

Equal pay for equal value: The case for care workers

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Abstract

In 2012, Kristine Bartlett, an aged care worker, and the Service and Food Workers Union took a claim for equal pay for work of equal value under New Zealand's Equal Pay Act 1972. They claimed that Kristine's skills, responsibility, service and conditions of work were undervalued because caring for the elderly is done almost entirely by women. The last pay equity case, for clerical workers in 1986, was rejected, making *Bartlett vs Terranova* an important test of New Zealand law. In August 2013 the Employment Court ruled in favour of the plaintiffs on questions of law, allowing gender neutral job comparisons with work done by males outside the female-dominated care sector. This article aims to make the arguments in this case – on interpreting the text and historic purpose of the Act, consistency with human rights legislation and compliance with international conventions – available to a wider audience.

Key words

equal pay, pay equity, comparable worth, gender discrimination, carers, women's work, job evaluation

Introduction

In late 2012, Kristine Bartlett, a rest home worker from Lower Hutt, and the Service and Food Workers Union (SWFU) took a case to the New Zealand Employment Court claiming equal pay for work of equal value under the Equal Pay Act 1972.¹ This is the first equal value case to come before the Employment Court since 1986. The plaintiffs claimed that Bartlett's pay rate was discriminatory; that her skills, responsibility, service and conditions of work in caring for the elderly were undervalued because caring work is done almost entirely by women. Terranova Homes and Care Ltd, a privately owned rest home chain, paid her \$14.46 an hour – just 71c above the minimum wage despite twenty years' experience caring for frail and ill elderly patients.² This was \$4 an hour less than she would have received for the same work in a public hospital. The plaintiffs' claim under the Equal Pay Act was that Bartlett's pay rate should be the same as for jobs done predominantly by males that required the same level of skill, responsibility, experience and effort under similar conditions.

Bartlett vs Terranova is an important test of New Zealand law. The last equal pay for equal value case under the Equal Pay Act, 27 years ago, was rejected. At that time the Court said it had no jurisdiction to decide equal pay matters, if the parties could not, except during the implementation period of the Act. This decision was not appealed and over the years gave rise to perceptions that the Equal Pay Act 1972 did not, or did not adequately, allow for equal pay claims comparing women's and men's typically different jobs.

It is also a claim for higher wages for 'one of the lowest paid groups in the country' whose pay scales reflect 'historic systemic undervaluing of the caring role played by women' (Human Rights Commission, 2012).

This case is part of a broader Pay Equity Challenge campaign by women's organisations and unions. Fair pay for women, opposition to youth rates, raising the legal minimum and a Living Wage campaign are the union movement's strategies to address the growing poverty among

working families that has resulted from structural adjustment policies since the 1980s (Kelsey, 1997; Podder & Chatterjee, 1998; Stillman, 2012).

This article reports on the Employment Court hearing in June 2013. It provides the historical background of the 1972 Equal Pay Act, then presents the arguments put forward on both sides of the case in Bartlett and Terranova, followed by the Judgment of the Court. My purpose is to make these important and successful arguments available to a wider New Zealand and international audience that is unlikely to read the court records.

The historical context

Equal Pay Act 1972

Since New Zealand women won the right to vote in 1893, they have been calling for pay equal to men's (Hill, 1993). When the International Labour Organization (ILO) adopted Convention 100 on Equal Remuneration in 1951, women public servants began campaigning for equal pay and in 1957 a broad-based Council for Equal Pay and Opportunity (CEPO) was formed. The Government Services Equal Pay Act was passed in 1960, putting women, and women-only jobs, on the same rates as men (Corner, 1988). There was minimal flow-on effect to women's wages in private sector employment (Orr, 2003). It took twelve more years of campaigning (Dann, 1985), the establishment of the National Advisory Council on the Employment of Women (NACEW, 2007), an Australian court ruling requiring equal pay in the private sector, and a full Royal Commission of Inquiry before the 1972 Equal Pay Act was passed, with implementation over a five year period.

