0141-90: Glengarry Memorial Hospital, **Applicant** v. Ontario Nurses' Association, **Respondent**

0246-91: Ontario Nurses' Association, **Applicant** v. Glengarry Memorial Hospital, **Respondent**

Before : Janis Sarra, **Vice-Chair**; Bruce Budd and Donald Dudar, **Members**

Appearances: Ann Burke forGlengarryMemorialHospital; Ann Marie Delorey for the Ontario Nurses' Association

Cite As: Glengarry Memorial Hospital (No. 2) (1992), 3 P.E.R. 34
Adjustments - Relevant Collective Agreement

The Tribunal held that ss.9(3) directs all positions in the job class be adjusted by the same dollar amount such that equal dollar amounts are paid to all levels of any wage grid for the position(s). This respects existing compensation practices and maintains the internal relativity of the wage grid. For the purposes of ss.13(10) a "relevant" collective agreement is one which has not yet taken into account the pay equity adjustments.Asthe newcollective agreement could nothavetakenintoaccount the payequityadjustments insettingwageratesitwasarelevantagreement. As such, ss.13(10) required the adjusted rates in the new and relevant collective agreement to be the pay equity adjusted rates from the old agreement plus the percentage or dollar increase provided for in the new agreement.

Rajustements - Convention collective pertinente

Le Tribunal a maintenu que le paragraphe 9(3) stipule que tous les postes de la catégorie d'emplois reçoivent le même taux de rajustement, en termes absolus. Conformément à cette disposition, le même montant en termes absolus doit être versé à tous les niveaux d'une grille de salaires existant pour le ou les postes. Cette exigence s'explique par la nécessité de respecter les pratiques de rétribution actuelles et de maintenir la relativité interne de la grille de salaires. Par conséquent, le barème de rétribution tout entier doit être rajusté à la hausse pour satisfaire à cette disposition légale. Aux fins du paragraphe 13(10), une conventioncollective "pertinente"estune conventiondans laquelle onn' a pas encore pris enconsidération les rajustements au titre de l'équité salariale. Le Tribunal a conclu que, puisque la nouvelle convention collective n' avait pas putenir comptedesrajustements au titre de l'équité salariale pour fixerlesnouveaux taux de salaire, à cet égard, elle constituait une convention collective pertinente. En vertu du paragraphe 13(10), les taux rajustés d'une nouvelle convention collective pertinente sont les taux rajustés au titre de l'équité salariale dans la convention existante plus l'augmentation en pourcentage ou en termes absolus stipulée dans la nouvelle convention collective.

DECISIONOFJANISSARRA, VICE-CHAIR,ANDMEMBERBRUCEBUDD,JUNE9,1992

1. In *Glengarry Memorial Hospital* (1991), 2 P.E.R. 153, the Tribunal dealt with how a

previously determinedpayequityadjustmentforthenursesrepresentedbythe Applicant,Ontario Nurses'Association ("ONA") should be incorporated into the collective agreements between ONA and the Respondent,

GlengarryMemorialHospital("theEmployer"). Those collective agreements (full time and part time) were effective April 1, 1988 to March 31, 1991 ("the Existing Collective Agreements"). The Tribunal determined that section 13(10) of the *Pay Equity Act*, R.S.O. 1990, c. P.7 (the *"Act"*) required the rate of pay specified in the collective agreements to be increased by the amount of the pay equity adjustment as of January 1, 1990. The result was a pay equity adjusted rate of compensation. All further increases provided for in the Existing Collective Agreements were to be calculated on the basis of this adjusted rate. The Tribunal directed the parties to meet within thirty days to agree on how to comply with the Tribunal's decision and the *Act.* The parties were unable to agree and have applied to the Tribunal requesting that we order a remedy in File 0141-90.

2 Prior to the release of the Tribunal's June6,1991decisioninFile0141-90,ONAandthe Employer negotiatednewcollective agreements (full time and part time), effective April 1, 1991toMarch31, 1993 ("the New Collective Agreements"). In Tribunal File 0246-91, ONA has applied to the Tribunalalleging that the Employer failed to incorporate the pay equity adjustment into the New Collective Agreements.

3 At the hearing, the Tribunal heard the issues with respect to both of the above noted files. Further submissions were made in writing by the parties on January 13, 1992.

File 0141-90

1 In the June 6, 1991 decision with respect to this file, the Tribunal unanimously held at paragraph 8 that "the Employer must uniformly apply the pay increases to all increment stages and salary ranges of the Collective Agreements." We held that "the (Existing) Collective Agreement continues to operate as before but with the pay equity adjustments included in the rates of compensation." The Tribunal held that subsection13(10) requiresthatpayequityadjustmentsbe incorporatedintothe Collective Agreement rate that prevails as of the date ofadjustment ("the AdjustedRate"), and then requires that whatever increases in compensation may be provided for in the Collective Agreement thereafter be calculated on the basis of the Adjusted Rate. Those increases may be expressed as an absolute dollar amount or as a percentage, depending upon how the increases were originally negotiated in the collective agreement.

2 The Employer submits that the parties were unable to agree upon how the nurses salaries are to be adjusted based upon the Tribunal's Decision. In the Employer's view, subsection 9(3) of the *Act* only requires the job rate, which is the highest rate of wages and benefits, be adjusted to achieve pay equity. Itsubmitsthatsincenone ofthe rates below that highest rate need tobe adjusted,subsection9(3)mustbe taken into account when orderingtheremedytoasubsection13(10)breach. It submits that the registered nursescompriseonlyone position for purposes of payequityand thatonlynurseswho receive the job rate forthatpositionare entitled to the pay equity adjustment. TheEmployerconcedesthatwhenitpostedthe pay equity plan, and made the pay equity adjustments retroactive to January 1, 1990, that it did give the $ .37 adjustment to each level on the salaryschedule and thus to allthe registerednursesforathreemonth period,atwhichpointitstoppedpayingtheadjustment. However, since in its view, subsection 9(3) of the *Act* only requires the job rate be adjusted, the Employer argues that its agreement to adjust all the levels on the salaryschedule wasabove the minimumrequirementsofthe *Act*, and thus, it should not be

required to pay an Adjusted Rate for nurses at salary rates below the job rate.

