

NINE TO FIVE

An equivalent role at my company was posted at a higher pay rate. What are my options?

ANDREA YU >

SPECIAL TO THE GLOBE AND MAIL

PUBLISHED 4 HOURS AGO

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THE QUESTION

I work as an administrative assistant for executive management at a hospital. My job is non-union. In 2012, I was moved to a different site of the hospital in the administration office. My co-worker is also an admin assistant and she makes roughly \$2 an hour more than I do. I inquired one time if I would ever get her rate of pay and was told that rate was “grandfathered in.”

This carries on for nine years. My co-worker is now retiring, and her job has been posted. Reading the posting I see it is my job, and is posted at her higher rate of pay. I feel that I’ve been lied to for nine years, and now I’m told I can “apply for her job,” which is the same one I have been doing (alone) for nine years. Do I have any recourse?

THE FIRST ANSWER

George Huang, *partner, Guardian Law Group LLP, Calgary*

There may be grounds for a human rights complaint. In Alberta, due to the time limitation of nine years, a subsection of the Alberta Humans Rights Act may be more likely to succeed in

courts depending on a variety of factors.

The subsection states that no employer can discriminate on race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person. More information on the client and co-worker is required to determine if there is recourse such as gender or racial differences. You are more likely to succeed if you belong to the historically disadvantaged group.

Note that the discriminatory consideration need not be the sole factor for the lesser pay, but merely one of the factors for the wage difference. Discrimination can be established through circumstantial evidence or reasonable inference. This is determined on a balance of probabilities, that is, “does the evidence that supports the inference of discrimination render that inference more probable than not.” You would have the burden of proving that the wage differential between yourself and the co-worker was at least partially influenced by any of the previously mentioned factors.

Furthermore, you would have a stronger case for recourse if you were not hired for the new position and no performance-based reasons are provided. Ultimately, more information is required to determine the likelihood to obtain damages. A lawyer can assist with explaining your claim and help you determine whether to proceed for a claim of damages.

THE SECOND ANSWER

George E. Cottrelle, *partner, Keel Cottrelle LLP, Toronto*

As a general rule, employers are permitted to pay employees in similar jobs different wages.

Most provinces have enacted “equal pay for equal work” legislation and some provinces also have pay equity legislation to ensure employers are not differentiating wage rates based on sex or gender. Human rights legislation also prohibits discrimination in employment based on certain prohibited grounds, such as race, sex or religion.

Equal pay for equal work legislation requires your employer to pay the same rate to employees doing substantially the same work, subject to permitted exceptions, such as seniority or merit. In certain provinces, such as Ontario, a complaint can be made only if your co-worker earning more is of the opposite sex and there is no applicable exception. You could be awarded additional wages or damages, depending on your province.

If you are in a province with pay equity legislation, your employer is required to pay workers in female job classes the same as those in male job classes, if the jobs are of equal value. A pay equity complaint is not an option for you as the positions are substantially the same.

An employer has a duty of honesty to employees, which includes truthful communications. You relied in good faith on the hospital's representation that the higher wage rate of your co-worker was unavailable to you due to "grandfathering," which may have been a misrepresentation.

You should apply to the posted job. If you do not get it, despite being fully qualified, then given all the above circumstances, it may not be reasonable for you to continue in your role, giving rise to a possible constructive dismissal claim.

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351 King Street East, Suite 1600, Toronto, ON Canada, M5A 0N1

Phillip Crawley, Publisher