

THE ROLE OF UNIONS IN FURTHERING WOMEN'S EQUALITY

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Part I: Introduction - Women and the Workplace

A. Patterns in Women's Inequality

In principle, employment can improve women's social equality through opportunities for economic independence, personal achievement and dignity through participation in public life.

In reality, however, women's experience in the labour force is marked by discrimination and inequality. Despite a vague public perception that "things" are better for women in the workforce, the gains for women are largely for a small group of white middle class professionals. Rather than widespread advancement for women, structural changes, such as government cutbacks, the trend towards employers contracting out workers or using part-time employees with little or no benefits has resulted in women faring very poorly in the workplace at present.

It is the sad reality that women in general are either working longer hours for less pay and benefits or struggling to find enough hours of work. To list but some of the problems:

- c women are occupationally segregated in female-dominated jobs which are typically undervalued and underpaid. Women tend to be employed in sectors of the labour force, such as retail service and garment industries, where jobs are not secure, not well-paid, often performed in isolation and under unsafe or unhealthy working conditions.
- c Women earn less money than men, sometimes for doing the same work as men or for doing different work of equal value.
- c Women are excluded from or under represented in traditionally male occupations and positions of responsibility.

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- c Discriminatory hiring and promotion practices make it more difficult for women to obtain higher-level and better paid positions.
- c Workplace structures and standards usually do not account for the different sociological and biological realities of women's lives. There are a range of issues related to pregnancy, child-bearing and family responsibilities, including responsibility for raising children and caring for elderly dependents. Women experience more stress trying to juggle work and family responsibilities.
- c Women have breaks in service, or take leaves of absence where available, to deal with their family responsibilities. These interruptions in employment often have a negative impact on women's earning capacity and opportunities for promotion.
- c Women have less access to pensions and receive reduced pensions because of their lower wages and interrupted service.
- c Many women are employed in part-time jobs or for part-time hours of work. Part-time workers usually receive lower wages, few or no benefits, and have less job security.
- c Women experience various forms of resistance and negative treatment, including sexual and racial harassment especially when they enter male-dominated work environments.

B. Responding to Women's Inequality in Employment

The above catalogue of inequalities does not purport to be comprehensive. It is clear that fundamental changes are needed for women to participate on a more equal basis in the labour force. The changes required are also well catalogued.²

- c Women must be paid the same wages for performing the same work as men. Women must be paid wages of equal value for performing work which is different from, but equal in value to, work performed by men.
- c Gender discrimination in hiring and promotion practices and criteria must be eliminated to increase women's access to non-traditional jobs and to positions of greater responsibility.
- c Paid leaves for family and family-related responsibilities, including for pregnancy, child-rearing and caring for adult dependents need to be provided by employers.
- c Sexual and racial harassment policies and procedures need to be consistently developed and implemented.
- c Terms and conditions of employment for part-time workers need to be brought closer in line with those of full time workers.
- c Issues regarding homeworkers need to be adequately addressed.
- c There should be more opportunities for job sharing and flexible work arrangements on

² For more details see: *Bargaining for Equality*. CLC Women's Symposium, November 1-3, 1998 (Canadian Labour Congress Women's and Human Rights Department); *Women and Work* (CLC)

fair and non-discriminatory terms. These arrangements should not turn into full-time jobs for which women are paid part-time wages.

PART II: Unionization as a Tool for Equality

To obtain these changes for women requires significant changes in the workforce. It is our view that these changes are impossible to obtain on an individual basis and require collective action. The vehicle for collective action in the labour force is the trade union.

