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BY COURIER

February 29, 2008

Ontario Federation of Labour
15 Gervais Drive, Suite 202
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Attention: Irene Harris, Secretary-Treasurer

Dear Irene:

Re: Legal Opinion on Pay Equity Maintenance Rights and Obligations

As you requested, we write to provide our opinion which summarizes key rights and obligations unions and employers have to maintain pay equity under the *Pay Equity Act ("Act")*. We understand that the Federation is particularly concerned about the recent erroneous statements and orders of the Pay Equity Commission ("Commission") which have minimized both the proactive and extensive nature of these obligations and the involvement of bargaining agents in this process. This letter summarizes why these positions do not comply with the *Act*. For more detailed information, see CHSMC's Guide to Maintaining Pay Equity Resource Guide which can be found at http://www.cavalluzzo.com/publications/index.html. See also the enclosed CHSMC Bargaining Agent Pay Equity Checklist.

1. Achieving and Maintaining Pay Equity

The *Act*'s Preamble states that "affirmative action" is necessary to "redress gender discrimination in the compensation of employees employed in female job classes in Ontario". The *Act* requires employers and bargaining agents to work together to first achieve pay equity by identifying where and by how much women's work (female job classes) have been undervalued and underpaid in relation to comparable male job classes. The Pay Equity Plan sets out the results of this comparison and the adjustments needed to close any gender pay gap. Recognizing that compensation discrimination is systemic, the *Act* does not stop at this "achievement" phase. It requires the workplace parties to "maintain" pay equity by ensuring that

the pay gap does not widen. This includes monitoring for changes in work and gender incumbency of job classes, the creation of new jobs and employers and the elimination of male comparator jobs. The Pay Equity Hearing Tribunal's case law has repeatedly indicated that pay equity is not a one shot deal. Making sure pay discrimination is ended requires pro-active and ongoing maintenance actions indefinitely into the future by both employers and unions with assistance and enforcement by the Commission and the Tribunal.

2. Closing Ontario's Ongoing Gender Pay Gap

What is the problem unions are facing in maintaining pay equity? While some progress has been made, there are still widespread pay inequities. Ontario women still earn on average 29% less than men. It would be difficult to find any Ontario public or private sector workplace where the structure and conditions of women's and men's jobs are the same as they were 20 years ago when unions and employers first negotiated pay equity plans. Most plans have never been amended to reflect these changes. Many women have seen their pay equity gains eroded. Many job classes no longer exist or have greatly changed. Many new job classes have never been subjected to any review. As well, most new employers failed to set up their workplaces with pay equity compliant pay as the *Act* requires. Stereotypes and prejudices against women's work continue to result in women taking home each week less than they are worth. The promise of pay equity remains elusive for many women.

Given the employer's primary responsibility for ensuring pay equity, the constant workplace change and the systemic nature of the discrimination, the onus should be on employers to show the steps they have taken to maintain pay equity since the early 1990's. Yet, the Commission recently appears to wrongly assume the early 1990's status quo, placing a heavy onus on unions and employees to prove change has taken place before it will take action.

3. Right and Obligation to Negotiate Pay Equity Maintenance

The obligation and right of unions to negotiate the maintenance of pay equity with employers flows both from the *Act* directly including sections 7, 13, 14.1 and 14.2 and also from the provisions of the *Labour Relations Act* ("*LRA*") and the *Human Rights Code ("Code").*

a. Sections 7, 13, 14.1 and 14.2 of the *Act*

Section 7 sets out the key obligation to achieve and maintain pay equity.

> 7. (1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.(emphasis added)
>
> (2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).

Section 7 prohibits the union and the employer from bargaining for or agreeing to any compensation practice that would contravene the *Act.* In other words, a pay practice that does not establish or maintain pay equity. Sections 13, 14.1 and 14.2 also address maintaining pay equity in the context of a Sale of Business or Change in Circumstances. Under section 14.1 where the union has given notice that because of changed circumstances a pay equity plan is

no longer appropriate, the parties must try to reach agreement on the change and failing agreement, notice of the failure is given to the Commission. Without consent, the Plan cannot be amended until a ruling is made. With respect to Sale of a Business under section 13, if the Pay Equity Plan is no longer appropriate to the new business, the new employer must negotiate with the bargaining agent to amend the Plan. Section 7 also apples to pay equity plans which were achieved using the proxy comparison method. Regardless of the method used to achieve pay equity, comparable women's and men's work must continue to be paid the same and if not, adjusted.

