CITATION: Participating Nursing Homes v. Ontario Nurses' Association, 2019 ONSC
DIVISIONAL COURT FILE NO.: 444/16 and 445/16
DATE: 2019-04-30

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Morawetz R.S.J., Backhouse, Gordon JJ.

BETWEEN:	
Participating Nursing Homes, Applicant	*Marco Falco/David Golden*, for the Applicant, Participating Nursing Homes
AND:	
Ontario Nurses' Association, Respondent	*Janet Borowy/Danielle Bisnarl Andrea Sobko* for Respondent, Ontario Nurses' Association
AND:	
Service Employees International Union, Local 1 Respondent	*Paul J.J. Cavalluzzo/Adrienne Telford/Lara Yeo* for Respondent, Service Employees International Union, Local 1
	Carolyn L.Kay/Frank Cesario for Intervener, Attorney General of Ontario
	Fay Faraday, for Intervenor, Equal Pay Coalition
	Aaron Hart/Andrea Bowker for Intervener, Pay Equity Hearings Tribunal
	HEARD at Toronto: February 5-7, 2019

REASONS FOR JUDGMENT

THE COURT

Overview

[1] The Participating Nursing Homes ("PNH") seek judicial review of the Order of the Pay Equity Hearings Tribunal (the "Tribunal") dated January 21, 2016. They ask that we quash that part of the Tribunal's decision requiring the parties to negotiate amendments to their pay equity plan. They seek a declaration that the *Pay Equity Act*, R.S.O. 1990, c.P.7 (the "*Act*") does not require them to further negotiate their maintenance obligation with the Unions by tying the maintenance obligation to how the proxy employer historically valued "male" jobs in its establishment in 1994.

Background

[2] The PNH are employers who operate up to 143 nursing homes in Ontario. The Ontario Nurses' Association ("ONA") is the bargaining agent representing about 2100 registered nurses and allied health professionals working at the nursing homes. The Service Employees International Union Local 1 ("SEIU") is the bargaining agent representing a range of health care workers in the nursing homes, including registered practical nurses, personal support workers and health care aides. (Collectively ONA and SEIU are referred to as "the Unions".) Employment in the nursing home sector is predominantly female.

[3] The *Pay Equity Act*, R.S.O. 1990, c.P.7 (the "*Act*") came into force in January of 1988 and was intended to redress issues of systemic gender discrimination in compensation. Initially, the *Act* only provided for a means of establishing pay equity across the same employer by comparing male job classes to female job classes in the same establishment (known as the "job-to-job" method of comparison). It soon became obvious that this method was not suitable for addressing issues of pay equity in predominantly female workplaces because in such workplaces there are no, or too few, male comparators. This left workplaces with insufficient male comparators unable to redress pay inequities within their establishments.

[4] Recognizing this concern, amendments to the *Act* were proclaimed in July of 1993 providing for, among other things, a "proxy methodology" for achieving pay equity in workplaces where little or no men's work is performed. Under this methodology a key female job class in one employer's workplace (the "seeking employer") is compared to an analogous female job class in a different employer's workplace (the "proxy employer") where pay equity has already been achieved by way of job-to-job comparison with a male job class. The female job class from the proxy employer is valued pursuant to a gender neutral comparison system ("GNCS") and its relationship to

compensation is determined. The key female job class is valued pursuant to the same GNCS and its relationship to compensation is determined. Pay equity is achieved for the key female job class by adjusting its compensation so that the same compensation/value relationship exists for both the key female job class and the proxy female job class. The key female job class is then treated as though it is a male job class in the seeking employer's establishment, and its compensation/value relationship is extended to the other female job classes there in the same manner.

[5] The *Act* requires every seeking employer to prepare a pay equity plan, and prescribes the required contents. Among those contents are the following:

- A description of the GNCS used for the purposes of making the comparisons.
- A description of the methodology used for the calculations required by the comparisons.
- The value of the work performed in each job class that was compared with another job class.
- The results of the comparisons.