Unions have not always been agents for equality but there has been a transformation in the labour movement over the last twenty-five years in Canada with more women not only joining unions but becoming activists and leaders in the union movement. In "The Feminist Challenge to the Unions", Linda Briskin and Patricia McDermott noted:

...the relations between women and unions are undergoing a striking transformation at the core of which is the critical recognition of interdependency: women need unions and unions need women. The key demand of women workers for economic independence, that is, for a decent living wage to support themselves, and in many cases their dependents, threatens to be reduced, under the grim reality of economic restructuring, to an urgent call for the right to work. Like men, women workers have always needed unions to help equal the relationship between labour and management, but in this period this need has taken on a desperate edge."³

Women's participation in both the membership of unions and the leadership is growing. Women now represent 45% of all union membership. 2 out of the 6 largest national unions have women presidents and 5 of 11 Federations of Labour are led by women. Union women have spiritedly promoted a feminist agenda within the labour movement for well over two decades. As a result, unions are tackling gender equality issues in a more widespread way and have brought issues such as pay equity for women to the forefront. One very current example is the Public Service Alliance of Canada's (PSAC) victory at the Federal Court of Appeal on October 19, 1999.⁴ This is an example of a union not only initiating the action on behalf of women but of tenaciously defending it, making it a union priority and taking steps to enforce it in the face of extreme pressure from the employer, in this case the federal government.

³ In Briskin and McDermott eds, *Women Challenging Unions: Feminism, Democracy and Militancy*, University of Toronto Press, 1993 at pg. 3

⁴ *Public Service Alliance of Canada v. Canada (Treasury Board)* (unreported case [1999] F.C.J. No. 1531 of Evan J. dated October 19, 1999)

These types of cases, whether they are at the human rights tribunals, in courts or in other tribunals are expensive and complex. Non-unionized individual employees do not have resources to take on employers either initially or to pursue or defence matters through expensive appeals. In Ontario, for example, the burden of developing the case law in the area of pay equity fell on unions such as the Ontario Nurses' Association, the Service Employees International Union, Local 204 and CUPE and the non-unionized workplaces benefitted from the union cases.⁵

Women work in many low pay and, as yet, unorganized workplaces such are retail and fast food. The process of organizing a union can provide opportunities for employees to identify shared concerns and to consider the possibility of working together to address these concerns. Where one or more major issues are identified, these can become the focus for a union organizing campaign.

For example, in a workplace where wage discrimination is a major issue, the prospective union can identify possible strategies to take on this problem such as trying to negotiate pay equity through the collective bargaining process or pursuing a complaint under human rights legislation. Both of these strategies have been used by unions to address wage inequity. In a workplace where sexual harassment is the most immediate concern for women, a union can try to negotiate policies and procedures into the collective agreement and can support complaints using the collective agreement's enforcement provisions.

In the absence of a union, an employer may ignore issues and concerns raised by employees. Non-unionized employees are also more vulnerable to employer authority and may be reluctant to challenge established workplace norms and practices. Not only do individual non-unionized employees have fewer resources, they also have fewer avenues to challenge discrimination: unions can litigate in the forum of arbitrations, human rights tribunals, and courts (for example: appeals, injunctions and judicial reviews). Non-unionized employees for the most part do not have access to the more time sensitive and less formal forum of arbitrations and are forced to rely on the very slow and limited forums of human rights tribunals and courts. Courts will not deal with most ongoing workplace issues, such as discipline or failure to promote, leaving many workplace issues for non-unionized employees with no means to challenge them.

Collective bargaining is a powerful tool. The employer must negotiate terms and

⁵ See for example: *Ontario Nurses' Association v. Regional Municipality of Haldimond-Norfolk* (1989), 1 PER 17; upheld (1989), 36 OAC 276 (Div.Ct.) and (1990), 41 OAC, 148 (C.A.); *Ontario Nurses' Association v. Women's College Hospital* (No.4)(1992) 3 P.E.R. 61; *Service Employees International Local 204 v. AG (Ont.)*, (1997) 35 OR 508 (Ont.Gen.Div.)

conditions of employment for all employees with the union. It is well-documented that employees generally obtain higher remuneration, better working conditions and more job security through unionization. These same benefits have also been documented specifically in relation to women workers:

