PAY EQUITY HEARINGS TRIBUNAL

0473-93	Ottawa Board of Education, **Applicant** v. Ontario Secondary School Teachers' Federation - Educational Assistants, **Respondent**
0474-93	Ottawa Board of Education, **Applicant** v. Ontario Secondary School Teachers' Federation - Custodians, Maintenance and Cafeteria Workers, **Respondent**
0475-93	Ottawa Board of Education, **Applicant** v. Ontario Secondary School Teachers' Federation - Speech Language Pathologists, **Respondent**
0485-94	Ontario Secondary School Teachers' Federation - Educational Assistants, **Applicant** v. Ottawa Board of Education, **Respondent**
0486-94	Ontario Secondary School Teachers' Federation and Group of Employees - Speech Language Pathologists, **Applicant** v. Ottawa Board of Education, **Respondent**
0487-94	Ontario Secondary School Teachers' Federation - Plant and Support Staff Unit, **Applicant** v. Ottawa Board of Education, **Respondent**
Before:	Phyllis Gordon, Chair and Members Bruce Budd and Charles Taccone
Appearances:	Carolyn Kay-Aggio, Rand Lintell and Joanne Glaser for Ottawa Board of Education; Cindy Wilkey and Lynn Hopkins for Ontario Secondary School Teachers' Federation
Cite as:	**Ottawa Board of Education** (14 February 1995) 0473-93; 0474-93; 0475-93; 0485-94; 0486-94; 0487-94 (P.E.H.T.)

DECISION OF THE TRIBUNAL, FEBRUARY 14, 1995

1. The Ottawa Board of Education, (the "Employer"), has made three Applications to the Tribunal seeking to quash Orders of the Review Officer, which direct the Employer to bargain pay equity with the Ontario Secondary School Teachers' Federation, (the "Union") for each of three different bargaining units in Files 0473-93, 0474-93, and 0475-93. The Union seeks to have the Orders upheld and has filed Cross-Applications with respect to each of the bargaining units in Files 0485-94, 0486-94, and 0487-94. These essentially assert that the Employer's posted plan violates the Pay Equity Act, R.S.O. 1990, c. P.7 (the "Act") and that the Employer's plan is no longer appropriate. The Union asks the Tribunal to make certain declarations including findings that the comparison system used by the Employer is gender biased, that the posted pay equity plan is inappropriate for the three bargaining units and that it does not conform to the requirements of the Act. The Union seeks orders which direct the Employer to bargain in good faith for each of the three bargaining units, and the parties to use the Union's comparison system as the basis of their negotiations.

2. This ruling deals with the Employer's preliminary objection that the Tribunal has no jurisdiction to consider the matters raised in the Cross-Applications of the Union or the allegations of violations of the Act raised in the Union's Responses to the Applications to quash. The basis of the objection is twofold: that the Tribunal is limited to consideration of the reasoning and outcome of the Orders of the Review Officer; and, that the Union's pleadings are premature in that they raise issues that have not been adequately canvassed at Review Services.

CONTEXT

3. The case at the Tribunal arises in the context of a complex set of relationships and a detailed pay equity chronology. We briefly outline the relations in paragraphs 5 to 9 in order to provide a framework for the preliminary objection and our decision.

4. The Employer posted a pay equity plan for its non-union employees on September 1, 1989, and on October 22, 1990, it posted a plan which it had negotiated with the Ottawa Board of Educational Employees Union ("OBEEU").

5. The Union became the bargaining agent for the Plant and Support Staff Unit ("PSSU") on May 22,1991. This unit includes custodian, maintenance and cafeteria workers who were formerly represented by the OBEEU, and who were covered by the negotiated plan posted on October 22, 1990. On February 24, 1993, the Review Officer ordered the Employer to negotiate pay equity with the Union for this bargaining unit.

6. The Union became the bargaining agent for the Educational Assistants ("EA") on March 24, 1992. This unit is comprised of educational assistants, formerly called teachers' aides. These employees were covered in the pay equity plan originally posted by the Employer in 1989. On May 28, 1993, the Review Officer ordered the Employer to negotiate pay equity with the Union for this bargaining unit.

