

0003-89 Ontario Public Service Employees Union, **Applicant** v. Cybermedix Health Services Ltd.,
Respondent

Before: Beth Symes, **Chair**; Donald Dudar and Susan Genge, **Members** .

Appearances: Elizabeth J. Shilton-Lennon, Isla Peters, Martin Sarra, Susan Tomchyshn for the Applicant; Mary Ellen Cummings, James le Noury, and Mary Jane Tome for the Respondent.

Cite As: **Cybermedix Health Services** (1990), 1 P.E.R. 41

Negotiations - Disclosure

Parties are jointly responsible for the process and the content of the pay equity negotiations. In order to meet these obligations, information relevant to pay equity issues must be disclosed so that rational and informed discussions may occur. Disclosure must be made whenever the 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. In this case, there are no male comparators within the bargaining unit and therefore the Union is entitled to information relating to job classes in the rest of the establishment. This includes job titles and descriptions as well as information about gender composition and compensation schedules but does not include disclosure of the names of individual employees.

Practice and Procedure - *De Novo* Hearings

The proceeding before the Tribunal is not an appeal. Rather it is a hearing *de novo* on the issues in dispute. Evidence on those issues must be called at the hearing by the parties and be subject to cross-examination.

Négociation - Divulgateion

Les parties sont toutes deux responsables du processus et du contenu des négociations en matière d'équité salariale. Afin de respecter ces obligations, il importe que les renseignements sur des questions d'équité salariale soient divulgués pour que des discussions rationnelles et éclairées aient lieu. Les renseignements doivent être divulgués chaque fois que les parties ne s'entendent pas sur une question sans les renseignements demandés. Les deux parties ont le droit d'obtenir des renseignements suffisants pour faire des choix éclairés à toutes les étapes du processus. Dans la présente cause, il n'y a pas d'emplois masculins dans l'unité de négociation, et, par conséquent, le syndicat a le droit d'obtenir des renseignements sur des catégories d'emplois qui existent à l'extérieur de l'unité de négociation. Notamment, le syndicat peut obtenir les titres de postes et description d'emploi et information sur les niveaux de salaire ou gammes des taux de salaire par poste. La nécessité de divulguer les noms des employés travaillant à l'extérieur de l'unité de négociation n'a pas été établie.

Pratique et Procédure - Audience *De Novo*

Une instance devant le Tribunal n'est pas un appel. Plutôt c'est une nouvelle audience relative aux

questions en litige. Lors de l'audience, les parties doivent convoquer des témoins en ce qui concerne les questions en litige et ces témoins peuvent être contre-interrogés.

DECISION OF THE TRIBUNAL, JULY 6, 1989

1 This is an application by the Ontario Public Service Employees Union (OPSEU) for a hearing with respect to a review officer's order dated April 12, 1989. Hearings were held in Toronto on June 21 and 22, 1989.

2 The Applicant alleges that the Respondent, Cybermedix Health Services Ltd. (Cybermedix) has breached sections 6, 13 and 14 of the *Pay Equity Act, 1987* with respect to its duty to negotiate pay equity in good faith.

3. The facts in this case are not in dispute. The parties have been actively negotiating pay equity and disagree on two issues:

i) What information must be disclosed for the purposes of bargaining pay equity? ii) When during the bargaining process must that disclosure be made?

3 Cybermedix operates a series of medical laboratories throughout the province of Ontario and in Montreal. As Cybermedix is a laboratory and therefore in the public sector, it must bargain and complete its pay equity plans on or before January 1, 1990 for its employees throughout Ontario, *Pay Equity Act, 1987* Appendix to Schedule.

4 OPSEU is the bargaining agent for all full time employees of Cybermedix in Metropolitan Toronto except for supervisory, office, and clerical staff. There is a collective agreement between the parties.

5 On February 25, 1988 OPSEU notified Cybermedix that it wished to negotiate pay equity and sought information concerning all employees in the province to assist the union in the bargaining process. The information was requested on several occasions but there was no response. OPSEU then filed a request with Review Services of the Pay Equity Office on August 16, 1988 alleging that the employer had failed to supply the union with information necessary for the union to bargain pay equity.

