New Equal Pay and Pay Equity law backward step for women

NZCTU briefing – 31 July 2017

Key points

- An update of pay equity law is welcome and this was significantly progressed through a Joint Working Group last year of government, business and union negotiators, who agreed in 2016 on a set of Principles to guide pay equity negotiations.
- However the government's *Employment (Pay Equity and Equal Pay) Bill* does not achieve what the Principles were designed to achieve: a better process and pathway to equal pay.
- There are four key problems with the Bill: it creates onerous requirements for women to prove merit in order to initiate a pay equity claim, it imposes an unnecessary hierarchy of comparators, it extinguishes women's ability to seek back pay in a pay equity claim, and the transitional provisions unfairly and retrospectively deal with current claims and new claims until the Bill becomes law.
- The CTU believes the government needs to bring back a Bill to the House that is consistent with the joint Principles, is consistent with the Court of Appeal ruling in *Bartlett v Terranova,* and provides a constitutionally acceptable way of dealing with existing equal pay claims.

Issue 1 – Establishing Merit (s. 14)

The Bill creates onerous requirements for women to prove merit in order to initiate a pay equity claim. They need to prove their part of the workforce is 66% female dominated, prove it is historically undervalued, and then prove it is the subject of ongoing undervaluation including through detailed labour market evaluation. This is just to determine whether the case has merit to proceed.

The onus on the employee for producing evidence for the criteria in clause 14(3) (the reasons for historical undervaluation) is already a significant burden. The matters in clause 14(4) – the detailed analysis of the relevant labour market – add very considerably to that burden, and can be added to by the employer under clause 14(4)(a)(vi). The assumptions sitting behind the labour market analysis requirements are flawed. They include aspects such as an employer's market share, competition for workers in a sector and employer's sources of funding. The assumption behind this is that if the free market is operating efficiently it will deal with pay equity issues itself – the market will provide for an equitable outcome for women as long as it's working properly. We have seen countless examples though of where this is just not the case.

It is very unlikely that individual women have the resources and legal skills to be able to provide this information, it represents a very high hurdle to bringing a claim, and these section 14 requirements could be used by a resistant employer to prevent or substantially delay a case from progressing. They act as a significant barrier to justice.

Issue 2 – Comparators (s. 24)

Pay equity means that women and men should receive equal pay for work of equal value. This involves working out the rate of pay that would be paid to male workers with the same (or substantially similar) skills, effort, responsibility and conditions as the female workers taking the pay equity case. A pay equity process identifies one or a number of male 'comparators' to help assess this.

Sometimes these comparators might be from the same industry, but sometimes they will need to be from a different industry – particularly when a whole industry of work has been undervalued and affected by gender discrimination because it's been work performed largely by women.

The Bill (at section 24) sets out a limiting mechanism for comparators by establishing a hierarchy which tries to keep comparators as close as possible to the equal pay claimants' workplace. The hierarchy would mean comparators would have to be selected as follows:

1. Comparators within the same employer, or if none are appropriate then
2. Comparators from within a similar employer, or if none are appropriate then
3. Comparators from within the same industry/sector, or if none are appropriate then
4. Comparators from a different industry or sector.

Women need to be able to select the most appropriate comparator for their particular role, regardless of who their employer happens to be.

Although there is provision in the Bill to deal with comparators that may themselves be historically undervalued, under the above process – unless the parties agree an alternative process – women would still need to prove there are no appropriate comparators in each of the steps (meaning they'd have to consider male comparators in each step and prove they don't have the same skills, effort, responsibility and conditions) before moving on to the next one. This is at odds with the existing Equal Pay Act, the recent Court of Appeal Judgement in *Bartlett v Terranova*, and is impractical and ultimately impedes and slows down women making pay equity claims.

Issue 3 – Back pay (s.40)

The Bill extinguishes women's ability to seek back pay in a pay equity claim prior to the date of filing or delivering a claim. While back pay wasn't in the final negotiations sought in the *Bartlett v Terranova* case that was then extended to residential aged care, home support and disability support workers, the right to claim back pay arguably existed, and this right is now being extinguished. We are concerned that this move may have human rights implications.

Issue 4 – Transitional provisions (Schedule 1)

The transition provisions affect both existing equal pay claims and also future ones until the Bill is passed.

The Bill is retrospective: existing pay equity claims and processes are deemed discontinued. The proposed transition provisions set out that where any current claims are not settled or determined prior to the date the Bill was tabled (Tuesday 26 July 2017) they must be continued under the new Act, not the original 1972 Act.

The transition provisions are also such that while the Bill is going through the House later this year and next year it creates a delay in women seeking recovery of underpayment in the time gap between when they file, and when the Act comes into force. For example if a woman filed a pay equity claim at today's date (31 July 2017), setting aside any loss of ability to seek back pay before today's date, the Bill as drafted also means that until the Bill becomes law, they are not able to recover wages from the point at which they filed the case. Assuming the Bill may become law and receive royal assent early in 2018, this could be a period of many months where women are prevented from seeking to recover wages from the date they file. The only purpose for this type of provision must be to stop women from strategically filing claims prior to the new law taking effect. We are concerned that these provisions may violate the established legal principle that laws should not have retrospective effect.

Summary

As noted above an update of pay equity law is welcome, but we believe the government needs to bring back a Bill to the House that is consistent with the jointly negotiated Principles, the Court of Appeal ruling in *Bartlett v Terranova*, and provides a constitutionally acceptable way of dealing with existing claims.

Please contact Sam Huggard at samh@nzctu.org.nz or 021 462 148 for a copy of the CTU's submission to the exposure draft of this Bill in April, for more detailed analysis if needed on the above points.