This obligation to maintain pay equity is no less compelling than the requirement to achieve it. Given the affirmative requirement to end pay discrimination and the broad wording of section 7, maintaining pay equity requires focused and powerful processes and remedial orders by the Commission and the Tribunal, similar to the early 1990's Tribunal orders which set the parameters for achieving pay equity. While there are some important Tribunal maintenance decisions, many unions such as CUPE, OPSEU, USW1998 and SEIU are currently bringing forward cases to the Tribunal challenging Review Officer orders and these Tribunal decisions will establish important new maintenance precedents.

b. *Labour Relations Act* and *Human Rights Code* Obligations and Rights

Pursuant to the *LRA,* the employer has the obligation to negotiate exclusively with the bargaining agent concerning all matters which affect the compensation of those job classes. Employers are therefore not permitted to change the pay of female job classes without the consent of a bargaining agent or a ruling under the *Act.* In order for the Union to carry out its representational responsibilities and be appropriately satisfied about consenting to any change in pay, the Union must be an active participant in that process. The equality obligations of the workplace parties also inform the *Act*'s requirements. Under the *Code*, and the *LRA,* unions are required to carry out their representational obligations in a manner which promotes the employment equality of women. This includes the *Code* obligation of the employer to work with the union to ensure that workplace compensation standards and rules are designed to be free from gender discrimination.[1]

4. Joint Union Employer Maintenance Processes

As noted above, maintaining pay equity is required to be a regular part of the compensation practices of an employer and the monitoring and negotiating practices of trade unions. The need for joint pay equity maintenance processes and committees flows from a number of different obligations. Most importantly, they are the concrete expression of the employer's responsibility to bargain any changes to the pay equity plan with the union.[2] Many of the original gender neutral comparison systems (GNCS) required by the *Act*, provided for the use of the a joint pay equity process/committee as an essential feature of arriving at gender neutral evaluations and adjustments. Pay Equity Commission orders have recognized that the original GNCS should continue to be applied to maintain pay equity. As a result, on this ground alone, a joint process involving workers should continue to be used by employers as a required feature of the pay equity maintenance process.

Such committees are also necessary to ensure that the pay equity maintenance process is

suitably informed by the job knowledge of workers. The Tribunal has found this is often the most reliable source of knowledge about women's work, as distinct from the views of supervisors and human resource personnel who currently dominate the compensation process.[3] Joint processes and committees also help parties to distinguish between negotiations for regular wage increases and those to ensure pay equity is maintained. This lessens the risk that female job classes fail to receive their required maintenance adjustment or if they receive it, lose out on getting their regular pay adjustment. This is especially important since regular wage adjustments do not count as maintenance adjustments and pay equity adjustments must be paid on top of collective bargaining adjustments.[4] The Commission and the Tribunal have repeatedly endorsed separate bargaining for pay equity and collective bargaining while keeping open the possibility that the parties may combine the two if they properly separate out the distinct bargaining interests.

Unfortunately, most employers disbanded their joint committees after the original Pay equity Plan was posted. It fell to Unions to struggle to have those Committees recreated as maintenance committees with a mandate to monitor the compensation of old and new female and male job classes to make sure the pay gaps did not widen again and that new or changed job classes were being paid equitably. Many employers took the position that they alone were responsible for pay equity maintenance. Others agreed to set up maintenance committees but then disputes arose as those committees tried to carry out their maintenance mandate. Other employers just ignored the *Act* altogether.

For many years, bargaining agents pointed recalcitrant employers to the PEC's Guides, *Maintaining Pay Equity Using the Job-to-Job and Proportional Comparison Methods* and *Maintaining Pay Equity Using the Proxy Comparison Method.* These Guides recommended procedures including the creation of joint pay equity Maintaining Committees in order to carry out a comprehensive process for monitoring workplace change and compensation practices. Over the last year, the Commission has removed these Guides from its website. In addition, a special May 2007 Commission Newsletter announcing "changes" which included that "there is no requirement in the *Pay Equity Act* for parties in a unionized environment to have a Maintenance Agreement" and stating that the Commission would not open a file or assign an Officer to assist in this type of negotiation or dispute. Instead, the Commission stated it would only assist parties where there was a signed agreement in place which "confirms that there are sufficient changes in circumstances so as to render the existing plan inappropriate and a summary of the changes" and the " commencement date for any adjustments which may be necessary as a result of the implementation of the amended plan". The Newsletter states that the Review Officers will not generally undertake settlement efforts if the union does not first prove that the employer's maintenance practices have led to a widening of the wage gap or whether new gaps have been created in contravention of the *Act.* When the OFL challenged these statements in a letter to the Pay Equity Commissioner, the Commissioner's July 25, 2007 response reiterated these positions.