[6] In 1995, the PNH and the Unions centrally negotiated and executed a pay equity plan for the entire nursing home sector using as the proxy employer "Unionized Municipal Homes for the Aged Across Ontario" ("Municipal Homes"), and designating the employee group known as health care aides as the key female job class and proxy female job class. They agreed that a total weighted average adjustment of $1.50 per hour would achieve pay equity for the health care aides in the employ of the PNH, and agreed upon a schedule for implementation of the increase. Contrary to the *Act*, the parties did not agree on a GNCS, did not use a GNCS to evaluate job classes in the PNH and proxy female job classes, and did not undertake any proportional value exercises to ascertain the compensation/value relationships or how they compare. The various adjustments contemplated by the pay equity plan were implemented with the result that by 2005, pay equity had been achieved.

[7] Over time, the Unions noted four significant changes within their workplaces: (1) A new legislative framework within which the PNH was required to operate; (2) New education requirements for its members: (3) Steadily increasing acuity of the residents; and (4) More medical services required to meet the rising needs of the residents. At the same time, they noted that wage gaps were re-emerging between employees of the PNH and comparable employees of the Municipal Homes to which the comparison had originally been undertaken.

[8] Considering the added responsibilities of their members and the wage gap that had re-emerged, the Unions concluded that pay equity was not being maintained. They reasoned that whereas female job classes in the Municipal Homes had continuing

comparison to male job classes with appropriate ongoing changes in compensation, the female job classes in the PNH had no male job class with which to compare, no ongoing comparison with a proxy female job class, and no commensurate changes in compensation.

[9] The PNH disagreed, taking the position that they had achieved pay equity as required by the *Act,* which contemplated a one-time comparison with a female job class in a proxy establishment. Until final argument before the Tribunal both PNH and the Attorney General of Ontario took the position that there was no duty to maintain pay equity on employers who achieved pay equity using the proxy method. During final argument before the Tribunal they acknowledged the obligation to maintain pay equity but took the position that the *Act*, properly interpreted, does not require ongoing comparison to a proxy establishment and pay equity could be maintained by an internal relativity approach within each establishment without any reference to the external proxy comparators.

[10] The Unions applied to Reviewing Services of the Pay Equity Commission. In a decision dated August 5, 2010, the Senior Review Officer addressed the ONA's application, and found as follows:

> There is no language in Part III.2 of the Act requiring seeking employers to request new or updated information from the proxy employer and timeframes or conditions to trigger the requirement. The collection of data from the proxy employer was required to be a one-time only occurrence; and it was required for a single use – to provide the parameters for a key female job class wage line; pay equity is achieved on the basis of the key female job class wage line and as such is internalized to within the seeking employee's control and constrained to the seeking employer's compensation practices.

[11] In a decision dated August 26, 2010 the same Senior Review Officer ruled on the SEIU's application and reached the same conclusion.

[12] The Unions applied to the Tribunal, objecting to the findings made by the Senior Review Officer. Before the Tribunal, the Unions took the position that there is a statutory duty on the PNH to maintain pay equity through the proxy comparison method, and, to the extent the *Act* does not so require, it contravenes section 15 of the *Canada Charter of Rights and Freedoms*.

The Decision of the Tribunal

[13] The Tribunal held that employers have the obligation to maintain pay equity regardless of the methodology of comparison used, and that, generally speaking,

maintenance requires on-going monitoring of changes in the compensation and the value (the amalgam of skill, effort, responsibilities and working conditions) of the job classes being compared.

[14] However, in the case of proxy plans, the Tribunal held that maintenance does not require the monitoring of changes to the value or compensation of the female job classes in the proxy establishment. It held that to do so would be inconsistent with the over-riding principle that the *Act* mandates each individual employer to whom it applies to ensure that its own compensation practices are free from gender discrimination. Instead, it ruled that what is required is monitoring of the compensation and value relationship of the non-key female job classes and key female job class as compared to the compensation/value relationship (PV line) that had already been determined to provide for pay equity.

[15] The Tribunal went on to observe that although the pay equity plan agreed upon by the parties may have achieved pay equity, it did so without identifying or applying a GNCS. Provided the skill, effort, responsibility and working conditions of the female job classes in the PNH remain unchanged and they receive the same percentage compensation increases, the absence of the GNCS analysis would have no impact on the maintenance of pay equity. However, where there are changes in the clientele and duties performed in the workplace, the value of the various job classes may well be impacted. Those changes may make the existing pay equity plan inappropriate because the pay equity consequence of it can only be ascertained by evaluating the job using a GNCS.