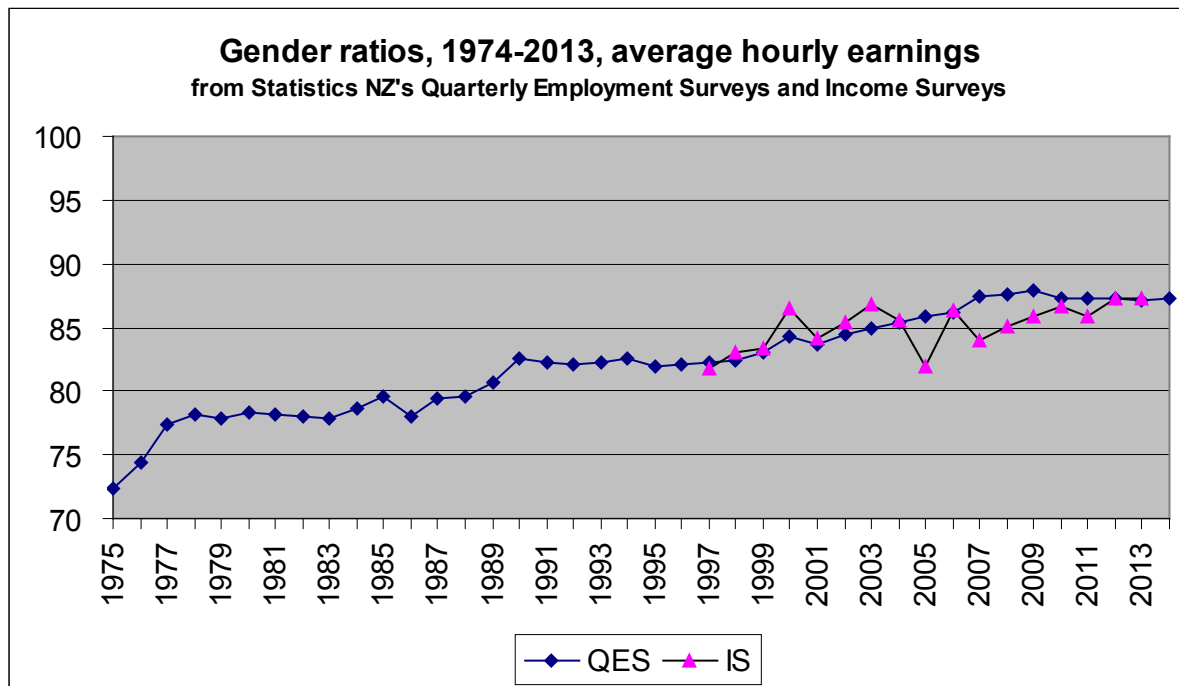
Until 1991, most wage rates were set by collective bargaining based on occupations. Wage documents were negotiated annually between unions representing particular occupations and groups of employers who used that occupation. If a group of workers registered themselves as a union, the rates and conditions they negotiated applied to everyone doing that kind of work and to everyone who employed them. This collective agreement ('award') was registered with the court, which had power to arbitrate disputes. The system was backed by compulsory arbitration (replacing the right to strike), compulsory union membership (preventing 'free riders') and wage 'relativities' between different occupations and between public and private sector awards. The regulatory framework for all this was the Industrial Relations Act. What the Government Services Equal Pay 1960 and the Equal Pay Act 1972 added to this system was the principle of gender equality.

During the implementation period of the Equal Pay Act, women were moved onto male pay scales in occupations that employed both sexes, and some 'women's work' rates improved relative to male occupations. For example, for many years male clerical workers were paid 99.38 per cent of the rate for carpenters, whose wage scale had a prescribed relativity with other male trades. Under the 1972 Act, this became the rate for Grade 3 clerical workers, men or women, such as experienced typists or accounts clerks (Coleman, 1992).

The Equal Pay Act had an overall effect of raising women's average hourly pay in relation to men's, but a sizeable gap remained – as it does to this day (see graph). Since 1974 Statistics NZ has monitored gender differences in average hourly ordinary time earnings from wages and salaries, as an indicator for fair pay for women. In 2000 a Labour Department analysis of the gender pay gap in average hourly earnings attributed 20-40 per cent to differences in occupation, noting that this was likely to be higher if more detailed job data were available (Dixon, 2000). The 10 per cent of the gap that Dixon linked to working part-time, and another 10 per cent linked to two or more children, may also be occupational, in that women can more easily find part-time employment in lower paid, predominantly female occupations. Short hours and

casual employment in occupations employing mainly women are key factors in the even larger gender pay gaps in weekly and annual earnings. However, hourly rates are the best measure of pay equality for women and men.

In June 2013 the average hourly ordinary time earnings of women were 87.3 percent those of men (Statistics NZ, 2013). The Equal Pay Acts have not yet achieved one of their stated purposes: preventing discriminatory pay for work typically done by women.