< Better Wages

*“The average hourly wage of women in unionized jobs was more than \$5.00 (or 31 per cent) higher than the average wage of women in non-unionized jobs ...”*⁶

< Better Benefits

*“Occupational pensions, medical and dental plans and paid holidays are important aspects of the compensation package and noticeable differences between workers in union and non-union jobs are evident... For example, women in unionized jobs are more than twice as likely to be included in pension plans than women in non-unionized positions, and the situation is similar when medical and dental plan coverage is considered.”*⁷

< Negotiated Equality Rights

“Gains for working women flow from the fact that pay and other forms of discrimination have been directly addressed in bargaining as union women have pushed forward an equality agenda... Half of workers covered by major collective agreements now have the protection of a formal sexual harassment clause, more than double the level of 1985, and 60.5% of major collective agreements contain a non-discrimination clause. 27.6% of workers covered by major collective agreements have access to a provision calling for equal pay for work of equal value, compared to just 5.4% in 1985. Many unions have negotiated formal job evaluation plans and elimination or compression of pay grades occupied by lower paid women. Bargaining has resulted in progress on equity issues in the absence of legislative provisions, and has often made resolution of such issues subject to grievance and arbitration procedures.

⁶ Andrew Jackson and Grant Schellenberg, *Unions, Collective Bargaining, and Labour Market Outcomes for Canadian Working Women: Past Gains and Future Challenges* (Canadian Labour Congress, Research Paper #11, 1999) at 10

⁷ Jackson and Schellenberg at 16

Another area of readily documentable progress has been with respect to paid maternity leaves. Today the majority of workers covered by major collective agreements have access to such leaves, often at up to 76% to 100% of normal pay. Provision for paid leaves in excess of 17 weeks have become much more common.

Gains have been made in terms of provisions allowing workers to take time off work to attend parental responsibilities and family care, although in most cases such leave has been provided on an unpaid basis. Several unions have also been able to bargain significant funds for child care. The Canadian Auto Workers, for example, have bargained 4.5 cents per hour for child care, which has been used to establish programs which accommodate the needs of shift workers. The Canadian Union of Postal Workers has also bargained significant funds which have been used to develop innovative, community based child care services. In some cases, the gains made by unions through collective bargaining have been trend setting and exerted pressure on governments to improve labour standards.”⁸

< Job Security and work environment

Unions allow women access to employment protection, recall rights and grievance procedures where they can challenge more than dismissals but also lack of promotions and job opportunities, discipline and a variety of workplace problems. For example, unions have challenged failures to promote qualified women by grieving the matter as sex discrimination at arbitration, have challenged failure to recognize maternity leave as service which counts towards pension benefits.*

Contrary to neo-conservative rhetoric, unionization also promotes democracy in the workplace. There is a well-recognized imbalance of power in the relationship between employer and employee which the presence of a union redresses to a significant extent. In unionized work environments the decision-making processes are usually more formalized and more transparent. Through the union there are more opportunities for employee participation in governing the workplace and employers can be held accountable for their conduct through the grievance arbitration process.

PART III: EMPLOYER OBLIGATIONS TO ADDRESS DISCRIMINATION

⁸ Jackson and Schellenberg at 18-19

* See for example: *Newfoundland Association of Public Employees v. The Queen* (1996) 134 DLR (4th) 1

Human rights legislation and jurisprudence clearly recognizes two forms of obligation on employers to remedy discrimination in the workplace - a “reactive” obligation and a “positive” obligation. The reactive obligation requires the employer to respond appropriately to complaints of discrimination. The positive obligation requires the employer to take proactive steps to determine whether there is discrimination in the workplace and to put in place positive measures to remedy identified inequalities.

