Top 10 Pay Equity Compliance Myths

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INTRODUCTION

This is a quick reference tool that reviews the "Top 10 Pay Equity Compliance Myths" to assist you when enforcing pay equity in your workplace. The myths are not based in law and are often used to justify on-going systemic gender discrimination in compensation with the result that women's wages are kept artificially low.

This tool helps to explain the main myths and points you in the direction of helpful resources including the CHSMC *Trade Union Guide to Enforcing Pay Equity*.

If you hear an employer saying one of these phrases, it is highly likely that there is a violation of the *Pay Equity Act*.

MYTH # 1   *"Pay Equity Act was a '90's thing"*

No. Ontario's *Pay Equity Act* came into effect on January 1, 1988. From that point forward, employers are required to have gender-inclusive compensation practices which establish and maintain pay equity. Any wage gaps that existed at that time were to be eliminated and new wage gaps were not allowed to be created. Employers, back in 1988, both in the private and the public sector, were given reasonable time frames within which to post pay equity plans and to eliminate those gaps.

Where a pay equity gap was found to exist, employers were required to make pay equity adjustments up to at least 1% of payroll. In the public sector, these adjustments were to be paid out fully by January 1, 1994. However, there is no legislated date by which pay equity must be achieved in the private sector and the broader public sector which used the proxy comparison method. In these sectors, pay equity adjustments continue at the rate of at least 1% until the wage gap is closed. Pay equity is an on-going obligation.

In 1995, the Conservative government repealed certain sections of the *Act* including the proxy comparison methods and some employer erroneously think that the repeal still stands. However, in the 1997 *SEIU Local 204 v Attorney-General of Ontario* case the Ontario Court of Justice struck down this repeal of the proxy comparisons as violating section 15(1) of the Canadian Charter of Rights and Freedoms.

New employers who set up operations after January 1, 1988 are required to have pay equity compliant wages in place from the date they started up. Certainly during the '90's there was enormous activity by employers and unions to create pay equity plans, to assess whether a job class was female or male, to analyse the compensation practices and then pay adjustments were required. However, with the gender pay gap at 29%, the need for pay equity to identify and redress systemic gender discrimination in compensation practices is far from over.

MYTH # 2 ***"Pay Equity is completed only once"***

No. Pay Equity come into effect in 1988, but the process and the legal obligations to achieve and maintain pay equity are continuous. Pay equity is an on-going legal obligation and must be maintained.

The *Employment Standards Act* sets the minimum wage, the requirement for equal pay for equal work and the floor that no employer may legally pay below. The *Ontario Human Rights Code* also bans gender pay discrimination.

The *Pay Equity Act* sets the minimum requirement and on-going obligation of employers to pay equal wages for work of equal value.

Section 7 of the Pay Equity Act sets out that

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

The requirement to maintain pay equity means that once pay equity gaps have been identified in the achievement phase, the gaps are not allowed to widen and any new discriminatory wage gaps must not be allowed to re-open.

MYTH # 3 ***"Our pay equity plan is frozen or sealed, never to be re-opened"***

No. Once a pay equity plan was negotiated between an employer and a bargaining agent and agreed to by the parties, Section 14(5) of the *Pay Equity Act* sets out that the plan shall be "deemed approved" by the Commission. There was no requirement to send a copy of the plan to the Pay Equity Commission.

A pay equity plan is a living document. The plan cannot be kept in a drawer and out of sight. The Act requires that the plan be implemented and this requires the parties to review the plan to ensure that it is enforced and that the plan does not violate the *Act*. As well, this myth may not be relied up as an excuse not to review the plan for pay equity maintenance purposes.

Here are some of the basic questions to consider to evaluate whether your pay equity plan may require maintenance, updating and renegotiation: Are the job rates for the female job classes at least equal to those of the male job classes identified in the pay equity plan and this consistently been the case from the date that pay equity was achieved under the plan? If there have been changes in the workplace, have these "changed circumstances" that render the original pay equity plan no longer appropriate? Has the pay equity gap widen or a new gap to emerged? For example, have new job classes been created; or male comparator job classes eliminated; or significant changes in the duties of existing job classes; a new union certification; or a new employer bought the business?

Sections 7, 13.1 and 14.1 of the *Pay Equity Act* provide the authority for revision and renegotiation of your pay equity plan where there are such changes.

Finally, where there are changed circumstances, the employer cannot later use the change of circumstances as a defence to a failure to maintain pay equity.

MYTH # 4 ***"The percentage wage increase we negotiated in collective bargaining means we achieved pay equity"***

No. Pay Equity is a human rights remedy not a "wage increase". A pay equity plan prevails over all collective agreements. Pay equity adjustments are required to be incorporated into and form part of the collective agreement in addition to and on top of collective bargaining increases. (See Section 13 (10)) Collective bargaining increases cannot be "deemed" to be pay equity adjustments. To deem collective bargaining increases as pay equity increases is a violation of Section 7 (2) of the *Act* that provides that no Union may agree to compensation practices that would cause a contravention of the Act.

Where collective bargaining increases are deemed to be pay equity increases, the wage gap widens.

For example, in a workplace for the parties negotiated a proxy pay equity plan, the pay equity adjustments for a female job class are 1% per year. However, the general wage increase in collective bargaining is 2% per year. The female job class is owed 3% per year: 1% for pay equity and 2% general wage increase.

If the 1% pay equity increase was deemed to be part of the collective bargaining increase, the underpaid and undervalued female job classes would lose 1% per year and would continue to receive a discriminatory wage rate compared to the male job classes.