Clerical Workers Unions vs Farmers Trading Company

In the early 1970s, not all union leaders were wholeheartedly in support of equal pay and equating women's occupations to those of skilled tradesmen (Orr, 2003). Review committees at the end of the implementation period identified ten registered wage agreements or awards that were not fully compliant with the Act despite the overview of the Arbitration Court, and expressed doubt about the Court's understanding of pay discrimination in the two individual complaints cases taken. The Court had provided no interpretations or guidance. Unions learned that taking a case to arbitration would be expensive, require a high level of proof (from the union, but not the employer) and was likely to be unsuccessful (Coleman, 1997; Orr, 2003). In the 1970s most union leaders and employers were men, as were most judges. Within the union movement, women began forming committees to encourage women into leadership positions and to raise the employment concerns of women (Hill, 1994a). This included dissatisfaction with operational aspects of the Equal Pay Act.

In 1985 the clerical workers award was one of the largest in the country. The Clerical Workers Unions, now led by women, had 30,000 members, 90 percent of them women. Dissatisfied with the best settlement they could get in their 1985 negotiating round, they took an equal pay for work of equal value case to the Arbitration Court under the Equal Pay Act, rather than the Industrial Relations Act. They claimed their wage award was once again a 'depressed female rate' and not in accordance with the Act. Employers had refused to negotiate on this issue (NZ Clerical Workers Unions, 1986).

The Court declined to adjudicate. In his Decision, Judge Finnigan said the Act was 'still alive' but gave the court no power to decide, if the parties could not, except during

the implementation period (s.4(2)). The Court did not interpret the criteria for work ‘exclusively or predominantly performed by female employees’, or consider whether the clerical award satisfied those criteria, as requested by the union. At the end of the Decision, Judge Finnigan appeared to mistake the question in hand, in my view. He refers to an acknowledged lack of pay differentiation between women and men ‘*in that proposed award*’ – that is, in the award for clerical work done predominantly by women, rather than in comparing clerical pay with pay for predominantly male occupations as requested by the union (NZ Clerical Workers Unions, 1986). He concluded, ‘The Court can take no action and that must be the end of the matter’ (Finnigan J, 1986).

The Clerical Workers did not appeal and may have seen the test case as clearing the way for new legislation (Coleman, 1997). Political strategies seemed to offer more promise than legal ones.

New implementing legislation

From the 1970s women were organising within the union movement, within the Labour Party, and through women’s organisations. These groups working together succeeded in raising and legitimating the concept of employment equity (Wilson, 1992). A Ministry of Women’s Affairs was established in 1985. The Coalition for Equal Value Equal Pay (CEVEP) was formed after the Clerical Workers case. Women’s organisations and unions representing women were among those consulted by a Working Group on Equal Employment Opportunities and Equal Pay, whose recommendations formed the basis of new legislation (Working Group on Equal Employment Opportunities & Equal Pay, 1988).

The Employment Equity Act 1990, sitting alongside the Equal Pay Act, provided a means of delivering equal pay for women compared to work of equal value performed mainly by men (Shields, 1989, 1990). It established an Employment Equity Commission to make gender neutral job assessments for female-dominated occupations, with outcomes to be part of wage negotiations under the Industrial Relations Act. Twelve pay equity³ claims were registered as soon as the Commission opened its doors. The Act also required large private sector employers to be ‘good employers’ and to implement and report on equal employment opportunity programmes (mirroring the State Sector Act 1988).

National repeals pay equity and occupational awards

Three months after its introduction, the Employment Equity Act was repealed by the incoming National government (Hill, 1993; Wilson, 1993). The twelve claims went unaddressed.

In early 1991 the Employment Contracts Act replaced the 100 year old system of occupational bargaining with enterprise-only collective or individual agreements. Without the support of compulsory union membership and compulsory arbitration, union membership plummeted 45 percent in two years – most especially among women in small, hard-to-organise workplaces (Charlwood & Haynes, 2008; Harbridge, 1993; Hill, 1994b). The Clerical Workers Unions collapsed (Hill & Du Plessis, 1993) and the Service Workers membership dropped 63 percent (Dannin, 1997). For the next decade, those unions with industrial strength used it to defend their right to negotiate collectively. Most employees are now on individual agreements, with remarkably little research into the circumstances or content of these.

Public sector equity via policy

When Labour and the Alliance formed a government in 1999, pay equity was on the agenda of both parties, as well as that of CEVEP, the National Council of Women and other women’s organisations. In 2002, the government released a discussion document *Next steps towards*

pay equity (Ministry of Women's Affairs, 2002). Despite international and local expert advice (NACEW, 2004), Margaret Wilson, chair of the 1988 Working Group and then Minister of Labour, was reluctant to use legislation this time, preferring a policy approach. Nor did the government appear willing to take on the private sector. It set up a Taskforce to commission research on employment equity in the public service, public health and public education (Taskforce, 2004). Its recommendations led to a Pay and Employment Equity Office in the Department of Labour that developed materials and processes for organisational pay reviews and gender neutral job evaluations (Department of Labour, 2005) and began working with government departments and public sector unions.

