0345-92 Ontario Nurses' Association, **Applicant** v. St. Joseph's Villa, **Respondent**

Appearances: Anne-Marie Delorey, Raymonde Boileau, Gloria McIntyre and Kim Gillet for the Ontario Nurses' Association; Carole Piette for St. Joseph's Villa

Before : Mary Anne McKellar, **Vice-Chair**; Nicole LeClerc and Susan Genge, **Members**

Cite As: St. Joseph's Villa (1993), 4 P.E.R. 33

Change in Circumstances

The pay equity plan included all employees. The *Act* requiresseparate payequityplans forbargaining unit and non-bargaining unit employees. ONA's certification as bargaining agent for the nurses employed in the establishment constituted a change in circumstances making the plan inappropriate for those employees. The Tribunal ordered that the existing plan be split. Having brought the form of the plan into compliance with the statute, in the absence of evidence or argument to suggest that the otherwise deemed approved plandid not meet the requirements of the *Act*, the Tribunal refused to order the negotiation of a new plan.

Practice and Procedure - Disclosure

The Employerwasordered to discloseinformationnecessarytopermit ONAtofulfillitsss.7(2) obligations on behalf of the bargaining unit. This did not include financial information as the plan did not require adjustments to nurses' wages.

Changement de situation

La *Loi* exige des plans d'équité salariale distincts pour les employés syndiqués et les employés non syndiqués. Le Tribunal ont conclu que l'accréditation de l'ONA constituait effectivement un changement de situation et que le plan ne convenait plus au groupe d'employés en question. Le plan visé s'appliquait aux deux groupes d'employés. Le Tribunal ont donc ordonné qu'il soit divisé en deux plans distincts. Après s' être assurés de la conformité de la forme duplanauxexigencesde la *Loi,* le Tribunal ont décidé de ne pas accueillir la demande de l'ONA qui voulait la négociation d'un nouveau plan. Le Tribunal a invoqué l'absence de preuves ou de moyens selon lesquels le plan réputé approuvé n'était pas conforme aux exigences de la *Loi.*

Pratique et procédure - Divulgation de documents

Le Tribunal ont ordonné à l'employeur de divulguer à l'ONA les données dont elle a besoin pour remplir sesobligations au nom de l'unité denégociationenvertuduparagraphe 7(2) dela *Loi.* Comme l' adoption du plan n'a pas donné lieu à un redressement des salaires du personnel infirmier, le Tribunal ont refusé d'ordonner la divulgation de données financières.

DECISION OFMARYANNEMCKELLAR,VICE-CHAIR AND MEMBER SUSAN GENGE, AUGUST 19, 1993

THE ISSUES

1 The principal issue in this case is whether a bargaining agent's certification to represent previously nonunionemployeesforwhom a pay equity plan has already beenposted constitutesa changedcircumstance thatrendersthe planinappropriate for a female job class to which the newly unionizedemployeesbelong. The secondary issue concerns the extent to which the employer must disclose information relevant to the pay equity process to the newly-certified bargaining agent.

2 In an oral ruling we disposed of the preliminary issue of whether the Tribunal has jurisdiction to hear this matter given that no Review Officer order had been made. While the parties had agreed that the Tribunalhad jurisdiction, we declined to accept their agreement as sufficient to determine the question or to confer jurisdiction on us. The Tribunal itself was bound to determine the question of its jurisdiction. After hearing the parties' submissions on the issue, we ruled that in the circumstances of this case, and having regard to the Tribunal's jurisprudence on the issue, we do have jurisdiction:

> We are satisfied that we have jurisdiction to hear this matter. The parties have clearly joined issue on aquestionrequiringa legalinterpretationofthe *Pay Equity Act.* The issue is one of fundamental importance, but it is not factually complex. Based on the additional facts provided in this morning's submissions, it is clear to us that the parties have used the resources available to them, meeting or speaking on several occasions with the Review Officers assigned to the case. We are satisfied that there is no further reasonable opportunity to settle this matter and that it requires determination by the Tribunal.

THE FACTS

1 The parties filed an Agreed Statement of Fact. In addition, at the hearing, the Applicant, the Ontario Nurses' Association ("ONA") called one witness, Ms. Raymonde Boileau, an Employment Relations Officer with ONA who is responsible for dealing with the ONA bargaining unit at St. Joseph's Villa ("the Employer"). Our statement of the relevant facts in the paragraphs below is based on the Agreed Statement of Fact and Exhibits thereto and Ms. Boileau's testimony.

2 On May 3, 1990, the Employer posted a pay equity plan ("the Plan") for its non-unionized employees, whichincludedatthattimethenursesinitsemploy. The Employer gave the employees covered by the Plan 90daysinwhichto review it and submit comments. No comments or complaintswithrespecttothePlan were made and the Employer reposted the Plan. No objection in respect of the Plan was filed with the Pay Equity Commission. Paragraph 7 of the Agreed Statement of Fact states, "No male comparator of equal value and no male comparator of lesser value being higher paid were found." Although the Agreed Statement of Fact does not say so, we assume the consequence of this state of affairs was that no adjustments were required or made under the Plan.

