

## DISPATCH NO. 43 - NEW ZEALAND

### PAY EQUITY BARGAINING IN NEW ZEALAND

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#### INTRODUCTION

Article 2 of the ILO Equal Remuneration Convention states:

“Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”<sup>1</sup>

As Smith, Layton and Stewart outline, different countries have responded to this imperative in different ways.<sup>2</sup>

New Zealand has recently adopted a novel approach to addressing the systemic undervaluation of female dominated jobs. This aims to tackle enduring fundamental difficulties in enforcing gender pay equity; it switches pay equity claims from an individual to a collective right by introducing a collective bargaining process to pay equity. The purpose of the system is to facilitate a process of negotiation whereby parties are jointly satisfied with the outcome. Pay equity negotiation is thus aligned with New Zealand’s existing bargaining framework in which employers, workers and unions must negotiate settlements in good faith, with access to mediation and dispute resolution services available if they are unable to agree.

The new system also challenges narrow comparator requirements and recognises that the value of work is subjective and has been infused in systemic and historical gender inequity.

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1. Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, art. 2, June 29, 1951, 165 U.N.T.S. 303.

2. Meg Smith, Robyn Layton & Andrew Stewart, *Inclusion, Reversal, or Displacement: Classifying Regulatory Approaches to Pay Equity*, 39 COMP. LAB. L. & POL’Y J., 211 (2017-2018).

## CONTEXT AND BACKGROUND

The 2021 gender pay gap in New Zealand was 9.1% co-existing with an ethnic pay gap, particularly in relation to Māori and Pacific women.<sup>3</sup> This pay gap has remained persistent over the past decade. Despite scoring highly on the Global Gender Gap Report<sup>4</sup> and the OECD gender pay gap index women in New Zealand, remain clustered in historically female dominated underpaid sectors such as education, retail and health services.<sup>5</sup> They are also under-represented in senior and managerial position compounding horizontal and vertical occupational segregation.<sup>6</sup>

Legal progress and recognition of systemic gender pay inequity for female dominated occupations appeared to have stalled in New Zealand until ground-breaking litigation *Terranova v. Bartlett*<sup>7</sup> allowed for the expansion of the judicial interpretation of the 1972 Equal Pay Act<sup>8</sup> to recognise a broad interpretation of the principle of pay equity, to include equal pay for equal work as well as equal pay for work of equal value. In this particular case, the Court of Appeal confirmed a right for aged care workers to make a pay equity claim.<sup>9</sup> The Government, following extensive negotiation, announced on 18 April 2017 an historic \$2 billion pay equity settlement for care and support workers in New Zealand's aged and disability sector. This success prompted pay equity claims from other female dominated industries.

As further litigation was politically unpalatable, a tripartite working group was convened in 2015, tasked with creating an accessible mechanism for raising, negotiating and settling pay equity claims culminating in amendments of the Equal Pay Act 1972, which came into effect on 6 November 2020.<sup>10</sup> This law introduces a new process for individual

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3. Human Rights Commission, Tracking Equality at work 2018 (June 27 2018), [https://www.hrc.co.nz/files/2115/3013/8951/Tracking\\_Equality\\_Report\\_FINAL.pdf](https://www.hrc.co.nz/files/2115/3013/8951/Tracking_Equality_Report_FINAL.pdf). The report highlights significant difference in median hourly pay rate between European men and Pacific women (\$7.28 per hour). The gender pay gap for a European male and Pacific female is 27%.

4. World Economic Forum, *Global Gender Gap Index*, <https://reports.weforum.org/global-gender-gap-report-2020/dataexplorer/> (last visited on May 9, 2022) (New Zealand ranks 6<sup>th</sup> out of 153 countries on the global gender Gap index ranking in 2020).

5. NEW ZEALAND MINISTRY FOR WOMEN, OCCUPATIONAL SEGREGATION (Oct. 11, 2018), <https://women.govt.nz/work-skills/paid-and-unpaid-work/occupational-segregation#:~:text=New%20Zealand%20has%20a%20clear,more%20prevalent%20in%20managerial%20positions.>

6. See The Organization for Economic Cooperation and Development (OECD), Gender Wage Gap, <https://data.oecd.org/earnwage/gender-wage-gap.htm> (last visited on May 9, 2022) (New Zealand ranks 6<sup>th</sup> out of the 38 OECD countries in the terms of gender pay gap).