By the end of 2008, pay reviews had been undertaken for all 39 public-service departments, the 21 district health boards, for teaching in state schools and for some tertiary institutions (Association of University Teachers, 2008). In mid 2008 the Pay and Employment Equity Office reported that every pay review so far had found a gender pay gap, from three per cent to 35 per cent. There were gender differences in starting rates within the same occupation, gender pay gaps got wider after appointment, women got less performance pay, and men moved more rapidly up the pay scale (Pay and Employment Steering Group, 2008). Reviews had so far led to two job evaluations, for social workers and special education support workers, which were underway at the time of the next election.

National discontinues policy

In early 2009 the new National-led government discontinued the job evaluations as 'unaffordable in the current economic and fiscal environment'. It then disestablished the Pay and Employment Equity Office. Government departments, as 'good employers' under the State Sector Act, would 'continue to respond to any identified inequities' (Ryall, 2009) – but the government had just stopped their best efforts to do so.

The nurses and teachers unions – representing female dominated occupations with industrial strength – hadn't waited for the slow process of pay reviews to reach them. Primary and kindergarten teachers, now with degrees, claimed pay parity with male-dominated secondary teaching jobs. Nurses had been saying they were worth more, and certainly as much as policemen, since the 1980s. The Nurses Organisation made wage claims based on equal value arguments and overseas salary comparisons, and backed them with pickets, rallies and media advocacy. Led by former Minister of Women's Affairs Laila Harré, the Nurses Organisation won one 19 percent increase in 2003, leveraged that around the other state-funded district health boards, then took similar claims into wage negotiations for nurses in the private sector.

Neither the slow policy process in the public service nor the industrial action taken by the 35,000 strong nurses' union reached, or trickled down to, women caring for the elderly in rest homes.

Back to the courts

CEVEP members have long believed that an equal value case could and should be taken under the Equal Pay Act, and that the 1986 decision was not correct (Coleman, 1997). By 2013 several factors came together to make a test case possible. The union movement is smaller than in the 1980s but has a high proportion of women and growing strength in the health sector. The importance of issues specific to women members is better recognised by union leaders, many of whom are women. The employment contracts era necessitated greater legal capacity in unions. Recent Court decisions suggested greater receptiveness by the judiciary to arguments about fairness and discrimination, about treating one group of employees (or beneficiaries) the same as another. Recent pay equity cases in Australia resulted in large increases in wage award

rates for social, community and disability workers (Fair Work Commission, 2012; Queensland Industrial Relations Commission, 2009). The Service & Food Workers Union felt the time was right for an equal value test case that could potentially benefit a large number of low paid New Zealand women.

Kristine Bartlett and Service & Food Workers Union vs Terranova Homes & Care

The preliminary hearing

The test case is proceeding in two stages. A preliminary hearing on questions of law was held in late June 2013. The Judgment (Inglis, 2013) favoured the plaintiffs' arguments, allowing the case to proceed to its second, substantive stage which will involve evidence on Kristine Bartlett's skills, responsibility, service and conditions in her job caring for the elderly, how these compare with those of appropriate male comparators, and what she should fairly be paid.

Because of the importance of this case, the questions of law were determined by three of the Employment Court's five judges, rather than the usual one. These were Chief Judge Graeme Colgan, Judge Mark Perkins and Judge Christina Ingliss. Lawyers represented Kristine Bartlett and the SWFU as plaintiffs and the employer Terranova Homes and Care Ltd as defendant. As the outcome of this hearing could have wide implications, six interested organisations had applied to the Court for 'intervener' status: the NZ Council of Trade Unions, the Pay Equity Challenge Coalition; the Human Rights Commission; CEVEP; the New Zealand Aged Care Association; and Business New Zealand. Their role was 'to assist the Court' with further information. The Ministry of Health, as public funder of aged care, was invited to participate, but declined.

The questions presented by plaintiffs and the defendant concerned the correct interpretation of the Act in regard to work done exclusively or predominantly by women (s.3(1)(b)) and the powers of the Court to set general principles to guide negotiating parties (s.9).

Arguments by the plaintiffs

Peter Cranney, appearing for Kristine Bartlett and her union, said the key question that the negotiating parties had brought before the Court was whether the fact that Terranova paid four male carers the same rates as its 106 women carers was a complete defence against Ms Bartlett's claim. In the view of the plaintiffs, it was not, as it did not meet the s.3(1)(b) criteria for work done predominantly by women (Bartlett and Service & Food Workers Union, 2013).

