IN THE MATTER OF THE *PAY EQUITY ACT 2009*

AND AN ARBITRATION UNDER SECTION 17 THEREOF

BETWEEN

WORKSAFENB

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1866

APPEARANCES:

FOR CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1866:	Michael Meahan
FOR WORKSAFENB:	André G. Richard, Q.C.
ARBITRATOR:	Elizabeth MacPherson
DATE OF DECISION:	April 4, 2018

I- BACKGROUND

1. On February 8, 2018, the Chairperson of the Labour and Employment Board (LEB) appointed the undersigned as Arbitrator pursuant to section 17 of the *Pay Equity Act, 2009,* SNB 2009, c.P-5.05 (the *PE Act*), with a mandate "to hear and determine the matters in dispute" between WorkSafeNB (WorkSafe or the Employer) and the Canadian Union of Public Employees, Local 1866 (CUPE 1866 or the Union).

2. The parties agreed that the arbitration be conducted by way of written submissions, rather than an oral hearing. The parties submitted an Agreed Statement of Facts and written briefs on March 19, 2018. Written reply submissions were filed on March 26, 2018.

II – FACTS

3. WorkSafe is a body corporate listed in Part IV of the *Public Service Labour Relations Act*, RSNB 1973, c. P-25. It is subject to the provisions of the *PE Act*.

4. WorkSafe has 447 employees, of whom 300 or 67% are women. There are some 180 job classifications within the organization, many with fewer than 3 incumbents.

5. There are two bargaining units at WorkSafe.

6. CUPE 1866 has 105 members, of whom 96 are women (91% female). This bargaining unit is composed primarily of clerical and other office personnel. There are 33 different classifications in CUPE 1866, with an average of 3.2 incumbents per classification.

7. The second bargaining unit, which is represented by CUPE Local 946, has 30 members, of whom 17 are male (57% male). This bargaining unit consists of technicians, cooking, cleaning and maintenance personnel and rehabilitation assistants. There are 14 classifications within CUPE 846's bargaining unit, with an average of 2.1 employees per classification.

8. Unrepresented employees make up 70% of WorkSafe's labour force (312/447). Of this number, 61% are female. There are 133 classifications; according to the Employer, the average number of non-unionized employees per classification is 2.3.

9. The parties are engaged in a Pay Equity evaluation in relation to the position of Support Clerk II, a female-dominated classification within the bargaining unit represented by CUPE 1866. There are 25 employees within this job classification, of whom 23 are

women. The parties agree that this position is a female-dominated job classification, as defined in the *PE Act*.

10. The parties have agreed on a non-discriminatory job evaluation system, as required by section 13(1)(a) of the *PE Act*. The agreed upon tool measures jobs in relation to four criteria: skill, effort, responsibility and working conditions.

11. To date, the parties have been unable to agree on the identification of the male-dominated classification(s) that are to be used as comparators for the Support Clerk II position.

12. WorkSafe has only one job classification, Health and Safety Officer (HSO), that meets the definition of "male-dominated classification" contained in the *PE Act*. Although there are other job classifications within WorkSafe occupied predominately by men, none have more than 10 incumbents, and therefore do not meet the definition for a "male-dominated classification" contained in the *PE Act*.

13. The parties sought the advice of the Pay Equity Bureau to identify male-dominated comparators for the purposes of the evaluation. On November 9, 2016, the Director of the Pay Equity Bureau recommended that the parties look at all the male dominated classifications within the Commission, regardless of the current incumbency numbers, to identify appropriate male comparators.

14. The parties remained unable to agree and sought further guidance from the Director of the Pay Equity Bureau. The response was that unionized female job classes should be compared to male job classes in the bargaining unit; if more than one male comparator is found, the one with the lowest wage rate is the appropriate comparator. However, the Director added that this advice was based on best practices from other jurisdictions and was not prescribed in the *PE Act*.

15. In a later email, the Pay Equity Bureau confirmed the options advanced by the parties: the Employer had identified a number of unionized male comparators with pay levels both above and below the female-dominated position; the Union had identified the same unionized comparators and had also found five non-unionized comparators, for a total of 11. The Director stated that, in her opinion, the Employer and the Union proposals were both viable to ensure compliance with the *PE Act*, if the parties agreed to it.

