to achieve pay equity under the *Act*. However, on judicial review, in both cases the Ontario Divisional Court overturned the Tribunal’s decisions, held the parties to the terms of the release and found that the individual employees had released their claims for pay equity.
- In these decisions, the Court found that “the law does not interfere with the right to contract out of the Pay Equity Act when settling a claim under that Act.” The Court



noted that settling an individual claim in these circumstances is distinct from a situation where an employee might bargain away a statutorily-protected right as a term of employment or as a precondition to employment. The Court also ruled that “a release signed by one employee does not, in law, release an employer from its obligations to its female employees pursuant to the requirements of the Act.”

## COLLECTIVE AGREEMENT REMEDIES

- Collective agreement remedies can be used to supplement and bolster rights to pay equity. Collective agreement provisions can either provide an alternate forum for enforcing pay equity rights or can provide additional rights – particularly in relation to job evaluation and maintenance of pay equity – to make more effective the rights which are set out in the *Pay Equity Plan*.

### **(A) enforcement of pay equity adjustments under the collective agreement**

Sections 13(9) and (10) of the *Pay Equity Act* provide that an approved pay equity plan is binding on the parties, the pay equity plan prevails over all relevant collective agreements, and the adjustments in the plan are deemed to be incorporated into and form part of the relevant collective agreements:

**13. (9)** *A pay equity plan that is approved under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.*

**13. (10)** *A pay equity plan that is approved under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.*

### **(B) incorporating maintenance provisions in the collective agreement**

Various unions have negotiated pay equity maintenance protocols in their collective agreements.

The following sample is an excerpt from the collective agreement between the **Ontario Public Service Employees Union, Local 261 and the Regional Municipality of Halton (Allendale) (June 1, 2002 to May 31, 2005)**

**21.05 Terms of Reference Re: Pay Equity Maintenance**

1. *The Union and the Employer acknowledge their ongoing responsibilities under the Pay Equity Act to:*
  - a. *establish and maintain compensation practices that provide for pay equity in accordance with section 7 of the Pay Equity Act;*
  - b. *to ensure that the Pay Equity Plan between the parties is appropriately amended to reflect any change of circumstances which subsequently render the Plan to be no longer appropriate within the meaning of the Act; and*
  - c. *to ensure that pay equity is maintained for new and existing job classifications.*
2. *The Union and the Employer agree to establish an ongoing process to address issues of maintenance including evaluation of new jobs that have undergone significant change.*
3. *The joint Job Evaluation Committee will have the following composition:*
  - a. *Three Union representatives chosen by and from the local union;*
  - b. *Three Employer representatives.*
4. *The parties agree that the McDowell Job Evaluation System will continue to be used as the gender neutral comparison system for pay equity maintenance purposes including any changes to that system which may subsequently be agreed to by the parties.*
5. *When a new position is established that falls within the scope of this bargaining unit, or when a position is included in this bargaining unit, or when the Employer makes a significant change to the job content of the existing classification to the extent that the classification becomes a new*

*classification or another existing classification, the incumbent employee will complete a Job Information Questionnaire and submit it to her Supervisor.*

6. *Within ten (10) days of receipt of the completed questionnaire, the Supervisor will make any comments and forward the Questionnaire to the Compensation Specialist who will evaluate the position using the agreed upon job evaluation tool. Joint Job Evaluation Committee will meet to evaluate the position for the purpose of determining the level for each new or changed position, using the agreed upon Job Evaluation Plan.*
7. *The Compensation Specialist will provide the Job Evaluation Review Committee her ratings on a factor by factor basis along with the completed Questionnaire in advance of the Committee meeting. The joint Job Evaluation Review Committee will have the right to interview incumbents if necessary in order to evaluate jobs. The Committee members will discuss the point ratings submitted by the Compensation Specialist to determine which points, if any, are in dispute.*
8. *The Committee members will be provided materials in advance of the meeting referred to in paragraph 7, as well as two (2) hours of preparation time during working hours to consider the materials and prepare to meet in joint session.*
9. *Upon agreement of the Committee as to the point ratings on each subfactor, the job will then be placed in the appropriate pay band according to its total points.*
10. *Any pay increase will be retroactive to the date of completion of the questionnaire by the incumbent.*
11. *If the point total falls outside the range of the current job evaluation system, the Union and the Employer will negotiate an appropriate hourly rate for the job, consistent with the established pay grid. If the Committee is unable to agree on the points to be assigned to any subfactor, or if a dispute exists concerning the hourly rate of a particular job, the matter will be referred to an arbitrator familiar with job evaluation for full and final resolution. The arbitrator has all the powers of an arbitrator under the Labour Relations Act.*
12. *If there is a dispute, the Employer and the Union members of the Joint Job Evaluation Committee will prepare a rationale for their position on any of the following issues for the arbitrator:*
  - a. *whether substantial change has occurred;*

