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Riverdale Hospital v. C.U.P.E., Local 79

Between
The Riverdale Hospital, Applicant, and
Canadian Union of Public Employees, Local 79, Respondent
And Between
Canadian Union of Public Employees, Local 79, Applicant, and
The Riverdale Hospital, Respondent

Ontario Pay Equity Decisions: [1990] O.P.E.D. No. 6

File Nos. 0016-89, 0031-89

Ontario
Pay Equity Hearings Tribunal

Before: J. Sarra, Vice-Chair, B. Budd and N. Leclerc, Members

February 16, 1990

Appearances:

Robert J. Atkinson, Jean Rushworth and Lois Cauthers, for the Applicant, the Riverdale Hospital.
Laura Trachuk, Linda Jewett and Steven David, for the Respondent, Canadian Union of Public Employees, Local 79.

DECISION OF THE TRIBUNAL:--

1 Tribunal File 0016-89 is an application for hearing in which the Applicant, The Riverdale Hospital (the "Hospital") objects to an order made by a review officer directing the Hospital to provide the Respondent, the Canadian Union of Public Employees Local 79 ("CUPE" or the "Union") with the compensation schedules of the non-unionized positions for the purpose of pay equity negotiations. The parties settled all other issues of disclosure prior to the first day of hearing. The Union has also filed an application for enforcement of the same order (File No. 0031-89). The two matters were listed together for hearing. The parties agreed at the pre-hearing conference that the files would be heard sequentially,

with evidence from file 0016-89 to be applied to file 0031-89. The panel accepted that arrangement and proceeded on that basis. At the completion of the hearing of file 0016-89, the panel reserved and this decision pertains only to the issues in file 0016-89.

2 The parties made submissions to the Tribunal with respect to the issue of legal onus. It is not necessary to decide the question of legal onus in disposing with the merits of this case and accordingly, we do not do so.

THE FACTS AND ISSUES

3 The issue before us is whether the review officer's order of disclosure should be confirmed or revoked. Arising out of that was a limited question as to the Tribunal's jurisdiction to order disclosure for job information outside of the bargaining unit. In assessing disclosure, there were two issues in dispute. First, does the Union require the compensation schedules in order to agree upon job classes which will form the basis of possible male job class comparators? Secondly, is the compensation information either necessary or relevant to the Respondent's ability to assess the gender neutrality of the comparison systems proposed in these pay equity negotiations?

4 The facts are not in dispute. The Applicant is a chronic care hospital, governed by the provisions of the Public Hospitals Act , R.S.O. 1980, c. 410. The Union represents two bargaining units at the Hospital, one consisting of nursing and paramedical staff, and the other consisting of service workers. The parties agree that there are no male comparators within the nursing and paramedical unit. There are also three other unionized groups at the Hospital, as well as a non-unionized or "excluded" group of employees who are largely comprised of managerial personnel.

5 The parties began exchanging correspondence on pay equity negotiations in February 1988 and commenced face-to-face bargaining in June 1989. There are two concurrent sets of pay equity negotiations for the two CUPE bargaining units. To date the Hospital has provided information on the job titles and gender composition of all jobs; as well as the job descriptions where they are available, for all positions in the establishment. It has provided wage and benefit data for the unionized jobs only. The Hospital has tabled a proposed system of comparison entitled "Job Evaluation Manual for Use by Member Hospitals of the Ontario Hospital Association provided by Stevenson, Kellogg, Ernst and Whinney." The Union has tabled a proposed comparison system entitled "Draft Metropolitan Toronto Local 79 Pay Equity Job Comparison System", a system it is in the process of developing with the Municipality of Metropolitan Toronto. Both systems are "a priori point factor" systems; although CUPE's proposed system is being developed and has no weights as yet. Both parties have tabled their respective proposals for both bargaining units concerned. The parties have agreed upon a questionnaire which has been jointly developed and have agreed upon an interviewing process to collect the job content information; the process of data collection is scheduled to start early in 1990. To date, the parties have not agreed upon the definition or identification of job classes.

6 The Union applied to Review Services on August 30, 1989. Subsequently, on October 4, 1989, a review officer of the Pay Equity Commission issued the following order to the

parties:

> I order the Employer to disclose to the Union forthwith the compensation schedules for all positions outside the bargaining units; this includes but is not limited to the current salary ranges for non-unionized positions. I further direct the parties to resume pay equity negotiations.

7 The Applicant seeks to have the order revoked, submitting that it should not be required to provide the Respondent with any compensation schedules relating to non-unionized positions. It believes the information is not necessary to determine job class of potential male comparators; that only job content information is required to select male job class. In the alternative, it challenges the Union's right to negotiate job classes that would form part of another pay equity plan. The Applicant believes the information is also not necessary to test the gender neutrality of the proposed comparison system. It called opinion evidence that such information has not been historically used in traditional job evaluation methodologies. The Applicant submitted that even if compensation information is needed to test gender neutrality, the wage information of the other unionized groups not represented by CUPE was sufficient to do the testing. Further, the Hospital was concerned about the confidentiality it believes it owes to the large number of excluded positions held by single male incumbents with respect to the salaries they are receiving. In the alternative, it requests the Tribunal not to order information for the Executive Director position, since the Union admitted in evidence that this job is not a possible male comparator.