The idea that the employer cannot simply wait until a problem arises in order to address discrimination was first articulated by the Supreme Court of Canada in the 1987 *Robichaud* decision.⁹ The *Robichaud* case dealt with the question of whether an employer should be liable for the sexually harassing conduct of its employees. The Court concluded that employers should be liable because they have a positive obligation to maintain a workplace environment free of sexual harassment. A positive obligation requires the employer to take measures to find out whether discrimination already exists and to prevent discrimination in the future.

To take the sexual harassment example, the positive measures an employer should develop include: (1) a written policy which explains what sexual harassment is and the consequences for engaging in these forms of conduct, (2) a clear procedure for dealing with complaints of sexual harassment, (3) procedural safeguards which encourage employees to bring complaints forward and which establish a fair process for investigation, and (4) education and training for managers and employees to ensure that the policy and procedures are clearly communicated.

The positive obligation concept has been now broadly affirmed by the Supreme Court of Canada in the recent *Meiorin* decision - the British Columbia Firefighters case.¹⁰ In this case a Coalition, consisting of LEAF, CLC and DAWN (Disabled Women’s Network Canada) argued that that discrimination law needed to be dramatically revamped and that workplace rules must accommodate women and other groups up front, rather than make exceptions for individuals after the fact. The Court accepted this argument and clearly ruled that the employer has a positive obligation to create equality in the workplace by ensuring that workplace standards incorporate the diverse realities of women and other groups who do not fit the norms established largely with reference to the white, able-bodied men. Specifically, the Court put a positive obligation on employers and rejected the “conventional analysis” in former discrimination cases

⁹ *Robichaud v. Canada (Treasury Board)* [1987] 40 DLR (4th) 577 (SCC)

¹⁰ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU [British Columbia Government and Service Employees’ Union]* (“*Meiorin*”) decision of the Supreme Court of Canada released September 9, 1999

“Under the conventional analysis, if a standard is classified as being ‘neutral’ at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how ‘different’ individuals can fit into the ‘mainstream’, represented by the standard.”¹¹

The Court quoted with approval Sheilagh Day and Gwen Brodsky in critiquing the established power imbalances in the workplace :

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourse of dominance, such as racism, able bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves “normal” to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are “accommodated”.¹²

The Court concluded that standards must incorporate diversity by building it into the workplace rather than waiting for an individual complainant to have the ability to challenge the standard:

“Employers designing workplace standards own an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced.”¹³

Both reactive and positive obligations are important to remedying employment

¹¹ Meiorin at para. 40

¹² Meiorin, para. 41 and Day, Shelagh and Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit” (1996), 75 Can.Bar.Rev. 433

¹³ Meiorin at para. 68

discrimination. The advantage of the positive obligation, of course, is that it can be used to force the employer to look for discrimination instead of placing the entire burden on employees experiencing discrimination to bring this to the attention of the employer.

The union's role is to ensure that the employer complies with its obligations to deal with discrimination in the workplace. Discrimination of course includes not only gender discrimination but discrimination on the basis of race, sexual orientation and disability etc. The various avenues through which unions may seek to enforce the employers obligations are discussed in detail below.

It is also important to remember that discrimination and equality are broad concepts which can encompass all practices and conditions of employment that have a discriminatory impact - whether directly or by way of a so-called neutral or adverse affect impact. For example, improving terms and conditions of employment for part-time workers is a gender equality issue because most part-time workers are women and the impact of these terms and conditions therefore have a disproportionate affect upon women's employment.

PART III: Unions and the Collective Agreement

A. Negotiating the Collective Agreement

The collective agreement is the group "employment contract" the union negotiates with the employer on behalf of all of the employees in the bargaining unit. The collective agreement governs employment rights and benefits for all employees in the bargaining unit. Collective agreements usually have a much broader scope than individual employment contracts. In principle, there is no limit to the issues that can be addressed in a collective agreement (with some exceptions in the public sector where legislation may place some restrictions on the scope of bargainable issues). The tools of collective bargaining such as strikes and picketing means that employees have some power to bargain these broader issues into the contract in the face of employer's resistance.