- b. *the factors and points that are in dispute and the rationale for the dispute issues;*
- c. *the pay band or hourly rate in dispute and the rationale for the issue in dispute.*

*Each party will share the rationale with the other party 10 days after the meeting at which the dispute occurred. The rationale will then be forwarded to the arbitrator unless a settlement is reached.*

## HUMAN RIGHTS GRIEVANCES/HUMAN RIGHTS COMPLAINTS

- Where women are unable to access rights directly under the *Pay Equity Act*, collective agreement (and human rights tribunal) remedies may allow them to access pay equity rights. These avenues for accessing pay equity entitlements would be of interest to women working in predominantly female workplaces in the private sector who could not get proxy pay equity under the *Act*.
- Under s. 48(12)(j) of the *Labour Relations Act*, an arbitrator has jurisdiction to interpret and apply human rights and other employment-related statutes:

**48. (12)** *An arbitrator or the chair of an arbitration board, as the case may be, has power,*

*(j) to interpret and apply human rights and other employment related statutes, despite any conflict between those statutes and the terms of the collective agreement.*

- This would enable an arbitrator to consider whether the wage rates in a collective agreement violate the right to be free of discrimination in employment under s. 5(1) of the *Human Rights Code*.
  - *Parry Sound (District) Social Services v. OPSEU*, (2003) 230 D.L.R. (4th) 257: substantive rights in the Human Rights Code and other employment-related statutes are incorporated into each collective agreement;

- *Nishimura v. Ontario Human Rights Commission* (1989), 70 O.R. (3d) 247 (Ont. Div. Ct.): enactment of the *Pay Equity Act* does not remove jurisdiction from Commission to deal with pay equity complaints;
- *SEIU Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.): the proxy method is a valid method for assessing wage discrimination.

## LABOUR BOARD REMEDIES

- Labour board remedies may be useful for preserving pay equity entitlements in certain contexts.
- For example, if an employer lays off or contracts out women's jobs because they have been awarded pay equity adjustments, arguably this can be characterized as an unfair labour practice. It could be argued that such lay offs or contracting out constitute intimidation, coercion or a reprisal for attempting to exercise rights integral to labour relations or that such conduct interferes with the union's representation of its members in relation to the right to receive non-discriminatory wages. It would be necessary to build the appropriate evidentiary record to show that the lay offs or contracting out were motivated by anti-pay equity animus.
- If such a claim was pursued under the *Canada Labour Code*, the Labour Board has the power to issue substantive interim orders which may be useful in blocking the lay offs or contracting out pending a resolution of the dispute.

## REPRISALS/SECTION 9 COMPLAINTS

**The *Pay Equity Act* Prevents Reprisals Against Employees Who Engage in Activity under the *Act*. Section 9 of the *Act* sets out that protection as follows:**

*Reduction of compensation prohibited*

**9(1)** *An employer shall not reduce the compensation payable to any employee or reduce the rate of compensation for any position in order to achieve pay equity.*

*Intimidation prohibited*

*(2) No employer, employee or bargaining agent and no one acting on behalf of an employer, employee or bargaining agent shall intimidate, coerce or penalize, or discriminate against, a person,*

*(a) because the person may participate, or is participating, in a proceeding under this Act;*

*(b) because the person has made, or may make, a disclosure required in a proceeding under this Act;*

*(c) because the person is exercising, or may exercise, any right under this Act; or*

*(d) because the person has acted or may act in compliance with this Act, the regulations or an order made under this Act or has sought or may seek the enforcement of this Act, the regulations or an order made under this Act.*

#### *Compensation adjustments*

*(3) Where, to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class shall receive the same adjustment in dollar terms.*

### **The Tribunal Has the Following Specific Powers in Terms of a Remedy for a Breach of the Section 9 Anti-Reprisal provisions:**

*25(2) The Hearings Tribunal shall decide the issue that is before it for a hearing and, without restricting the generality of the foregoing, the Hearings Tribunal,*