[16] Because the selection and implementation of a GNCS are matters the *Act* contemplates will be negotiated between the parties, the Tribunal directed the parties to "negotiate and endeavor to agree on an amendment to the $1.50 Plan to stipulate a GNCS, and to apply that GNCS to determine whether any maintenance adjustments are required". It then adjourned the hearing to allow the negotiation to take place.

Jurisdiction

[17] This Court has jurisdiction to hear this matter under ss. 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

Standard of Review

[18] The parties agree that the appropriate standard of review is reasonableness.

The Positions of the Parties

[19] The PNH argued before the Tribunal that pay equity should be maintained by an internal relativity approach within each establishment with no ongoing comparison to a

proxy establishment. PNH now challenge the internal relativity approach ordered by the Tribunal on the basis that it may result in pay adjustments unrelated to gender. The PNH fail to identify any method for maintaining pay equity for women in predominantly female workplaces. The PNH argue that the amendment to the pay equity plan required by the Tribunal is unreasonable because: (a) It has no basis in the language of the *Act*; (b) It is not supported by a purposive analysis of the *Act*; and (c) It is not supported by a contextual analysis of the *Act.* PNH submit that to require it to establish a GNCS to 1994 circumstances imposes an onerous if not impossible task. PNH seek a declaration that the *Act* does not require them to maintain pay equity by continuing to be tied to the pay equity gap identified by comparison to how the proxy employer evaluated male jobs in 1994.

[20] The Unions are of the view that pay equity can only be maintained in female dominated workplaces by periodic comparison to a deemed male job class. They agree that what is required is an ongoing analysis of both the value of the job classes in question (having regard to a GNCS) and the compensation being paid, but that the comparison must extend beyond the female job classes in the PNH to the proxy female job class used to achieve pay equity in the first place.

[21] The Unions accept PNH's argument that under the internal maintenance process ordered by the Tribunal, any time there is an increase in "the skill sets, years of experience and educational levels" (i.e.value) of the key female job class at the seeking employer's establishment, a corresponding pay equity adjustment is required which may have nothing to do with wage discrimination against women.

[22] The Unions take the position that PNH's complaint underscores the fundamental importance of a male comparator in determining pay equity adjustments and that it is not possible to determine whether there is, in fact, a discriminatory pay gap without a comparison between female and male jobs. They submit that if pay equity in predominantly female workplaces is maintained through the proxy comparison methodology, there would be no need for PNH to apply a GNCS to 1994 circumstances. Rather, the GNCS and proxy comparisons would be applied from 2010, the date the pay equity gap is alleged by the Unions to have re-emerged.

Analysis

[23] Section 4 of the *Act* codifies its purpose: to redress systemic gender discrimination in compensation for work performed by employees in female job classes. To "redress" means to remedy or set right. The means by which systemic gender discrimination in compensation is to be remedied or set right is threefold: (1) Employers must identify if such discrimination exists in their establishments; (2) To the extent such discrimination is identified, employers must increase compensation for the female job

class(es) affected; and (3) Employers must establish and maintain compensation practices that provide for pay equity in their establishments.

[24] There are specific provisions in the *Act* directing employers how to identify systemic gender discrimination in compensation in their establishments. There are specific provisions in the *Act* directing employers how to eliminate gender discrimination in compensation that is identified.

[25] In our view, the wording of section 7 of the *Act* is of critical importance. It is the provision the parties point to as requiring that pay equity be achieved and maintained.

> 7(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.

Although achievement and maintenance of pay equity may be the effective outcome of the section, what it requires of employers is that they establish and maintain *compensation practices* that provide for pay equity.

[26] "Compensation practices" are nowhere defined in the *Act*. We would define compensation practices as the means by which compensation is determined and paid. What the *Act* requires, then, is that on an ongoing basis each employer has a means of determining compensation for its employees that ensures there is no gender discrimination in their compensation.