6 When the parties met with a review officer in September 1988, Cybermedix gave OPSEU the information the union had requested with respect to employees in the bargaining unit. The company did not disclose the information requested for employees outside the bargaining unit.

7 In November, Cybermedix provided the union with a copy of the job comparison system it proposes to use. At a meeting in December, the employer made a presentation of its proposed job comparison system and invited the union to either accept or reject it, to propose modifications, or to table its own job comparison system.

8 The information disclosed showed that OPSEU represents 134 of 529 employees of Cybermedix in the province of Ontario. There are seven different jobs in the bargaining unit; six of those jobs are predominately female, that is 60 per cent or more of these jobs are held by women. There are no predominately male jobs in the bargaining unit. The parties have not yet agreed on the definition and identification of job classes for the workplace.

9 The *Act* requires the comparison of female job classes to male job classes within an establishment, to determine if the work performed is of equal or comparable value. The comparisons are to be made first within the bargaining unit. If there are no male comparators within the bargaining unit, then the female job classes are to be compared to male job classes throughout the establishment, even though the male job comparators will be outside the bargaining unit *Pay Equity Act, 1987* s.6.

10 As there are no male job comparators within this bargaining unit, OPSEU is seeking information about employees outside the bargaining unit. OPSEU has requested the names, job titles,

current earnings, gender composition, and existing job descriptions for all positions in the workplace. OPSEU's position is that it is unable to formulate an informed bargaining position about job class and a gender neutral job comparison system appropriate for the workplace without this information. It is the union's position that the disclosure of this information is required from the employer to enable the union to negotiate in good faith and endeavour to agree upon a gender neutral job comparison system and the pay equity plan for the bargaining unit.

11 Cybermedix has agreed that it must provide OPSEU with the job titles and the gender composition for positions outside the bargaining unit and had offered to do so. The company refuses to provide the union with the names of these employees on the ground that such information is not relevant to bargaining pay equity and that the disclosure of this information would breach the confidentiality owed by the employer to its non-union employees. Finally, Cybermedix refuses to provide the current earnings and job descriptions to the union, as this information is not yet relevant at this stage of the parties' bargaining for pay equity and may never become relevant.

12 The Applicant called Dr. Lois Haignere, an expert witness in job comparison systems and pay equity. Dr. Haignere has been a consultant to employers, to unions, and to joint committees of employers and unions in the pay equity bargaining process both in Canada and in the United States. She testified that in order to meet the requirements of the *Pay Equity Act, 1987* it was necessary to use accurate and complete job information, to use a gender neutral job comparison system appropriate for the particular workplace, and to apply the job comparison system in a gender neutral way. Gender bias can occur in any one of these three areas.

13 Dr. Haignere testified that from her experience job titles are a poor predictor of job content. Sometimes job titles are sex specific: for example, male employees are called "custodians", and female employees are called "housekeepers" or "matrons", even though they do essentially the same work. Position descriptions are often less detailed and more generic for women than for men. "Female jobs" tend to have more members, therefore job specifications must be very general to cover the range. In contrast, "male jobs" have fewer members and the job descriptions are more detailed. Persons writing job descriptions may leave out important elements of the job. An example would be the omission of nurturing from a care-giving position. In addition, the person delineating the position may incorporate gender bias into the description. For example, the position description for "driver of a small van" said twelve months training required, whereas the training required for "secretary" was only one month. Some job descriptions do not include working conditions. Others include working conditions for the trades, but not for the office staff. Dr. Haignere concluded that the gathering of job information which is gender neutral is an important component of the pay equity process.

14 Dr. Haignere testified that most job comparison systems fall into two types: *a priori* and policy capturing. An *a priori* system is one in which factors and weights are selected and predetermined before analysing the content of jobs. Although salary information is not required in order to select an *a priori* system, normally it is available and used. A policy capturing system is statistically driven and captures or measures the policy that underlines payment for work. Regression and factor analysis are used to establish the factors and weights which form the basis of the current compensation package. These results are not gender neutral. There must be an implementation process in which the policy makers decide how to alter the system to make it gender neutral for pay equity purposes. She concluded that it is essential to have job information and current salaries in order to do policy capturing.