Some collective agreements adopt legislated standards for equality rights and benefits. For example, a collective agreement may incorporate the prohibition against employment discrimination in human rights legislation, or the pregnancy leave provisions in employment standards legislation. Other collective agreements build upon and expand upon the rights and benefits guaranteed by legislation. As the excerpts from *Unions, Collective Bargaining, and Labour Market Outcomes for Canadian Working Women* quoted above demonstrate, unions bargain on a wide range of issues affecting women's equality in the workplace. A detailed checklist for bargaining women's equality is set out in the Appendix to the CLC publication

Bargaining for Equality which is available through the CLC and on the CLC website.¹⁴

Unions have been able to negotiate provisions for women beyond that set out in the legislation. For example, many unionized workplaces have been able to negotiate “top up” pay and benefits during pregnancy leaves and negotiate leaves in excess of that set out in the various Employment Standard Acts. In the latest round of bargaining between CAW (Canadian Auto Workers) and the “Big Three” Auto manufacturers, the Union was able to negotiate significant childcare subsidies. In the previous round of bargaining they negotiated provisions protecting women employees who were subject to domestic violence, from having adverse employment consequences when they had absences due to their domestic situation.

It is not easy for unions to negotiate these types of provisions and the resistance to pay equity by employers is a clear example of the difficulties that unions face in these types of issues. All Canadian labour relations statutes impose a duty on the union and the employer to bargain in good faith to reach a collective agreement. The good faith bargaining duty generally requires the parties to make reasonable efforts to agree, and prevents either party from pursuing illegal proposals. The bargaining duty is enforced by labour relations boards. These boards have traditionally focused on how the bargaining process has been conducted and on the legality of the bargaining proposals. Labour boards have generally been reluctant to pass judgment on the relative merits of bargaining proposals. In view of the clear obligations on the employer to remedy inequalities in the workplace, however, unions may be able to use the bargaining duty in a proactive way to require the employer to negotiate equality issues with the union. Although unions do not appear to have relied on the bargaining duty for this purpose to date, it is a strategy which may be worth considering. Although the bargaining duty may not apply to the content of any particular bargaining proposal, it may apply where the employer simply refuses to negotiate equality issues with the union or demands concessions in exchange for negotiated equality rights.

Given the reluctance to apply the bargaining duty to the content of bargaining, a labour board might not be prepared to force the employer to agree to a specific proposal put forward by the union on an equality issue. However, the bargaining duty may apply where an employer simply refuses to negotiate equality issues with the union or where the employer demands concessions in exchange for negotiated equality rights. Unions may take the position that because the employer has a positive obligation to remedy workplace discrimination, the employer cannot refuse to bargain equality issues with the employees’ bargaining agent. Unions may also take the position that it is illegal for an employer to press the union to trade equality rights for other collective agreement rights and benefits. Once again, the bargaining duty may not require a particular outcome on a particular issue. However, because the employer has legal obligations to remedy discrimination, it may be illegal for the employer to

¹⁴ CLC website address - www.clc-ctc.ca

demand that its obligations be met at the expense of other rights and benefits. Applied this way, the bargaining duty could require the employer to give a non-concessionary response to a union's bargaining proposal on equality rights issues.

B. Enforcing the Collective Agreement

Courts proceedings and human rights cases are notorious for being slow; it is not uncommon for matters to take 2-6 years to reach resolution. Grievance arbitration is the relatively informal speedy legal process for resolving disputes under collective agreements. There are number of practical advantages to grievance arbitration. The union has control over the process in that it can launch the grievance and can take steps to prevent undue delay in having the case proceed to a hearing (e.g by expediting it under a negotiated provision or under the expedited provisions found in many Labour Relations Acts).

Other practical advantages are that arbitrators and arbitration boards have broad discretion to receive whatever evidence they consider relevant, regardless of whether the evidence could be received by a court. Arbitrators also have broad remedial powers which allow them to award both individual and systemic remedies. The *Marian* case, for example, began with a grievance invoking human rights principles and led to the Supreme Court of Canada establishing important new legal principles for workplace equality.

