



Nursing Home Workers Win Landmark Proxy Pay Equity Case!

What the Court Decision Means for Proxy Pay Equity Advocacy

2 May 2019

Dear Equal Pay Coalition Members,

Ontario nursing home workers have won two landmark pay equity decisions that could be worth millions of dollars for workers in female-dominated workplaces across the broader public sector!

On 30 April 2019, the Ontario Divisional Court unanimously allowed the Ontario Nurses' Association and Service Employees International Union Local 1 application and overturned a 2016 decision by the Pay Equity Hearings Tribunal.¹ The Court ruled that the predominantly female nursing home bargaining units must maintain pay equity using the proxy pay equity method. This means the value and pay of the female jobs in these predominantly female workplaces, which lack internal male comparators, must be compared with similar jobs at larger public sector workplaces which have access to male comparators.² If proxy pay equity was used to develop the pay equity plan, pay equity must be maintained by continuing to use proxy comparators from outside the predominantly female workplace.

In a related judicial review, the Court unanimously dismissed the employers' application. It ruled that as the original pay equity plan had not used a gender neutral comparison system (GNCS) to achieve pay equity, the Tribunal has authority to order the parties to negotiate a GNCS to determine if any pay equity maintenance adjustments are owed.³

¹ *Ontario Nurses' Association v. Participating Nursing Homes; Service Employees International Union Local 1 v. Participating Nursing Homes*, 2016 CanLii 2675 (Ont. PEHT)

² *ONA v Participating Nursing Homes*, 2019 ONSC 2168 (Div. Ct.)

³ *Participating Nursing Homes v. ONA*, 2019 ONSC (Div. Ct.) Court File No. 444/16 and 445/16



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While the cases deal specifically with workers at nursing homes, the rulings protect the rights of over 100,000 workers throughout the broader public sector who used the proxy comparison method to develop their pay equity plans.

The Equal Pay Coalition intervened in the judicial reviews before the Divisional Court, making submissions in support of the two Unions and presenting the implications of the decisions on non-unionized women in the broader public sector. These wins build on the solid victories that the Equal Pay Coalition helped secure at the Supreme Court of Canada in 2018.⁴

The Nursing Homes have already indicated they plan to seek leave to appeal.

What is proxy pay equity?

Proxy comparisons are used in the broader public sector – at workplaces such as nursing homes, childcare centres, and other health and community services – where the workforce is so female-dominated there are not any or sufficient male jobs available to do a pay equity comparison. Under the *Pay Equity Act*, the value (skill, effort, responsibility, working conditions) and pay of female jobs in these predominantly-female workplaces are compared with similar jobs at larger local public sector workplaces – “proxy workplaces” – that have male-dominated jobs which they used to calculate the appropriate pay equity compliant pay.

After pay equity is achieved by adjusting women’s wages to eliminate sex discrimination, all employers have a legal duty to maintain pay equity on an ongoing basis so discriminatory wage gaps don’t re-emerge.

The dispute in this case was about whether workplaces that used the proxy method to achieve pay equity must continue to use the external proxy comparators to maintain pay equity. The nursing home employers argued they did not. The Divisional Court ruled that they did.

Key Wins from the Decision

The Divisional Court decisions address three key themes as follows:

PAY EQUITY IS A FUNDAMENTAL HUMAN RIGHT

- 1. Pay equity is a human right.** The Court emphasized that the *Pay Equity Act*’s “statutory mandate is to redress systemic discrimination in the compensation of employees employed in female job classes in Ontario.”⁵
- 2. Pay equity recognizes and redresses the systemic sex discrimination that devalues women’s work compared to men.** Adopting language from the Supreme Court of

⁴ See Equal Pay Coalition, [10 Key Pay Equity Wins at the Supreme Court of Canada](#) (15 May 2018)

⁵ *ONA v. PNH*, para. 88

Canada's 2018 decision in *CSQ*, the Divisional Court found that "the goal of pay equity legislation is to recognize and remedy the discrimination that *women* have suffered in the way they are compensated in the workforce. This is systemic discrimination premised on the historic economic and social devaluation of 'women's work' compared to 'men's work'."⁶ The Court overturned the Tribunal's ruling, finding that "its decision that maintaining pay equity did not require continued resort to male comparators [is] unreasonable".⁷

ALL EMPLOYERS – INCLUDING EMPLOYERS WITH PREDOMINANTLY FEMALE WORKPLACES – HAVE A LEGAL DUTY TO MAINTAIN PAY EQUITY WITH REFERENCE TO MALE COMPARATORS

- 3. All employers are equally bound by the duty to maintain pay equity.** On its face, s. 7(1) of the *Pay Equity Act* requires every employer to whom the Act applies to "establish and maintain compensation practices that provide for pay equity in every establishment of the employer." The Court emphasized that: "The obligation to maintain pay equity applies regardless of the methodology by which pay equity was achieved. There is no distinction created by the *Act* insofar as maintenance is concerned."⁸

Because all employers are equally bound by the same duty to maintain pay equity, the Court found that the *Act* does not violate the right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms*. The Court did not need to undertake an analysis of whether there was a substantive equality violation of s. 15 because it found that, properly interpreted, women in predominantly-female broader public sector workplaces were not denied the right to pay equity maintenance with reference to male wages.⁹

- 4. The *Pay Equity Act* must be interpreted in a way that is consistent with the values of equality under s. 15 of the *Charter*.** At all times, administrative decision-makers, like the Pay Equity Hearings Tribunal, must act consistently with the values – including *Charter* values – that underlie the legislation under which they exercise their authority.¹⁰ As a result, the Pay Equity Hearings Tribunal was required to balance the *Charter* value of equality with the statutory objectives of the *Pay Equity Act*. In reviewing the Tribunal's decision to determine if its interpretation complies with *Charter* values, the court must consider (1) if the Tribunal's interpretation of the *Pay Equity Act* limited the *Charter's* protection; and (2) if so, what is a proportionate balance "that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate".¹¹