15 Dr. Haignere testified that, no matter which system of job comparison is selected, to assess whether it is gender neutral, two factors must be considered. First, does the system fairly value the job content of both the male and the female jobs? Secondly, is the system consistently applied? In her opinion, it is not acceptable in a service organization to value customer contact at the managerial level

but not at the level of operations, especially where those latter employees are hired and evaluated on their contact with customers. Based on Dr. Haignere's experience, it is her opinion that a job comparison system may be gender neutral in one workplace but not in another, depending upon the type of work being performed. It is essential to field test a job comparison system for a workplace. Gender neutrality may be established either after a test run or after all the male and female jobs have been evaluated. Dr. Haignere stated that it is necessary to have the job information of both male and female jobs in order to test gender neutrality.

16 During argument, counsel for the Respondent raised the issue of whether proceedings before the Tribunal were in the nature of an appeal or in the nature of a hearing and to what extent should the Tribunal scrutinize a Review Services order. The *Pay Equity Act, 1987* establishes the Pay Equity Commission and divides it into two separate and independent parts: the Pay Equity Office and the Pay Equity Hearings Tribunal. The *Act* provides that when a matter comes to the Commission, it is sent to the Pay Equity Office and a review officer is assigned who must investigate the matter and may endeavour to effect a settlement. The primary focus of Review Services is to mediate with the parties and to attempt to settle the issues in dispute. This focus is essential in an effective dispute resolution process. The receipt and the evaluation of evidence is not their focus. Although review officers are required to be fair, the more formal requirements of the *Statutory Powers Procedures Act* R.S.O. 1980, c.484 do not apply *Pay Equity Act, 1987*, s. 34(4). In contrast, section 25 of the *Pay Equity Act, 1987* requires the Tribunal to hold a hearing and to comply with the provisions of the *Statutory Powers Procedure Act*. This proceeding is not an appeal from a review officer's order, but is rather, a hearing *de novo* on the issues in dispute. For example, the only information the Tribunal had about this case from the Pay Equity Office is the order of the review officer. Evidence on issues in dispute must be called at the hearing by the parties and be subject to cross-examination. The Tribunal will assess the credibility of witnesses and determine the weight to be given to the evidence. To turn these proceedings into an appeal of a review officer's order would be contrary to the intent of the statute, would have the negative impact of judicializing the review services process and would take away their primary focus on mediation and settlement. Therefore, these proceedings will be hearings not appeals, and the decisions of the Tribunal will be made based on the evidence presented at the hearing.

17 The purpose of the *Pay Equity Act, 1987* is to redress systemic gender discrimination in compensation. In a unionized setting, the employer and the bargaining agent are required to negotiate in good faith and to endeavour to agree upon a gender neutral job comparison system and the pay equity plan for the bargaining unit (ss. 14(2)). They are precluded from bargaining for or agreeing to compensation practices that, if adopted, would contravene the *Pay Equity Act* (ss. 7 (2)). The *Act* imposes a joint responsibility on the employer and the union for both the process and the content of pay equity negotiations. Process refers to the duty to negotiate in good faith; content refers to both the gender neutral job comparison system and the component parts of the pay equity plan. A failure to negotiate the component parts might lead to a union rejecting the pay equity plan completed by the employer without union input; a failure to agree to the statutory minimum would leave both parties responsible for their failure to meet their obligations.

18 It is preferable for the parties to negotiate their plan, without resort to the Commission. Success at this depends upon the bargaining agent being a full partner in the process. If the parties are unable to agree, the Pay Equity Commission is available for assistance in order to resolve their dispute. Given the purpose and nature of the *Pay Equity Act, 1987*, the Tribunal will review both the process and the content of negotiations to ensure the obligations established by the *Act* are met.