16. As the parties remained unable to reach agreement, they applied to the Chairperson of the LEB for the appointment of an arbitrator.

III - POSITIONS OF THE PARTIES

17. The parties have been unable to agree on the articulation of the issue that is in dispute between them. This is somewhat problematic, as the Arbitrator's mandate is limited by section 20(2)(b) of the *PE Act* to only the matter or matters referred to the arbitrator by the Chairperson of the LEB. As noted above, the appointment letter refers to "the matters in dispute" between the parties. Accordingly, I have interpreted my mandate to include determination of how the issue in dispute is to be articulated, as well as how that issue should be resolved.

18. The Employer formulates the issue as follows:

> Should the Evaluation proceed on the basis of unionized male-dominated classification comparators only, or are both unionized and non-unionized comparators necessary in the present circumstances?

19. The Employer submits that there is no compelling reason to deviate from the best practices identified by the Director of the Pay Equity Bureau. It states that there are five male-dominated classifications with fewer than 10 incumbents within the two bargaining units that can be used as comparators. It argues that there is no need to include unrepresented classifications in the evaluation exercise. The Employer relies on the best practices identified by the Pay Equity Bureau: that a single comparator is sufficient and that unionized comparators are preferred for unionized classifications.

20. The Employer submits that CUPE 1866 (91% female) and CUPE 946 (57% male) have negotiated very similar working conditions. This provides an ideal context against which to compare female and male-dominated classifications. By focusing on comparators within the bargaining units, it is easier to determine whether wage disparities arise as a result of gender. The Employer submits that if the comparison is extended to include non-unionized employees, it is more difficult to discern whether any wage differences arise due to differences in working conditions or bargaining strength, rather than gender.

21. The Employer submits that, given the existence of five potential male-dominated unionized comparators, it is unnecessary to consider non-unionized positions.

22. The Employer also suggests that the advice given by the Pay Equity Bureau with respect to best practices should not be lightly supplanted. The Employer submits that, when the parties sought the Pay Equity Bureau's advice in 2016, they had both reached the conclusion that the HSO position was not an appropriate comparator.

23. The Employer suggests that the stark differences in the skill, effort, responsibility and working conditions of the Support Clerk II and the HSO positions, any job evaluation exercise is likely to confirm that these two classifications do not perform work of equal or comparable value and thus that the HSO position is not an appropriate comparator for the Support Clerk II position. The Employer submits that it would be contrary to the purpose and intent of the *PE Act* for the parties to be ordered to proceed on the basis of a comparator that the parties themselves, when working together in good faith to identify the best approach, did not consider to be a viable option.

24. The Employer argues that the arbitrator's mandate is limited to determining which of the two alternatives put forward by the parties at the time they applied for arbitration is to be preferred. It submits that the arbitrator does not have jurisdiction to resurrect an option previously discarded by the parties. The Employer further argues that the use of the HSO as the sole comparator could not reasonably be expected to provide an example of work of comparable value that would permit the evaluation contemplated by the *PE Act*.

25. The Union submits that the issue to be determined by the Arbitrator is:

> In compliance with the *Pay Equity Act*, should the pay equity evaluation consider only unionized male-dominated classification comparators or both unionized and non-bargaining unit comparators?

26. The Union states that the disagreement between the parties over the identification of the appropriate male-dominated classifications to be used as comparators for the Support Clerk II position prevents the job evaluation process from moving forward. The Union submits that there is only one classification within WorkSafe that meets the definition of a male-dominated classification, namely the HSO position, which is a non-unionized position. It also recognizes that there are other male-dominated classifications within the organization, but points out that these classifications do not meet the statutory definition because they each have fewer than 10 incumbents.

27. The union submits that the Employer's position that only unionized classifications should be considered for the purpose of selecting comparators is not consistent with the language and intent of the *PE Act*. It points out that the *PE Act* does not distinguish between bargaining and non-bargaining positions, nor are there any provisions in the *PE Act* that require unionized positions to be compared only with other unionized positions. The union argues that the stated purpose of the *PE Act* is to achieve pay equity within the organization (being each body corporate listed in Part IV of the *Public Service Labour Relations Act*), so there is no basis on which to limit the potential comparators solely to bargaining unit positions.

28. The Union submits that the statutory language is plain and unambiguous and the legislative intent can be gathered from the plain meaning of the language used. In light of the facts, the Union submits that the HSO position is the only one within WorkSafe's organization that satisfies the statutory requirements of the *PE Act*.