[27] Gender discrimination in compensation is identified by the means prescribed in section 4 of the *Act*: undertaking comparisons between job classes in terms of compensation and in terms of value of the work performed. Section 5(1) of the *Act* provides that the criterion to be applied in determining value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed, and Section 21.15(3) of Part III.2 of the *Act* requires that the comparisons be carried out using a GNCS.

[28] In effect, the *Act* prescribes the *compensation practice* required to ensure that pay equity is achieved. It requires assessment of two factors affecting each job class: (1) the compensation being paid; and (2) the value of the work as established by a GNCS. In our view it was entirely reasonable for the Tribunal to have ordered that the same compensation practices be maintained in order to ensure pay equity on an ongoing basis.

[29] The Tribunal's finding that an employer's duty to maintain pay equity is ongoing is established law and not challenged in this judicial review. This duty includes the "ongoing responsibility" to "ensure[] that compensation practices are kept up-to-date

and remain consistent with pay equity principles", including "reviewing job classes regularly to capture any changes to job duties and responsibilities, which may require pay equity adjustments".[1] These duties apply equally to PNH and the Municipal Homes, because they are both public sector employers subject to the *Act*.

[30] Dealing specifically with the arguments presented by the PNH, for the reasons above, we do not agree that the order of the Tribunal has no basis in the language of the *Act*. Nor do we agree that the order is unsupported by a purposive analysis of the *Act*. To the extent legitimate differences in compensation may exist for reasons other than gender discrimination, Section 8 of the *Act* specifically provides that the *Act* does not apply so as to prevent differences in compensation between job classes if the employer is able to show that the difference is the result of a variety of different factors, including a formal seniority system, a merit compensation plan, a skills shortage causing a temporary inflation in compensation, or a difference in bargaining strength. Finally, we do not agree that the order cannot survive a contextual analysis of the *Act*.

[31] The Tribunal came to the conclusion that the PNH's obligation to maintain pay equity does not require continuing comparison through a proxy employer. In another decision being released concurrently[2], we held that the matter should be remitted to the Tribunal to specify what procedures should be used to ensure that the claimants who achieved pay equity through the proxy methodology continue to have access to a male comparator in order to determine whether pay equity has been maintained.

[32] With ongoing access to a male comparator, there will be no need for PNH to apply a GNCS to 1994 circumstances. Proxy comparators will be applied from the date the pay equity gap is alleged to have re-emerged. Although establishing a GNCS at the date the pay equity gap is alleged to have re-emerged may pose some challenges, there is no evidence before us to establish that the task would be particularly onerous or impossible. In any event, it was the obligation of the employer to prepare a pay equity plan in compliance with the *Act*. It failed to do so. Its position now that it should be relieved of the obligation because it would be too onerous rings hollow.

Conclusion

[33] The PNH's application for judicial review is dismissed. The Tribunal's decision directing the parties to negotiate a GNCS and determine whether any maintenance adjustments are required shall be done in conjunction with the procedures to be specified by the Tribunal in accordance with our decision being released concurrently that ensure that the claimants who achieved pay equity through the proxy methodology

---

[1] Decision, para.110, citing *Call-A-Service Inc.*, ONA ABOA 362/16,T3,para.25\
[2] *Ontario Nurses' Association v. Participating Nursing Homes* 2019 ONSC 2168 (Divisional Court Files 362/16 and 364/16)

continue to have access to a male comparator in order to determine whether pay equity has been maintained.

[34] The parties have advised that no costs award is required.

Morawetz, R.S.J.

Backhouse J.

Gordon J.

Date: 30 April 2019

CITATION: Participating Nursing Homes v. Ontario Nurses' Association, 2019 ONSC
DIVISIONAL COURT FILE NO.: 444/16 and 445/16
DATE: 2019-04-30

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Morawetz, R.S.J., Backhouse, Gordon JJ.

BETWEEN:

Participating Nursing Homes,

Applicant

AND:

Ontario Nurses' Association,

Respondent

AND:

Service Employees International Union, Local 1

Respondent

REASONS FOR JUDGMENT

Released: April 30, 2019