*(b) where it finds that an employer has contravened subsection 9 (2) by dismissing, suspending or otherwise penalizing an employee, may order the employer to reinstate the employee, restore the employee's compensation to the same level as before the contravention and pay the employee the amount of all compensation lost because of the contravention;*

*(c) where it finds that an employer has contravened subsection 9 (1) by reducing compensation, or has failed to make an adjustment in accordance with subsection 21.2 (2), may order the employer to adjust the compensation of all employees affected to the rate to which they would have been entitled but for the reduction in compensation and to pay compensation equal to the amount lost because of the reduction*

### **The Burden of Proof Is a Reverse Onus**

*25(7) In a hearing before the Hearings Tribunal, a person who is alleged to have contravened subsection 9 (2) has the burden of proving that he, she or it did not contravene the subsection.*

- Therefore, the burden is on the employer to prove that they did not intimidate, coerce, penalize or discriminate against the claimant

### **Who May Bring a Section 9(2) Reprisal Complaint?**

- A person who may or is participating in a proceeding under the *Act*.
- A person who has made or may make a disclosure required in a proceeding under the *Act*.
- A person who is exercising or may exercise any right under this *Act*.
- A person who has acted or may act in compliance with the *Act*, regulations or an order under the *Act* or who has sought or may seek enforcement of the *Act*, regulations or an order made under the *Act*(s. 9(2)).
- Those who have entitlement to a pay equity plan, without having any further involvement in the pay equity process, have a “right” under the *Act*. It is not necessary to be actively involved in the pay equity process in order to raise a s. 9(2) complaint (*New Liskeard Board of Police Commissioners (No.2)* (1991), 2 P.E.R. 65).
- Those who have entitlement to a pay equity adjustment are protected by the provision (*Great Lakes Brick and Stone Ltd.*, (1994), 5 P.E.R. 1).
- The *Act* is a proactive system and therefore, in most cases, the beneficiaries of the *Act* will have been passive recipients. Clearly, the intention of the legislature was not to limit the protection of the provision to those who file complaints or are otherwise actively involved in the process ((*Peterborough*) *Clow (No. 3)*, (1996), 7 P.E.R. 33).

### **Applicant must Raise a *Prima Facie* Case**

- The applicant has the initial burden to raise a *prima facie* case. Once that burden has been met, the onus is on the employer to disprove the allegation. A *prima facie* case can be established, for example, by proving that the applicant had or was entitled to receive a pay equity increase and that the applicant had suffered a detriment (*Liquor Control Board of Ontario* (No. 3) (1997), 8 P.E.R. 1; *Management Board Secretariat* (No. 6) (1998-99), 9 P.E.R. 48)

### **Is There Anti-Pay Equity Animus?**

- When dealing with employee terminations, if anti-pay equity animus is the main reason or incidental to the reason to dismiss the employee, s.9(2) will have been violated. The onus is on the employer to establish, on a balance of probabilities, that the reasons given for the discharge are the only reasons and secondly, that the reasons are not tainted by an anti-pay equity motive. For instance, the applicant's increased wage rate, as a result of a pay equity increase, must not have been a consideration in the decision to terminate her employment
- The Tribunal has held:
 

*Whenever the timing of the discipline or discharge coincides with the enjoyment or seeking of a benefit, it should be scrutinized closely and false motives should not be allowed to masquerade as legitimate ones. If an employer has implemented a genuine management objective, even though it coincides with the enjoyment of a benefit, the employer will be able to discharge its onus so long as he employer's conduct is not tainted with anti-pay equity animus. ((Peterborough) Clow (No. 3)).*
- Although the onus is on the responding party to disprove the allegation, an applicant should still challenge the evidence of the responding party through cross-examination and the presentation of its own evidence (*Liquor Control Board of Ontario* (No. 2) (1995), 6 P.E.R. 148).
- The employer must demonstrate more than a seemingly plausible explanation for their conduct. It must be established that there is no taint of anti-pay equity animus to the reasons given for the employee's dismissal. (*Plantagenet* (No.1) (1997), 8 P.E.R. 32)
- The reason must be legitimate but does not have to be a sound business judgment. The Tribunal will not concern itself with the employer's decision if it is free of anti-



pay equity animus, therefore only facts relating to motive will be relevant (*Alzheimer Society* (1997), 8 PER 187. 551-95).