29. In its reply submissions, the Union points out that the best practices identified by the Pay Equity Bureau and relied upon by the Employer have no basis in the New Brunswick statute. They appear to be based on the legislation in place in Ontario, which specifies that comparisons are to be made between job classes within a bargaining unit and that if more than one comparison is possible, the male job class with the lowest wage rate is to be used when the work performed by both job classes is of equal or comparable value. The Union submits that the clear language of the *PE Act* is to be applied in preference to best practices from other jurisdictions that have no equivalent statutory basis in New Brunswick.

IV - ANALYSIS AND DECISION

30. The issue in this case is whether, under the circumstances, the pay equity evaluation for the female-dominated bargaining unit position of Support Clerk II should take into account only unionized male-dominated classification comparators or both unionized and non-bargaining unit classifications.

31. The *PE Act* is designed to encourage the parties to work together in good faith in order to give effect to the legislation. The advice issued by the Pay Equity Bureau appears to suggest that the parties can work around the strict language of the statute, if they mutually agree to an approach that will achieve the objective of pay equity. However, as the Union points out, the best practices identified by the Pay Equity Bureau have no basis in the New Brunswick legislation. When the parties are unable to agree on an approach, it is necessary to proceed in accordance with the strict language of the *PE Act*.

32. The purpose of the *PE Act* is set out at Section 3:

> 3. The purpose of this Act is to implement pay equity within each of Parts I, II and III of the Public Service and in the case of a body corporate listed in Part IV of the Public Service, within that organization.

33. In view of the stated purpose of the *PE Act*, it is clear that, in the case of corporations listed in Part IV of the *Public Service Labour Relations Act*, the parties must look at the entire organization when endeavouring to identify potential comparators for pay equity purposes. In this case, this means that the HSO classification must be included in the parties' search for an appropriate comparator.

34. This conclusion is supported by the language of section 8(1) of the *PE Act*, which directs the parties to undertake comparisons between female-dominated and male-dominated classifications within "an organization that is a body corporate listed in Part IV". There is nothing in the statute to suggest that the scope of the comparison is limited a subset of classifications within the organization.

35. The Employer suggests that the parties had previously concluded that the HSO was not an appropriate comparator for the Support Clerk II position. The union denies that any such agreement was reached. In the absence of an agreement, it is my view that the statute requires the HSO position to be evaluated. The evaluation will establish with certainty whether the HSO position is of equal or comparable value to the Support Clerk II position.

36. It is possible that the Employer's concerns will be realized and, upon evaluation, the HSO position will be found not to be of equal or comparable value to that of the Support Clerk II. There is no express guidance in the *PE Act* for situations in which there are no classifications of equal or comparable value within the organization that meet the definition of "male-dominated classification".

37. Pay equity legislation has been universally characterized as human rights legislation. It is generally accepted that human rights legislation must be given a liberal interpretation so as to give effect to the intent of that legislation. The *PE Act* must be interpreted, if reasonably possible, to remedy the inequality that it was intended to correct.

38. Under the current circumstances, should the HSO position be found not to be of equal or comparable value to the Support Clerk II position, the parties should engage in good faith efforts to find a male-dominated position of equal or comparable value within the organization. Under the circumstances, the reasonable course of action to give effect to the purpose of the *PE Act* would be for the parties to consider the other male-dominated positions within the organization (both bargaining unit and non-bargaining unit), despite the fact that these classifications all have fewer than 10 incumbents. While not mandated by the *PE Act,* this approach would be consistent with the scheme and purpose of the statute.

39. In summary, it is my award that the dispute between the parties referred to in the Chairperson of the LEB'S letter dated February 8, 2018 be resolved as follows:

    a. The parties are to evaluate the HSO position to determine whether it is of equal or comparable value to the Support Clerk II position; and
    b. If it is determined that the HSO position is not an appropriate comparator for the Support Clerk II position, the parties are to evaluate all of the other male-dominated classifications within the organization, despite the fact that there are no such male-dominated classifications with 10 or more incumbents, in a good faith effort to find an appropriate comparator for the Support Clerk II position.

Issued at Grand Barachois, New Brunswick this 4th day of April, 2018.

Elizabeth MacPherson
Arbitrator