3 The Union disagrees, and submits that "position" can be defined to include levels on the salary schedule and that each nurse can be viewed as occupying a different position. It submits that pursuant to subsection9(3), eachnurseineachofthesepositions isentitledto the payequityadjustmentsinequaldollar amounts. ONA cites the fact that the Employer gave equal dollar amounts on January 1, 1990 to each registered nurse as support for its submission that each nurse was entitled to the pay equity adjustments.

Subsection 9(3)

7. Subsection 9(3) directs parties how to make adjustments within a job class. Subsection 9(3) specifies:

> Where,to achieve payequity, itisnecessarytoincreasethe rateofcompensationfora job class, allpositions inthe same job class shall receive the same adjustment in dollar terms.

Section 9(3) is one part ofthe overallscheme ofthe *Act* toestablishandmaintainpayequity. It forms part of a series of directions to partiesto a payequityplan, onhowto determine the compensation adjustments which will be made for pay equity purposes. There are several components.

1 First, the parties must determine which adjustments are required for pay equity. In a unionized context, once the parties have agreed upon and applied the gender neutral comparison system, and have agreed upon the female and male job classes which are of equal or comparable value, the amount of adjustment is identified by comparing the job rate of the female job class to the job rate of the comparably valuedmalejobclass. Job rate is definedinsubsection1(1)ofthe *Act* as the highestrateofcompensation for a job class. Compensation is defined as "all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount". Thus the highestrateofcompensation(wagesand benefits) of the female jobclassmustbe comparedwith that of the male job class. There is only one job rate per job class, whether the class contains one or many positions. This comparison of the job rates determines what gap in compensation must be eliminated to achieve pay equity.

2 Second, section 13 outlines the step by step mechanism by which the gap is to be eliminated through apayequityplan. With respect to compensation, it gives specific direction on when and how the payments must be made. Subsection 13(2)(d) requires parties to describe how compensation will be adjusted to achieve pay equity. Subsection 13(2)(e) sets out the required schedule for first pay equity adjustments. Subsection 13(3) provides that the female job classes with the lowest job rate shall receive greater pay equity adjustments than other female job classes. Subsections 13(4) through 13(8) specify the payroll dollars which must be directed each year towards the achievement of pay equity. Subsection 13(10) requires that the pay equityadjustmentstoratesofcompensationmustbe incorporatedinto and form part of the relevant collective agreements.

3 Third, subsection 9(3) directs parties on how to accomplish the adjustments, requiring that where increases are necessary, all positions in a job class shall receive the same adjustment in dollar terms.

4 Finally, once the aboverequirementshavebeenmet,subsection6(1)ofthe *Act* specifies when pay

equityisachieved. It provides that when the job rate for the female job class is equal to the job rate of the comparablyvaluedmalejobclass,payequityhasbeenachieved. If a series ofpayequityadjustmentsare requiredoverseveralyears,onlywhenthese job rates are equal has pay equitybeenachievedasrequired by subsection 6(1).

5 Thus, the *Act* provides a complete scheme of how adjustments are to be made in order to achieve pay equity, and subsection 9(3) is one component of that direction to parties. Subsection 9(3) protects positions within a job class from being treated differently from each other. The *Act* directs the parties to give equal dollar amounts to all positions within a job class. If an employer was free to determine which positions in the job class should receive the pay equity adjustment or how much of the pay equity adjustment each position would receive, this could amount to discrimination. The purpose of the direction in subsection 9(3) is to avoid having to embark upon a lengthy inquiry into the parties' motivationand the effects of pay equity adjustments that are unequally distributed among the positions in the job class. The section is designed for clarity and certainty in the application of pay equity.

6 In interpreting and applying ss.9(3), we note that where a position is paid only one rate of compensation, the adjustment required is self evident. Eachpositiongetsthe same dollar adjustment and each incumbent and any new hire to that position would receive the adjusted rate. The issue which arises in this case is, when a position has a salary schedule, must all parts of the salary schedule of that position be adjusted in equal dollar amounts?

7 "Position" is not expressly defined in the *Act*, but it is referred to in the definition of job class. In subsection 1(1) of the *Act*, job class means 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. Thus the fourth criteria, that of the samecompensationschedule,salarygradeor range ofsalaryratesisanessentialrequirement ofajobclass. In *Gloucester (No. 2)* (1991), 2 P.E.R. 208, the majority inferred from the definition of job class that individuals occupythe same positioniftheyhave identicalduties and responsibilities, the same qualification requirements, are recruited by the same procedures and have the same compensation schedule, salary gradeorrangeofsalaryrates. An alternate approach topositionistorestrictitsinterpretationtoasingular meaningwhichdenotesthateachemployeeoccupiesoneposition;inotherwords, the numberof"positions" intheestablishmentisequalto the total workforce complement. In this interpretation, the termisdifferent from incumbent since it includes both vacant and filled positions.