3 On February 22, 1991, ONA became the certified bargaining agent for the nurses employed by the Employer.

4 On July 9, 1991, Ms. Boileau wrote to the Employer's Director of Human Resources. The full text of this letter reads:

> As the newly certified bargaining agent for the registered nurses at St. Joseph's Villa, we arenotifyingyouthatweare obliged to ensure that pay equity has been

establishedand is maintained in this work place for our members.

We are also of the view that a newly certified bargaining unit .results in a change of circumstances in your establishment. Thus it is our view that the pay equity plan implemented for our members may no longer be appropriate.

I will be contacting you in the near future to request disclosure of documentation with respect to the implementation of pay equity in your establishment. I would also like to arrange ameetingtodiscusswithyouthe appropriateimplementationofpayequityforour members.

7. The Employer responded in a letter dated July 8, 1991:

I am in receipt of your letter of 09 July 1991. Under the Pay Equity Act, once certain procedures have beencompletedto enactPayEquity, the plan is deemed to be complete and final. We have complied with the said Act, and the pay equity process with our Registered Nurses at the Villa is now complete in as much as we are under a continual obligation, according to the Act, to maintain pay equity.

Your suggestion to meet to discuss the "appropriate" implementation of pay equity is presumptuous at best and such meeting is not warranted.

1 On August 7, 1991, ONA wrote to the Employer requesting "disclosure of all documentation with respect totheimplementationofpayequityinthe above establishment [St. Joseph's Villa]." The letter went on to enumerate the various documents of which disclosure was sought.

9. The Employer responded to ONA's August 7, 1991 letter in a letter dated August 20, 1991. The pertinent part of this letter reads:

As indicated in my previous letter, we have completed the process of pay equity in 1990 using a "SKEW" system and no male comparator was found. Theplananditsresult was posted in accordance with the Act and is being maintained.

2 On November 11, 1991, ONA made a written application to the Review Services Branch of the Pay Equity Commission, alleging that the Employer had contravened the *Act* byrefusing to negotiate with ONA for a gender neutral comparison system and pay equity plan for the nurses employed by the Employer, and by failing to disclose to ONAthe informationONArequired"toascertainthe status ofpay equity in the establishment and to ensure meaningful negotiations to achieve and maintain Pay Equity." ONA's application went on to enumerate the nature of the information it requested be disclosed.

THE PARTIES' POSITIONS

1 ONA's position is that its certificationasbargainingagentforthenursesemployedbythe Employer is a "changed circumstance" that makes the Plan "not appropriate" under ss.22(2)(b) of the *Pay Equity Act*, R.S.O. 1990, c. P.7. ONA says the Plan is not appropriate because it purports to cover all of the employeesofthe Employer, both thosewho remainunorganizedand thosewhomONAhasbeencertified to

represent in collective bargaining. ONA submits that this situation runs afoul of the requirement in ss.14(1) of the *Act* that there must be a pay equityplanforeach bargaining unit in an establishment and a plan for all non-unionized employees in the establishment. According to ONA, it is required to negotiate a gender-neutral comparison system and plan. Furthermore, ss.7(2) of the Act requires ONA to ensure that pay equity is maintained. Disclosure is required to enable ONA both to negotiate and to maintain a pay equity plan for its bargaining unit.

2 The Employer's position is that the plan is deemed approved by virtue of the operation of subsections 15(8) and 13(9) of the *Act*, and that ONA's certification is not the kind of changed circumstance that triggers the reopening of the Plan. The Employer agrees with ONA that ONA is required by ss.7(2) of the *Act* to ensure that pay equity is being maintained, but the Employer disagrees withONA'scontention that the Employermustdisclosecertaininformationtoenable ONAto fulfil that obligation. The Employer says that it will disclose necessary information as it becomes relevant.

THE ANALYSIS

Changed Circumstances

13. Subsection 22(2)(b) of the *Act* provides:

> (2) Anyemployeeorgroup of employees, or the bargaining agent,ifany, representingthe employee or group of employees, may file a complaint with the Commission complaining withrespect toa payequityplanthat applies to the employee or group ofemployeesthat,
> (a) .....
>
> (b) because ofchangedcircumstancesinthe establishment, the planisnot appropriate for the female job class to which the employee or group of employees belongs.

14. There are thus two requirements to making out a complaint under ss.22(2)(b). The complainant must show:

> (i) that there has been a change in the circumstances in the establishment; and
> (ii) that the change in circumstances is one that renders the plan not appropriate for a female job class to which the complainant belongs, or which the complainant union represents.