19 For the parties to negotiate in good faith and endeavour to agree on the job comparison system and the pay equity plan, there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals,

to formulate their own positions in bargaining pay equity, and to fairly represent their members. The duty to disclose information for the purposes of bargaining collective agreements has been long established *DeVilbiss (Canada) Limited*, [1976] O.L.R.B. Rep. March 49; *Globe Spring & Cushion Co. Ltd.*, [1982] O.L.R.B. Rep. Sept. 1303; *The Windsor Star*, [1983] O.L.R.B. Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] O.L.R.B. Rep. May 705; *Forintek Canada Corp.*, [1986] O.L.R.B. Rep. Apr. 453; *Royal Conservatory of Music*, [1985] O.L.R.B. Rep. Nov. 1652. In pay equity negotiations, the parties also will be required to disclose sufficient information to enable informed and rational bargaining to take place. The Respondent acknowledges this obligation, but disputes the extent and timing of that disclosure.

WHAT INFORMATION MUST BE DISCLOSED FOR THE PURPOSE OF BARGAINING PAY EQUITY?

1 The position of counsel for the Respondent was that the duty to disclose is tied to the duty to rationalize a bargaining proposal. She maintained that there is no "in the air freedom of information" just because the Applicant has said that it wishes to talk about an issue or because the information is related to the union's proposal. It was her position that if the employer has tabled a reasonable and rational proposal, then and only then is the employer under an obligation to disclose the information related to the tabled proposal *Royal Conservatory of Music*, supra at pp. 38. Cybermedix maintains that there has been no breach of the duty to disclose at this time because the employer has not yet put any of these issues to which this information relates on the bargaining table.

2 It is the Tribunal's decision that not all information requested must be disclosed. The information requested must be necessary to negotiate pay equity. The information must be rationally related to an issue or issues in pay equity bargaining. The information may be necessary to test the quality or impact of a decision in the pay equity bargaining process. Unlike collective bargaining where parties may place a variety of issues on the bargaining table, this *Act* sets the issues to be bargained. Specifically, the parties must bargain and endeavour to agree on the gender neutral job comparison system and on the pay equity plan (s.14(2)). Component parts of a pay equity plan include the establishment to which the plan applies, the male and the female job classes which form the basis of the comparison, a description of the gender neutral job comparison system, the results of the comparisons, the exemptions (if any), the adjustments in compensation, and the dates of the adjustments (s.13). The parties are entitled to information so that rational and informed bargaining on these issues can take place and the parties can move towards a settlement.

WHEN DURING THE BARGAINING PROCESS MUST DISCLOSURE BE MADE?

1 The Respondent's position is that there is a sequential process to the negotiation of pay equity, that is, initial issues such as establishment must be agreed upon before other issues are bargained. The Applicant disagreed with this lock-step approach to pay equity bargaining. In this case, Isla Peters, the pay equity advisor for the Applicant, testified that the union was not prepared to commit itself to sequential bargaining but instead wanted the issues bargained interactively. She said that the Applicant does not want a piecemeal approach to pay equity bargaining. Dr. Haignere testified that there are many paths towards pay equity and that it is not a simple, straight forward process.

2 The Tribunal accepts that these sequential processes may assist some parties to bargain pay equity. But, the sequential process is not the only way to bargain pay equity. Neither party can force the timetable of bargaining by refusing to disclose on outstanding issues. The timing of disclosure may depend upon the

type of pay equity bargaining in which the parties wish to engage. 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.

3 These parties have been bargaining pay equity since February 1988. It is agreed that there are no male comparators in the bargaining unit and that male comparators must be sought outside the bargaining unit. The Respondent has tabled its proposed job comparison system and has asked the Applicant to either accept or reject it, to propose modifications, or to table its own job comparison system. It is the Applicant's position that pay equity bargaining can go no further without the disclosure of the names, job titles, current earnings, gender composition, and existing job descriptions for all positions outside the bargaining unit. The Applicant states that this information is needed to negotiate the boundaries of job classes both inside and outside the bargaining unit and to identify and evaluate the male job classes which will become the comparators for the female job classes inside the bargaining unit. This information is also needed in order to evaluate the job comparison system tabled by the employer for gender neutrality and to propose its own job comparison system.

26. The Respondent's position is that the parties are a long way from determining job classes and from assessing gender neutrality, and therefore this information is not relevant at this stage of pay equity

bargaining. Secondly, the employer's duty to disclose only arises when it must rationalize a bargaining proposal it has tabled. Until the employer proposes a particular male job comparator, there is no obligation to disclose information about this job. Finally, the information sought by the union is about employees outside the bargaining unit and the disclosure of some of the requested information would breach confidentiality.