15. Regardlessofapproach,oneofthekeyattributesof a "position" is its compensation schedule. The similarity of compensation schedules determines whether various "positions" are in a job class. The compensation schedules are also a mechanism by which pay inequities are identified. Any inequities are redressed by making adjustments to those compensation schedules. It is logical therefore, that the compensation schedule of a position remains intact during the pay equity process, just as the other parts of the position remain intact. We find that parties cannot take one element of what defines position and alter it, divide it up or treat it in different ways in order to make the pay equity adjustments. The

compensation schedule of a position must be treated as a whole, and any adjustments made be done in equal dollar terms in order to keep the compensation schedule intact.

8 Subsection 9(3) requires that where the rates of compensation for the job class must be adjusted, all positions in the job class must be adjusted by the same dollar amount. Subsection 9(3) does not permit, as the Employer suggests in this case, that only the job rate for a position be adjusted. Unlike subsection 13(3) which makes reference to how adjustments are to be made for

female job classes with the lowest job rate, subsection 9(3) makes no reference to job rate. Nor does subsection 9(3) suggest that different levels on a compensation schedule can be adjusted by different amounts. It requires all positions within a job class to receive thesameadjustmentindollaramounts. If subsection 9(3) protects different positions fromdiscriminatorypractices,thenitis a reasonable interpretationofsubsection9(3)to saythatitprotects salarylevelswithinaposition. The whole of the position is protected. Given that position is defined in large measure as having a particular compensation schedule, it is the entire compensation schedule which is adjusted upwards in equaldollaramounts. This interpretation of subsection 9(3) makes sense, it provides certainty in both the compensation schedule and in the determination of pay equity adjustments.

9 This interpretation is reinforced by the placement of subsection 9(3) in the prohibitions section of the *Act*. Section 9 provides a series of rights and protections. Subsection 9(1) states that an employer shall not reduce compensation payable to any employee or reducethe rateofcompensationforany position in ordertoachievepayequity. This section protects both theindividualworkerfromanyreductionindollars payable to them, and alsoprotects the position; anemployercannot reduce the rates on the compensation schedule to achieve pay equity. It is all the rates of compensation payable within a position's salary schedule or range of salary rates which are protected, not just those levels that have an employee being paidthatrate. Similarly, subsection9(3)protectstheentirepositionandrequiresthatwhereitisnecessary to increase the rate of compensation, all positions in the class shall receive the same adjustment in dollars terms. Subsection 9(3) protects against not only arbitrary adjustments between positions in a job class; we find it also protects the compensation schedule within the position from arbitrary and discriminatory adjustments.

10 In *Gloucester, supra,* the majorityheld atparagraph34 thatsubsection 9(3) "does not answer the question of how to adjust the compensation of the incumbents in the female job class who are at various increment levels within the range of salary rates for a position." The Tribunal has said that with any new statute, decision making will be incremental and that the jurisprudence will more fully evolve on a case by case basis. In this case, in order to ensure that subsection 9(3) was fully and carefully considered, we asked the parties for written submissions commenting upon *Gloucester*. Our reasoning in this case is thus anevolutionfromthe decisionin *Gloucester* based uponthe Tribunal's further considerationofsubsection 9(3) .

19. We find subsection 9(3) does answer the question of how to adjust the compensation schedule. In our view, the Tribunalcannotuse one definition of position which requires four criteria,and thendismantle the criteria or remove or divideone element,thatofcompensationschedule,forthe purpose ofdetermining pay equity adjustments. Subsection 9(3) was designed to respect existing compensation practices and to ensurethattheinternal dollar relativity of a wagegridorcompensationscheduleismaintained. Subsection 9(3)isarecognitionthatinlarge measure, a position isdefinedbyitscompensationschedule. It addresses the maintenance of internal relativity of levels of a compensation schedule, while ensuring that dollars directed towards pay equity are made in a non-discriminatory fashion. The Legislature chose to respect the internaldollarrelativityofcompensationschedules,subsection9(3) directspartiesto adjustthe position in equal dollar terms.

11 In assessing the evidence led in this case, the Tribunal adopts the Employer's submission that the registered nurses comprise one position for thepurposesofthispayequityplan. The pay equity plan only describesandevaluatesoneposition,thatofregisterednurse. The plan has not distinguished any different nursepositionsbyany of the four criteria cited above. No other "positions" wereevaluated,ordiscussed during the pay equitynegotiations. Although ONA argued that each nurse comprised a different "position"

withintheestablishment,itsevidencewasnotsufficienttopersuadetheTribunal. Applying subsection 9(3), the Tribunal finds that the registered nurse position, including its entire compensation schedule, must be adjusted upwards in order to meet the requirements of subsection 9(3) .

12 We might further add, that had the Tribunal applied the tests in *Gloucester, supra* to these facts, the nurses would not have been deprivedofpayequityadjustments. Given the evidence in this case, and based upon the considerations set out in *Gloucester,* inour view, the result would have beenthat the nine step salaryschedule would be collapsedtomatchthe single stepsalaryscheduleofthe male job classwhich was the subject of comparison. Although such an interpretation would have meant greater dollar adjustments for the nurses, we find that it would have extended beyond what subsection 9(3) provides for, and would have been disruptive to the compensation practices of these parties. We find that our interpretationofsubsection9(3) respects the integrity of boththe requirementsofthe *Pay Equity Act*, and the collective agreement negotiations.

13 Our findings with respect to subsection 9(3) in this case are completely compatible with the decision in *Lady Dunn* (1991), 2P.E.R. 168, in which the Tribunal held that "where compensationisincreasedby way of a payment to a job class,eachpositioninthatjob classmustreceive the same monetary increase". Although it held that subsection 9(3) did not address the mix between wages and benefits as "compensation", the Tribunal found all nurses were entitled to the same increase in vacation benefits, the exercise of which depends upon the appropriate service. In that case, as well as this, the Tribunal determined that each nurse receives the same adjustment.

