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BARRISTERS SOLICITORS

**TRADE UNION
ENFORCING**

**GUIDE TO
PAY EQUITY**

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1. Introduction

This Guide gives an overview of employers' obligations and union's rights and obligations in respect of enforcing pay equity for their bargaining unit members. While the focus is on unionized workplaces, most of the Guide also applies to non-unionized employers.

2. Pay Equity is a Human Rights Obligation

Pay equity laws such as Ontario's *Pay Equity Act (PEA)* are a human rights remedy designed to rectify and prevent the persistent and systemic compensation discrimination experienced by women arising from their labour market occupational segregation and the prejudices and stereotypes, sustained by labour market practices, which had under-described, under-valued and underpaid women and their work relative to men and their work.

Employer and bargaining agent's responsibilities under the *Pay Equity Act* are also informed by their broader equity and collective bargaining responsibilities provided for in other workplace laws.

A bargaining agent has an obligation under section 7(2) of the *PEA* not to bargain for or condone compensation practices that would contravene that law. It also has a proactive obligation under the *Human Rights Code* to carry out its representational obligations under the *Labour Relations Act* and pursuant to the collective agreement in a manner which promotes the equality of its women members and those doing "women's work".

A unionized employer has the obligation to negotiate exclusively with the trade union concerning all matters which affect the compensation of those job classes. This exclusive obligation flows from the provisions of the *LRA* and its jurisprudence. Similarly, under the *Code*, both a trade union and employer have positive obligations to ensure that the decisions affecting the compensation of women's work performed in that bargaining unit.

The Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union (re: Tawney Meiorin)* made it clear that the employer and bargaining agent if any have positive obligations to ensure that workplace standards and rules (which would include compensation standards and rules) must be designed from the outset to incorporate the realities of women's work. The Court found this included a positive obligation to take measures to find out whether discrimination exists and to prevent future discrimination.

"Employers designing workplace standards owe 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 must be designed to reflect all members of society in so far as reasonably possible. " para. 68.

3. Two Stages of Pay Equity - Achieve and Maintain

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

- Step 1 Achieve Pay Equity
- Step 2 Maintain Pay Equity

These obligations are set out in s. 7 of the *Pay Equity Act* as follows:

Section 7(1)

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

Section 7(2)

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

For many unionized workplaces, the issue is maintaining the pay equity that was achieved back in the early 1990's when Ontario's *PEA* was first implemented. With wide-spread restructuring and cutbacks both in the public and private sector and many employers ignoring their maintenance obligations, most workplaces need to revisit their original pay equity plan to consider whether the "women's work" or "female job classes" are being paid free of gender-based discrimination.

For new employers or employers who just avoided pay equity implementation initially, there is a need to take the necessary steps to both achieve and then maintain pay equity. Both these steps are required by the *PEA*.

See Part VII below re: Pay Equity Compliance in the federal sector.

PART II STEP 1: ACHIEVING PAY EQUITY

1. Introduction

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

The *PEA* sets out the various methods and time tables for achieving pay equity for different sectors and sizes of employers: See *PEA*, Part II (public sector and large private sector employers), Part III (Small Private Sector Employers), Part III.1 (Proportional Value Comparisons) and Part III.2 (Proxy Comparisons). The CHSMC "A Trade Union Pay Equity Compliant Checklist, April 2010" helps to diagnose pay equity implementation issues. For a history and overview of pay equity in the public sector, see Chapter 6 in Tim Hadwen et al, Ontario Public Service Employment & Labour Law (Toronto: Irwin Law, 2006) at pp. 378-383.

A summary of the steps required to achieve and maintain pay equity are set out in the separate document - “*Overview of the Pay Equity Act*”, prepared by CHSMC and Fay Faraday. The Pay Equity Commission’s training power point, “Achieving and Maintaining Pay Equity” provided separately also provides a summary of employer and union obligations and rights. The separate CHSMC document, *Ten Steps to Pay Equity* sets out the ten basic steps with the Pay Equity Commission Guidelines which relate to each step. These Guidelines do not bind the Tribunal.

A useful review of important principles which should guide the job evaluation process is the CHSMC document, “*Pay Equity Act Compliance – Making Visible and Valuing Women’s Work*”.

2. Pay Equity Compliant Resolution Required

The *Pay Equity Act* requires that employers and trade unions work together to resolve pay equity implementation issues on a principled basis which will ensure that the overall pay equity/job evaluation process is consistent, free of gender bias and transparent. Pay equity systems should be created which are capable of being explained, replicated and maintained in the future. This means focussing on the principles which should guide ensuring that women’s and men’s work are both described fully and fairly and valued appropriately.

The principles which should guide the work of employers and trade unions are drawn from the *Pay Equity Act*, the jurisprudence of the Pay Equity Hearings Tribunal, the International Labour Organization’s “Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-By-Step Guide” (International Labour Office, Geneva, 2008), (“ILO Guide”) http://www.ilo.org/declaration/info/publications/lang--en/docName--WCMS_101325/index.htm; and the Canadian Human Rights Commission Guide (“CHRC Guide”) which is available from the CHRC. The 2004 Federal Pay Equity Task Force Report also contains important research and principles. See CHSMC CD for copies.

This requires keeping at the forefront of the process, the requirements of the *Pay Equity Act*, the dynamics of which sustain gender discrimination in the compensation of women’s work and the need to make visible and value the work both women and men perform in workplaces.

In that regard, the following statement from the ILO Job Evaluation Guide is of note:

“It is important the union and management representatives clearly distinguish the process of achieving pay equity from the process of negotiating a collective agreement. Pay equity is a fundamental human right which must not be subject to concessions or compromises that characterize collective agreement negotiations. Distinguishing between the issues of pay equity and those of collective agreements also helps to limit the potential conflicts between women’s and men’s interests in trade unions” (p. 11)

ILO Job Evaluation Guide.

3. Making Work Visible - Inclusivity

Ensuring that both men's and women's work is made visible and valued is one of the greatest challenges in ensuring a gender neutral job evaluation process.

"The job evaluation process must include all aspects of work done by men and women even if the work was not previously valued, understood or even noticed. Missing or overlooking elements of work has created much of the gender bias problem.

The concept of inclusivity is relevant to the processes of describing jobs and of choosing the factors. It is essential that the job evaluation process capture (i.e. include) all aspects or requirements for each job in the organisation and all working conditions associated with it. Factors, examples and weights must fairly represent jobs and job tasks done by men and women."

CHRC Guide

The ILO Guide notes that it is important for a committee to:

"include members who have as direct as possible knowledge of the main jobs to be evaluated". This ensures "that the characteristics of the jobs to be evaluated are more fully taken into account";

"include members who are willing to recognize and eliminate any gender bias that might affect the process or the evaluation tool";

"allow female workers to play a significant role in the process which concerns them most directly"; women members "help better identify the overlooked requirements of female jobs" and "exert an influence over the decisions". These female members should come from the "female dominated jobs involving the highest number of employees should have priority." This should include "employees from different hierarchical levels". p. 10

Be trained in the "dynamics of wage discrimination" and the "methodological aspects related to implementing pay equity." p. 11 This helps "identify the prejudices and stereotypes which can appear in different steps of the programme and should deal with the following points: "the factors which account for wage discrimination; the influence of prejudices and stereotypes on job perception; the influence of prejudices and stereotypes on evaluation methods and the influences of prejudices and stereotypes on compensation systems. It also helps members "carry out the process in a rigorous manner, including understanding the evaluation method, the data collection procedures, the evaluation procedures, the components of total compensation and the values and mission of the enterprise." p. 11

4. Obligations of New Employers

a. PEA Part I Obligations

The Act recognizes two categories of employers:

employers that were in existence on the date that the *Pay Equity Act* came into effect (i.e. employers who existed on January 1, 1988); and,

new employers established after that date.