7. *Terranova Homes & Care Limited v. Service and Food workers Union NGA Ringa Tota Incorporated* [2014] NZCA 516.

8. Equal Pay Act 1972, (N.Z.).

9. *Terranova Homes & Care Limited v. Service and Food workers Union NGA Ringa Tota Incorporated* [2014] NZCA 516.

10. Jane Parker & Noelle Donnelly, *The Revival and Refashioning of Gender Pay Equity in New Zealand*, 62(4) J. of INDUS. REL. 560 (2020).

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employees and unions to raise a pay equity claim directly with an employer for work, which may be subject to systemic sex-based discrimination.

## DESCRIPTION

The mechanisms for raising, negotiating, and settling pay equity claims are set out in Part 4 of the Equal Pay Act. Some features of note are follows:

*EMPLOYER IS THE GATEKEEPER WHO MUST DETERMINE  
WHETHER A CLAIM IS “ARGUABLE”*

Where a union or an employee seeks to make a claim based on historic or current undervaluation, the employer has to decide within 65 days whether they agree that there is an “arguable” pay equity claim. The Employer is therefore the initial gatekeeper who has the power to determine whether a bargaining process can be undertaken. The precise meaning of “arguability”

is yet to be determined<sup>11</sup> but the legislation establishes that the threshold to raise a claim should be low<sup>12</sup> and that all claims that could have a pay equity case should proceed to bargaining.

To be arguable a claim must satisfy two criteria: first, it must relate to work that is or was predominantly performed by female employees i.e. by a workforce comprised of at least 60% of women.<sup>13</sup> Second, it must be arguable that the work is either currently or historically undervalued.<sup>14</sup> The Act outlines a non-exhaustive range of factors, derived from the framework and jurisprudence of pay equity policy and law developed in state jurisdictions in Australia that may be considered in deciding this issue.<sup>15</sup>

Employers who decide that the claim is not arguable, must put forward their reasons and explain how the claimant can challenge their conclusion.<sup>16</sup>

If the claim is acknowledged as arguable the parties can proceed to bargaining, although accepting that a claim is arguable does not mean an employer agrees there is pay inequity, or that there will be a pay equity settlement.<sup>17</sup>

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11. See generally Avalon Kent, *The Arguability Threshold in the Equal Pay Act 1972 (as amended in 2020)*, in MAZENGARB’S EMPLOYMENT LAW (NZ) (Gordon Anderson et al. eds), Selected Topics in Employment Law, pay equity.

12. Equal Pay Act 1972, s 13A(a) (N.Z) (The provision states that: “The purpose of this Part is to facilitate resolution of pay equity claims, by (a) setting a low threshold to raise a claim”).

13. *Id.* s13F(2).

14. *Id.* s 13F(1).

15. *Id.* s 13F(3). See Avalon Kent, *supra* note 11.

16. *Id.* s 13 (3).

17. *Id.* s 13 (2).

*PAY EQUITY BARGAINING AND SETTLEMENT*

Bargaining, once initiated, requires the parties to act in good faith<sup>18</sup> as they work towards an agreement as to whether the work in question is undervalued, based on sex. As part of this process the Act provides several factors including the nature of the work, comparators, terms and conditions of employment and remuneration, which must be assessed.<sup>19</sup> Interestingly, in contrast to most jurisdictions where the approach to male comparators is rigid,<sup>20</sup> the New Zealand approach is flexible, and parties have wide discretion to choose the comparators they consider most relevant and appropriate.<sup>21</sup> However, while this flexibility could be seen as an advantage, it is potentially problematic in that it is subject to the parties in a claim reaching an agreement on suitable comparators, which they may not. Presumably an intransigent approach to bargaining on this issue would be a breach of the duty of good faith but it is unclear what role the Employment Relations Authority would have in resolving any such conflict.

Bargaining concludes and a pay equity claim is settled<sup>22</sup> when the parties arrive at a rate of remuneration which they agree is the same as that which would be paid to male employees “who have the same, or substantially similar, skills, responsibility, and experience; and work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.”<sup>23</sup>

As with other employment related disputes, mediation is available to facilitate negotiation. Where the matter cannot be resolved through mediation, any party can bring a claim to the Employment Relations Authority and ultimately the Employment Court on appeal although the Act aims to limit litigation. The parties may also apply for a determination on a remuneration rate but, as yet there are no decided cases.