Only pay increases that are clearly identified as pay equity adjustments can be counted as pay equity adjustments for meeting the obligation to achieve and maintain pay equity.

MYTH #5 ***"We can't afford pay equity"***

No. Pay Equity is a statutory minimum. It is a floor of rights that no employer or union may bargain below or contract out of. The Act does not have a provision that limits pay equity adjustments to an employer's ability-to-pay. Financial hardship is not provided as an exception to the *Act*.

The Pay Equity Hearings Tribunal has consistently held that the inability to pay argument is not accepted under the *Act*. As the Tribunal stated in *Kensington Village* (2000 - 01), 11 P.E.R. 1 that if

> the legislature had intended to provide that organizations in the broader public sector not be obligated to make pay equity adjustments unless and until they received annual dedicated funding, it could have included such a provision in Part III.2 of the *Act,* which deals with the Proxy Method of Comparison. Instead, the legislation sets out a scheme of mandatory obligations and mandatory time-frames for the payment of adjustments.

Put simply, an employer cannot rely on the argument that it cannot make pay equity adjustments because it did not receive funding from the provincial government or because the economy is poor.

MYTH #6 ***"You don't get salary information to negotiate pay equity"***

No. Pay Equity requires a detailed review of the compensation practices and this requires information to assist the parties in all aspects of the negotiation of the pay equity plan. A union is entitled to relevant information to negotiate, implement and maintain the pay equity for its members.

The Pay Equity Hearings Tribunal has consistently ordered that any information related to implementing or maintaining pay equity must be disclosed to the bargaining agent. This may include information about job classes outside the bargaining unit. (see *Cybermedix* (1990) 1 P.E.R. 41) The Tribunal outlined that for the parties to negotiate in good faith and endeavour to agree on the job comparison system and the pay equity plan, there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. Not all information must be disclosed, but information that is rationally related to an issue or issues in pay equity bargaining.

Importantly, disclosure must be made when parties cannot agree on an issue without the information requested. For example, information about a highly paid, non-union male job class may be relevant to assess job-to-job comparison with the female job class of equal value. Both parties are entitled to sufficient information to make informed choices at all stages of the process. Disclosure is an on-going requirement, not a one-time event.

In collective bargaining the union has the right to relevant information to make informed proposals. This similar right exists in pay equity negotiations.

MYTH #7 "We compared the hourly wage rate for the female job class to the male job class. It's the same and that means we have pay equity."

No. One of the most significant issues is what is the job rate that gets compared between female and male job classes. The *Act* defines compensation as all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount. The job rate means the highest rate of compensation for a job class. (See Section 1(1))

When comparing the job rate of a female job class to the higher rate of compensation of a male job class *all forms* of payment and benefits need to be taken into account. It does not matter which comparison method relied upon in the plan (job-to-job, proportional value or proxy), all forms ascertainable benefits and payments must be included in the job rate.

The job rate is not simply the hourly rate or the annual salary of the job class. It is important to evaluate all benefits for differences between the female and the male job class. Consider and compare, for example, all forms of benefits, vacation, overtime provisions, paid lunch breaks, uniform allowances, length of the pay grid.

While this may seem challenging at first, it is the same process of costing benefits as done in collective bargaining. Only with pay equity, the comparison is considered in the context of the job class.

It is important review all benefits and wages to ferret out all forms of potential gender bias in the compensation system. Most importantly, no union wants to leave money on the negotiating table that otherwise belongs on the pay cheque of its members, especially historically under paid female job classes.

MYTH #8 " We just bought the business, not the pay equity plan."

No. If a business or workplace is sold and there is a pay equity plan in effect, the purchaser is required to make any compensation rates that were to be made under the plan. (See Section 13.1 (1)).

The *Act* defines a sale of business broadly to include a lease, transfer, merger, acquisition, amalgamation and any other manner of disposition.

After a sale of business, it is critical to examine all pay equity plans and determine whether they are still appropriate and if no longer appropriate, the union may initiated the process for negotiating a new plan. Common examples of circumstances where a post-sale pay equity plan is no longer appropriate include adding or subtracting jobs, creating new departments, creating new services or products, changes in duties and responsibilities that alters the value of the jobs.

MYTH #9 "Pay Equity adjustments are retroactive for only 3 months or 6 months...it's really a short period."

No. The Act does not limit pay equity retroactive adjustments. The *Act* requires that where an employer fails to have pay equity compliant compensation that employer is liable for all pay equity adjustments needed to close any pay gap. In the achievement phase, employers are required to make all pay equity adjustments as if they were paid on time.

Retroactivity also applies to maintenance obligations. Maintenance retroactive adjustments are owed back to the date of the change that rendered the first pay equity plan inadequate and widened the gap or created a new gap. The full amount of the pay gap must be paid out retroactively to the date that the gap widened. This may require significant retroactive adjustments.

MYTH #10 "Pay Equity Commission's Review Services is a friend of the union"

No. The Pay Equity Commission has the statutory obligation to enforce the *Pay Equity Act*. A complaint to Review Services is the first step where an issues or dispute arises in the negotiation of a pay equity plan. Review Services is required to investigate the complaint and may endeavour to affect a settlement. Where a settlement cannot be effected, the Review Services officer may issue an order to take steps necessary to implement the plan.

The objective of Review Services is to ensure that pay equity is implemented pursuant to the *Act*. However, many unions do not agree with some of the interpretations of Review Services and are challenging them at the Tribunal. As with any labour mediator, the union cannot assume that Review Services will rely upon the same analysis and interpretation of the *Act* as that of the union. It is highly recommended that any complaint to Review Services sets out the union's story completely, clearly in a detailed way backed up with documentary evidence.