Given the changes to the economy, many of Ontario's current employers are considered "new employers".

These groups are treated differently because when the *Act* was introduced, it allowed employers who were then in existence a period in which they could gradually move their compensation practices into compliance with the new law by phasing-in pay equity adjustments over a period of time (although they could not create new wage gaps or widen existing ones). Employers who came into existence after the *Act* took effect had to achieve pay equity immediately and are not entitled to a phase-in period. See Pay Equity Commission Guideline #2 on "Determination of Employer and Employee".

The obligations of new employers, created after January 1, 1988, are set out in Part I of the *PEA*. The fundamental obligation to achieve and maintain pay equity is set out in section 7 which is found in Part I. New employers are not covered by Part II of the *Act* which explicitly requires taking steps over set periods of time and the posting of pay equity plans. This is because new employers are required to open their business pay equity compliant and are not given any phase-in period. In order to achieve pay equity, though, these employers must still compare male and female job classes and pay female job classes at least as much as the male job classes of comparable value.

see: *Pay Equity Act*, s. 11(2) and 11(3)

In addition, employers that were in existence prior to January 1, 1988 but had fewer than 10 employees will become subject to the *Act* and be required to achieve pay equity as of the date that they have 10 or more employees.

When an organization is involved in a merger or an acquisition, it is not always clear whether is a "new employer" or a successor employer under the sale of business provisions for purposes of the *Act*. In those situations, whether an employer is a new employer will need to be determined on the facts of the case.

b. Obligations to Negotiate Pay Equity

While the explicit mandatory duty to bargain pay equity is only set out directly in Part II of the *Act*, Part I employers also have an obligation to bargain pay equity with the union for a number of reasons:

Under the *Labour Relations Act, 1995*, a union is the exclusive bargaining agent for employees in a bargaining unit and an employer has a legal duty to bargain in good faith with the union to reach agreement on terms and conditions of work. Wages are perhaps the most important term and condition of employment and in a unionized workplace the employer does not have a right to set wages in the absence of negotiation and agreement with the exclusive bargaining agent.

The *PEA* does not displace the employer's obligations under the *LRA* with respect to the exclusive bargaining agent and it does not displace the union's rights under that law as the exclusive bargaining agent. The employer therefore cannot reach determinations on compensation without negotiation and agreement with the exclusive bargaining agent. While the Tribunal has recognized that collective bargaining generally and bargaining on pay equity do

not need to happen simultaneously, the *PEA* does not exempt the employer from bargaining pay equity compliant wages with the union.

While the Review Officers have taken the position that a Part I employer's duty to bargain with a union only flows where it has agreed to do so, this is too narrow a view of the law. As noted above, a Part I employer's duty to bargain is embedded in the structure and terms of the *Act* and in the nature of the relationship between employer and union. Section 7(2) in particular makes specific reference to the fact of bargaining between an employer and union and prescribes explicitly that the parties cannot bargain or agree to terms that do not comply with the *PEA*. This is not a matter upon which the parties have discretion.

Under s. 7(2), the bargaining agent has an independent legal obligation to ensure that it does not agree to compensation that does not achieve or maintain pay equity. Because it has this legal obligation, the bargaining agent must be entitled to assess whether an employer's wage proposals comply with the *PEA* and to negotiate in order to ensure that pay equity is achieved and maintained. Through bargaining and disclosure of information, the union must be able to substantiate whether the employer's wage proposals are in fact pay equity compliant.

As result of the above, new employers should do the following:

- (a) negotiate pay equity with the Union;
- (b) disclose information with respect to and relevant to pay equity to the Union;
- (c) identify male and female job classes as prescribed in the *Act*;
- (d) evaluate male and female job classes based on a composite of skill, effort, responsibility and working conditions;
- (e) achieve pay equity by comparing male and female job classes in accordance with the job-to-job, proportional value or proxy methods as identified in the *Act*;
- (f) conduct pay equity job comparisons following the sequence of search for male comparators identified in the *Act*;
- (g) achieve pay equity as of the date when the employer's operations commenced; and
- (h) maintain pay equity.

PART III	STEP 2:	MAINTAINING PAY EQUITY
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1. What are Ongoing Obligations to Ensure No Pay Gap

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

Employers and bargaining agents must take the necessary to steps to ensure that any identified gap in compensation between comparable male and female job classes

identified in the "achievement" stage is not allowed to widen. While there has been some decisions dealing with this obligation, there are likely to be further decisions setting out in more detail the responsibilities. To date, the maintenance obligation has been found to include the following:

Any identified gap in compensation between comparable male and female job classes identified in the "achievement" stage and closed by the identified pay equity adjustments in that Plan must not be allowed to widen. See *CUPE Local 1776 v. Brampton Public Library* [1994] O.P.E.D. No. 37.

Male and female job classes must be regularly reviewed to consider the impact of

changes to job duties;
new job classes (creation of an entirely new job class in the establishment or significant changes to an existing job class);
vanishing job classes;
changes to the value of job classes;
changes to the gender of job classes;
changes to job rates.

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

New comparators must be identified where appropriate, and necessary pay equity adjustments paid out with retroactivity and interest where required;

Where a union is certified after the creation of the pay equity plan, this requires to start, the creation of a separate plan which includes only the employees in the certified unit. See s. 14 of the Act which requires that there be a separate pay equity plan for each bargaining unit and a pay equity plan any part of the establishment not in the bargaining unit (*St. Joseph's Villa and Ottawa Board of Education (No. 2)* (1995), 6 P.E.R. 45). the plan must be split for the two groups.

Where the newly certified union provides evidence that the original plan contravenes the Act or that changed circumstance render the plan no longer fully appropriate, this will require further changes to the plan. (*Ottawa Board of Education*).

Make any necessary pay equity changes required by the reorganization or restructuring of the employer which includes the elimination of job classes and the merger of job classes. *Parry Sound District General Hospital* (No. 2) (1996), 7 P.E.R. 73. This includes relocation of employees to different facilities, renaming of jobs and a change to a team management style within an establishment would constitute changed circumstances which may or may not have an impact on the plan (*Ford Motor Co. of Canada*, (No.3) (2002-03), 13 P.E.R. 49).

Where the pay equity plan is no longer appropriate, steps need to be taken to amend the pay equity plan. This is done by the employer (for unorganized employees) posting the amended plan which gives notice to the employees who can then file complaints. If those employees are subsequently organized, the employer must negotiate any changes with the bargaining agent and where there

are unresolved disputes, seek an order of the Review Officer. Any pay equity adjustments form part of the collective agreement. The obligation to maintain pay equity in accordance with the old plan will exist until the new plan is posted (*BICC Phillips Inc.*).