In his view, three considerations framed interpretation of the Equal Pay Act on this matter. Firstly, it was well established by case law that statutory interpretation should be based on the text and purpose of the legislation. Secondly, interpretation should be consistent with New Zealand's human rights laws and, thirdly, it should be consistent with international conventions. Cranney noted the text of the Act's long title expressed a dual purpose: 'the removal *and prevention* of discrimination based on the sex of the employees in rates of remuneration of males and females in paid employment'. 'Prevention' was not achieved merely by abolishing separate male and female pay scales in the early 1970s. The Act defined equal pay as a rate of remuneration in which there was 'no element of differentiation' based on sex, and s.3 provided two separate criteria for determining this: (a) for work which was not exclusively or predominantly performed by women, and (b) for work which was exclusively or predominantly performed by women. If Parliament had intended the defendant's interpretation, there would be no subsection (b). Cranney pointed to two similar categories in the Government Services

The equal value, equal pay principle

UN Convention 100 on Equal Remuneration (1951, ratified 1983)

...to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value...

Where such action will assist in giving effect to the provisions of this convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

UN Convention 111 on the Elimination of Discrimination against Women (1979, ratified 1985)

Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...

(d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;...

Government Service Equal Pay Act 1960

3 (a) That differentiations based on sex in scales of salary or wages of Government employees shall be eliminated, to the end that women shall be paid the same salaries or wages as men where as Government employees they do equal work under equal conditions.

(b) Where women as Government employees perform work of a kind which is exclusively or principally performed by women and there are no corresponding scales of pay for men to which they can fairly be related, regard shall be had to scales of pay for women in other section of employment where the principle has been or is being implemented.

Equal Pay Act 1972

An Act to make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment, and for matters incidental thereto...

3. Criteria to be applied ... (1) Subject to the provisions of this section, in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section 4 of this Act, the following criteria shall apply: (1)(a) For work which is not exclusively or predominantly performed by female employees ...

(i) The extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility; and

(ii) The extent to which the conditions under which the work is to be performed are the same or substantially similar.

(b) For work which is exclusively or predominantly performed by female employees the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility and service performing the work under the same, or substantially similar, conditions and the same or substantially similar degrees of effort."

...

s.9. Court may state principles for implementation of equal pay ... The Court shall have power from time to time, of its own motion or on the application of any organisation of employers or employees, to state, for the guidance of parties in negotiations, the general principles to be observed for the implementation of equal pay in accordance with the provisions of sections 3 to 8 of this Act.

Equal Pay Act, with pay for work done exclusively or principally by women linked to women in mixed sex public service occupations who had already been moved onto male pay scales. The Equal Pay Act approach linked work done exclusively by women to male rates with a hypothetical 'would' – the male rate that *would* be paid if there *were* males with the same level of skills, responsibility, service, conditions of work and degrees of effort.

Care work was predominantly performed by women. The rest home workforce was 92 per

cent female, mostly older women, many working part-time. If pay in this sector was affected by traditional roles for women and historic discrimination, then four males paid the same rate would also be affected. The purpose of the Act to remove and prevent discrimination based on sex would not be satisfied by this comparison. To assess a fair rate of pay for carers' skills, responsibility, service, and effort, a comparison with males was needed that reached beyond work typically done by women.

Evidence of this intention was presented from the 1971 Royal Commission of Inquiry into Equal Pay, whose recommendations formed the basis of 1972 legislation. The Commission focused on 'the attractive proposition...that pay should be based on the content of the job', and referred to 'equal value...objectively determined' as required by the international Convention 100 on Equal Remuneration. It rejected the UK's restriction of equal pay to 'the same undertaking or group of undertakings', and Australia's exclusion (at that time) of work essentially or usually performed by women, as urged by New Zealand employers. Although the Act did not contain the term 'equal value', its definition of equal pay was very similar to the language of the Commission and of the Convention on Equal Remuneration ('rates of remuneration established without discrimination based on sex') which requires governments to ensure equal pay for men and women for work of equal value. The formulation about skills, responsibility, service, conditions and effort also came from the Commission's report.

More evidence of purpose and intention was available from the debates in Parliament. At its second reading, National's Minister of Labour made clear that the Bill would apply to 'all work performed by women, including work in female intensive industries, where very few males are engaged' (Thomson, 1972). At the third reading, a subsection was added to ensure the Act would have effect beyond 1978 (s.6(8)), and in 1976 Parliament expanded the definition of wage 'instruments' to include any decision of an employer fixing the rate of remuneration (s.2(f)).

