

It Doesn't Pay to Delay: Review Officer's Order Rescinded by Pay Equity Hearings Tribunal

Despite rumours to the contrary, pay equity has not come to a quiet end in Ontario. The *Pay Equity Act* (the "Act") continues to require employers to ensure that their compensation practices provide for pay equity for all employees in female job classes. However, in a recent decision, the Pay Equity Hearings Tribunal (the "Tribunal") found that delay in filing and processing a complaint about an employer's pay equity plan amounts to an abuse of the pay equity system.

In *Maitland Manor Health Care Centre v. Mattuci et al.*, the Employer (a nursing home) took issue with an order issued by a Review Officer in November 2009. The Review Officer concluded that the Employer's non-union proxy pay equity plan (the "PPEP") (which the Employer had posted in 1995) did not comply with the Act. As a result, the Review Officer ordered the Employer to prepare a new proxy pay equity plan and provide employees with any additional pay equity wage adjustments. The Employer commenced an application to the Tribunal challenging the Review Officer's order.

The Employer's position before the Tribunal was that the PPEP complied with the Act. The Employer also argued that there was unreasonable and inordinate delay

by the complainant (an anonymous employee) in filing his complaint with the Pay Equity Office (the "PEO"), as well as undue delay by the PEO in processing the complaint after it was received. These periods of delay – that is, 9 years to file the complaint and 5 years to process it – resulted in substantial and irreparable prejudice to the Employer which amounted to an abuse of process and brought the pay equity system into disrepute. The Employer requested that the Tribunal permit it to remedy the resulting prejudice by retroactively characterizing wage increases provided to employees over the years as pay equity wage adjustments or, alternatively, revoke the Review Officer's order.

The Tribunal found that pursuant to the *Statutory Powers Procedure Act*, it has the power to make orders or



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give directions in order to prevent an abuse of its processes. The Tribunal also held that an unacceptable administrative delay may amount to an abuse of process when significant prejudice results to a party, even where the fairness of the hearing has not been compromised. The Tribunal determined that whether delay amounts to an abuse of process depends on contextual factors including the nature of the case and its complexity, the facts and issues in dispute, the purpose and nature of the proceedings, whether the party seeking a remedy contributed to the delay, and the various rights at stake in the proceedings.

The Tribunal applied the contextual factors to the facts of the case and held that the 14-year delay amounted to an abuse of process. According to the Tribunal, the *Act* clearly sets out time frames within which employees may submit comments or object to an employer's pay equity plan. Thus, the process for employees to make timely complaints to the PEO is not complicated. Also, the issue raised in the complaint (i.e. whether the PPEP complied with the *Act*) was not a matter of such complexity as to justify a 5-year delay in issuing the Review Officer's order. The Tribunal further recognized that the Employer had not meaningfully contributed to the delay. The Tribunal was also satisfied that the rights of the Employer had been considerably and irreparably prejudiced by the delay. For instance, had an objection been made by the anonymous employee within the prescribed period, the

Employer could have amended the PPEP as necessary and characterized future wage increases as pay equity wage adjustments. Further, had the Employer been advised of the complaint and the PEO's position in that regard in a timely manner, it could have mitigated its potential liability by characterizing all wage increases provided to the employees since the complaint was filed as pay equity wage adjustments. However, due to the delay, the Employer was deprived of these options, as well as others.

Apart from the substantial prejudice to the Employer, the Tribunal held that abuse of process arising from delay can also occur in instances where the administrative system itself would suffer disrepute. According to the Tribunal: **"There is a strong public interest in promoting the timely and final resolution of pay equity disputes. The workplace parties are entitled to have their disputes resolved without undue delay...If the Tribunal allows the anonymous employee's complaint to proceed in this case, there is a real risk that other complainants will feel emboldened to raise objections long after a pay equity plan has been "deemed approved". The Tribunal should discourage the raising of such ghosts from the past."**

Having found that the delay caused significant prejudice to the Employer and brought the pay equity system into disrepute, thus amounting to an abuse of process, the Tribunal proceeded to consider

the issue of remedy. With respect to the Employer's request for an order permitting it to retroactively characterize wage increases as pay equity wage adjustments, the Tribunal found that such an "extraordinary remedy" was not warranted (assuming that the Tribunal had the jurisdiction to grant it). Instead, the Tribunal rescinded the Review Officer's order.

For the nursing home industry, the case is a very important one. In the mid-1990's, the majority of nursing homes in Ontario posted proxy pay equity plans which are virtually identical to the PPEP posted at Maitland Manor. These plans are known in the industry as the \$1.50 Plan. Thus, the decision may shield the pay equity plans in place at most nursing homes from findings of non-compliance, thereby eliminating potentially substantial liability for unpaid prior pay equity wage adjustments.

For employers generally, the decision provides some reassurance that employees will not be permitted an unlimited amount of time to object to pay equity plans posted in the workplace, and that pay equity disputes must be dealt with by the PEO in a timely manner.

Having acted as counsel to Maitland Manor in this case, I can confirm that pay equity lives on in Ontario. The *Act* applies to most employers and the PEO continues to enforce the legislation. If you have any questions about your pay equity obligations, please do not hesitate to contact me.