The employer must ensure employees continue to be paid in a manner which is free of systemic gender discrimination in the valuation and payment of that work, including ensuring that such inequity is not being inadvertently hidden by incorrect use of the job class system or by other incorrect implementation measures.

2. Maintaining Pay Equity is a Joint Responsibility

The obligation to maintain pay equity is a joint responsibility. *Ottawa Board of Education* (1995), 6 P.E.R. 45. An employer is required to ensure (in conjunction with the bargaining agent) that its compensation practices do not result in any pay gap between comparable male and female job classes.

Specifically Tribunal jurisprudence has interpreted this requirement to include the following:

Section 7(2) obliges both employers and trade unions not to bargain to disrupt compensation practices that provide for pay equity or to bargain for any compensation practice that does not provide for pay equity for female job classes. See *St. Joseph's Villa (19 August 1993) 0345-92 (PEHT)* and *Ottawa Board of Education* (1995), 6 P.E.R. 45

A trade union is prohibited from condoning the University's failure to maintain pay equity. See *York Region Board of Education (CUPE)* (1995), 6 P.E.R. 3.

Section 14.1 [the provisions dealing with "changed circumstances"] applies to maintenance. A Part II employer, i.e., an employer who is required to or elects to do a pay equity plan, looks to Part II for guidance on pay equity maintenance just as it did for achieving. Section 14(1) allows a subjective determination of when negotiations may be necessary on the part of either party. *Ottawa Board of Education* (1995), 6 P.E.R. 45.

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

3. Review Services and Tribunal Litigation on Maintaining Pay Equity

In a 1997 decision, the Tribunal has referred to the following test for whether the pay equity obligations set out in a pay equity plan have been maintained:

- (I) Are the job rates for the female job classes at least equal to those of the male job classes identified under the pay equity plan as performing work of equal or comparable value to them and has this consistently been the case from the date that pay equity was achieved under the plan?

- (ii) If the answer to (i) is negative, is there any justification in the *Pay Equity Act* for this difference in job rates?"

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

Various unions are now in the process of litigating under the *Pay Equity Act* a variety of maintenance issues, including the obligations of employers and unions. This will likely expand the above-noted maintenance test.

Review Services, whose Officers make the initial decision under the *PEA* have issued decisions over the last number of years which have restricted the pay equity rights of employees and minimizing the obligations of employers to engage with unions in the pay equity process. These decisions have often been inconsistent with what the Commission said in previous publications.

A number of these decisions have been appealed to the Pay Equity Hearings Tribunals and are now awaiting the Tribunal's decision. Eg. *SEIU Local 1 v. Oakwood Retirement Communities*, and *CUPE Local 543.3 v. Windsor Essex Health Unit*, So keep looking at the Pay Equity Hearings Tribunal website - <http://www.olrb.gov.on.ca/pec/peht/index.html> where past and current Tribunal decisions are posted. These decision should address the obligations of employers to bargain pay equity maintenance and to disclose the necessary information required to carry out such bargaining.

4. Process for Maintaining Pay Equity

The Tribunal in *Ottawa Board of Education* (1995), 6 P.E.R. 45 set out the following process to be followed by the employer and bargaining agent in carrying out their maintenance obligations:

The obligation to maintain pay equity is a joint responsibility.

Section 14.1 [the provisions dealing with "changed circumstances"] applies to maintenance.

A Part II employer, i.e., an employer who is required to or elects to do a pay equity plan, looks to Part II for guidance on pay equity maintenance just as it did for achieving.

Under s. 7(2), the Union is obligated not to agree to compensation practices that fail to provide for the maintenance of pay equity for any of the bargaining units it represents.

Section 14(1) allows a subjective determination of when negotiations may be necessary on the part of either party.

If there is a disagreement, there is a procedure for seeking the Commission's assistance in settling, deciding or adjudicating the dispute.

The Pay Equity Commission has recommended that a pay equity Maintaining Committee be established in each bargaining unit in order that there is a systematic process for monitoring change in the workplace. This includes a comprehensive review each year of

their compensation practices to ensure that they have maintained pay equity and make any necessary retroactive adjustments required. Ontario Pay Equity Commission publication - Maintaining Pay Equity Using the Job-to-Job and Proportional Comparison Methods. (Note: Review Services has taken the position such a committee process involving the workers is not mandatory and unions have been disputing this interpretation of the *PEA*). Both the ILO Job Evaluation Guide and 2004 Pay Equity Task Force see the use of a committee process as ensuring to ensuring the involvement of women workers and the gender inclusiveness of the process.

Generally, employers and bargaining agents will use the same comparison method or methods for maintenance purposes which they used the first time to achieve pay equity unless that process is not appropriate.

5. Maintenance Pay Equity Adjustments

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

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

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

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

6. Maintaining Pay Equity using the Proxy Comparison Method

The proper way to maintain pay equity for workplaces using the proxy comparison method is now a subject of dispute under the *PEA*.

a. Maintaining within the Bargaining Unit

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

In summary, the Commission states that employers using the proxy comparison method are required to do the following:

Each January 1, give the necessary pay equity adjustment required until the wage gap is closed using a minimum 1% of annual payroll;

Give any non-pay equity increase on top of the pay equity adjustments required by the proxy pay equity plan and increase the target rates by the same amount;

Do not allow the wage gap to widen, eg. by negotiating or permitting percentage wage increases;

Do not reduce pay equity target rates; and

Establish or negotiate where a union exists, a regular maintenance review process to deal with changed circumstances that may occur in the organization. eg. new job classes, changes in duties or responsibilities of job classes, organizational restructuring, mergers, amalgamations and unionization or decertification. Prepare and post amended plans as necessary.

b. Maintaining by Tracking the External Comparator

Unions are taking the position that the employer and the bargaining agent have an obligation to maintain proxy pay equity by continuing to keep the appropriate relationship between the female job class in the workplace and the comparator female job classes originally used in the seeking employer's workplace. While this obligation is not referred to in the Commission's publication, it follows from the employer's ongoing maintenance obligations under section 7. This means that unions should track the compensation increases which have been received by the relevant female job classes in the employer originally used as the "proxy" and identified in the proxy pay equity plan. The Schedule in the Proxy Comparison Method Regulation, identifies which employer is the "proxy employer" for each kind of "seeking employer" using the proxy method. This issue is now being litigated under the *PEA* by unions and will need to be determined by the Tribunal.

While the *Act* does not contain any requirement for the comparison employer to provide any further information to the "seeking" employer after the initial process during the achievement phase, in the public sector much of this information is already public with collective agreements filed with the Ministry of Labour and many unions represent the employees of both the seeking and proxy employers.

7. Pay Equity for New or Changed Job Classes

a. New Job Classes

Pay equity for new job classes is established through the proportional value comparison method by comparing the values to the values and pay equity target rates of existing job classes.

Every new female job class created after January 1, 1994 must be paid immediately at the pay equity rate.