7. The Union received an interim certificate that it was the bargaining agent for the Speech Language Pathologists ("SLP") on November 19, 1992, and was certified as the bargaining agent on July 12, 1993. The members of this unit had worked at the Ottawa Board of Education on secondment from the Children's Hospital of Eastern Ontario, until September 1, 1992, when they became employees of the Board. They were not included in the original posted plan but were placed in the plan by the Employer when they became Board employees. The Review Officer ordered the Employer to negotiate pay equity with the Union for this unit on May 28, 1993.

8. The Union was also certified as the bargaining agent for the Professional Student Services Personnel ("PSSP") unit in late May, 1990, although this unit is not the subject of any of the Orders before us. The employees in the PSSP unit had been covered in the posted non-union plan. The parties, however, reached an agreement in January of 1992 to negotiate pay equity. At the same time pay equity complaints which had been filed at Review Services prior to the certification of the bargaining unit were withdrawn. The parties led considerable evidence about what occurred at Review Services between the Employer and the PSSP unit, even though the Orders before us do not deal with this unit. While we were advised that the negotiations have not been successful and that the parties have been at Review Services, the substance of the bargaining negotiations was without prejudice and thus not in evidence.

EVOLUTION OF THE DISPUTE

9. In our view, the multi-faceted nature of the relationship between the parties and the considerable amount of time which has passed have influenced the formulation of the issues which are at the Tribunal. As the process to date between the parties and the characterization of the stage they are at now is relevant to the determination of the preliminary objection, we set out our assessment of how the issues in dispute evolved in paragraphs 10 to 16.

10. The evidence indicates that when it became the bargaining agent for each of the four bargaining units, the Union advised the Employer that it wished to bargain a new pay equity plan on behalf of the employees. At that time it was the Union's position that certification was a change of circumstance in the establishment which rendered the plan inappropriate pursuant to s.22(2)(b) of the Act.

11. The Employer's initial position with respect to the three bargaining units which are the subject of the Orders before the Tribunal was that certification subsequent to the posting of a plan does not meet the requirements of s.22(2)(b). This view was shortly thereafter amplified and the Employer's position was that if the Union was able to demonstrate that the Plan violated the Act or was no longer appropriate, the Employer would have the obligation to negotiate those offending elements with the Union. This position has been maintained by the Employer in its dealings with the Union, its submissions to Review Services, and its pleadings at the Tribunal.

12. The Review Officer held the view that post-plan certification was sufficient to trigger the obligation to negotiate and so advised the parties throughout the process and prior to issuing her Orders.

13. The parties disagree about the timing and extent to which the Union raised its concerns about the Employer's comparison system and plan, in the context of the EA, SLP and PSSU bargaining units while they were at Review Services. Much of the evidence was led with the intent of establishing that the Union had or had not raised its allegations, and to what extent. We have reviewed the extensive evidence regarding the timing and content of meetings, letters, and conversations. On balance, we agree with the Employer's view that the Union did not actively pursue the substance of the allegations with respect to the gender neutrality of the comparison systems in the discussions, correspondence or meetings respecting the three units. We do find however that the Union did raise certain problems with the plan at Review Services with respect to two of the bargaining units. With respect to the PSSU bargaining unit, the Union raised the appropriateness of the job rates in the original plan negotiated by the OBEEU and the Employer and alleged that the process of negotiating that plan had been a "sweetheart deal" between the Union and the Employer. With respect to the SLP unit, the Union expressed its concern that salaries had been improperly determined when the speech language pathologists became employees of the Employer. The Union admits that the main issue discussed was its right to bargain.

14. In its presentation of the evidence and its argument, the Union placed great emphasis on what was canvassed at Review Services with respect to the PSSP bargaining unit. It is common ground that the Union made its allegations about the lack of gender neutrality of the comparison system used by the Employer and about violations of the Act at those discussions. (The PSSP is the bargaining unit for which the Employer had agreed to bargain and which is not the subject of an Application before the Tribunal.) Essentially the Union's argument was that although the critique made of the Employer's comparison system addresses professional student service personnel specifically, it clearly applies to all employees in the educational sector, and that some general analysis of the plan was made.