Any dispute relating to a provision in the collective agreement can be referred to grievance arbitration.¹⁵ Unions have addressed a wide range of issues through grievance arbitration, including wage discrimination, seniority accrual during maternity leave and rights upon return to employment after maternity leave and same sex benefits.

Grievance arbitration has been particularly effective in achieving systemic remedies for with sexual harassment,¹⁵ often through settlement during the course of a lengthy hearing. Systemic remedies can require the employer to develop and implement a sexual harassment policy and procedures, to provide training for supervisors, the provide education for employees and to monitor implementation of the policy.

The labour arbitrator's power to decide a grievance comes from the collective agreement. Arbitrators are, however, also required to apply relevant laws to their interpretation of the collective agreement and to its application to the issues raised by the grievance. Unions have successfully invoked the requirements in human rights legislation to challenge employer conduct and even collective agreement interpretation. For example, arbitrators have held that collective agreement provisions which allow the employer to terminate an employee

¹⁵ e.g. *Canada Post v. Canadian Union of Postal Workers* (Gibson) 27 LAC (3d) 27 (Swan)

after some period of absence from work cannot be enforced against employees with disabilities.¹⁶

To date human rights requirements have been raised most often in connection with discrimination on the basis of disability and sexual harassment. It may be possible for unions to apply these requirements to other issues which are dealt with in the collective agreement in order to expand the scope of rights under the collective agreement. There is a current trend to download the enforcement of employment-related rights onto the collective agreement. Courts have held that the grievance arbitration process should be used to resolve all legal claims an employee may have in connection with a grievance or with a matter which is covered by the collective agreement, including *Charter*, tort and negligence claims.

Recently in *Weber v. Ontario Hydro*,¹⁷ the Supreme Court of Canada reinforced that arbitrations are the proper, and with few exceptions, the exclusive forum for resolving all matters arising out of the unionized workplace. As a result, even matters of tort, formerly dealt with by the court (such as defamation, negligence etc) now could be "grieved". One example is of a B.C. union which grieved that an employer not only wrongfully terminated an employee but committed the tort of "intentional infliction of mental suffering" upon the employee when the employer relied on a false allegation of promiscuity against a female employee in the logging camp. The arbitrator agreed and awarded damages, even when the conduct occurred "off the workplace".¹⁸

The shift to download additional enforcement obligations onto arbitrations places greater burdens on unions and their limited resources. Moreover, it is important for unions and employees to continue to have access to state enforcement of statutory rights and benefits (e.g., through human rights commissions). However, where state enforcement is not available or is ineffective, access to grievance arbitration may provide an avenue for unions to enforce statutory rights and benefits. In Ontario, for example, the Human Rights Commission is largely dysfunctional and recently has used its discretionary powers to deny unionized employees access to its enforcement procedures. At the federal level, the employment legislation does not expressly provide unions with access to its enforcement procedures.¹⁹ The expanded view of the role of grievance arbitration may provide an opportunity for unions to seek to enforce the requirements imposed by these statutes through the collective agreement.

¹⁶ Re: *Ontario Nurses' Association and Etobicoke General Hospital* (1993), 14 OR (3d) 40 (Div.Ct.)

¹⁷ (1995), 125 DLR (4th) 583 (SCC)

¹⁸ *CVC Services and IWA-Canada, Local 1071* (1997), 65 LAC (4th) 54

¹⁹ For a discussion of how unions can seek to participate in enforcing the federal *Employment Equity Act*, see the Canadian Labour Congress' Guild to the *Employment Equity Act*