A new position may fit into an existing job class and therefore be paid at the phased in rate if the position has similar duties and responsibilities and requires similar qualifications, is filled by similar recruiting proceeds and has the same compensation schedule, salary grade or range of salary rates. It may also fit in if it is part of a group of jobs. New positions which cannot fit into existing job positions must be paid at the target rate immediately.

b. Changed Job Classes

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

8. Changed Circumstances

a. Sections 14.1(1) and Section 22(2) (b)

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

Section 14.1(1) applies:

If the employer or bargaining agent is of the view that because of changed circumstances in the establishment, the pay equity plan for the bargaining unit is no longer appropriate, the employer or bargaining agent may give written notice to the other to enter into negotiations to amend the plan. The language of the provision indicates that a subjective test applies to determine when notice to bargain should be given - it is when either party “is of the view” that this is necessary.

If an agreed amendment is not reached before 120 days from the date the notice to bargain a new plan was given, the employer must give notice of the failure to the Commission.

The bargaining agent may also give notice to the Commission of failure reach an agreement.

If the plan is amended, any applicable compensation adjustments shall not be less than the adjustment that would have been made under the plan, before it was amended.

Section 22(2) (b) applies:

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

The language of the provision indicates that an objective view that the plan is no longer appropriate is necessary to succeed.

b. What “Changed Circumstance” Renders a Plan Inappropriate?

I. Introduction

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

Issues pertaining to job classes:

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

Certification of a bargaining agent after a deemed approved plan; and

Restructuring within the organization.

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

ii. Certification of a Bargaining Unit

Where a group of employees is unionized after a pay equity plan is signed, the union certification constitutes a changed circumstance (*St. Joseph’s Villa and Ottawa Board of Education (No. 2)* (1995), 6 P.E.R. 45).

However, certification may not necessarily render the plan inappropriate: *Parry Sound District General Hospital (No. 2)* (1996), 7 P.E.R. 73. If the certification results in some employees of the employer, who had previously been covered by one pay equity plan, being in the bargaining unit and some employees being outside the bargaining unit, the plan must be split for the two groups, in order to comply with s. 14 of the *Act* which requires that there be a separate pay equity plan for each bargaining unit and a pay equity plan any part of the establishment not in the bargaining unit (*St. Joseph’s Villa*).

The newly certified union may not have the ability to negotiate any part of the plan that will apply to the new bargaining unit - the plan may simply be split and deemed approved. This will depend however, on whether there is any evidence that the plan contravenes the *Act* or whether the changed circumstance renders the plan no longer appropriate. A change in the composition of the unit following certification may cause the plan to be inappropriate (*Ottawa Board of Education*).

iii. Vacant Job Class Subsequently Filled

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

iv. Workplace Restructuring

Restructuring of the workplace or the elimination of jobs would likely qualify, as would the merger of job classes (*Parry Sound District General Hospital*).

A vacant male comparator job class may not result in a plan not being appropriate if a widening wage gap does not occur as a result of unequal general wage increases (*Niagara (No. 2)* (1998-99), 9 P.E.R. 25).

The demolition of a plant, the rebuilding of a plant, relocation of employees to other facilities, renaming of two job titles and a change to a team management style within an establishment would constitute changed circumstances which may or may not have an impact on the plan (*Ford Motor Co. of Canada*, (No.3) (2002-03), 13 P.E.R. 49).

c. Effective Date of Changes/Amendments to the Plan

Any amendments will be effective as of the date of the triggering event - the changed circumstance (*Ottawa Board of Education*).

The obligation to maintain pay equity in accordance with the old plan will exist until the new plan is posted (*BICC Phillips Inc.*).

d. Relationship to General Pay Equity Obligation and Other Issues

The specific sections in the *PEA* which address the situation of a sale of business or changed circumstances provide specific obligations for ensuring the wage gap does not widen. However, this does not detract from the wider obligation to maintain pay equity found in section 7.

The *PEA* does not clearly set out the relationship between the section 7 maintenance obligation and section 22(2)(b) which sets out the right of an employee, group of employees or bargaining agent to file a complaint where due to a “change in circumstances” the pay equity plan is not appropriate. The Tribunal has indicated that section 22(2)(b) is available to deal with some kinds of workplace changes occurring after the posting of a plan, and also after full achievement of pay equity. For example, the vacancy over a significant period of time in a male comparator job class could be either a section 7 maintenance issue and/or "changed circumstances" under s. 22(2)(b): See *Niagara No. 2* (1998-99), 9 P.E.R. 25 (PEHT).

The employer cannot use the “change of circumstance” as a defence to a failure to maintain” pay equity between comparable male and female job classes. See *BICC Phillips Inc.* case.

In a unionized workplace, an employer cannot unilaterally fail to maintain pay equity between comparable male and female job classes on the basis that there has been a change in circumstances. The employer is required to negotiate the necessary changes to the pay equity plan caused by the alleged change in circumstance and if no agreement, the plan cannot be changed until amended by a Review Officer or Tribunal Order. The original plan must be maintained until a new plan is agreed to or ordered.

If there is no bargaining agent, the employer can unilaterally amend and post the revised pay equity plan but this is then subject to challenge by the unrepresented employees.

A change in pay practice does not necessarily give rise to a change in circumstance. For example, when a collective agreement increased the threshold at which part-time employees could receive premium/overtime pay, but did not change the employees’ hourly pay rate, the Tribunal found this change did not contravene the *Act* even though it may have reduced employees’ take-home pay: (*Children’s Aid Society of the County of*

Lanark and the Town of Smiths Falls September 7, 2005 and January 5, 2006, 3565-04-PE (P.E.H.T.)). In that case, the increase in the threshold for premium pay applied to all job classes. It was not asserted that female job classes were denied a benefit that remained available to either a male job class or their proxy comparator.

9. Sale of a Business

a. Section 13.1

The *Pay Equity Act's* Sale of Business provisions are set out in s. 13.1 below:

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

Plan no longer appropriate

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

- (a) in the case of employees represented by a bargaining agent, enter into negotiations with a view to agreeing on a new plan; and*
- (b) in the case of employees not represented by a bargaining agent, prepare a new plan.*

Same

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

(4) *Repealed*

Application to certain events

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

Definitions

(5) *In this section,*

"business" includes a part or parts thereof;

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

b. What Constitutes a Sale?

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

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

c. Pay Equity Obligations on Sale

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

i. Determine if Plan No Longer Appropriate

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

The following circumstances may result in the plan no longer being appropriate:

The addition or subtraction of jobs from a pay equity plan;

Restructuring of existing departments or creating new ones;

New jobs in new areas;

New products, services or manufacturing processes;

Changes in job duties or responsibilities which are sufficient to alter the value of jobs in the pay equity plan;

Changes to the composition of the bargaining unit or non-union group;

The gender neutral comparison system (GNCS) no longer adequately captures the work of the female and male job classes which may necessitate an amendment to the GNCS or selection or negotiation of a new GNCS (See: Pay Equity Commission fact sheet on Sale of a Business); and

A new plan would likely be necessary where there was a sale of part of a business and the seller's business contracts and the purchaser's business expands, with an accompanying loss or gain of employees. Once the sale has occurred and the consequences of the transaction are apparent, a determination should be made about whether a new plan is required *The Child's Place* (February 28, 2002) 0730-01 (PEHT)).

ii. What are Purchasers' and Buyers' Obligations?

Neither the purchaser nor the seller may opt out of their obligations under the *Act*.

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

However, the Tribunal has stated, in *obiter*, that it is difficult to construe s. 13.1 as absolving the seller of liability for outstanding adjustments at the point of the sale. In fact, it is possible to construe s. 13.1 as holding the seller and purchaser jointly and severally liable for payments that the seller failed to make in a timely way (*Child's Place*).