- The *Act* and its reprisal provisions will not prevent employers from implementing legitimate management concerns about the structure and composition of the workforce (*Peterborough*) *Clow* (No. 3)).

### **Vicarious Liability**

- The employer cannot escape liability by placing the blame for the prohibited conduct on a member of management. The employer must ensure that conduct towards the applicant was legitimately motivated before supporting it. The lack of effort to ensure the legitimate motivation will not absolve the employer of responsibility under the *Act* ((*Peterborough*) *Clow* (No. 3) and (*Alzheimer Society of Chatham-Kent v. Moon*)).

### **Remedies**

#### **Reinstatement**

- Reinstatement is the remedy of choice for a violation of s. 9(2) because of job loss.
- However, the Tribunal may not order reinstatement if the employer persuades them that it would not be practicable. ((*Peterborough*) *Clow* (No. 3))
- If the position no longer exists, it will be appropriate to order reinstatement to an alternative position that is similar with no loss of wages. To argue that the person ought not be reinstated at all, simply because the position no longer exists, would go against the remedial nature of the *Act* and the liberal construction warranted in order to meet the goal of addressing systemic discrimination in compensation. (*Plantagenet* (No.1) (1997), 8 P.E.R. 32)
- The Tribunal may consider the following factors when determining whether reinstatement is appropriate:
  - the impact of reinstatement in the workplace on the employees;
  - whether there has been any change in management (ie: is the offending individual still in the workplace?);
  - the skill set required for the job;
  - whether there has been any change in job duties. (*Alzheimer Society of Chatham-Kent v. Moon*)

### **Lost Wages and Interest**

- An order of lost wages may be made but the applicant has an obligation to mitigate those damages. If the applicant fails to reasonably mitigate, damages may be reduced by one-third.
- Although the *Act* is silent on the subject, the Tribunal has ruled that interest may be awarded on damages. ((*Peterborough*) *Clow* (No. 3); *Royal Crest Lifecare Group* (No. 5) (November 18, 2002); *Helping Hands Daycare* (No. 2) (11 October, 2006), 2387-05 (P.E.H.T.)
- Interest will be calculated by dividing the amount owing in half and applying the applicable *Courts of Justice Act* interest rate ((*Plantagenet* (No.1)).

### **Other Damages**

- An applicant's out-of-pocket costs (ie: accommodation, travel, etc.) are not recoverable.
- The Tribunal has not yet awarded damages for mental distress to an applicant but it appears that it is a possibility if the evidence establishes enough distress to warrant such an award ((*Peterborough*) *Clow* (No. 3)) .
- Expenses incurred by an applicant in attempts to mitigate losses may be compensated. (*Alzheimer Society of Chatham-Kent v. Moon*)
- Legal fees are not recoverable ((*Peterborough*) *Clow* (No. 3) and *Alzheimer Society of Chatham-Kent v. Moon*).

## **PAY EQUITY FOR UNORGANIZED WORKERS**

### **Ontario *Pay Equity Act***

- Employers are required under the *Pay Equity Act* to achieve and maintain pay equity for their workers, whether represented by a union or not so long as the employer has 10 or more employees or is a public sector employer of any size.
- Employers in smaller workplaces are not required to prepare pay equity plans but must still "establish and maintain compensation practices that provide for pay

equity.” *Comport Communications International* (No.2), July 14, 2006 File No. 4067-05-PE (P.E.H.T.)

- Employees who have no union generally are required to file a complaint with the Pay Equity Commission in order to enforce their rights to pay equity.
- The Pay Equity Commission has the power to monitor compliance with the *Pay Equity Act* and has a programme to do that.
- Unorganized employees may take advantage of the following provisions in the *Act* in order to facilitate their ability to use the complaint procedure:

#### Group Representation

*An employee or a group of employees may appoint any person or organization to act as the agent of the employee or group of employees before the Hearings Tribunal or before a review officer.*  
s. 32 (3)

#### Anonymous Representation

*Where an employee or group of employees advises the Hearings Tribunal or the Pay Equity Office in writing that the employee or group of employees wishes to remain anonymous, the agent of the employee or group of employees shall be the party to the proceeding before the Hearings Tribunal or review officer and not the employee or group of employees.*

*This agent, in the agent's name, may take all actions that an employee may take under this Act including the filing of objections under Part II and the filing of complaints under Part IV. s. 32 (4) -(5).*

### **Ontario Human Rights Code**

- The *Human Rights Code* which covers all Ontario employers regardless of size requires that employers establish and maintain equitable compensation practices. This obligation exists in addition to the *Pay Equity Act* obligations of an employer. The *Code* covers all Ontario workplaces regardless of size and provides a remedy for workers in workplaces with 10 or less employees.