Cranney then reviewed the case law against discrimination under the Bill of Rights Act 1990 and the Human Rights Act 1993, identifying principles and processes of comparison accepted by the Courts. These favoured the plaintiffs' approach in *Bartlett vs Terranova*. Moreover, the Bill of Rights Act stated that an interpretation of law consistent with the Bill of Rights should be preferred over any other interpretation (S.6); that is, consistent with freedom from discrimination. In the plaintiffs' view, the defendant's approach 'preserves and ossifies discrimination, rather than prevents it' (Bartlett and Service & Food Workers Union, 2013, p. 30).

Interpretation consistent with international Conventions, whether ratified or not, was also well-accepted 'in the spirit of international standards'. Before ratifying a Convention, it was government practice to ensure New Zealand laws were compliant. In 1983, Parliament ratified ILO Convention 100 on Equal Remuneration and ILO Convention 111 on Discrimination (Occupation and Employment) as, in the view of the Minister responsible, the 1960 and 1972 Equal Pay Acts and the Human Rights Commission Act 1977 implemented their provisions.

The Convention on Equal Remuneration originated in principles established by the Treaty of Versailles in 1919. Together with the Convention on Discrimination (Occupation and Employment), it was declared one of the ILO's Four Fundamental Freedoms at Work in 1998.⁴ It requires governments to ensure 'equal remuneration for men and women workers for work of equal value', 'rates of remuneration established without discrimination based on sex', and to 'promote objective appraisal of jobs on the basis of the work to be performed'. New Zealand governments submit biennial reports on compliance (Ministry of Business Innovation and Employment, ongoing), and unions and women's organisations may also make submissions.

Cranney drew the Court's attention to repeated comments from the ILO's Committee of Experts on the need for appropriate comparisons to assess equal value (1992, 1994, 2001, 2008,

2010, 2012). In 1992, the Committee stated that, 'in order to ensure implementation of the principle in an occupation or industry employing mostly women, it is essential that there be a basis of comparison outside the limits of the establishment or enterprise concerned'. The Committee has also commented on New Zealand's 'difficulties' in the private sector (2008, 2010) and requested information on any judicial decisions and pay discrimination complaint cases (1998, 2001, 2004, 2008, 2010, 2012).

New Zealand also reports on compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979, ratified 1985), which similarly requires government to ensure equal pay for work of equal value (Article 11) (National Council of Women). In 2010 the CEDAW Committee identified pay inequality and pay equity as a principal area of concern. In 2012 its concerns were lack of pay equity, lack of consistent policy, insufficient protection against discrimination in the private sector and, more generally, the need for CEDAW to be seen by judges as 'an effective framework for all law, court decisions, on gender equality and the advancement of women' (CEDAW, 2012, p. 3).

The Convention on Discrimination (Occupation and Employment), the International Covenant on Economic, Social and Cultural Rights (1966, in force 1976, ratified 1978) and the International Covenant on Civil and Political Rights (1966, ratified 1978) are all consistent with Convention 100 on Equal Remuneration and CEDAW in requiring government action against discrimination on grounds of sex.

Cranney summarised the small number of cases taken under the Equal Pay Act, the last being *Clerical Workers Unions vs Farmers Trading Co.* which he considered 'not well reasoned or even easy to understand'. None cast light on the meaning of s.3(1)(b). The plaintiffs submitted that these earlier cases should not stand in the way of an interpretation of this section of the Equal Pay Act that was consistent with human rights case law and New Zealand's international obligations.

Arguments by the defendant

Harry Waalkens QC appeared for Terranova Homes & Care Ltd. Terranova's submission asserted that New Zealand's equal pay regime did not operate as a 'pay equity' scheme that would require comparisons across industries or entire occupations. The Act's purpose was to remove formerly lawful pay differentials between women and men doing the same job from award documents and from non-award employment.

The defendant's view was that an employment agreement provided equal pay if there was no element of differentiation in the rates an employer paid its female employees and its male employees for 'the work or class of work', where they had the same or substantially similar skills, responsibility and service. This position in the defendant's initial submission appeared to soften a little in court. Waalkens said paying four males at the same rates as women carers was not submitted as a *complete* defence, but as highly relevant evidence the Court must consider. The rate paid for a predominately male role within the employer's workforce, such as a gardener, could also be relevant. Waalkens allowed that in some cases, but not this one, it might be necessary to look outside the workplace, but not outside the sector.