The interaction between collective agreement rights and negotiated rights is a complex question. This complexity is illustrated by an arbitration decision dealing with a challenge to restrictions on seniority and service accrual for employees who are unable to work due to disability. The arbitration board held that restrictions which negatively affect an employee's access to employment violate human rights legislation whereas restrictions which negatively affect an employee's compensation do not. The Ontario Court of Appeal agreed with the arbitration board and it remains to be seen whether the Supreme Court of Canada will hear an appeal.²⁰

While there may now be opportunities for unions to try to use legislation to build on collective agreement rights, the extent to which human rights requirements can change collective agreement rights and obligations remains an open question. While this strategy is certainly to be considered, it may not be appropriate for labour arbitrators to have the final word on these questions. Labour arbitrators were not traditionally been called upon to deal with equality issues, although this has changed in recent years. Labour arbitrators can be institutionally disposed not to alter the parameters of negotiated rights unless the law clearly requires such a result, particularly if the alteration would dramatically increase the employer's economic obligations. Human rights tribunals on the other hand, where they are available, are generally less concerned with what the parties agreed to and focus on their interpretation of the statutory right. Where unions choose the grievance arbitration route to address equality rights issues, they may need to be prepared to challenge grievance arbitration decisions in the courts and use courts to obtain interim remedies in certain jurisdictions or injunctions.

D. Positive Obligation on Unions

Unions can also be held accountable if they are found to be a party to the discrimination. In the *Central Okanagan School District v. Renand*,²¹ the Supreme Court of Canada held the union as well as the employer accountable for the discrimination when the employer terminated an employee after the union did not agree to an adjustment to a work schedule. This case, while controversial, has increased the incentive on the part of the unions to actually fight for equality issues and has assisted union leadership in convincing its membership of the need to deal directly with discrimination and accommodation issues.

PART IV: Unions and Statutory Rights

A. Enforcing Employment-Related Legislation

²⁰ *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), 92 OR (3d) 692 (C.A.)

²¹ 95 DLR (4th) 577 (SCC)

There are a number of employment-related statutes and provisions in statutes which are fundamental to pursuing equality rights in the workplace. Provisions in human rights statutes dealing with employment discrimination, pay equity legislation, employment equity legislation and employment standards provisions governing pregnancy and parental leaves are the most important. In some instances unions can enforce these rights directly by bringing their own complaint or application. In other cases the union will provide support and representation for complaints or applications initiated by employees.

Unions have been successful in pursuing wage discrimination in jurisdictions with legislative rights and an effective enforcement procedure. Under Ontario's pay equity legislation, unions have been directly involved in negotiating pay equity agreements. Unions have taken complaints to the enforcement tribunals where they believed the employer was not complying with its obligations under the statute.²² In the federal sector, unions have taken pay equity complaints under the provisions of the *Canadian Human Rights Act*, most recently against Bell Canada and the federal government.²³ The Bell Canada case did not reach a hearing on the merits. In the case brought by the Public Service Alliance of Canada, the case went to a human rights tribunal which found wage discrimination and awarded significant pay equity adjustments. The tribunal's award has been resoundingly upheld on appeal by the Federal Court of Appeal.

Union access to enforcing human rights legislation directly through the tribunal enforcement processes has virtually come to a standstill in most Canadian jurisdictions. In Saskatchewan, there has been a challenge to the ability of a unionized employee to bring a sexual harassment complaint to the human rights commission instead of pursuing a grievance under the collective agreement.²⁴ The Saskatchewan Court of Appeal ultimately ruled that the employee could not be denied the right to pursue her human rights complaint. However, the scope of the matters which are held to be within the exclusive jurisdiction of the grievance arbitration process has not been fully resolved. Other challenges to the right of employees and unions to maintain access to state enforcement of statutory human rights may be encountered. If unions continue to be unable to pursue equality rights on behalf of the employees they represent through the human rights adjudication process, it will be essential for labour arbitrators to bring both a human rights and a labour relations perspective to their interpretation of human rights requirements and obligations under a collective agreement.