Remedy in File 0141-90

1 In the Tribunal's Decision, we held that the Employer had violated section 13 of the *Act* and remainedseizedshouldthepartiesbeunableto come to agreementonthepayequityadjustments. Having consideredthe parties'submissions,wefindthatthefollowingremedyisnecessarytomeetthe requirements of subsections 13(10) and 9(3) of the *Act*.

24. In this case, the Existing Collective Agreements set out a salary schedule of hourly rates in dollar amounts based upon service credits. The parties disagreed as to whether the changes to hourly rates at April 1, 1990 were set by percentage or fixed dollar increases. Given that we had no evidence to the

contrary,wehaveadoptedthemoreconservativeofthealternativestocalculatetheincrease. The Tribunal subtractedthe ratesatJanuary 1, 1990fromthe previouslynegotiatedratesatApril1, 1990 inthe Existing Collective Agreements to find a fixed dollar increase as shown in column "D" below. We note parenthetically that in future, the Tribunal will expect parties to establish what formed the basis of rate increases in collective agreements. If the increase previously negotiated is a percentage increase, then subsection 13(10) requires those percentage increases to be applied to the pay equity Adjusted Rates. Wherethe increasesare fixeddollaramounts,as wehave determinedonthe specific factsofthis case, then the increase will be the fixed dollar amounts added onto the pay equity Adjusted Rates.

2 Thus the remedy flowing in this case is that the Existing Collective Agreements schedule at January 1, 1990 (column "A") must be amended by the $ 0.37 pay equity adjustment (column "B") to form the January 1, 1990 pay equity Adjusted Rates (column "C"). The Employer must also add the previously negotiatedincreasesinthe ExistingCollective Agreements onApril1, 1990,asdeterminedbythe Tribunal (column"D")to thepayequityAdjustedRatesatJanuary1, 1990(column"C") to determine the Collective Agreements Rates effective April 1, 1990 (column "E").

Effective January 1, 1990 Effective April 1, 1990

	"A" Existing Collective Agreement	"B" Pay Equity Adjustment	"C" Pay Equity Adjusted Rate	"D" Previously Negotiated Collective Agreement Increase	"E" Adjusted Rate
Start	16.17	.37	16.54	.64	17.18
1 year	17.03	.37	17.40	.68	18.08
2 years	17.29	.37	17.66	.69	18.35
3 years	17.60	.37	17.97	.71	18.68
4 years	18.04	.37	18.41	.72	19.13
5 years	18.40	.37	18.77	.73	19.50
6 years	18.80	.37	19.17	.75	19.92
7 years	19.24	.37	19.61	.77	20.38
8 years	19.53	.37	19.90	.78	20.68
9 years				1.09	20.99 *

(* The Existing Collective Agreements provided for an additional salary rate for nine years of service effective April 1, 1990.)

26. We note that the Employer made the pay equity adjustments to all the rates for the period from January1, 1990 toMarch31, 1990, atwhichpoint itrevertedback topayingthe April1, 1990 unadjusted rates in the Existing Collective Agreements. We find that subsection 13(10) requires that the salary schedule in the Existing Collective Agreements must alsobe amendedinaccordance with the above table inorderfortheEmployertomeetitsobligationstoachievepayequity. The Employer mustpaythemonies owed to the registered nurses for the period from April 1, 1990 to March 31, 1991 which it has not yet paid.

File 0246-91

1 That brings us to the issues in File 0246-91. First, are the New Collective Agreements "relevant" forpurposesofsubsection13(10)and thus are the ratesinthe New Collective Agreementstobecalculated based upon the pay equity Adjusted Rates? Second, has the Employer violated section 7 of the *Act* by failing to maintain pay equity?

2 The parties are in agreement on the following facts. Negotiations for the New Collective Agreements took place between a group of hospitals, represented by a negotiating committee and the ONA. A Memorandum of Settlement was signed in February 1991 and ratified in March 1991 by the hospitals participating in centralnegotiations and ONA. Glengarry Memorial Hospital was one of the participating hospitals and is bound by this settlement. The New Collective Agreements cover the period from April 1, 1991 to March 31, 1993 and provide for a new salary schedule for the registered nurses. With respect to the non-unionized employees at Glengarry MemorialHospital, the Employergave an across the Board increase of 7% effective April 1, 1991 and a further 4.35% effective October 1, 1991. The job rate of the male job class has not exceeded that of the registered nurse job class as a result of these increases.

3 The Union filed this application alleging that the New Collective Agreements were "relevant" collective agreementscoveredbysubsection13(10) and that the Employerhadfailedto incorporatethose rates based upon the pay equity Adjusted Rates. It submitted that since the pay equity adjustments were still pending in a dispute before the Tribunal when the New Collective Agreements were signed, the TribunalshouldordertheratesincorporatedintothepayequityadjustedRates. The Union submitted that these parties conducted pay equity negotiations quite separately from negotiations for a collective agreement and thus there was no reasonfor the Union to have raised the outstanding pay equity litigation at the collective agreement bargaining table.

4 The Employer submitted that any pay equity adjustments only apply for the life of the collective agreements in existence until pay equity is achieved and that the *Act* does not contemplate additional pay equityadjustmentstobeaddedontopofnewcollectiveagreementsforever. The Employer submitted that the salary rates in the New Collective Agreements were negotiated by the parties with a view to the requirement undersection7 toestablishand maintainpayequitycompensationpractices,althoughitadmits that it did not raise the issue of the pending pay equity litigation at the bargaining table. As an alternative position, the Employersubmittedthatthe onlyrateswhichmaybe entitledto be increased are thosenurses at the two lowest rates on the salary schedule in the New Collective Agreements, where the rates of compensation may fallbelowthe payequityAdjusted Rates should the Tribunal order them in File 014190, and thus they would fail to maintain pay equity.