Waalkens agreed that purpose and context was important, but it was not permissible to stray too far from the enacted text. The text of the Equal Pay Act did not require Terranova to have regard to rates paid to caregivers by other public or private employers, or for predominantly male roles in other industries. Waalkens interpreted s.3(1)(b) as ascertaining, by comparing skills, responsibility and service, the rate that would be paid to male employees *of the employer* (adding those words into his quotation of the text). Use of the words '*the employees*' in the long title and in 3(1) meant it was the rates paid by *their* employer that are relevant. He

quoted the 1975 and 1979 Review Committees' expectations of how comparisons and job classifications should be done, but stated repeatedly that it was impractical, if not impossible, for an employer to have information about the pay practices of other employers or sectors and to undertake the complex assessments that the plaintiffs' interpretation would require. Had the Act intended this, it would have said so. By comparison, the 2009 Fair Work Act in Australia required equal remuneration for men and women 'for work of equal or comparable value'. That the Equal Pay Act did not address pay equity was made plain by the enactment of the Employment Equity Act 1990 to provide mechanisms for equal value comparisons, and by a 2003 Bill (not enacted) that would have replaced the Equal Act 1972 with a complaints process in the Employment Relations Act for equal pay in the same job only.

Chief Judge Colgan referred to the Act's purpose of removing and preventing sex discrimination in pay and asked Waalkens what comparisons he thought would be needed to achieve that purpose for predominantly female work in a predominantly female health sector. Judge Perkins mentioned similar care work performed predominantly by males in a different sector: the care of mentally ill prison inmates. In response, Waalkens seemed to allow that regard might be had to males employed for care work in other rest home organisations, but not in quite different occupations. He noted it was well accepted, for example, that lawyers were paid more than accountants – then drew parallels between the two occupations' skills and responsibilities to clients.

It was Terranova's position that, notwithstanding government views at the time, the 1972 Act did not fully satisfy Convention 100 on Equal Remuneration; it did not achieve the full meaning of 'equal pay for work of equal value'. This is evidenced by the comments from the ILO and CEDAW Committees, and was also borne out by the 1986 Decision for clerical workers. In regard to rest home workers, the Equal Pay Act had been implemented in incremental pay increases until 1979 when their award no longer contained separate male and female rates.

Terranova believed its interpretation of s.3(1)(b) was consistent with, but placed a reasonable limit on, the right of freedom from discrimination under the Bill of Rights and Human Rights Act, while the plaintiffs' interpretation was 'novel and unduly strained' and overstated the extent to which the Court should have regard to New Zealand's international obligations.

Interventions to assist the Court

Matthew Palmer appeared for the Human Rights Commission (HRC). The Commission supported the plaintiffs' claim, submitting that equal pay in a female dominated industry required comparisons with men's pay that was unaffected by gender-based undervaluation. This view proceeded from a purposive interpretation of the Act's text in the context of its legislative history, New Zealand's international obligations and the Bill of Rights Act.

Part of the context of the claim was the HRC's 2012 report *Caring Counts*, examining equal employment opportunities in the aged care sector (Human Rights Commission, 2012). At the heart of the question before the Court, in the HRC's view, was a link between low rates of pay in care-giving and women being the predominant workers. This reflected historical and structural gender discrimination. There were logical implications from this in choosing male comparators. They should be selected as a means to an end; that of removing and preventing gender discrimination in pay.

Bruce Corkill QC, seconded by Jock Lawrie (NZ Nurses Organisation), appeared for the NZ Council of Trade Unions (NZCTU), representing over 340,000 union members, and also for the Pay Equity Challenge Coalition (PECC), a broad coalition of community, employer, union and academic groups committed to reducing the gender earnings gap.

The NZCTU and PECC supported the plaintiffs' interpretation of the s.3(1)(b) criteria, and

provided more historic evidence that this was the interpretation intended by government at the time of enactment from reports and debates on the contemporaneous development of human rights legislation and ratification of the international Conventions. The Act implemented the recommendations of the 1971 Commission of Inquiry, which was set up to give effect to Convention 100 on Equal Remuneration, which was subsequently ratified. For assessment against male skills, responsibilities, service, conditions and effort to have meaning for work done exclusively or predominantly by women, a wider comparison was needed than for women in mixed sex occupations. The words 'class of work' also suggested broad comparisons. Nothing in the Act restricted comparison to one employer or organisation. Corkill also noted Parliament showed it intended an ongoing role for the Act by updating it with amendments, most recently in 2000.

Wendy Aldred, counsel for the NZ Aged Care Association, supported the defendant's position as to the impossibility of compliance with s.3(a)(b) as interpreted by the plaintiffs. She described the aged residential care sector and the statutory framework regulating its funding from government. Private providers of residential care such as Terranova received a per bed care subsidy (maximum contribution) via District Health Boards at a rate set annually by government under the Social Security Act. This had to cover all costs of capital, supplies and labour, and the government accepted that this largely determined wages. Work tasks and training standards were set out in contracts between rest homes and DHBs, and were monitored by the Ministry of Health. Since 2000, subsidy levels had been based on Ministry of Health modelling that had a low rate of pay for carers. In 2007 the High Court had set aside contract clauses that would have tagged funding increases to increases in caregiver wages (*Healthcare Providers NZ v Northland DHB*, 1997). The plaintiffs' interpretation would require comparisons with male workers in sectors that are unconstrained by these limitations on funding and revenue. Rest home carers were on individual and collective employment agreements and employers would not practically be able to consider terms of employment outside their own enterprise.