15. With respect to the first requirementsetoutabove,counselfortheEmployersubmittedthatONA's certification is not a changed circumstance in the establishment. Her argument relied on the fact that the *Act* defines "establishment" to mean "all of the employees of an employer employed in a [geographical area]". She argued that because a bargaining agent is not an employee,itisexternalto the establishment, and therefore its certification cannot constitute a change to the establishment. Given the consequences of certification for the bargaining unit employees under the *Act*, we are not persuaded on this point. We accept that ONA's certification satisfied the first requirement to making out a complaint under ss.22(2)(b): it constituted a change in circumstances in the establishment.

2 The question that requires closer analysis is whether ONA's certification satisfied the second requirement to makingout a complaint underss.22(2)(b):did itmakethe Planinappropriateforthenurses? In order to determine this issue, we must examine how certification changes the establishment, and what the pay equity consequences of those changes are.

3 The certification of a union changes the circumstances in the establishment in two important ways: it creates a bargaining unit; and it recognizes the unionas the exclusive bargainingagent for that bargaining unit.

4 The bargaining unit defines the scope of any collective agreement, regardless of how that collective agreementisreached-throughanegotiatedsettlement,interestarbitration,orfinalofferselection. Similarly, byvirtue ofss.14(1)ofthe *Act*, the bargaining unit defines the scope of any pay equity plan, however that planisreached--throughnegotiatedsettlement,orthroughthe interventionofthe PayEquityOfficeand/or Tribunal. This is the consequence of the creation of a bargaining unit.

5 What is the consequence of therecognitionofexclusivebargainingagent status? What effect does it have on employment contracts generally? Prior to certification, individual employees have the legal capacity to negotiate the terms and conditions of their employment contracts with their employer. Each employee is a party to his or her own employment contract and can complain individually with respect to any alleged breach of it. Upon certification, the union becomes the exclusive bargaining agent for the employees in the bargaining unit. The employees' individual rights to negotiate terms of employment and complainoftheir breachisdisplacedbythe bargainingagent's right to conduct negotiations fora collective agreement covering all of the employeesinthe bargainingunit,and to administerthatcollective agreement, includinggrievingwithrespecttoanyalleged violations of it. In addition, the bargaining agent issubjectto a special obligation that flows directly from the fact that it is exclusively able to contract on behalf of bargainingunitemployees.The bargainingagentisstatutorilyobligedto represent fairlyallofthe employees in the bargaining unit, in both the negotiation and administration of the collective agreement.

6 What is the significance of exclusive bargaining agent status under the *Act*? The *Act* recognizes the exclusive bargaining rights of bargaining agents in ss.1(1). The *Act* provides that pay equity plans for bargaining units are to be negotiated between the bargaining agent and the employer. The bargaining agent has the right to file objections to a pay equity plan under s.16 or to file complaints under s.22 of the *Act*. In addition, ss.7(2) of the *Act* imposes on a bargaining agent the obligation not to bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1) (the employer's obligation to establish and maintain compensation practices that provide for pay equity).

7 How did ONA's certification as exclusive bargaining agent for the nurses affect the circumstances in the Employer's establishment? The following are the pertinent considerations:

- subsection 14(1) of the *Act* requires that there be separate pay equity plans for each bargaining unit and for all unorganized employees in an establishment;
- C the nurses in the Employer's employ are now in a bargaining unit;
- C the Planindisputeappliesto bothemployeesin the bargaining unit and employees outside of the bargaining unit;
- C ONA has the exclusive right to negotiate and administer a collective agreement on behalf of the nurses;
- C many of the most important terms and conditions in collective agreements relate to compensation;

C the *Act* is all about redressing systemic gender discrimination in compensation;

C ONA is under a statutory obligation to fairly represent the employees in the bargaining unit;

C ONAisunderno similarobligationto any of the Employer'semployeesoutsideof the bargaining unit;

C ONA represents the individual employees in the bargaining unit and has the right to file objections or complaints under the *Act* on their behalf; and

C subsection 7(2) of the *Act* statutorily prohibits ONA from bargaining for or agreeing to compensation practices that would contravene the requirements of ss.7(1) respecting the establishment and maintenance of pay equity.

1 Having regard to the factors set out above, we find that ONA's certification is a change in the circumstances in the establishment that makes the Plan inappropriate for the nurses. The Plan is inappropriate as it is because both bargaining unit and non-bargaining unit personnel are covered by it. Uponcertification, ONAbecame became exclusivelyentitledto represent the nurseswho werepreviously covered by the Plan. The same cannot besaidofthenon-unionemployeescovered by the Plan: ONA is not their bargaining agent and has neither authority nor obligation to represent them.