⁶ *Centrale des Syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para. 23-25 cited in *ONA v. PNH*, para. 61

⁷ *ONA v. PNH*, para. 88

⁸ *ONA v. PNH*, para. 63

⁹ See *ONA v. PNH*, para. 63-65

¹⁰ The Court reiterated the binding authority from the Supreme Court of Canada and the Ontario Court of Appeal that a party does not need to prove that the words in legislation are ambiguous before an administrative tribunal can use the *Charter* as an aid to interpretation: *ONA v. PNH*, para. 66-68

¹¹ *ONA v. PNH*, para. 69

- 5. Conducting a pay equity analysis requires a comparison with male wages, even when workers are at a predominantly female workplace.** The Court held that “the touchstone of a pay equity analysis is the comparison to male work, as men enjoy the benefit of compensation that is tied to the value of their work – as opposed to their gender.”¹² As a result, the Court rejected the employers’ argument that pay equity could be maintained solely using an internal comparison between female job classes within the predominantly female workplace. The Court ruled that the Tribunal’s decision limited the equality protection under s. 15 of the *Charter* “because it denies women in predominantly female workplaces ... the right to maintain pay equity with reference to male work.”
- 6. Denying women in predominantly female workplaces access to male wage comparators for pay equity is undeniably a distinction based on sex, not “locus of employment.”** The Court overturned the Tribunal’s analysis and found that denying the right to maintain pay equity with deemed male comparator was a distinction based on sex, not “locus of employment.” It underscored that this issue “was conclusively decided” by the Supreme Court of Canada in *CSQ*.¹³
- 7. Denying women in predominantly female workplaces access to male wage comparators for pay equity fails to give as full effect as possible to the *Charter* right to equality.** The objectives of s. 15 of the *Charter* and the *Pay Equity Act* both focus on protecting women’s right to equality in the face of systemic sex discrimination. The *Act*’s objectives are to recognize and redress systemic sex discrimination in pay and to ensure such discrimination does not re-emerge. The Court ruled that “Not requiring access to deemed male comparators so as to enable women working in predominantly female workplaces to maintain pay equity does not give effect as fully as possible to the *Charter* protection of equality. The Tribunal’s decision was therefore unreasonable.”¹⁴
- 8. The duty to maintain pay equity includes ongoing responsibilities to actively review job values and compensation.** The duty to maintain pay equity includes ongoing responsibility to “ensure that compensation practices are kept up-to-date and remain consistent with pay equity principles”, including the ongoing responsibility to “review[] job classes regularly to capture any changes to job duties and responsibilities, which may require pay equity adjustments.”¹⁵ Where the employer has not prepared a pay equity plan that used a gender neutral comparison system to achieve pay equity in compliance with the *Act*, the Tribunal has the authority to order the parties to negotiate a GNCS and use it to determine any maintenance adjustments that may be required.¹⁶ This pay equity analysis must be done with reference to a male comparator.

¹² *ONA v. PNH*, para. 70

¹³ *ONA v. PNH*, para. 61, 70-73

¹⁴ *ONA v. PNH*, para. 80-85, esp. at 84-85

¹⁵ *PNH v. ONA*, para 29

¹⁶ *PNH v. ONA*, para. 32-33

COURT REJECTS COMMON EMPLOYER/GOVERNMENT ARGUMENTS

In setting out these principles, the Divisional Court also expressly rejected three arguments that employers and governments often raise to resist equality claims.

- 9. The fact that the *Pay Equity Act* does not apply to all women is irrelevant to the analysis of whether denying access to proxy provisions for maintenance has a discriminatory effect on claimants who do come within the scope of the *Act*.**¹⁷
- 10. The Tribunal's bald conclusion that an employer in a predominantly female workplace can maintain pay equity without the proxy method does not further *Act's* ameliorative purpose and perpetuates historic disadvantage and stereotyping.**¹⁸ Without expressly referencing s. 15(2) of the *Charter*, the Court essentially rejected the employers' and government's attempt to use s. 15(2) to evade scrutiny under s. 15(1) of the *Charter*. This is consistent with the Supreme Court of Canada's 2018 rulings which held that s. 15(2) of the *Charter* cannot block an equal claim by someone who is intended to be a beneficiary of the legislation. Section 15(2) instead protects against "reverse discrimination" claims by privileged groups who are seeking to strike down substantive equality initiatives that protect marginalized groups.¹⁹
- 11. Employers cannot argue that their failure to comply with the *Pay Equity Act* now makes it too onerous to comply.** The Court soundly rejected the employers' argument that it would be difficult to go back in time to determine if pay equity had been maintained. The Court noted that while there may be some challenges, there was no evidence that it would be particularly onerous or impossible: "In any event, it was the obligation of the employer to prepare a pay equity plan in compliance with the *Act*. It failed to do so. Its position now that it should be relieved of the obligation because it would be too onerous rings hollow."²⁰

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While these decisions from the Divisional Court represent significant wins for pay equity advocates, this fight is far from over. The Participating Nursing Homes have indicated that they will seek leave to appeal to the Ontario Court of Appeal. Watch for further bulletins as this case progresses.

¹⁷ *ONA v. PNH*, para. 82

¹⁸ *ONA v. PNH*, para. 81

¹⁹ See analysis on s. 15(2) of the *Charter* in EPC, [10 Key Pay Equity Wins at the Supreme Court of Canada](#)

²⁰ *PNH v. ONA*, para. 32