5 We find that the Tribunal's decision in *Glengarry Memorial Hospital, supra,* described how adjustments required for the purpose of pay equity are to mesh with the existing collective bargaining regime. Subsection 13(10) requires that a pay equity plan which is approved, prevails over the relevant collective agreements and the adjustments to rates of compensation shall be deemed to be incorporated into and form part of those collective agreements. It is a statutory mechanism to ensure that pay equity adjustments are not lost during collective agreement negotiations until such time as pay equity is achieved. Once payequity has been achieved, the parties have a continuing obligation under section 7 of the *Act* to maintain pay equity, and not to bargain for or agree to compensation practices which would violate this obligation.

6 Normally, the process followed to incorporate pay equity adjustments is fairly straight forward. In a unionized setting, the parties are tocompletea payequityplan, includingmeetingthe requirementsunder section13describedinourdispositionofthefileabove. As part of their statutory obligations under section 13, the partiesmustthenincorporatethe payequityadjustmentsinto the entire collective agreement tofind thepayequityAdjustedRates,asrequiredbysubsection13(10). Once pay equity is achieved, then parties bargainsubsequent collective agreementswithboththe knowledge of the pay equity adjustmentsand their obligations to maintain pay equity as required by subsection 7(1) and (2) of the *Act.*

7 Unfortunately, the precise timing of a pay equity plan and the negotiation for a new collective agreementdonot always follow neatly one after the other, asisthecaseinthisfile. While the issues in File

0141-90 were pending before the Tribunal, the parties ratified the New Collective Agreements. In such cases, the Tribunalmustdetermine whether anewcollective agreement isa "relevant"collective agreement for the purpose of subsection 13(10). We find "relevant", those collective agreements that have not yet takenintoaccountthepayequityadjustments. If the collective agreement is "relevant", then the pay equity adjustments shall beincorporatedintoandformpartofthecollectiveagreement. In order to determine the appropriatepayequityAdjustedRatesforanew collective agreement, the Tribunal willdetermine the pay equity Adjusted Rates in the existing collective agreement and will determine whether the increases in the new collective agreement are a percentage or a fixed dollar increase. Subsection 13(10) requires that the AdjustedRatesinanewand "relevant"collective agreement shallgenerallybethe payequityadjustedrates inthe existingcollective agreement plus the percentage ordollarincreaseprovidedfor in the newcollective agreement for the life of that collective agreement.

8 In thiscase,wefindthattheNewCollectiveAgreementsare"relevant"collectiveagreements within the meaning of subsection 13(10). Given that the issue of pay equityadjustmentswaspendingbeforethe Tribunal at the time the New Collective Agreements were negotiated, we find the New Collective Agreements could not have taken into accountthepayequityadjustments. The parties could not possibly have bargained the New Collective Agreements rates with knowledge of the pay equity Adjusted Rates since those were the very adjustments at issue before the Tribunal when the New Collective Agreements were ratified.

9 This fact is clear in the Agreed Statement of Facts between Glengarry Memorial Hospital and the Ontario Nurses Association which the parties submitted to the Tribunal at the hearing on December 3, 1991:

> In1987and 1988, the Ontario Nurses Association and the Ontario HospitalAssociation preliminarily discussed central negotiations for the hospital sector for pay equity. These negotiations broke down in June 1988. It was understood that **the hospitals and the ONA would pursue pay equity negotiations on a hospital by hospital basis**.
>
> **By March 1991, when the Memorandum of Settlement had been concluded, no participatinghospitalhadcompletedpayequityadjustments. Glengarry Memorial Hospital'spayequityadjustmentswere underconsiderationbytheTribunalatthat time.** (emphasis added)

The parties thus agree that the negotiations for pay equity were to be conducted locally, and that none of these adjustments had been completed at the time that the Memorandum of Agreement for the New Collective Agreements was signed. They also agree that in the case of Glengarry Memorial Hospital, the pay equity adjustments were pending before the Tribunal at the time the Memorandum was signed. The Agreed Statement of Facts makes clear that both parties understood at the time of signing the MemorandumofAgreement forthe New Collective Agreements,thatpayequityadjustmentshadnotbeen completed, and that these were being litigated before the Tribunal.

1 The *Act* allows parties to craft the frameworkforpayequity negotiations, as long as they meet the statutory obligations. The *Act* requires the parties to negotiate pay equity plans for each bargaining unit, as these parties did. Although it provides a mechanism for parties to agree to centralized negotiations, it is not a requirement of the *Act*, and the parties in this case chose not to exercise that option. Both parties also acknowledged at the hearing that once these issues were finally resolved by

the Tribunal, they would continue to take very seriouslytheir responsibilitiesundersection7 to bargain for compensation practices which meet the pay equity requirements of the *Act*.

2 That the parties could not have negotiated the New Collective Agreements taking into account the pay equity adjusted rates is further confirmed by the fact that the Employer is still disputing which nurses areentitledtopayequityadjustments. To quote from its written submissions of January 1992 at paragraph

27: "It is and wasthe Employer'ssubmissionthatonlythe April1, 1990`jobrate' forthe RegisteredNurse position should be amended by the Tribunal rather than each step in the grid." The Tribunal has difficulty understandinghowthe Employercansubmit thatthe payequityprocessiscompletedforone purpose (that of its responsibilities under the New Collective Agreements), when it is still litigating the very question of pay equity adjustments in these proceedings.