2 Subsection 7(1) of the *Act* requirestheEmployertoestablishandmaintain pay equity. Subsection 7(2) is a corollary to ss.7(1): it prohibits the Employer and ONA from bargaining for or agreeing to compensation practices that would contravene ss.7(1). Although ss.7(2) is framed in negative language as a prohibition, the constraints it places on a bargaining agent's behaviour may also be restated positively: byrequiringONAnotto undermine the establishment or maintenance of pay equity, it effectively requires the bargaining agent to play a role in ensuring that the Employer maintains pay equity. That obligation, however, can only extend to those persons the bargaining agent is entitled to represent, namely the employees in the bargaining unit. At the very least, the obligation would require the bargaining agent to monitortheimplementationofanypayequityplanpertainingtobargainingunitmembers. ONA would have the right to, and indeed might be obliged to, complain under ss.22(2)(a) of the *Act* in the event that the Employer was failing to implement the plan according to its terms. However, ONA could only complain insofar as that failure to implement pertained to the bargaining unit employees. It would clearly be inappropriate to require a bargaining agent to monitor the implementation of pay equity for employees it did not represent.

3 For all of the above reasons, we have found that it is not appropriate that there be a single pay equity planforboththebargainingunitandnon-bargaining unit employees of the Employer. Subsection 25(2)(f) of the *Act* confers on the Tribunal the remedial jurisdiction to order that a pay equity plan be revised. Accordingly, we are ordering that, in compliance with ss.14(1) of the *Act*, the Plan be "split" into two: a plan for the bargaining unit; and a plan for the rest of the Employer's employees.

4 We are not ordering that a newplanbenegotiatedhowever:we are ordering that the Plan be split. In other words, our order extends to the **form** of the Planonly, and not to its **content** or the comparison system on which it is based. We decline to order the Employer to negotiate a plan with ONA. The Plan wasprepared andpostedinapparentcompliancewiththe *Act* and none ofthe employeesnowrepresented by ONA, who were then capable of making individual objections to the Plan, did so. It therefore is deemed approved. We see no reason to order that a deemed approved plan to which no one has objected bere-opened or re-done. Further, we heard no evidence or argument to suggest that the contentsofthe posted Plan failed to meet or contravened the requirements of the *Act*.

Disclosure

1 The information which must be disclosed to ONA is information relevant to ONA's ability to fulfil its obligations under the *Act* vis-à-vis the bargaining unit. As we have already indicated, that obligation is not an obligation to negotiate a new pay equity plan, but to satisfy the requirements of ss.7(2) of the *Act* with respect to that part of the Plan that applies to the bargaining unit. At a minimum, as noted, ss.7(2) requires a bargaining agent to monitor the situation to ensure that a pay equity plan is being implemented according to its terms. The threshold requirement then, is that the bargaining agent have knowledge of the terms of the plan.

2 Section 13 of the*Act* specifiesthe content of pay in determining what informationmustbe disclosed to ONA. ONA is already in possession of the information set out in subsections 13(1)(a) and (b), namely, theidentificationoftheestablishmentandthejobclassesinit. There is no further obligation to disclose with respect to this information.

3 Subsection 13(2)(a) requires that the pay equity plan describe the gender neutral comparison system used. In this case, ONA knows that the system used for the Plan was the SKEW system and they have been provided with both the manual used for the evaluations and the job fact sheet or questionnaire used to collect job content information. What the Plan does not disclose, however, is a further essential part of the comparison process: what wage adjustment methodology was used. For example, were the jobs banded? We are of the view that information relating to the wage adjustment methodology is necessary to enable ONA to fulfil its obligations under the *Act*. We are ordering the employer to disclose this information.

4 Subsection13(2)(b)requiresthatapayequityplansetoutthe results of the comparison carried out usingthegenderneutralcomparison system. The Plan does notclearlydosoonitsface. We are ordering the employer to disclose to ONA the values assigned to the work of the female job classes within the bargaining unit, and those male job classes outside the bargaining unit which are potential male comparators.

5 Subsection 13(2)(c) requires that any s.8 exemptions relied on be specified in the pay equity plan. The Plan does not indicate if any such exemptions were relied on. If they were, they must be disclosed, and we so order.

6 Subsection 13(2)(d) requires that a payequityplan set out how compensation will be adjusted for female job classesforwhichpayequitydoesnotexist. The Plan identified no male job classes performing work of comparable value to that performedbyjobs inthe bargainingunit,so itdoesnotappear thatthere is any information to be disclosed under this section.

7 Subsection 13(2)(e) requires a pay equity plan to set out the date on which adjustments under it will be paid. Again, there does not appear to be anything further to be disclosed under this section.

8 In addition, ONA has specifically requested certain information from the Employer. The requested information is itemized in ONA's November 12, 1991 letter to the Review Services Branch of the Pay Equity Commission. We have reviewed this letter and determined that in order to enable ONA to meet its obligations under ss.7(2) of the *Act*, the following additional information must be disclosed to it:

> 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 items; and

the gender composition of the job classesidentifiedinthe plan, the number of incumbents in each job class, and any future changes.