## CONTROVERSIES

There are some controversies around fundamental issues of design and implementation in this new model of pay equity bargaining.

There are two ways in which pay equity may be conceptualised. On the one hand it may be seen as a pay claim which it is appropriate to resolve through a process of negotiation, collective bargaining and compromise. Conversely pay equity may be seen as an aspect of the human right not to be

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18. *Id.* s.19 C.

19. *Id.* s. 13ZD (1).

20. Meg Smith & Andrew Stewart, *Shall I Compare Thee to a Fitter and Turner? The Role of Comparators in Pay Equity Regulation*, 30 AUSTRALIAN J. OF LAB. L. 113 (2017).

21. Equal Pay Act 1972, (N.Z), s 13ZD.

22. *Id.* s 13ZE.

23. *Id.* s 2AAC (b).

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discriminated against which is best resolved through a process of judicial interpretation and declaration of a non-discriminatory rate of pay (as would have been the case under the Act before it was reformed). New Zealand's new pay equity framework awkwardly embodies both of these two approaches and arguably they have not been appropriately calibrated<sup>24</sup>:

As it stands the system is largely reliant on bargaining and 'agreement' between the parties,<sup>25</sup> whose capacity for vetting and quality-setting may be questionable. The system of independent oversight safeguards and enforcement is sketchy<sup>26</sup> and strategic litigation may be required to determine the key parameters of the system.

The 'bargaining phase' notion of the law relies upon the assumption of employer participation in the style of 'interest-based bargaining'.<sup>27</sup> Thus far, this has proved to be, at least at a surface level, feasible due to the mechanisms of the State compelling the behaviour of employers in the public sector. It remains to be seen how private sector employers will interpret, and behave, during the 'bargaining' phase of a pay equity claim. There is ample opportunity for employers to simply convert to traditional positional bargaining, and limited 'sticks' for claimants to effectively wield to counter the phenomenon.<sup>28</sup>

Furthermore, the system is not one of genuine industry bargaining. There are limited mechanisms in the law to create industry-wide settlements, an issue being currently considered by bargaining parties.<sup>29</sup>

There is also some concern that the inability of women to raise a collective claim, other than via the auspices of the union, creates a barrier to access.<sup>30</sup> However, individual women can raise pay equity claims and follow the bargaining process.<sup>31</sup>

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24. Judy McGregor, Margaret Wilson & Pam Nuttall, *Submission to the Education and Workforce Select Committee on the Equal Pay Amendment Bill 2018*, New Zealand Public Service Association, at 22.

25. See Equal Pay Act 1972, (N.Z), s 13ZH (1)-(2).

26. The Act does not empower the Labour Inspectorate to review the rate of remuneration agreed to by the bargaining parties as part of a pay equity settlement and the Authority is only able to review the rate of remuneration in 'exceptional circumstances' (s13ZY(5)).

27. See Employment New Zealand, *Pay Equity-Guide to Good Practice* (Feb. 2022), <https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/pay-equity-guide-to-good-practice.pdf>.

28. A claimant would need to apply to the Authority for a dispute resolution process.

29. MINISTER FOR THE PUBLIC SERVICE, CABINET BRIEFING: PAY EQUITY IN THE FUNDED SECTOR, CAB-21-MIN-0391 (Nov. 8, 2021). <https://www.publicservice.govt.nz/assets/SSC-Site-Assets/Proactive-Releases/Cabinet-Paper-Pay-Equity-in-the-Funded-Sector.pdf>.

30. McGregor et al., *supra* note 24.

31. Equal Pay Act 1972, (N.Z), s13E(1)(c).

## CONCLUSION

To date, some settlements have come from the pay equity bargaining process which inspired the law including the Ministry of Social Development which has pay equity settlements in place for vocational and disability care and support workers, and mental health and addiction support workers. A pay equity settlement between district health boards and the Nurses Union was announced in April which includes pay rises for nurses but this is currently stalled on the issue of back-pay. It is early days to reach a conclusion on how successful the new pay equity bargaining regime will be but in the novelty of its approach it provides an interesting case study for other jurisdictions.