8 The Respondent asks the Tribunal to confirm the order; alleging that the Hospital is bargaining in bad faith in refusing to disclose the compensation schedules necessary to enable the parties to engage in informed pay equity negotiations. The Union believes it requires the information to consider, define and identify job classes or possible groups of jobs that might be potential male comparators for the female job classes within its bargaining unit. The Union submitted that the Hospital can undertake impact testing for gender neutrality prior to agreeing to either system and that the Union should be entitled to the same information to enable it to undertake the same process as effectively. The Union led evidence describing the types of tests it sought to undertake to assess the gender neutrality of both proposed comparison systems. The Union has approached the pay equity bargaining on the assumption that wages in its bargaining units have been historically undervalued because of systemic gender discrimination, and that the Union has an obligation to seek the best redress consistent with the Pay Equity Act, 1987. The Union believes it is not in a position to make any further progress in pay equity negotiations without the compensation information of the excluded positions.

9 The Tribunal heard of the evidence of Ms. Lois Cauthers, Director of Personnel for the Hospital, and Ms. Linda Jewett, CUPE National Representative responsible for pay equity negotiations for these two bargaining units. The Tribunal also received the opinion evidence of Mr. Robert McDowall who was qualified as an expert in traditional job evaluation on the basis of his skills, knowledge and experience. The Union objected to the summary of his proposed evidence as required by Rule 9.01 of the Tribunal's Rules of Practice. Given the early stages of application of the rule, the Tribunal was prepared to

accept the summary in this case. The purpose of the rule is to prevent surprise, and to allow preparation of cross-examination as well as preparation of a party's own witnesses. Given the nature of evidence expected from an expert, notice is especially required. As a general policy matter, a summary should include an outline of the issues the witness seeks to give evidence on; the conclusions she or he has formulated; and the basis or reasoning underlying each of the conclusions. With respect to the evidence given by Mr. McDowall, although we found him to be a forthright witness, his evidence was not particularly useful in the pay equity issues the Tribunal must decide in this case.

DECISION

10 Section 7(1) of the Pay Equity Act, 1987 requires employers to "establish and maintain compensation practices that provide for pay equity in every establishment of the employer" and the Act further requires that no employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would contravene Section 7(1). Section 14 of the Act imposes a joint obligation upon the employer and a bargaining agent to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan; such an obligation applies both to the process and to the content of pay equity negotiations. In bargaining the component parts of a job comparison system and a pay equity plan, the parties must meet the statutory requirements of the Act.

11 The duty to disclose information in the context of bargaining for a collective agreement is well established in labour relations jurisprudence. The bargaining duty includes an obligation to provide the information necessary to foster rational, informed discussion and to prevent either party from negotiating in the "dark". (see: DeVilbiss (Canada) Limited, [1976] O.L.R.B. Rep. March 49; The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic) [1985] O.L.R.B. Rep. May 705; The Windsor Star, [1983] O.L.R.B. Rep. Dec. 2147; Globe Spring & Cushion Co. Ltd. [1982] O.L.R.B. Rep. Sept. 1303; Forintek Canada Corp. [1986] O.L.R.B. Rep. Apr. 453). Although the disclosure requirement in the context of bargaining for a collective agreement is not directly analogous, there are useful elements to apply in the pay equity context. The Tribunal has the jurisdiction under the Pay Equity Act, 1987 to order disclosure and it has done so as part of its jurisdiction to deal with complaints of bad faith bargaining. In Cybermedix Health Services Ltd. (July 6, 1989), 0003-89 (P.E.H.T.), the Tribunal said at paragraphs 20 and 24:

> 20. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members...
> 24. Disclosure must be made when parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process.

The Section 14 duty to negotiate in good faith includes, as part of the bargaining duty, the

obligation to disclose information necessary or relevant to pay equity negotiations. In the process of negotiating a gender neutral comparison system and a pay equity plan, the parties must disclose sufficient information to ensure that rational and informed discussion can take place. With respect to disclosure requirements in the context of pay equity negotiations, the requested information may be required to determine a bargaining position or it may be related to the ability of one party in the negotiation process to assess the impact of a bargaining proposal. Disclosure is also necessary where the parties must have the information in order to identify and agree upon a definition statutorily required by the Act.