The Employer is ordered to disclose the above information to ONA.

34. ONA also requested certain financial data in order that it might determine 1% of the Employer's annualpayroll. Given that no comparators have been identified for female job classes in the bargaining unit, and henceno adjustmentshave beenscheduledforthem, wecan see no reason forrequiringthe Employer to disclose this information to ONA at this time.

CONCLUSION

35. In conclusion, we direct the Employer to comply with the Tribunal's orders contained in paragraphs 24, 28, 29, 30 and 33.

DECISION OF TRIBUNAL MEMBER NICOLE LECLERC, AUGUST 19, 1993

1 I disagree with the decision of the majority in this case. I do not dispute the account of facts as presented by the majority, however I issue the following decision and reasons.

2 There are three issues to be determined in this case, the first relates to the status of a union which is certified after a pay equity plan has been posted in an establishment and deemed approved under subsection 15(8) of the *Pay Equity Act.* Specifically, does a newly certified bargaining agent have rights and obligations to negotiate with respect to a deemed approved pay equity plan?

3 Thesecondissueiswhetherthecertificationofabargainingagentconstitutesachanged circumstance in the establishment under subsection 22(2)(b) of the *Act* that makes the pay equity plan no longer appropriate for the female job class to which the employees belong?

4 The third issue concerns the extent to which the employer must disclose information to the newly certified bargaining agent.

5. The Applicant in this case requests the Tribunal to order:

-that bargaining rights and obligations to establish pay equity fall to the union as of the date the union obtained its certification and therefore order that ONA and the employer bargain a new pay equity plan for the bargaining unit;

-that the certification of a bargaining unit is a changed circumstance under subsection 22(2)(b) of the *Pay Equity Act*;

-disclosure by the employer of all documentation with respect to the implementation of pay equity in the establishment.

STATUS OF A UNION CERTIFIED AFTER THE ESTABLISHMENT OF PAY EQUITY

6. The Applicant union argues it has an obligation to ensure that pay equity has been correctly

established and is being adequately maintained in the workplace for its members. ONA relies on section 14 of the *Pay Equity Act* which it claims, and as is affirmed in the majority decision:

"requires that there must be a pay equity plan for eachbargaining unit in an establishment and a plan for all non-unionized employees in the establishment."

2 In oral evidence, Ms. Boileau, an employment relations officer with ONA, testified that ONA had by virtue of section 14 of the *Pay Equity Act* an obligation to negotiate a new pay equity plan as well as an obligation to maintain pay equity. Ms. Boileau claims ONA has a right to negotiate because the nurses were not represented at the time pay equity was established and that now, since the employees are members of a certified bargaining unit, the union has a duty to ensure that pay equity was appropriately done forthoseemployeesitrepresents,and thereforehasthe obligationto negotiatea newpayequityplan. She states that as a newly certified bargaining agent, ONA is obliged to make sure what was done with respect to pay equity in 1990 is still correct.

3 The employer argues that ONA is bound, as are the employees it represents, by the plan that was

implemented by the employer as it has been deemed approved under subsection 15(8) of the *Act* which states:

> 15(8) If no objection in respect of a pay equity plan is filed with the Commission under subsection (7), the plan shall *be deemed to have been approved by the Commission* and, on the day provided for in the plan, the employer shall make the first adjustments in compensation required to achieve pay equity. (emphasis added)

9. The employer further relies on subsection 13(9) of the *Pay Equity Act* to support its position, and that subsection provides the following:

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. (emphasis added)

2 The employer has presented argument with respect to the meaning of the " deemed approved" provisioninvariousstatutes. Succinctly, the courts have generally attributed three meanings to these types of provisions. First, that "deemed approved" provisions constitute a conclusive presumption; secondly, "deemed approved" provisions constitute a rebuttable presumption; thirdly, that "deemed approved" provisions have but a suggestive meaning.

3 As the case law clearly indicates, where a "deemed approved" clause states that legal consequences areto flowfromthe stated circumstances, the presumptionestablishedbythe deemedapproved provision is a conclusive one. In this particular case, the legal consequences clearly established by the *Pay Equity Act* are the following:atthe end ofthe payequityprocess wherebythe employeeshave hadanopportunity to review, comment, and file objections to a pay equity plan posted by an employer following subsections 15(4),(5),(6),(7) of the *Act*, the pay equity plan is deemed approved by the Pay Equity Commission and the parties to the plan are bound by it in accordance with subsection 13(9) of the *Act*. In this case, the parties bound by the previously posted pay equity plan are the employees and the employer, since there was no bargaining agent at the time.