4 Counsel for the Respondent divided the information requested into three types:

- i) the information the Respondent is prepared to disclose, that is, the job titles and gender composition of positions outside the bargaining unit,
- ii) information which the Respondent says is not yet relevant at this stage in pay equity bargaining, that is, earnings for each job outside the bargaining unit and the existing job descriptions, and
- iii) information which the Respondent is never prepared to release, that is, the names of employees outside the bargaining unit.

1 The Applicant's position is that it must have the earnings for each job outside the bargaining unit in order to be able to identify and evaluate the male job classes which may become the comparators for the female jobs inside the bargaining unit. Secondly, the Applicant seeks the information about current earnings in order to assess the gender neutrality of the job comparison system proposed by the Respondent and to enable the Applicant to propose alternate job comparison systems, which might include a policy capturing system.

2 In this workplace, the male comparators for pay equity must be sought outside the bargaining unit. Therefore, the union is entitled to sufficient information necessary to negotiate the boundaries of job classes both inside and outside the bargaining unit. "Job class" is defined as "those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates" ss.1(1). Therefore, in order to define job class, and to identify and evaluate male job comparators, the Applicant is entitled to the compensation schedule, salary grade, or range of salary rates for all employees outside the bargaining unit. This information is also necessary to allow the Applicant to consider and possibly to propose a policy

capturing system of job comparison for this workplace. As both issues of job class and job comparison systems are currently in dispute between these parties, this information must be disclosed by the Respondent to the Applicant forthwith to enable the parties to engage in informed and rational pay equity bargaining.

30. The Applicant seeks the existing job descriptions for jobs outside the bargaining unit as a first step in gathering job information in order to negotiate job classes, to evaluate the job comparison system proposed by the Respondent, and to propose an alternative system. The Respondent opposes this request because these job descriptions, which were prepared by the employer for a purpose different than pay equity, are not always reliable and therefore are not relevant to pay equity negotiations. The Respondent relied upon the evidence of Dr. Haignere that job descriptions are not always accurate: sometimes they are outdated; sometimes they do not accurately reflect the work performed; sometimes they are gender biased; and sometimes they fail to include all of the relevant factors for a gender neutral enquiry. As it is essential

to ensure the accuracy of the job information, the parties should be concerned about relying on job descriptions for a pay equity enquiry. While the Tribunal recognizes the potential flaws in the existing job descriptions, they are a starting point in the collection of job information data in this workplace. This information must be disclosed now to enable the Applicant to bargain the current issues of job classes and job comparison systems.

3 Finally, the Applicant seeks the names of employees outside the bargaining unit. The Respondent's position is that these names are not relevant to pay equity bargaining and that their disclosure would breach the confidentiality owed by an employer to its employees. Isla Peters, the pay equity advisor for OPSEU testified that the names were necessary for the Applicant to anchor and verify the other information requested. The Tribunal notes that the Applicant's request for information has been made at a preliminary stage of collecting job information. The Applicant's request for names presumes that there will be problems with the information provided. There is no evidence to establish a basis for this concern. The Tribunal is not prepared at this time to require the Respondent to disclose the names of employees outside the bargaining unit.

4 Based on the agreed facts, the expert evidence presented, and the submissions of the parties, the Tribunal finds that the Respondent must disclose to the Applicant information necessary for the purposes of bargaining pay equity. Failure to disclose this information is a breach of the Respondent's duty to bargain in good faith.

5 The Tribunal varies the order of the review officer dated April 12, 1989 and orders the Respondent, Cybermedix to disclose to the Applicant union forthwith the following information for all positions outside the bargaining unit:

- i) the job titles;
- ii) the gender composition of the positions;
- iii) the compensation schedules, salary grades or range of salary rates for each position;
- and,
- iv) the existing job descriptions.

1 This information is necessary to enable the parties to engage in informed and rational pay equity bargaining. There is every indication that the parties will only use this information for the bona fide purpose of negotiating a gender neutral job comparison system and a pay equity plan.

2 The parties are ordered to continue bargaining pay equity.