For all the reasons set out above, these Commission positions reflect a fundamental misapprehension of the systemic nature of gender-based pay discrimination and the requirement for proactive steps to root out ongoing pay inequities. The also fly in the face of the specific provisions in the *Act* requiring the employer to negotiate changes to the original plan with the bargaining agent. [5] As is clear from the above-noted review of the requirements

of the *Act,* the *LRA,* and the Code, negotiating pay equity maintenance is not only consistent with and required by Tribunal jurisprudence but flows from the other representational and equality promoting legal obligations of the workplace parties. The Commission's reversal of its earlier approaches also reflects a failure to properly understand that the pay equity, human rights and collective bargaining responsibilities of employers and trade unions are inextricably linked and mutually reinforcing.

Union Right to Information

The Tribunal has clearly established that the bargaining agent is entitled to the information necessary to permit it to discharge its negotiation obligations under section 14 of the *Act* which refers to the negotiation of the pay equity plan for the achievement phase. [6] As set out above, a bargaining agent's negotiation responsibilities flow beyond the original Plan. Accordingly, the reasoning behind requiring disclosure of information to the bargaining agent for the achievement phase, also extends to the maintenance phase. Unions will not be able to carry out the obligations set out in this letter without the ability to require the employer to disclose the necessary information to monitor pay equity relevant matters such as workplace job and pay changes. As stated by the Tribunal in the context of the achievement phase, unions are entitled to sufficient information to intelligently appraise the City's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. Neither party should negotiate "in the dark". Disclosure must be made at all stages of negotiating pay equity so that informed choices can be made.[7]

The Tribunal has found that a newly certified union is entitled to all the information necessary to carry out their representational responsibilities and this includes pay equity information.[8] Such information includes documentation which would allow the union to verify whether the previous steps taken by the employer when non-union were pay equity compliant and to determine what current and future steps need to be taken to ensure ongoing compliance.

The Commission has recently wrongly stated in a USW Local 1998 order that a University of Toronto union is not entitled to requested information prior to its certification as its responsibilities are only forward looking. Again, this misunderstands what information is necessary to ensure pay equity compliance. A union should be entitled to the non-union pay equity implementation information, (including ratings, questionnaires, etc) as well information setting out any attempts by the employer to maintain the original non-union plan and documentation concerning changes to jobs and pay. This order is presently being challenged before the Tribunal.

Union Liability

Where the Union does not carry out its equality obligations under the *Act,* the *Code* or the *LRA* affected individual members of its bargaining units can legally challenge its conduct. Signing collective agreements which include discriminatory pay could be challenged if the Union does not take simultaneous steps to challenge the pay inequity under the *Act.*[9] Neither employers or unions are entitled to contract out the of the provisions of the *Act.*[10] The deemed approval sections of the *Act* relating to the original pay equity plans do not insulate the parties from the

failure to maintain pay equity.[11] There is no time limit on filing complaints.

Conclusion

It is clear from the above review of the law that bargaining agents have serious, pro-active and wide-ranging legal responsibilities in the area of pay equity maintenance. Employers are required to negotiate with such bargaining agents to maintain ongoing pay equity compliance. The Commission's recent positions and orders to the contrary are wrong. They are being challenged at the Tribunal and should by resisted by unions should employers insist they be followed.

Yours truly,

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Mary Cornish

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enclosure

CASES CITED:

1. *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, (1999), 176 D.L.R. (4th) 1

2. *Ottawa Board of Education*, (No.2) (1995) 6 P.E.R. 45.)

3. See *ONA v. Haldimand-Norfolk (No. 6)*, 2 P.E.R. 105

4. *Glengarry Memorial Hospital (No. 2)* (1992), 3 P.E.R. 34

5. See *Ottawa Board of Education*, above.

6. See *OPSEU v. Cybermedix Health Services Ltd.* [1989] O.P.E.D. No. 4 at para.20.

7. See *St. Joseph's Villa*, (1993) 4. P.E.R. 33

8. See *St. Joseph's Villa*, above.

9. See *Welland County General Hospital (No.2)*, (1994), 5 P.E.R. 12

10. *Ontario Northland Transportation Commission v. Transportation Communications International Union, Lodge 1463* (1992), 3 P.E.R. 166 (P.E.H.T.); affirmed (1993), 4 P.E.R. 19 (Div. Ct.)

11. See *Ottawa Board of Education* above, at para 34.