1 We also note in examining the Collective Agreements, that the lowest two rates on the salary schedule of the New Collective Agreements are identicaltothe unadjustedratesinthe Existing Collective Agreements; we can thus infer that the ratesare baseduponthe unadjustedratesinthe Existing Collective Agreements. This is reinforced by the Employer's own submissions that there was a 0% increase over the Existing Collective Agreements Rates at the lowest rates on the salary schedule. We find therefore, that the New Collective Agreements are "relevant" under subsection 13(10) in that they have not yet taken accountofthepayequityadjustments. The parties must therefore ensure that pay equity adjustments have been incorporated into the New Collective Agreements.

2 Our finding that the New Collective Agreements are "relevant" for purposes of subsection 13(10) is not to suggest that the pay equity adjustments must continue to operate as supernumerary or "add-on" adjustments to all future collective agreements. Once the parties have complied with the requirements of the *Act*, including subsection 13(10), the partieswillthenhave payequityAdjustedRatesinthe Collective Agreements. In future collective agreement negotiations, the parties will negotiate with the "knowledge" of the pay equity adjusted rates, and their obligation to maintain pay equity.

3 In this file, the parties were again in dispute as to whether the rates in the New Collective Agreements were based upon percentage increases or fixed dollar increases above a base rate. The Tribunal, on the facts of this case, and based upon the considerations outlined in our disposition of file 0141-90, hasthereforedeterminedthatthe increasesinrateswerefixeddollar increasesand hasamended the salary schedule accordingly in the order below.

4 Given our disposition of this file based upon our finding that the Employer has not yet remedied the violation of subsection 13(10) of the *Act*, it is not necessary to deal with ONA's allegation that the Employer has violated subsection 7(1).

Order

1 For the purpose of File 0141-90, the Tribunal hereby orders the parties to amend the entire salary schedule in the Existing Collective Agreements to reflect the $ 0.37 pay equity adjustment, and we order the Employer to pay the Adjusted Rates for the period from April 1, 1990 to March 31, 1991.

2 For the purpose of File 0246-91, the Tribunal orders the Employer to comply with subsection 13(10) by amending the salary rates in the New Collective Agreements in accordance with the following table,and weorder the Employertopaythe AdjustedRatesforthe lifeofthe New Collective

Agreements.

Adjusted Salary Rates

April 1, 1991 October 1, 1991 April 1, 1992

Start 17.18 17.18 17.18 1 year 18.08 18.08 18.08 2 years 18.47 18.47 18.83 3 years 19.34 19.34 19.86 4 years 20.11 20.37 20.88 5 years 20.88 21.14 21.91 6 years 21.65 21.91 23.19 7 years 22.42 22.93 24.47 8 years 23.19 23.96 25.75 9 years 23.96 24.99 27.04

44. The Union submitted that the Tribunal should order the remedies to be effected within 21 days. The Employersaid thatitrequired30 days tocompletetheseadjustments,forreasons ofpayrolladministration.

Inorder tofacilitatethe administrative work involved in adjusting the ratesofcompensationand payingthe payequityadjustmentsowing, weherebyorder the adjustmentsto be madewithin30days ofthis decision.

DECISION OF MEMBER DONALD DUDAR, JUNE 15, 1992

1. I dissent from the majority's decision in File 0246-91. In addition, I reject the reasoning adopted in File 0141-90.

File 0246-91

1 I disagree with the decision of the majority in File (0246-91) on two grounds. First, the decision ignoresthe equalobligations imposedbythe *Pay Equity Act*, R.S.O. 1990, c.P.7 as amended, as well as thefactualandpracticalrealitiesoftheworkplace. Second, the decision further ignores that pay equity was achieved in this workplace during the life of the Collective Agreements in place at the time that the pay equity plan was executed.

2 The following facts are important:

- C the parties were bound by Collective Agreements from April 1, 1989 to March 31,1991;
- C during the life of those Collective Agreements, the parties negotiated for and executed a pay equity plan, in keeping with their obligations under the *Act;*
- C that pay equity plan was agreed to on April 4, 1990 and was posted April 10, 1990;
- C shortly, thereafter, the employer paid nurses the agreed to adjustment of$0.37 per hour for the period January 1, 1990 to March 31, 1990;
- C bythis amount,the female job class of nursewaspaid atleastas muchas the male job class comparator;
- C on April 1, 1990, the employer adjusted the rate of pay for all nurses in keeping

with its understanding of its obligations under the *Act* and the Collective Agreements;

C the uniondisagreedwiththe interpretation of these obligations,and complainedto the Pay Equity Commission, which eventually resulted in the first hearing by this Tribunal and our earlier decision, dated June 6, 1991;

C the hospital and the union participated in central bargaining conducted by the OntarioNurses'Associationand the Ontario HospitalAssociation, fortherenewal of the "central agreements";

C

these negotiations resulted in renewal Collective Agreements between these parties; the negotiations for renewal concluded in early March, 1990;

C

according to the "Memorandum of Terms of Negotiations" for central bargaining, the parties were able to negotiate "local issues" between them, once the central negotiations were concluded;

C

at the time the parties ratified the renewal Collective Agreements for the period April 1, 1991 to March 31, 1993, the Tribunal had completed the hearing concerning the earlier question arising out of the "existing Collective Agreements" but had not yet released a decision ;

C

pay equity was not discussed at central negotiations, nor, apparently, was it discussed as a "local" issue before executing the renewalCollective Agreements;

C

the union asserted at the hearing that it was not required to raise the pay equity issue in collective bargaining, as pay equity was being dealt with separately; and,

C

the employer believed the renewal Collective Agreements satisfied the parties' obligations under the *Act*.