4 Section 22 of the*Act* supportsthatinterpretationofthe deemedapproved provisions inthatitaffirms the Legislature's desire to bring finality to the pay equity process once pay equity has been implemented, and limits complaints regarding a deemed approved pay equity plan to a restricted number of circumstances. In fact, there are but three situations specifically provided for by section 22 of the legislation where a pay equity plan is subjecttocomplaintsandsubsequentrevisionbytheTribunal. First, when one ofthe parties claims that there has been abreachofthe *Act* (subsection22(1)); secondly,

whena deemed approved pay equity plan is not implemented in accordance with itsterms,(subsection22(2)(a)) ;thirdly, when there is a change of circumstance in the establishment that makes the deemed approved pay equity plan no longer appropriate for the female job class to which the group of employees belong (subsection 22(2)(b)). In situations other than those, and unless the parties can demonstrate to the Tribunal that one of those situations applies, the posted pay equity plan is deemed approved and binds the parties to it.

13. The Applicant alleges it has an obligation to negotiate a pay equity plan for the employees it represents in accordance with section 14 of the *Act*. I disagree with that interpretation of section 14. In

my view, section 14 of the *Act* refers to the establishment of pay equity in the workplace and applies for that purpose only. The *Act* establishesthattherearetwostagestotheimplementationofpayequity. First, payequitymustbe establishedthroughout theemployers'establishmentstowhichthe *Act* applies;secondly, payequityafterbeingestablishedmustbe maintainedto ensurethat the situation the *Act* is meant to rectify is corrected on a continuing basis.

5 The purpose of section 14 of the *Act* isnotto stipulatethe kindsand numberofpayequityplans that mustbe in existence in a specific establishment. Section 14,inmyview,referstotheprocessthatmustbe followedbythe employerforthe establishment ofpayequityifthereare bargainingagentsinthe employer's establishment. Where there are bargaining agents in the employer's establishment, section 14 stipulates that theemployercannotestablishpayequityunilaterally, but mustdo so throughnegotiations withthosevarious bargaining agents representing his employees.

6 In this particular case, when pay equity was established in 1990, there was no bargaining agent representing the employees in question in the establishment and therefore section 14 did not apply. If section 14 of the *Act* did not apply in 1990, at the time pay equity was established in this establishment, I fail to see how it can apply now, retroactively and generate negotiating rights to ONA.

7 Section 7 of the *Pay Equity Act* is the relevant section of the legislation to consider in determining the general rights and obligations of employers and bargaining agents with respect to pay equity. The Legislaturehasdeterminedveryclearlythatthereare two stagesto be carriedout forpayequityto become a reality in the workplaces of Ontario, the first is toestablishpayequityand the second is to maintain pay equity. The Legislature has also clearly provided that the obligation to carry those out falls on the **employers** in Ontario as stated in subsection 7(1) of the *Act*:

> 7(1) Every**employer**shall **establish** and **maintain** compensation practices that provide for pay equity in every establishment of the employer. (emphasis added)

Theestablishmentandmaintenanceofpayequityisclearly an employer responsibility and obligation. The purpose of sections 14 and 15 of the *Act*, is to impose on the employera processto followincarryingout his obligation to establish pay equity throughout his establishments. That process differs whether the establishment is comprised of bargaining units or not.

17. It is therefore clear in subsection 7(1) of the*Act* thatthe employeris solely obligated to establishpay equity and to fulfill the continuing obligation of maintaining pay equity. The bargaining agents have obligations as well, and the Legislature has indicated thoseinsections 7(2) and 14 ofthe *Pay Equity Act*. Subsection 7(2) outlines the bargaining agents' general obligation:

7(2) Noemployerorbargainingagent shallbargainforor agreeto compensationpractices that, if adopted, would cause a contravention of subsection (1).

Section 14 of the *Act* outlines specific rights and obligations for bargaining agents to carry out jointly with employers for the establishment of pay equity. These obligations flow from the participatory role given bargaining agents by the Legislature to negotiate pay equity for the employees they represent in establishments where they are present.

1 That is the extent of the bargaining agents' general obligations with respect to pay equity, namely that they cannot bargain or agree to compensation practices that would disrupt the achievement or ongoing maintenance of pay equity in the employer's establishment. Subsection 7(2) obliges both the bargaining agents and the employers not to bargain to disrupt compensation practices that provide for pay equity throughout the employer's establishment. The nature and extent of the obligations given to employers and bargaining agents respectively by the *Pay Equity Act* are logical. One cannot expect a bargaining agent to be preoccupied with, or to see to the establishment of pay equity throughout the employer's establishment, that is for employees other than those it represents. Pay equity is not established on a bargaining unit basis but on the employer's establishment basis. For that reason, there must be but one entityobligatedto see tothe establishment and maintenanceofcompensationpracticesthatprovideforpay equitythroughout theestablishment,fromonegroupofemployeesto another,whethertheyare represented by a bargaining agent or not. That entity, designated in the *Pay Equity Act* as the employer, is ultimately responsible to see that the compensation practices he implements provide forpayequity for all groups of employees in his establishment. Subsection 7(2) of the *Act* then acts as a safeguard for all parties, employers,employeesandbargainingagents;itallowsthosewho have obligations to adequatelyfulfillthem, and secures the others that the compensationpracticesimplemented to provide for pay equity will not be unduly disrupted.