B. Using the Charter

²² Supra footnote 5

²³ Re: Communication, Energy and Paperworkers Union (CEP) and Bell Canada (1998) 167 DLR (4th) 432 and PSAC, supra footnote 4

²⁴ *Saskatchewan Human Rights Commission v. Cadillac Fairview Corporation*, Saskatchewan Federation of Labour, Intervenor (1999) 173 DLR (4th) 609

To date unions have used the *Charter* in several cases to challenge a government taking away legislated benefits. In Ontario, the Service Employees International Union, Local 204 brought a challenge under s. 15 of the *Charter* when the a new government repealed provisions in the *Pay Equity Act* which the predecessor government had added to provide for a proxy method of pay equity comparison.²⁵ The challenge was successful. The Court at first level held that the government's repeal of these provision did violate the *Charter* and could not be justified. The same government's repeal of the *Employment Equity Act* has also been the subject of a challenge under s. 15 of the *Charter* in which the Ontario Federation of Labour was an intervenor at the Court of Appeal level.²⁶ That case has so far been unsuccessful and is currently awaiting a decision as to whether an appeal will be heard by the Supreme Court of Canada. *Charter* litigation is very expensive and the chances of success are often uncertain.

Where a union represents employees of an employer who is a government actor bound by the *Charter*, the union may consider a *Charter* action as a strategy to force the employer to address discrimination in the workplace. A case of this type was launched against the federal government by several employees who claimed remedies for workplace discrimination.²⁷ No precedent has been set because the case has not been heard on the merits and may be resolved by way of a negotiated settlement.

C. Lobbying

For many years, collective bargaining has taken place against a backdrop of important legislated rights and benefits. In many cases unions have been involved in getting these issues on the legislative agenda and participating actively in the legislative process through which the issues are considered and addressed. Unions may turn to the legislative arena where litigation has failed to deal effectively with an issue or where litigation cannot deal effectively with an issue. The existence of a wide range of legislated rights and benefits is critically important for unions in new collective bargaining relationships, unions dealing with small employers and unions dealing with anti-union employers. Unions have been particularly active in pursuing pay equity and employment equity legislation. They are largely responsible for the passage of pay equity legislation in Ontario and Quebec and continue to pursue this agenda in other jurisdictions.

PART V: Challenges for the Future

Equality issues in employment are under attack, despite gains achieved and victories such

²⁵ *SEIU Local 204 v. A.G. (Ont.)* (1997) 35 OR 508 (Ont.Ct.Gen.Div.)

²⁶ *Ferrell and A.G. (Ont.)* (1997) 149 DLR (4th) 335 (Ont.Ct.Gen.Div.)

²⁷ *Perera v. Canada* (1998), 158 DLR (4th) 341 (FCA)

as the Meiorin case. As Judy Darcy President of the Canadian Union of Public Employees (CUPE), Canada's biggest union, has written:

The bad news is that as neo-conservatism takes hold in Canada, the equality that's been won is being threatened. Our biggest challenge right now is to be vigilant enough so that equality issues aren't pushed to the background because of the obsession with competition and deficiencies and the juggernaut of international capital.²⁸

The good news is that Unions are powerful vehicles through which woman can work to achieve greater equality in employment. Women are now more active in unions in both membership and leadership roles, as Judy Darcy's career illustrates. Unions are trying to achieve gains in women's equality issues and although they face both the equality backlash and, in some jurisdictions, neo-conservative agendas to weaken both union representation rights and legislative employment rights and benefits they are in many cases being both persistent and successful in equality issues. The recent victories pay equity against a government that seems hellbent on not making the payments to woman that the law requires are examples of unions providing both leadership and resources towards equality issues that we should all be proud of.

To improve the situation for woman at work this energy must continue. Becoming unionized is the best vehicle available to women to pursue an employment equality rights agenda. The time to "up the ante" and put pressure through collective bargaining is now. We cannot afford to wait. Unions need women and women need unions.

²⁸ Page IX, of Women Challenging Unions, supra note 3