Party's Bargaining Obligations

1 The majority relies on the fact that the Parties entered into the renewal Collective Agreements without knowledge of how the matter earlier remitted to us would be resolved. As a consequence, the majority findsinparagraph34that"the newCollective Agreementscould nothave takenintoaccount the payequity adjustments". They find further support for this proposition in the finding that the rates

found in the renewal Collective Agreements for employees at the Start Rate, and the Rates for 1 and 2 Years of Service on the rate schedule are identical to those in the predecessor agreement.

2 As fully set out in myreasonsfordecisionin*Lady Dunn General Hospital* (1992), 3 P.E.R. 1, this analysis ignoresthe statutoryframeworkofthe *Act.* The majority wrongly acceptsafundamentalpremise underlyingONA's argument,whichisthatitisentitledto negotiate renewal collective agreements separate andapartfrom pay equity. The majority, consequently, goes ontodeterminehowtoreconcilepayequity and collective bargaining. I strongly disagree with this approach. It is incorrect and fails to account for the prohibition on both employers and bargaining agents from negotiating for or agreeing to compensation practices which fail to establish and maintain pay equity.

3 In this case, ONA alleges a "failure to maintain pay equity" based on section 7 and section 22 of the *Act.* This amounts to an assertion that the rates in the renewal Collective Agreement do not meet the requirements of the *Act.* Those rates are the result of an *agreement* (emphasis added) between these Parties made after the effective date (January 1, 1990, according to section 13). For ONA to make its assertion, it must alsoaccept thatithasfailedto meetitsobligations undersubsection7(2) whichprecludes itfromnegotiatingfororagreeingtoanythingwhichfailsto maintain payequity,whichitdenies. Therefore, its case is illogical and must be rejected.

4 I will return to this proposition at the end of this decision in discussing the appropriate remedy.

Increases Required in the Plan

1 Subsection 13(10) instructs that "adjustments to rates of compensation **required by the plan** shall be deemed to be incorporated into and form part of the relevant collective agreements."

2 What adjustments can be**requiredby the plan**? Simply, the adjustments necessary to achieve and thenmaintainpayequity. Therefore, in general, the role of the Tribunal is to inquire whether the pay equity plan provides for adjustments necessary to achieve and then maintain pay equity.

3 There is an exception in which the Tribunal has construed the statute to require the job rate of the female job class to exceed that of the male comparator. This occurred where the two job rates are equalized during the lifeofa collective agreement underwhichthere is provision for a subsequent increase for the female job class (i.e., pay equity was achieved). In that exceptional circumstance, which existed in *Glengarry Memorial Hospital,* (1991) 2 P. E. R. 153, in order to ensure that neither pay equity nor collective bargaining gains for the female job class are eroded, full effect must be given to both.

4 In this case, the Employer explicitly relied on its belief that pay equity was achieved by the expiry date of the predecessor Collective Agreements. The Employer also relied on a belief that the only obligationin the renewal Collective Agreements was to maintain pay equity and that it metthis obligation. The Union accepts this when they argue that the Employer has failed to "maintain" pay equity. This is an admissionthat the Employer had,infactachievedpayequity. Inthe frameworkofthe *Act*, I agree that pay equity was achieved.

12. The language of the *Act is* clear and unambiguous with respect to when pay equity is achieved. Subsection 6(1) sets out

For the purposes of this Act, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.

5 Based on the clear language of this provisionandthefactsabove,theparties"achieved" pay equity during the life of the "existing Collective Agreements". This occurred once the job rate for the female

(nurse) job class was set to be at least equal to that of the comparator male job class, which is set out in the pay equity plan posted April 10, 1990, and effective from January 1, 1990. The Hospital paid its employees according to the new "pay equity adjusted rate" effective January 1, 1990, well before the execution of the renewal Collective Agreements.

6 I note, parenthetically, that the majority, in paragraph 11, complicates the unambiguous language section 6 of the *Act*, which sets out when pay equity is achieved, by subjecting it to a series of preconditions ("once the above requirements have been met"). This exceeds our jurisdiction by reading requirements into the *Act* which do not otherwise exist. These preconditions are found in the reasons for decision in File 0141-90. Yet, the majorityinnowayreliesuponthem for the purposes of File 0141-90. Further,theyfail to account for this issue in the analysis of File 0246-91, in which the Employer explicitly raised the question.

Maintaining Pay Equity

1 After achieving pay equity, the only obligation on the parties is to then maintain pay equity. By reframing the case in terms of whether the renewalCollective Agreements are "relevant" for the purposes of the *Act*, the majority has answered the wrong question.

2 Job rate is defined in the*Act* as the "highest rate of compensation for a job class" [subsection 1(1)]. Under the renewal Collective Agreements, the job rate for the female (nurse) job class (column "A") and the comparator male job class (column "B") are as follows:

	A Female Job Class	B Comparator Male Job Class
1	22.46 (20.99 + 7%)	
2	23.44 (22.46 + 4.35%)	
		26.67 unknown

17. Thus, there is no evidence that at any time has the job rate for the female (nurse) job class fallen below the rate for the comparator male job class. Accordingly, ONA's case that the Parties have failed to maintain pay equity lacks merit. There is no evidence of a breach.

The Appropriate Remedy

1 The majority finds at paragraph 34 that "the New Collective Agreements could not have taken into account the pay equity adjustments."
Whatprovisionofthestatuterequiresoneratetobecalculatedfrom any specific starting point? What is the breach which the majority purports to remedy? By what power does the Tribunal determine the starting point for collective bargaining? The authority of the Tribunal is limited to determining whether the results of collective bargaining satisfy the obligations of the *Act.*

2 The majority relies on subsection 13(10). Rather than **incorporating** certain adjustments required bythe *Act* **into** collective agreements,subsection13(10) isnow taken to **require** certain **adjustments as part of the pay equity plan**. This turns the import of subsection 13(10) around.