PART IV PROCESS ISSUES

1. Employer Obligation to Disclose Pay Equity Information

Section 14 of the *PEA* requires the parties to negotiate in good faith and includes the obligation to disclose information necessary or relevant to pay equity negotiations.

For the parties to negotiate in good faith and endeavour to agree...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. O.P.S.E.U. v. Cybermedix Health Services Ltd., [1989] O.P.E.D. No. 4 at para. 20.

With respect to the timing of disclosure, depending on the particular stage of negotiations, the Tribunal in *Cybermedix* commented:

Disclosure must be made when parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process. para. 24.

With respect to the scope of disclosure, the Tribunal has held that the information requested for negotiations must be related to an issue in the bargaining. The Tribunal has indicated this includes but is not limited to :

job titles, gender composition of positions, compensation schedules, salary grades or range of salary rates per position and existing job descriptions.
O.P.S.E.U. v. Cybermedix Health Services Ltd.

all information necessary to consider the four criteria under the *Act* for job class: 1) positions in an establishment that have similar duties and responsibilities; 2) require similar qualifications; are filled by similar recruiting procedures; and have the same compensation schedule, salary grade, or range of salary rates. *Riverdale Hospital v. CUPE Local 79*, (1990) O.P.E.D., No. 6.

information concerning the evaluation system and the results of the evaluation of the bargaining unit jobs including the distribution of points across the degree levels of each subfactor and the total point score of each

bargaining unit position. *Gloucester (City) V. CUPE Local 1525*, {1991} O.P.E.D. No. 20.

Where a trade union becomes certified for a bargaining unit, (where the original pay equity plan was prepared on the basis employees were non-unionized), the Tribunal has stated that the union is entitled to the information necessary to carry out their obligations under the Act. See *Ontario Nurses Association v. St. Joseph's Villa*, [1993] O.P.E.D No. 38. This includes at a minimum:

information necessary to ensure that the previous plan is being implemented according to its terms. This requires that the bargaining agent have knowledge of the terms of the plan. This includes the identification of the establishment, the job classes, and the GNCS. With respect to the GNCS, this includes information concerning the evaluation manual, the job collection questionnaire and the wage adjustment methodology including the banding process. It also required that the bargaining agent be provided with the values assigned to the work of the female job classes and the male job classes.

the means by which the duties and responsibilities of the female job classes within the bargaining unit and those male job classes outside the bargaining unit which are potential male comparators were ascertained, including any job descriptions, and /or the content of job fact sheets, and any future changes in those duties and responsibilities.

for those male job classes which are potential comparators, the job rate, the maximum hours of work and any future changes to those terms; and

the gender composition of the job classes identified in the Plan, the number of incumbents in each job class and any future changes. *Ontario Nurses Association v. St. Joseph's Villa*, (1993) O.P.E.D No. 38

In addition to the above-noted obligations, a party to proceeding under the *Pay Equity Act* must produce all information which is "arguably" relevant to the issues in the proceeding. *Dufferin-Peel Roman Catholic Separate School Board v. Group of Employees*, {1998} O.P.E.D. No. 1. citing *Kingston and Frontenac Children's Aid Society* (1990) 2 P. E. R. 310. This has included information such as job questionnaire and informational charts used by the Pay Equity Committee in carrying out its responsibilities under the Act, *Salvation Army on Behalf of Group of Employees*, (No. 2) (1996, 7, PER, 2 and *Ottawa Board of Education v. OSSTF*, {1997} IO.P.E.D. No. 2.

2. Pay Equity Settlements and Releases

a. Individual Employee Settlements and Releases

Unions and employees must be very careful in drafting releases or settlements to ensure that they protect employees' pay equity entitlements. This issue has been addressed twice recently in circumstances where individual employees have been terminated and have signed settlements with general language releasing their employers from future

legal claims. See *Bucyrus Blades of Canada v. McKinley* (2005), 250 D.L.R. (4th) 316 (Ont. Div. Ct.); *Better Beef Ltd. v. MacLean* (2006), 80 O.R. (3d) 689 (Div. Ct.).

In both situations, at the time they were terminated the employees had outstanding concerns with respect to their pay equity entitlements which were not addressed in the subsequent monetary settlement on termination. In both cases the Pay Equity Hearings Tribunal looked at the underlying facts to determine whether the employer had complied with its pro-active obligation to achieve pay equity under the *Act*. However, on judicial review, in both cases the Ontario Divisional Court overturned the Tribunal's decisions, held the parties to the terms of the release and found that the individual employees had released their claims for pay equity.

In these decisions, the Court found that "the law does not interfere with the right to contract out of the Pay Equity Act when settling a claim under that Act." The Court noted that settling an individual claim in these circumstances is distinct from a situation where an employee might bargain away a statutorily-protected right as a term of employment or as a precondition to employment. The Court also ruled that "a release signed by one employee does not, in law, release an employer from its obligations to its female employees pursuant to the requirements of the Act."

b. Collective Agreement or Pay Equity Plan Releases

Unions should also be very careful not to sign collective agreement or pay equity plan documents which release employers from pay equity obligations unless this is because employers are in fact paying pay equity compliant wages. Since there is an ongoing obligation to maintain pay equity, it is not appropriate to release the employer from future liabilities. Such a release may expose the trade union to liability for a breach of its duty of fair representation under the *LRA* or under section 7(2) of the *PEA*.

3. Dealing with the Deemed Approval of Pay Equity Plan Issue

Employers argue that the original plan is deemed approved as a result of section 13(11) of the *PEA*.

The *Ontario Northland* Tribunal decision upheld by the Divisional Court makes it clear that the hat the deemed approval sections of the *PEA* do not insulate an employer from a section 22 complaint under the *PEA* that the plan violated the *Act*.

The decision states that the deemed approval only relates to "compensation practices that existed immediately before the effective date", namely January 1, 1988. (See para. 34 of the Decision which cites the provisions of section 13(11) of the *Act*.) An employer remains responsible to ensure that all its compensation practices after January 1, 1988 are pay equity compliant;

"When the provision of the Act alleged to be contravened sets an exact requirement, we will inquire whether the impugned aspect of the plan is correct. When the provision is not capable of exact complaint, but implies a range or an exercise of discretion, we will inquire whether the impugned aspect of the plan is reasonable." (para. 46)

The decision refers to a section such as the definition of the job rate as "the highest rate of compensation for a job class" as an example of a precise standard. Another example, the Applicants submit would be the definition of "job class", "male job class" and "female job class" in section 1(1) of the *Act*.

