

Ontario Nurses' Association and SEIU Local 1 v Participating Nursing Homes, 2019 ONSC 2168 (Divisional Court File No 362/16 and 364/16); Participating Nursing Homes v Ontario Nurses' Association and SEIU Local 1 (Divisional Court File No. 444/16 and 445/16)

Overview: On April 30, 2019, the Ontario Divisional Court released two important decisions on the duty of employers to maintain pay equity in female-dominated workplaces. The Court agreed with the Unions, the Service Employees' International Union, Local 1 (SEIU1) and the Ontario Nurses' Association (ONA) that female-dominated workplaces which initially achieved pay equity for their workers by using the proxy method of comparison under the Pay Equity Act (the Act) are required to use this same method to maintain pay equity thereafter. The Court found that workers in a predominantly female workplace have the right to maintain pay equity with reference to male comparators external to the workplace at a proxy establishment. The Court rejected the Participating Nursing Homes' (PNH) argument that pay equity could be maintained by monitoring internal relativity among female job classes. These decisions represent an important victory for women workers in the province, particularly for women in sex-segregated workplaces, such as nursing homes, who are most vulnerable to sex discrimination in their compensation.

"This is a significant win for the labour movement and women working in predominantly female workplaces," said SEIU Healthcare President Sharleen Stewart. "After a long battle, we are incredibly pleased that The Court has ruled in favour of the working women of Ontario."

Unfortunately, but not surprisingly, the corporations that represent the participating long-term care homes in this case, including Extencicare, Chartwell, Sienna and Revera, have indicated they will continue their fight against their employees and are expected to appeal Tuesday's decision.

The Government of Ontario, along with those participating long-term care corporations, is also a party in this case and could likewise push back.

"These for-profit long-term care corporations make millions in profits from taxpayer-funded government business," added Stewart. "Going forward, Premier Ford's government has a chance to show whose side they're on. That's why we call on the Government of Ontario to accept the decision in this case and take the side of the women on the frontlines who dedicate their lives to caring for others, and not the greedy corporations fighting to deny pay equity to workers."

Background Facts: In 1995, SEIU1 and the employers, the Participating Nursing Homes, used the proxy method under the Act to enter into the \$1.50 Plan to achieve pay equity for its members employed at PNH's female dominated workplaces. Under the proxy method, SEIU1 was able to import proxy male comparators from the Municipal Homes for the Aged in order to achieve pay equity for its members at the PNH. However, over the years, a pay equity gap between the wages of comparable jobs at the Municipal Homes for the Aged and PNH reemerged. Despite SEIU1's efforts to have the pay equity gap addressed, PNH denied they had any duty to maintain pay equity under the Act, let alone maintain it with reference to the external proxy comparators.

SEIU1 filed a complaint with the Pay Equity Hearings Tribunal. SEIU1's case was heard together with a similar complaint by ONA against the PNH. The Unions argued that the PNH have a statutory duty under the Act to maintain pay equity through the proxy method and, alternatively, should the Act not require this, the Act breaches section 15 of the Charter – the equality rights guarantee.

The Unions were partially successful before the Tribunal. While the Tribunal agreed with the Unions that employers in the proxy sector must maintain pay equity, it found that they are not required to do so through the proxy comparison method. Rather, the Tribunal found that pay equity can be maintained by the PNH through maintaining internal relativities among female job classes, without on-going reference to male comparators in an external proxy establishment. The Unions and PNH sought judicial review of the Tribunal's decision.

SEIU1 and ONA Arguments: In the Unions' judicial review applications, the Unions continued to advance their long-standing position that pay equity can only be maintained in female dominated workplaces by on-going access to male comparators in a proxy establishment. The Unions argued that the Tribunal erred in its interpretation of the Act because it failed to properly balance the Charter value of equality with the Act's statutory mandate, undermined the purpose of the Act to remedy systemic discrimination, and removed the statutory requirement that the proxy method include male comparators.

The Unions also argued that if the Court were to agree with the Tribunal's interpretation of the Act, then the Act unjustifiably violates the equality rights of workers in female dominated workplaces, contrary to the Charter, because these workers are unable to maintain true pay equity without reference to external male comparators.

Decision: The Court found in favour of the Unions, concluding that the Tribunal's interpretation of the Act was unreasonable. The Court agreed with the Unions that the Tribunal erred when it concluded that a distinction based upon a denial of the right to maintain pay equity with external male comparators was a distinction based on the nature of the workplace – or “locus of employment” – as opposed to gender. However, the Court did not go on to find that the Act violated the equality rights guarantee under the Charter. Rather, the Court found that when the Act is properly interpreted in accordance with the values underpinning the equality rights guarantee, it does not discriminate against women in female-dominated workplaces, because the Act itself requires that their employers maintain pay equity using the proxy method. In this regard, the Court agreed with the Unions that the Tribunal erred in its interpretation of the Act by not proportionately balancing the workers' Charter equality rights. The Court concluded that the proportionate balancing of the Charter equality rights of workers with the Act's statutory mandate leads to one outcome only: that pay equity must be maintained in female-dominated workplaces with reference to external male comparators under the proxy method. The Court did not examine the Union's other statutory interpretation arguments given its determination that the Tribunal had fatally erred in its Charter values analysis.

The Court concluded that the Act is non-discriminatory when interpreted in a manner that proportionately balances the Charter equality rights of women workers.

The Court sent the matter back to the Tribunal with the direction that the Tribunal must specify what procedures the employers and Unions must use to ensure that pay equity is maintained under the proxy method by access to male comparators.

In a separate decision, the Court rejected the PNH's judicial review applications. The Court agreed with the Unions and the Tribunal's order that the parties negotiate a Gender Neutral Comparison System and determine whether any maintenance adjustments are required was reasonable. The Court directed that these negotiations must occur in conjunction with the Court's determination that women at female-dominated workplaces have a right to maintain pay equity with reference to male comparators under the proxy method.

Comments: The two decisions represent an important victory for women in predominantly female workplaces across the province, as well as for equality-seeking groups and the labour movement more generally. The decisions significantly advance pay equity jurisprudence as they establish for the first time in Ontario the ongoing right to maintain pay equity in the proxy sector with reference to external male comparators. Thus, women in sex-segregated workplaces will no longer be limited to a one-time pay equity adjustment based on 1995 circumstances. Rather, for the first time since initially entering pay equity plans nearly a quarter century ago, women in sex-segregated workplaces will be able to maintain true pay equity with male work and be able to remedy systemic discrimination in their compensation. The importance of these decisions to workers in predominantly female workplaces cannot be overstated. While it is anticipated the PNH will seek leave to appeal the decisions, the Unions will have the advantage of two strong, unanimous Divisional Court judgments in their favour.