3 There are serious consequences of this error by the majority. The majority's approach fails to follow the important policy direction adopted by this Tribunaltoattemptto achieve the best

reconciliation of pay equity and collective bargaining processes. It amounts to "statutory ambush" by permitting the union to enter into a collective agreement from which itcansubsequentlyresile. This is permitted even thought the union is not required to advise the employer in advance of its view that the collective agreements are somehow deficient or not "final". It effectively rewards the unionforitsownfailure to meet its obligations under the *Act.* Thus, the approach ignores the joint responsibilities placed by the *Act* on employers and bargaining agents.

4 Finally, the approach ignores the massive financial and operational disruption it is likely to impose. I believe a much clearer mandate is required in order for the Tribunal to embark on such an imposition.

5 In these circumstances, then, the proper remedy is to find that the Collective Agreement provisions inquestionare anullity; this would require the parties to complete their negotiations lawfully, and witha full awareness of all statutory obligations. This is in keeping with our power to interpret and apply the *Pay Equity Act.* Subsection 7(2) of the *Act* precludes parties from making agreements (including collective agreements) which violate the *Act.*

File 0141-90

1 In this decision, themajorityintroducesa third analysis of subsection 9(3) of the *Act.* At the same time, they unnecessarily reject one adopted by the Tribunal in *Gloucester (No. 2)* (1991), 2 P.E.R. 208 and ignored the second.

2 I do not believe the analysis is necessary at all. The decision of the majority, at paragraph 4, relies upon the earlier unanimous decision in *Glengarry* repeating "the Employer must uniformly apply the pay increases to all increment stages and salary ranges of the Collective Agreements." Having said that, what further analysis is necessary?

The Subsection 9(3) Analysis

1 To the extent that the majority has set out their analysis on subsection 9(3), I believe they are wrong. In making this statutory determination, the majority has failed to afford the section a meaning that takes account of and will be appropriate in a variety of different factual circumstances.

2 The majority in *Gloucester* found that pay equity is not achieved if **only** the job rate is adjusted. Incumbents at all steps ofthecompensationschedulemaybeentitledtosomeadjustment. In this case, the majorityexpressed their agreement bysayingatparagraph15 of their decisionthat"[i]tislogicaltherefore, that the compensation schedule of a position remains intact during the pay equity process."

3 Here, the female jobclasshastendifferentpaylevels,includingthe job rate. The comparator male job class has one pay level, its job rate. No matter how the pay rates at the various levels for the female job class are adjusted there will be no anomolies or inequities created with respect to the male job class. Therefore,thedecisiontoapplyequaldollarincreases to each step is appropriate. That was not the case in *Gloucester,* where there were the same number of pay levels for both the female and male job classes. The effect of giving equaldollaradjustmentsto eachstepofthe compensation schedule for the female job class would have beento elevatethe salaryofan incumbent at a given step on the schedule below the job rate to a rate higher than her counterpart in the male job class. This would have created an anomaly, as well as the administrative difficulties outlined by the majority in *Gloucester.*

28. It would be wrong to correct one form of discrimination and replace it with another. On its

face, the creation of anomalies or inequities between the female and male job classes might offend the founding

principle of the *Pay Equity Act*, which is set out in the Preamble to "redress gender discrimination in the compensation of employees ..."

4 Another factor to consider in the *Glengarry* factsituationistheentirebargaininghistory. From the facts set out by the majority in paragraph 25, ONA negotiated for a **longer** compensation schedule with even more steps, in the existing Collective Agreements. Clearly, recognition of additional experience through salary (rate schedule) progression was a bargaining objective adopted by ONA and should not be ignored here.

5 I note that *Lady Dunn General Hospital* did not impose an "equal dollar amount" increase to the compensation adjustment granted by way of increase to the vacation benefit for the female job class. In that case, the Tribunal adopted ONA's view that the "entitlement" to a benefit be changed,suchthat only those with the requisite service actually are granted a benefit under our *Act.* Some employees actually receive no immediate increase, in dollar terms or benefit terms. The same principle should apply here.

The Panel's Decision-Making

1 Since the matter was heard over six months ago, I believe there have been events which call into serious question whether the parties' rights to natural justice have been respected.

2 I have raised theseissueswithinthePanelandtheTribunal,however,itisapparentthatthe question cannot be resolved satisfactorily, in my view.

3 Further, it may well be that, notwithstanding the seriousness of my concerns, it would be inappropriate and wrong in law for me to discuss the bases for my concerns in this decision. This arises out of my Oath of Office and my obligations to confidentiality as an adjudicator. This further calls into questionwhethertheparties'rightsarebeingrespected, as wellas myownindependenceas anadjudicator.

4 I apologize to the parties for the inconvenience this will cause and the injustice they will feel. I have been left with no choice.

ADDENDUM OF VICE-CHAIR JANIS SARRA AND MEMBER BRUCE BUDD, JUNE 15, 1992

1. Since the release of the majority decision, we were surprised by the release of a subsequent "dissent" communicated byTribunalMemberDudartotheparties. We have now had the opportunity to review the dissent and feel compelled toaddressthecommentsinparagraphs31to34. Given the nature of Member Dudar's complaint, we can only assure the parties that in our view there has been absolutely no denial of natural justice to anyone. Not only was our majority decision made in full compliance with all Tribunal policy, but our majority decision was based uponthe panel'scareful, deliberateand considered review of the submissions and argument of the parties. There was no dispute concerning the evidence which was presented by agreed statement of fact. The only unfortunate aspect of the decision is the delay in its release, for which Tribunal Member Dudar, correctly, assumes the bulk of responsibility.