4. Pay Equity, Collective Bargaining and Interest Arbitration

Unions have two separate obligations with respect to the compensation of employees within its bargaining unit. They are required to ensure that it presents collective bargaining compensation proposal which fairly represent the entitlement of its members to collective bargaining adjustments. They are also required to take necessary actions under the *PEA* to redress any compensation which is not pay equity compliant. This issue was considered in the Tribunal's decision in *Welland County General Hospital (No.2) (1994) 5 P.E.R. 12*

"The Union points out that it is subject to a dual set of obligations. As a collective bargaining agent, it is required to fairly represent and advance the interests of all members of the bargaining unit. Under the Act it has a role to play in ensuring that pay equity is achieved for the female job classes in the bargaining unit." *Welland County General Hospital (No.2) (1994) 5 P.E.R. 12, para. 42*

Pay equity adjustments are a human rights remedy and not a regular "wage increase". They should not be considered a wage increase for the purpose of interest arbitration. Otherwise, their wage would be

"artificially suppressed, contrary to the spirit of the Act and, in particular, ss.9(1), which prohibits the reduction of wages to achieve pay equity." *Welland County General Hospital (No.2) (1994) 5 P.E.R. 12, para. 42*

The *Welland County* decision was also relied on in the *United Counties of Leeds, Grenville and Lanark District Health Unit* decision of the Ontario Labour Relations Board, [1997] O.L.R.D. No. 1928 (Whitaker). That decision noted that the Tribunal's *Welland County* decision which it stated

"attaches significant importance to the notion that pay equity negotiation and collective bargaining are two separate and distinct processes. This view is consistent with the practical experience of workplace parties, where as a matter of course, these two sets of negotiations are dealt with separately. In order to preserve the integrity of each, it is necessary to interpret the governing legislation in a manner which requires the least impairment by one process of the other." para.34.

The *United Counties* decision also found that it was being called upon to decide a question which required "pay equity" expertise and this should be left to the Tribunal alone to "determine the question and if necessary fashion a remedy pursuant to its jurisdiction under the Pay Equity Act." para. 35.

This decision at paragraph 28 also relied on the Ontario Divisional Court decision in *West Park Hospital (1992) O.J. No. 523*, where the Court concluded that parties, subsequent to the negotiation of a collective agreement, must determine whether it has an impact on pay equity compliance. If it does, the parties must either agree to vary the plan or use the enforcement mechanisms of the Act to "achieve the necessary variations in the pay equity plan".

All of the above decisions recognize that an interest arbitration board must make decisions separate from their pay equity implications in order to respect the separate interest arbitration process and mandate and then separately address any pay equity implications. As the Divisional Court stated in West Park (cited at para. 28 of the United Counties of Leeds, Grenville and Lanark District Health Unit)

“The result as we see it, is not a contravention of the Pay Equity Act, but an award made by the Board in accordance with its mandate which in turn requires further adjustments in the pay of female dominated jobs in order to comply with the Pay Equity Act and the agreement entered into between the parties pursuant to the Act. There is no breach of the Act and no loss of jurisdiction in the Board.” which are within its jurisdiction to make,

The Union has properly separated the pay equity compliance process from the collective bargaining process as required by the Pay Equity Act.

“The Act contemplates and indeed requires that there be certain connections between the collective bargaining process and the pay equity process. Where a pay equity plan is prepared in respect of employees represented by a bargaining agent, the employer and the bargaining agent must negotiate the plan (ss.14(2)). Adjustments provided for under the plan must be incorporated into and prevail over the relevant collective agreement (ss.13(10)). Note that it is only the adjustments and not the plan itself that are incorporated into the collective agreement. If the plan itself were incorporated there would be no need for a provision like ss.13(9), which makes the plan, like a collective agreement, binding upon the employer, the bargaining agent and the employees covered by it.” Para. 47

“Not only does nothing in the Act compel the negotiation of a pay equity plan to be carried out in conjunction with collective agreement negotiations, the Act appears to contemplate that the two processes will occur separately. Surely if the Act contemplated that pay equity and collective bargaining were going to occur in conjunction, we might expect that the posting dates for plans would coincide with the commencement dates of the relevant collective agreements. Instead, all plans have a mandatory posting date of January 1st. As well, in the event of a negotiating impasse, different mechanisms for resolution are available under collective bargaining regimes and the pay equity regime. In the former, depending on the governing legislation, a strike/lockout may occur, or resort may be had to arbitration, as occurred here. In the latter, resort must be had to the Pay Equity Commission (s.16).”

5. Reprisals/Section 9 Complaints

a. Section 9 Anti-Reprisal Obligations

Section 9 of *PEA* prevents reprisals against employees who engage in activity under the Act.

Reduction of compensation prohibited

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

Intimidation prohibited

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

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

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

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

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

The Tribunal has the following specific powers to remedy a breach of section 9(2).

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

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

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

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

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

b. Who May Bring a Reprisal Complaint?

The following persons are entitled to anti-reprisal protection:

A person who may or is participating in a proceeding under the Act.

A person who has made or may make a disclosure required in a proceeding under the Act.

A person who is exercising or may exercise any right under this *Act*.

A person who has acted or may act in compliance with the *Act*, regulations or an order under the *Act* or who has sought or may seek enforcement of the *Act*, regulations or an order made under the *Act*(s. 9(2)).

Those who have entitlement to a pay equity plan, without having any further involvement in the pay equity process, have a “right” under the *Act*. It is not necessary to be actively involved in the pay equity process in order to raise a s. 9(2) complaint (*New Liskeard Board of Police Commissioners (No.2)* (1991), 2 P.E.R. 65).

Those who have entitlement to a pay equity adjustment are protected by the provision (*Great Lakes Brick and Stone Ltd.*, (1994), 5 P.E.R. 1).

The *Act* is a proactive system and therefore, in most cases, the beneficiaries of the *Act* will have been passive recipients. Clearly, the intention of the legislature was not to limit the protection of the provision to those who file complaints or are otherwise actively involved in the process ((*Peterborough Clow (No. 3)*, (1996), 7 P.E.R. 33).

c. Proving a Reprisal Complaint

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

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

The Tribunal has held:

Whenever the timing of the discipline or discharge coincides with the enjoyment or seeking of a benefit, it should be scrutinized closely and false motives should not be allowed to masquerade as legitimate ones. If an employer has implemented a genuine management objective, even though it coincides with the enjoyment of a benefit, the employer will be able to discharge its onus so long as he employer’s conduct is not tainted with anti-pay equity animus. ((Peterborough) Clow (No. 3)).

Although the onus is on the responding party to disprove the allegation, an applicant should still challenge the evidence of the responding party through cross-examination and the presentation of its own evidence (*Liquor Control Board of Ontario* (No. 2) (1995), 6 P.E.R. 148).

The employer must demonstrate more than a seemingly plausible explanation for their conduct. It must be established that there is no taint of anti-pay equity animus to the reasons given for the employee's dismissal. (*Plantagenet* (No.1) (1997), 8 P.E.R. 32)

The reason must be legitimate but does not have to be a sound business judgment. The Tribunal will not concern itself with the employer's decision if it is free of anti-pay equity animus, therefore only facts relating to motive will be relevant (*Alzheimer Society* (1997), 8 PER 187. 551-95).

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

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

d. Anti-Reprisal Remedies

Reinstatement is the remedy of choice for a violation of s. 9(2) because of job loss.