12 The information requested in the context of pay equity negotiations must be rationally related and relevant to an issue in the process. What is rationally relevant to pay equity? Section 13 of the Act specifies the component parts of a pay equity plan, which in a unionized workplace, must be negotiated and agreed upon. Subsection 13(1)(b) requires the identification of all job classes which form the basis of comparisons required by the Act. Where there are no male job classes within the bargaining unit, the parties are required to look throughout the establishment. Subsections 6(4)(a) and 6(5) of the Act state:

> 6(4) Comparisons required by this Act
> (a) for job classes inside a bargaining unit, shall be made between job classes in the bargaining unit; and...
>
> 6(5) If, after applying subsection (4), no male job class is found in which the work performed is of equal or comparable value to that of the female job class that is the subject of the comparison, the female job class shall be compared to male job classes throughout the establishment.

In this case, one of the two bargaining units is comprised of exclusively female dominated jobs. It is undisputed that the only possible male comparators will have to be found outside the bargaining unit. The parties will have to compare the female job classes in the nursing and paramedical unit to male job classes throughout the establishment as required by subsection 6(5) of the Act. The Employer and the Union must be able to identify and determine the job classes as required by Section 13(1)(b).

13 We accept the submission of Counsel for the Hospital that the Union cannot negotiate job classes for the purpose of another pay equity plan. Section 15(3) of the Act, in requiring an employer to prepare a pay equity plan for its non-unionized employees, specifies:

> 15.(3) An agreement under section 14 between an employer and a bargaining agent shall not affect any pay equity plan required by this section or subsection 14(8).

However, the Act requires the parties to compare the female job classes to male job classes throughout the establishment where there are no male comparators within a

bargaining unit and the Union can agree with the Employer on male job classes for this purpose. It may be that the male job class ultimately agreed upon by these parties for purpose of comparison with female job classes and the pay equity plan of these bargaining units is not the same job class arrived at for other purposes. In cases where the parties have agreed on job classes, the agreement cannot be binding on another pay equity plan. Whatever decision on job class is negotiated for purpose of male comparators will not bind the negotiation of job class with other bargaining agents, nor will it bind the Employer in defining job class for the purposes of its non-union plan.

14 Is it necessary to have compensation information of jobs outside the bargaining unit in order to identify possible male comparators for the female job classes within the bargaining unit? The Act defines job class as:

> 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;

The wording requires four criteria to be assessed in deciding job class. The definition of job class does not require any order of assessing the four factors; it only specifies that all four criteria must be considered. We do not accept the submission of the Applicant Counsel that disclosure of the fourth criteria of "same compensation schedule, salary grade or range of salary grades" is necessary only after the first three have been disclosed and found to be the same or similar.

15 In order to determine a bargaining position and to assess the position of the Employer on what constitutes a job class, the Union must have information on the four criteria upon which job class is defined by the statute. The compensation schedule, salary grade or range of salary rates is one of four criteria that both parties must apply in determining and agreeing upon the contours of a job class. The fact that the majority of jobs outside the bargaining unit are single incumbent positions does not preclude the parties from agreeing that several jobs constitute a job class given the statutory definition.

16 We find that the Union is entitled to the compensation schedule relating to the positions outside of the bargaining unit in order to formulate its bargaining position and in order to negotiate the male job classes which are to be used as comparisons for purposes of the gender neutral comparison system and the pay equity plan in these bargaining units. The disclosure of this information is essential to ensuring a rational and informed process of pay equity negotiations, consistent with the requirements of the Act.

17 The Tribunal heard considerable evidence and received very thoughtful submissions on whether the compensation information is necessary or relevant to test the gender neutrality of the proposed comparison systems. There is no caselaw to date which establishes the legal standard of gender neutrality. Nor are there established tests for such standards of gender neutrality under the Act. In such a context, it is essential that parties be given latitude in their efforts to satisfy themselves that their bargaining position meets their obligations under the Act. Both parties must assure themselves that a proposed

comparison system is applicable to the particular workplace and that there is not a gender effect. However, the Tribunal finds that parties are entitled to disclosure of compensation schedules in order to identify and agree upon the job classes as one of the four criteria required by the Act. Given that, it is unnecessary in this case to decide whether the information is needed to test for gender neutrality and accordingly, we do not do so.

18 In conclusion, we find that there is no prejudice to the Employer in ordering this information for the purpose of determining job classes. With respect to the issue of confidentiality, we note that there is both an implied and an explicit undertaking by the Union that the information will not be used for purposes other than the negotiation of pay equity. Although there are single incumbent positions, it is the salary range for each position, not the actual earnings of the incumbent which the Employer is obliged to disclose.

19 Based upon the evidence and submissions, the Tribunal finds that the Applicant must disclose to the Respondent information necessary to the pay equity negotiation process, in particular that it must disclose the requested compensation information relating to the non-unionized positions in this establishment. In light of the fact the Union conceded in evidence that the Executive Director was not a possible male comparator, there is no reason to give the compensation information for that position and accordingly, we vary the order of the review officer. Therefore, pursuant to Sections 25(2)(d) and 25(2)(g) the Tribunal hereby orders the Hospital to disclose to the Union the compensation schedule, salary grade or range of salary rates relating to the managerial and non-unionized jobs, except that of the Executive Director, and the Tribunal orders the parties to continue pay equity negotiations.