2 ONA relies on section 14 of the *Act* to claim it has a right to negotiate a new pay equity plan with the Employer in this case. In my view, section 14 is limited in its application to the initial establishment of pay equity and indicates the process to be followed by an employer where there are bargaining units in his establishment. This section of the *Act* which grants negotiating rights to a bargaining agent for the establishment of pay equity, deals with the situation where the bargaining agent has the status to bargain at the time pay equity is established.

3 That is not the situation in this case. WhentheEmployerdidproceedto fulfill his obligations under the *Act* and established pay equity for the employees of his establishment in 1990, the employees concerned were not represented by a bargaining agent and section 14 did not apply at that time, nor can it now apply retroactively. In this case, the Employer has fulfilled his obligation to establish pay equity respecting the provisions ofsection15ofthe *Pay Equity Act*, which is the relevant section that did apply at the time. The facts in evidence in this case are clear to that effect.

CHANGED CIRCUMSTANCES

1 The secondissueinthiscaseiswhetherthecertification of a bargaining agent constitutes a changed circumstanceinthe establishment, in itself, undersubsection22(2)(b)ofthe *Act,* that makes the pay equity plan no longer appropriate for the female job class to which the employees belong.

22. ONA claims that certification, in itself, results in a changed circumstance that makes the existing pay equity plan inappropriate; one could also argue whether certification is a change of

circumstance or new circumstanceintheestablishment. In essence, certification of the employeesbyONAdoesnotimpacton

the employer's obligations to establish and maintain pay equity within the establishment. The only impact ofcertification, oncepayequityhasbeenestablishedas in this case, is thatthe employerand the bargaining agent intheir upcomingnegotiations willhave to abidebysubsection7(2)ofthe *Act*,and are jointly obliged not to bargain or agree to any compensation practices that would disrupt the already provided for pay equity in the employer's establishment.

2 ONA feels that the association now has the right to negotiate a new pay equity plan with the employerbecause the nurseshadnotbeenrepresentedat the time payequitywasestablishedor achieved. Since then, there has been a change, in that certification has given those employees a representative for whom it is the duty to ensure that pay equity was appropriately done. I do not agree with this position. The obligations under the *Act* to implementorestablishpayequityandthe subsequent obligationto maintain payequity are not obligations that the Legislature has given tobargainingagentsbut ratherobligations that fall onto the employers.

24. ONA's claim to the right to "redo" pay equity must be based on clear evidence that pay equity as established and achieved by the employer, is no longer appropriate for the female job class the employees it represents belong. Such evidence was not tendered in this case, as is stated and confirmed by the majority in paragraph 25 of their decision:

25. We are not ordering that a new plan be negotiatedhowever:weareordering that the Plan be split. In other words, our order extends to the form of the Plan only, and not to its content or the comparison system on which it is based. We decline to order the Employer to negotiate a plan with ONA. The plan was prepared and posted in apparent compliance withthe *Act* and.noneoftheemployeesnowrepresentedbyONA, whowere then capable of making individual objections to the Plan, did so. It is therefore deemed approved. We see no reason to order a deemed approved plan to which no one has objected to be reopened or redone. Further, *we heard no evidence or argument to suggest that the contents of the posted Plan failed to meet or contravened the requirements of the Act.*

3 The Employer alleges a newly certified bargaining unit does not entail a changed circumstance pursuant to subsection22(2)(b) of the *Act* since there is no correlationbetweenunionizationas achanged circumstance and the appropriateness of a pay equity plan.

4 In myview,achangedcircumstancecanonlygotocompensationorto the value of a job, the basic elementsofpayequity. If a new union is a changed circumstance under subsection 22(2)(b), then so would thesaleofabusinesstoanotheremployer. A changed circumstance capable of rendering a pay equity plan inappropriate,mustimpactonthe elementsofa payequityplanas outlinedinsection13 ofthe *Act*, or must affect the compensation or value of jobs, as these form the basis for achieving pay equity.

27. The purpose of pay equity, as stated in section 4 of the *Act*, is to redress systemic gender discriminationincompensationthroughevaluationofcompensationpracticesand workinanestablishment. To credibly assert that circumstances have rendered a pay equity plan inappropriate, the changed circumstances must stem from issues related to compensation and the value of work; in that perspective,

certification is not a changed circumstance that is related to compensation or the value of work in the establishment. It is a change in the bargaining relationships of the parties in the workplace, but does not impactontheelementsofapayequityplanoronanyofthebasis for the establishment of pay equity. I do not believe there are any "pay equity consequences" in the establishment that flow from certification of a bargaining agent.