However, the Tribunal may not order reinstatement if the employer persuades them that it would not be practicable. ((*Peterborough*) *Clow* (No. 3))

If the position no longer exists, it will be appropriate to order reinstatement to an alternative position that is similar with no loss of wages. To argue that the person ought not be reinstated at all, simply because the position no longer exists, would go against the remedial nature of the *Act* and the liberal construction warranted in order to meet the goal of addressing systemic discrimination in compensation. (*Plantagenet* (No.1) (1997), 8 P.E.R. 32)

The Tribunal may consider the following factors when determining whether reinstatement is appropriate:

- the impact of reinstatement in the workplace on the employees;
- whether there has been any change in management (ie: is the offending individual still in the workplace?);
- the skill set required for the job;
- whether there has been any change in job duties. (*Alzheimer Society of Chatham-Kent v. Moon*)

An order of lost wages may be made but the applicant has an obligation to mitigate those damages. If the applicant fails to reasonably mitigate, damages may be reduced by one-third.

Although the *Act* is silent on the subject, the Tribunal has ruled that interest may be awarded on damages. (*Peterborough*) *Clow* (No. 3); *Royal Crest Lifecare Group* (No. 5) (November 18, 2002); *Helping Hands Daycare* (No. 2) (11 October, 2006), 2387-05 (P.E.H.T.)

Interest will be calculated by dividing the amount owing in half and applying the applicable *Courts of Justice Act* interest rate (*Plantagenet (No. 1)*).

An applicant's out-of-pocket costs (ie: accommodation, travel, etc.) are not recoverable.

The Tribunal has not yet awarded damages for mental distress to an applicant but it appears that it is a possibility if the evidence establishes enough distress to warrant such an award (*Peterborough Clow (No. 3)*).

Expenses incurred by an applicant in attempts to mitigate losses may be compensated. (*Alzheimer Society of Chatham-Kent v. Moon*)

Legal fees are not recoverable (*Peterborough Clow (No. 3)* and *Alzheimer Society of Chatham-Kent v. Moon*).

PART V OTHER ROUTES TO ENFORCE PAY EQUITY

Pay equity can be enforced through a number of different routes.

1. Collective Bargaining Remedies

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

a. Enforcement of Pay Equity Adjustments under the Collective Agreement

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

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

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

b. Incorporating Maintenance Provisions in the Collective Agreement

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

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

21.05 Terms of Reference Re: Pay Equity Maintenance

1. *The Union and the Employer acknowledge their ongoing responsibilities under the Pay Equity Act to:*

 - a. *establish and maintain compensation practices that provide for pay equity in accordance with section 7 of the Pay Equity Act;*
 - b. *to ensure that the Pay Equity Plan between the parties is appropriately amended to reflect any change of circumstances which subsequently render the Plan to be no longer appropriate within the meaning of the Act; and*
 - c. *to ensure that pay equity is maintained for new and existing job classifications.*

2. *The Union and the Employer agree to establish an ongoing process to address issues of maintenance including evaluation of new jobs that have undergone significant change.*
3. *The joint Job Evaluation Committee will have the following composition:*
 - a. *Three Union representatives chosen by and from the local union;*
 - b. *Three Employer representatives.*
4. *The parties agree that the McDowell Job Evaluation System will continue to be used as the gender neutral comparison system for pay equity maintenance purposes including any changes to that system which may subsequently be agreed to by the parties.*
5. *When a new position is established that falls within the scope of this bargaining unit, or when a position is included in this bargaining unit, or when the Employer makes a significant change to the job content of the existing classification to the extent that the classification becomes a new classification or another existing classification, the incumbent employee will complete a Job Information Questionnaire and submit it to her Supervisor.*
6. *Within ten (10) days of receipt of the completed questionnaire, the Supervisor will make any comments and forward the Questionnaire to the Compensation Specialist who will evaluate the position using the agreed upon job evaluation tool. Joint Job Evaluation Committee will meet to evaluate the position for the purpose of determining the level for each new or changed position, using the agreed upon Job Evaluation Plan.*
7. *The Compensation Specialist will provide the Job Evaluation Review Committee her ratings on a factor by factor basis along with the completed Questionnaire in advance of the Committee meeting. The joint Job Evaluation Review Committee will have the right to interview incumbents if necessary in*

order to evaluate jobs. The Committee members will discuss the point ratings submitted by the Compensation Specialist to determine which points, if any, are in dispute.

8. *The Committee members will be provided materials in advance of the meeting referred to in paragraph 7, as well as two (2) hours of preparation time during working hours to consider the materials and prepare to meet in joint session.*
9. *Upon agreement of the Committee as to the point ratings on each sub-factor, the job will then be placed in the appropriate pay band according to its total points.*
10. *Any pay increase will be retroactive to the date of completion of the questionnaire by the incumbent.*
11. *If the point total falls outside the range of the current job evaluation system, the Union and the Employer will negotiate an appropriate hourly rate for the job, consistent with the established pay grid. If the Committee is unable to agree on the points to be assigned to any subfactor, or if a dispute exists concerning the hourly rate of a particular job, the matter will be referred to an arbitrator familiar with job evaluation for full and final resolution. The arbitrator has all the powers of an arbitrator under the Labour Relations Act.*
12. *If there is a dispute, the Employer and the Union members of the Joint Job Evaluation Committee will prepare a rationale for their position on any of the following issues for the arbitrator:*
 - a. *whether substantial change has occurred;*
 - b. *the factors and points that are in dispute and the rationale for the dispute issues;*
 - c. *the pay band or hourly rate in dispute and the rationale for the issue in dispute.*

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

2. Human Rights Grievances/Human Rights Complaints

Where women are unable to access rights directly under the *PEA*, collective agreement (and human rights tribunal) remedies may allow them to access pay equity rights. These avenues for accessing pay equity entitlements would be of interest to women working in predominantly female workplaces in the private sector who could not get proxy pay equity under the *PEA*.

Under s. 48(12)(j) of the *Labour Relations Act*, an arbitrator has jurisdiction to interpret and apply human rights and other employment-related statutes:

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

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

This would enable an arbitrator to consider whether the wage rates in a collective agreement violate the right to be free of discrimination in employment under s. 5(1) of the *Human Rights Code*.

Parry Sound (District) Social Services v. OPSEU, (2003) 230 D.L.R. (4th) 257: substantive rights in the Human Rights Code and other employment-related statutes are incorporated into each collective agreement;

Nishimura v. Ontario Human Rights Commission (1989), 70 O.R. (3d) 247 (Ont. Div. Ct.): enactment of the *Pay Equity Act* does not remove jurisdiction from Commission to deal with pay equity complaints;

SEIU Local 204 v. Ontario (Attorney General) (1997), 35 O.R. (3d) 508 (Gen. Div.): the proxy method is a valid method for assessing wage discrimination.

3. Labour Board Remedies

Labour board remedies may be useful for preserving pay equity entitlements in certain contexts.

For example, if an employer lays off or contracts out women's jobs because they have been awarded pay equity adjustments, arguably this can be characterized as an unfair labour practice. It could be argued that such lay offs or contracting out constitute intimidation, coercion or a reprisal for attempting to exercise rights integral to labour relations or that such conduct interferes with the union's representation of its members in relation to the right to receive non-discriminatory wages. It would be necessary to build the appropriate evidentiary record to show that the lay offs or contracting out were motivated by anti-pay equity animus.

If such a claim was pursued under the *Canada Labour Code*, the Labour Board has the power to issue substantive interim orders which may be useful in blocking the lay offs or contracting out pending a resolution of the dispute.