## Unionization

- The quickest and most effective way to get pay equity for non-organized employees is to unionize and then:
  - get a collectively bargained wage which will reduce the wage gap
  - have a union take forward their claim for pay equity under a pay equity law.

## Pay Equity Litigation as a Organizing Technique

- Given the high degree of pay equity non-compliance in the unorganized sector, unions could offer to assist non-organized workers with pay equity litigation as a technique for attracting workers to sign membership cards. As non-organized employers are liable for outstanding pay equity adjustments back to the effective date of their obligations, eg. in public sector back to January 1, 1990, unions can assist workers to achieve substantial wage increases which will set a higher floor for bargaining once organized.

## Charter Litigation

- In Ontario, advances for non-organized workers under the *Pay Equity Act* were mostly made in the public sector where government pay equity funding was available and, where such funding was taken away, *Charter* litigation was conducted by unions to address the problem:

*SEIU Local 204 v Attorney General (Ontario)* (1997) 35 OR 508 O'Leary decision - restored pay equity rights for both organized and non-organized workers in the proxy public sector.

*CUPE et al v. Attorney-General (Ont) Action*. Mediated settlement - restored \$414 million of pay equity funding for proxy sector adjustments for both organized and non-organized workers.

## FEDERAL PAY EQUITY - SECTION 11 CANADIAN HUMAN RIGHTS ACT

- As unions who operate primarily in the provincial jurisdiction in some cases also have bargaining units in the federal jurisdiction, it will be important for them to be aware of the separate pay equity regime that applies to those federal bargaining units.

- The pay equity entitlements of employees under federal jurisdiction are found in the *Canadian Human Rights Act* and particularly section 11 and the *Equal Wages Guidelines* enacted under that *Act*. Unlike the Ontario *Pay Equity Act* which sets out a detailed pro-active scheme to achieve pay equity, the federal legislation sets out a basic right to pay equity and has a complaint-based enforcement system.
- The Canadian Human Rights Commission (CHRC) Website - [www.chrc-ccdp.ca](http://www.chrc-ccdp.ca) - contains the following useful reference documents:
  - *Canadian Human Rights Act and Equal Wages Guidelines*
  - *CHRC Guide to Pay Equity and Job Evaluation*
  - *CHRC Filing a Pay Equity Complaint*
  - *CHRC Implementing Pay Equity in the Federal Jurisdiction*

### **Pay Equity Review Task Force**

- In 2004 the Federal Government's Pay Equity Review Task Force released its Report which sets out detailed recommendations for a new pro-active pay equity statute. The report is available online at:  
[http://www.justice.gc.ca/en/payeqsal/docs/PETF\\_final\\_report.pdf](http://www.justice.gc.ca/en/payeqsal/docs/PETF_final_report.pdf)
- The Task Force commissioned research on a number of key pay equity implementation issues which may be of assistance to unions in both the federal and provincial jurisdictions. Executive summaries of that commissioned research is available at [www.payequityreview.gc.ca](http://www.payequityreview.gc.ca)
- See the Task Force research paper by Mary Cornish, Elizabeth Shilton and Fay Faraday "*Canada's International and Domestic Human Rights Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law* (November 2002). See [www.cavalluzzo.com/publications](http://www.cavalluzzo.com/publications) for a copy.

### **Lobbying for Pay Equity**

Since the Federal Pay Equity Task Force Report was released unions, women's groups and a range of community organizations, organized as the Pay Equity Network, have been lobbying the federal government to adopt the Task Force's recommendations.

“A Legislated Checklist for Substantive Pay Equality” prepared for the Pay Equity Task Force Symposium by Mary Cornish and Fay Faraday. See [www.cavalluzzo.com/publications](http://www.cavalluzzo.com/publications) for a copy.

“From Principle to Reality: Enforcing Canadian Women’s Right to Economic Equality” by Mary Cornish, Veena Verma, and Fay Faraday. Prepared for the International Association of Official Human Rights Agencies, 53rd Annual Conference. See [www.cavalluzzo.com/publications](http://www.cavalluzzo.com/publications) for a copy.