15. Similarly, the Union attempted to establish that as the comparison system presented and prepared by the Union is of general application, it was sufficiently the subject of discussion at Review Services for the purposes of establishing our jurisdiction to consider its merits in the present Applications.

16. For the purposes of characterizing what actually occurred at Review Services, we are not ready to assume that discussions which take place between an Employer and one of its bargaining units are transferable to another bargaining unit, without some clear indication that this was the parties' intention. It seems to us that doing so would do some violence to the integrity of negotiations in general, and upsets the ordinary expectation of how such discussions occur, and how understandings are reached. As well, the facts before us do not support the conclusion we are being

asked to make. We note in particular that the attendance at and the timing of the various meetings, the postponement of pay equity discussions in some instances by agreement and the chronology of events are consistent with the view that the parties were each treating these events as four different sets of discussions. On the other hand, we note that the Employer cannot claim that it is surprised with the allegations, given the discussions that took place with respect to the PSSP.

ARGUMENT AND DECISION REGARDING THE LIMITS OF TRIBUNAL'S REVIEW OF ORDER

17. The Employer's submission on its preliminary objection is that the only issue properly before the Tribunal is whether certification after a plan has been posted and deemed approved compels a complete renegotiation of pay equity by the Employer and the Union. It suggests that the Order is restricted to this issue and that the Tribunal should not consider more than what was in the Order. It also submits that the Union only suggested that the plan was not appropriate or that it violated the Act very late in the day, and that as these issues were not canvassed at Review Services the Tribunal has no jurisdiction to consider them. It similarly maintains that the Tribunal cannot consider the comparison system which the Union prepared or order it to be the basis of a negotiated plan because it was not discussed at Review Services with respect to these three bargaining units.

18. The narrower argument advanced by the Employer is that, as the Tribunal's jurisdiction is limited to what is in the order, we can only consider whether certification leads to an automatic entitlement to renegotiate the pre-certification pay equity plan. In this submission Counsel argues that as this case arises under s. 24(6) of the Act, we are limited to the consideration of matters 'with respect to the order' and she urged a narrow construction of these words. She submits that we should modify the Scarborough decision (March 15, 1994), in a manner which further restricts what comes to the Tribunal. In that case the Tribunal held that the outermost parameters of the issues in any application are the substantive issues the parties took to Review Services and any additional issues the Review Officer may have raised and decided by Order or referred to the Tribunal. Counsel urges that of those issues which the parties took to Review Services we only consider those which were decided by Order.

19. We do not agree that this is an appropriate way to restrict our jurisdiction. The Tribunal's jurisdiction can come from matters relating to the Order. Northumberland and Newcastle Board of Education (1992), 3. P.E.R. 50 at para. 8 and 9. As has been repeatedly noted, the Tribunal is not sitting in appeal from an Order and it may fully consider all of those substantive matters which were at Review Services. If we limit the Tribunal's jurisdiction to what is set out in the Order, then the jurisdiction of the Tribunal would be pre-determined by the Review Officer in each case, regardless

of the issues which the parties brought to Review Services. We therefore reject the Employer's submission that we are only entitled to consider the Order itself.

ARGUMENT AND DECISION RESPECTING TRIBUNAL JURISDICTION TO CONSIDER THE SUBSTANCE OF THE BARGAIN TO BE NEGOTIATED

20. We accept the Employer's challenge to the Tribunal's jurisdiction to consider much of what is in the Union's pleadings. We agree that the relief sought by the Union is significantly broader than the matters which were at Review Services. In particular, we find we are without jurisdiction to consider the merits of the Union's comparison system or to order it be used as the basis for any pay equity negotiations between the parties. On any construction of the evidence, (remembering that we did not hear about the substance of the negotiations between the Employer and the PSSP, as they were without prejudice), the merits of the Union's comparison system were not addressed at Review Services sufficiently to permit the Tribunal to assume jurisdiction.