PART VI PAY EQUITY FOR UNORGANIZED WORKERS

1. Pay Equity Entitlements

The pay equity entitlements of non-unionized workers are found the in the *Pay Equity Act*, the *Human Rights Code* and the *Employment Standards Act*.

a. Pay Equity Act

Employers are required under the *PEA* to achieve and maintain pay equity for their workers, whether represented by a union or not so long as the employer has 10 or more employees or is a public sector employer of any size.

Employers in smaller workplaces are not required to prepare pay equity plans but must still “establish and maintain compensation practices that provide for pay equity.”
Commport Communications International (No.2), July 14, 2006 File No. 4067-05-PE (P.E.H.T.)

Employees who have no union generally are required to file a complaint with the Pay Equity Commission in order to enforce their rights to pay equity.

The Pay Equity Commission has the power to monitor compliance with the *Pay Equity Act* and has a programme to do that.

Unorganized employees may take advantage of the following provisions in the *Act* in order to facilitate their ability to use the complaint procedure:

Group Representation

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

Anonymous Representation

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

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

b. Human Rights Code

The *Human Rights Code* which covers all Ontario employers regardless of size requires that employers establish and maintain equal treatment in compensation for men and women. This obligation exists in addition to the *Pay Equity Act* obligations of an employer. See *Nishimura v. Ontario Human Rights Commission* (1989), 70 O.R. (3d) 247 (Ont. Div. Ct.). The *Code* covers all Ontario workplaces regardless of size and provides a remedy for workers in workplaces with 10 or less employees.

c. Employment Standards Act

Section 42(1) prohibits an employer from paying “an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,

- (a) they perform substantially the same kind of work in the same establishment;
- (b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

2. Unionization as Route to Pay Equity

The quickest and most effective way to get pay equity for non-organized employees is to unionize and then:

get a collectively bargained wage which will reduce the wage gap

have a union take forward their claim for pay equity under a pay equity law.

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

3. Charter Litigation

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

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

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

See below re: Federal *PSECA Charter* litigation.

PART VII FEDERAL SECTOR PAY EQUITY COMPLIANCE

1. Introduction

For Union's with federally regulated bargaining units, the pay equity rules are different.

Most federal public service workers are now covered by the *Public Sector Equitable Compensation Act* which was enacted in March, 2009 but has not yet been proclaimed.

Private sector workers and the remaining public sector workers remain covered by section 11 of the *Canadian Human Rights Act* ("CHRA").

2. 2004 Federal Pay Equity Review Task Force

In 2004 the Federal Government's Pay Equity Review Task Force released its Report which sets out detailed recommendations for a new pro-active pay equity statute. (See CHSMC CD for a copy.)

The Task Force recommended a new federal pay equity law that would impose a specific pro-active obligation on employers to review their pay practices, identify any pay equity gaps and develop a pay equity plan to remedy discriminatory gaps in compensation. It recommended the creation of a pay equity commission and a pay equity tribunal, based on the proactive legislation models that exist in Ontario and in Québec. The Harper government rejected these recommendations when it adopted the *PSECA*.

The Task Force commissioned research on a number of key pay equity implementation issues which may be of assistance to unions in both the federal and provincial jurisdictions. Executive summaries of that commissioned research were available but the Federal Government has taken such links off its website.

See the Task Force research paper by Mary Cornish, Elizabeth Shilton and Fay Faraday "*Canada's International and Domestic Human Rights Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law* (November 2002). (See CHSMC CD for a copy.)

3. Section 11 *Canadian Human Rights Act*

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

The pay equity entitlements of employees under federal jurisdiction are found in the *Canadian Human Rights Act* and particularly section 11 and the *Equal Wages Guidelines* enacted under that *Act*. Unlike the Ontario *Pay Equity Act* which sets out a detailed pro-active scheme to achieve pay equity, the federal legislation sets out a basic right to pay equity and has a complaint-based enforcement system.

The Canadian Human Rights Commission (CHRC) Website - www.chrc-ccdp.ca - contains the following useful reference documents:

Canadian Human Rights Act and Equal Wages Guidelines

CHRC Guide to Pay Equity and Job Evaluation

CHRC Filing a Pay Equity Complaint

CHRC Implementing Pay Equity in the Federal Jurisdiction

4. *Public Sector Equitable Compensation Act* ('*PSECA*')

The *PSECA* will restrict the substance and the application of pay equity in the public sector. This includes:

removing the right of public sector workers to file complaints for pay equity with the Canadian Human Rights Commission.

fundamentally redefining pay equity concepts such as female predominance (requiring 70% dominance) and including discriminatory “market factors in the evaluation of whether or not jobs are of “equal” value.

transforming pay equity into an “equitable compensation issue” that must be dealt with at the bargaining table along with other collective bargaining issues. If pay equity is not achieved through the bargaining process, individual workers are left to file a complaint with the Public Service Labour Relations Board, but without their union's support: in fact, the *PSECA* imposes a \$50,000 fine on any union that would encourage or assist their own members in filing a pay equity complaint!

Pay equity is a fundamental human right that has been protected by the Canadian Human Rights Act since 1977. It should not be bargained away during collective bargaining. When a government violates women's right to pay equity, the Supreme Court of Canada has said that is an infringement of their constitutional equality rights. Pay equity is guaranteed by Convention 100 of the International Labour Organization and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

A number of unions, including the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada are challenging the constitutionality of the *PSECA*, along with the *Expenditure Restraint Act*. In summary, these applications allege that the *PSECA* violates the fundamental equality rights of women in the federal public sector to be free from wage discrimination in the payment of their work and perpetuates ongoing sex-based wage discrimination by government actors in the federal public sector. This includes establishing procedures that deny such women the ability to effectively implement and enforce even these eroded substantive rights. It also imposes remedial restrictions, which deny such women the right to have sex-based wage discrimination fully eradicated and prevented.

The federal government through its Office of the Chief Human Resource Officer is currently engaged in consulting with stakeholders about proposed *PSECA* regulations. It issued various policy directions in its June 10, 2010 meeting on the following issues: 1) Job Group; 2) Equitable Compensation Assessment; 3) The Value of Work - SERWC; 4) The Value of Work - Recruitment and Retention Needs; 5) The Value of Work - Prescribed Factors; 6) Provision of Data; and 7) Technical Aspects.

The Public Service Alliance of Canada's February, 2009 document gives a good summary of criticisms of the *PSECA*. See <http://psac.com/news/2009/issues/200902pseact-e.shtml>

PART VIII	PAY EQUITY LOBBYING
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1. Ontario

Ontario's Equal Pay Coalition continues to lobby for greater pay equity enforcement.

The Coalition's Framework for Action details the history of pay equity in Ontario, the need for better enforcement and a plan for action. See <http://www.equalpaycoalition.org/>. There are many other resources to assist unions and employees on the Equal Pay Coalition website.

2. Federal

After the 2004 Federal Pay Equity Task Force Report was released unions, women's groups and a range of community organizations, organized as the Pay Equity Network, lobbied the federal government to adopt the Task Force's recommendations. Unfortunately, this lobby was not successful as the Harper Government brought in the *PSECA*. The Network continues to lobby for the repeal of the *PSECA*.

"A Legislated Checklist for Substantive Pay Equality" prepared for the Pay Equity Task Force Symposium by Mary Cornish and Fay Faraday. See www.cavalluzzo.com/publications for a copy.