5 If one concludes that certification is a changed circumstance that now renders prior implementation of pay equity inappropriate in the workplace, one must conclude that decertification

of a union or recertification of a new union, for that matter, would have the same effect. If we follow that reasoning, a change of ownership of a corporation would also constitute a changed circumstance that would render an already established and implemented pay equity plan inappropriate. A new bargaining agent or new employer would therefore not be bound by a pay equity plan in that workplace, but would be bound by existing terms and conditions of employment by the application of existing labour law. This conclusion is absurd.

6 In current labour law, a newly certified bargaining agent, as does a new employer in the sale of a business,takes terms and conditions ofemployment as theyare whentheybecome accreditedto represent employees in a workplace. A binding pay equity plan, is inmyview, one of those terms a newly certified bargaining agent must respect. In this case, I feel ONA has no legal right to request the Tribunal recognize it has bargaining rights to negotiate a new pay equity plan with the Employer. Counsel for the employer pointed out, and rightly so, that had the Legislature required the employer to negotiate a new pay equity plan with a newly certified bargaining agent, it would have done so by specifically incorporating in the legislationa provisionsimilarto subsection3(2) ofthe *Pay Equity Act.* Subsection 3(2) of the *Act* states thatanemployercanbecome subjectto the applicationofthelegislation,uponmeetingcertaincriteria,even though he was not subject to the *Act* when it came into force.

DISCLOSURE

30. I agree with the disclosure ordered by the majority in paragraphs 26 to 34 inclusively. However, I do not agree with the majority's characterization of the bargaining agent's rights or obligations warranting disclosure under the *Pay Equity Act.* I do not agree that subsection 7(2) requires a bargaining agent to monitor the situation to ensure that a pay equity plan is being implemented according to its terms. The bargaining agent is not responsible for the establishment or maintenance of compensation practices that provide for pay equity. Subsection 7(2) requires that a bargaining agent and employer not bargain for or agreetocompensationpractices that would disrupttheachievementofpayequityintheestablishment. To do so, the bargaining agent must have knowledge of the terms of the pay equity plan that has been implemented in the workplace and must have the knowledge of the content of other jobs and their conditions of employment. The disclosure of that information to the bargaining agent is required to ensure itcanadequatelyfulfillits obligation not to bargain for or agree to compensation practices thatwould lead to the disruption of pay equity in the employer's establishment.

CONCLUSION

1 Iseenoreasonforthemajorityofthispaneltoordera pay equity plan to be split, particularly when it is required solely for cosmetic reasons. The majority itself states in paragraph 25 of their decision, previously quoted, that it is not warranted to intervene in the contents of the plan since it is deemed approved.

2 In my view and as outlined earlier, the obligations with respect to pay equity, and the existing pay equity plan in this case, are those that accrue to both parties under section 7 of the *Act.* Specifically, the employer has an obligation to maintain compensation practices that provide for pay equity in the establishment as persubsection7(1) ofthe *Act.* In addition, subsection 7(2) imposes on the employer an obligationnottobargainforor agreeto compensationpracticesthatwould

causeitnottofulfillitsobligation to maintainpayequityinitsestablishment;this obligationisalsoincumbent uponeverybargainingagent that has bargaining rights within an employer's establishment.

3 In this case, the employer must ensure that pay equity as already achieved in his establishment, and including the registered nurse group, is maintained. He may not bargain with any of the bargaining agents throughout his establishment, or agree tocompensationpracticesthatwould causepayequityto no longer be maintained.

4 The newly certified bargaining agent in this case has but one obligation and that is to bargain for and agree to in all upcoming negotiations, compensation practices that will allowthe employertomaintainpay equity as it has been established.

5 Idisagreethatcertificationisachangedcircumstancethatrendersthepayequityplaninappropriate; there is no evidence to sustain that argument. I believethedeemedapprovedprovisionsapplicableinthis case, subsections 15(8) and 13(9), as well as the limited number of circumstances justifying Tribunal interventionunder section 22, do not allow for any exercise of liberal interpretation by the Tribunal inthis case.

6 The evidence in this case is conclusive to the effect that the employer has already fulfilled his obligations under the *Pay Equity Act* and is not trying to circumvent the obligations imposeduponhimby the legislation. This is also not a situation where a particular group did not have access to the benefits of the *Act.* In fact, the *Act* itself empowered the non-unionized employees in this case to participate in the process of establishment of pay equity and the evidence in this case clearly indicates they had the opportunity to exercise those rights.

7 For the above reasons, I would reject the Applicant's request except with respect to disclosure.