21. The Employer's SKEW comparison system was the subject of some discussion at Review Services. The Union periodically asked for more detailed information from the Employer regarding the system and the development of the plan and also raised specific items that it considered problematic with respect to the plan. However, we do not find that there were significant discussions of gender bias sufficient to support the Tribunal's assumption of jurisdiction to fully review the SKEW system in order to determine whether it should be the basis of negotiations between the parties.

22. In our view, the request that we ascertain which comparison system should be the basis of negotiation is premature in any event. We are not prepared to decide the merits of these questions which have not only not been sufficiently canvassed at Review Services, but, more importantly, have not been the subject of bargaining negotiations between the Union and the Employer with respect to these bargaining units. If there is an obligation to bargain pay equity, and if after serious negotiations there is no resolution, then the parties can return to Review Services for assistance and possibly the Tribunal for determination of the issues.

ARGUMENT AND DECISION REGARDING SCOPE OF CONSIDERATION OF WHETHER THERE IS A RIGHT TO BARGAIN

23. In our view, the essence of the dispute at Review Services was whether the Employer was obligated to negotiate pay equity plans with the Union for the three bargaining units. The parties and the Review Officer each adopted a different position to this question but these differing

positions advanced at Review Services are not determinative of our jurisdiction. The Tribunal has the jurisdiction to consider the substantive matters which were at Review Services, (Scarborough) and as in this case, were related to the Order (Northumberland and Newcastle). We will therefore consider this question and decide, if necessary, whether in the circumstances of this case, the Employer is required to bargain pay equity with the Union for the bargaining units in question. We have the jurisdiction to consider what factors trigger the obligation to bargain, and in making our decision will not be concerned with what was or was not discussed at Review Services respecting the relevant factors or the standards necessary to trigger the obligation to bargain.

24. The Tribunal has already determined that certification, while a changed circumstance in an establishment, does not, on its own, compel bargaining pursuant to s. 22(2)(b) of the Act. St. Joseph's Villa (1993) , 4 P.E.R. 33. This decision was issued after the parties were at Review Services in this case, and after the Orders were made. The case did not consider what instances would amount to a change of circumstances in the establishment which would render a plan no longer appropriate for the female job classes to which the employees belong. It is certainly open to the Union to demonstrate whether there are changes of circumstances sufficient to render the plan no longer appropriate.

25. We note that where either party believes that the plan is no longer appropriate because of a change of circumstances in the establishment, it may issue a notice to bargain to the other party pursuant to s.14.1 of the Act. In the case before us this issue has already been the subject of dispute at Review Services and is properly before us. However, we note that under s.14.1 the result of a finding that the plan is no longer appropriate because of changed circumstances is that the parties are to negotiate. This remedy is not only mandated by the Act, but is, in our view, the appropriate remedy in the circumstances of this case. While we are prepared to adjudicate whether the changed circumstances render the plan sufficiently inappropriate to trigger negotiations, we are not ready to usurp the role and responsibility of the parties to negotiate, particularly when no real negotiations have occurred to date with respect to these bargaining units.

26. It is the Employer's position that if violations of the Act are demonstrated, it has an obligation to negotiate those offending elements. According to Counsel for the Employer, the Union's pleadings contain sufficient detail of the alleged violations to trigger the Employer's obligation to bargain. However, she insists that the Union's timing is wrong and that it must first return to Review Services before the Employer need consider the allegations. She relies on a very technical reading of the Scarborough decision, which we do not adopt. However, in the context of allegations of violations of the Act, we will consider argument about what would warrant a reconsideration of the plan.

27. During the hearing on the preliminary motions, Counsel greatly assisted the Tribunal by agreeing to and preparing certain documents which set out the chronology of events. We now request the parties to prepare for the next days of hearing with a similar approach. In our view, the question before us can be argued on the basis of an agreed statement of facts. At this time it appears that the determination we have to make is largely a legal one, although if findings of fact become necessary, we will do so on the basis of evidence when required. We look forward to arguments that will address the circumstances and statutory provisions that give rise to an obligation to bargain, within the context of these three bargaining units.