In *Business New Zealand's* submission, Terranova had a complete defence in paying its male carers the same rates as its women employees for the same work requiring the same or substantially similar skills and effort under the same or substantially similar conditions. Their counsel Peter Keily emphasised the fundamental difference between equal pay for women and men doing the same job and 'pay equity' as the term is commonly understood. They submitted that there was no requirement in s.3(1)(b) to make comparisons with pay rates in other occupations or industries, nor with other employees doing different work within the same organisation. This section did not require an employer to compare apples and oranges. Principles of statutory interpretation required the Act to be interpreted in a practical way. It would be unworkable and unduly onerous for employers to conduct an extensive and uncertain comparison with other employers. This would do away with pay scales and undermine the employer's ability to recruit the best employee, or reward merit and experience or respond to market signals, in their view.

Moreover, in *Business New Zealand's* view, judicial involvement in setting wages across industries would be a return to the award scheme Parliament abolished, and could have significant economic implications. At the time the Equal Pay Act was passed, information on pay rates was readily available from multi-employer award documents. The Employment Contracts Act 1991 had removed centralised wage fixing; the state now had no role beyond the statutory minima in the 1983 Minimum Wage Act. The Employment Relations Act had retained this fundamental shift to parties determining their own terms and conditions, preserving the freedom to bargain while providing a safety net. It was *Business New Zealand's* view that

the plaintiffs' approach was inconsistent with the modern bargaining and employment framework. A requirement for competitors to disclose pay rates would undermine the free market labour system in New Zealand.

Stephanie Dyhrberg represented the Coalition for Equal Value Equal Pay (CEVEP) which supported the plaintiffs' interpretation of 3(1)(b). Rest home care was a prime example of 'women's work' at low rates of pay that reflected the occupation's history as unpaid work within the family. It was because women and men typically do different work that the Convention on Equal Remuneration and the Convention on the Elimination of All Forms of Discrimination Against Women adopted the concept of equal pay for work of equal value and require governments to take action to ensure this through objective assessments. To eliminate any pay differentiation based on sex, Ms Bartlett's work and remuneration should be compared with predominantly male occupations across the labour market, not with the small minority of males in the same low paid, predominantly female job. When the Act was passed, labour market wide comparisons – 'relativities' – between occupations and between public and private sectors – were a norm of wage bargaining that the Equal Pay Act did not need to restate.

In CEVEP's view, the Equal Pay Act provides the legal framework for equal pay for work of equal value even in today's context of individual and collective bargaining. Equal value assessments and comparisons were not 'impractical' or 'unworkable', as characterised by the defendant, the Aged Care Association and Business NZ. Dyhrberg explained to the Court that 'job-sizing' was standard human resources practice in large companies, and gender-neutral job evaluation tools and expert advice were readily available in New Zealand. In the late 2000s, the government began a programme of pay reviews and gender neutral job evaluations in the public sector, using materials that were still available via the Ministry of Business, Innovation and Employment's website (Department of Labour, 2005, 2007a, 2007b).

Arguments on the Court's powers to state principles

A further question to be clarified was the Court's jurisdiction to state general principles under s.9 of the Equal Pay Act.

In Cranney's view, the prevention aspect of the Act came into play after the implementation period, in shaping future negotiations and future pay instruments. To assist in this, s.9 allowed the Court to state general principles for implementing equal pay in accordance with ss.2-8, and it could do this either on its own motion or on application by an organisation of employers or employees. Cranney reviewed similar statements of principles by courts in Australia and in Europe, noting that the 1971 Commission of Inquiry had specifically rejected Australia's very narrow 1968 principles. By 1972 Australia had itself rejected them, in favour of a 'new principle' of equal pay for work of equal value, emphasising comparisons between female wage awards and males in other awards. In the plaintiffs' view, nothing limited the scope of statements of principles by the Court other than the Act itself.

Under s.10 of the Act, the Court could on its own motion, or on application of any party or a Labour Inspector, examine any pay agreement or proposed agreement, whether agreed in conciliation or not. It could approve it if satisfied that the s.3 criteria were met, or refer it back to the parties and in this case could state party-specific principles to guide negotiations, or the Court could itself amend the wage agreement to meet the requirements of the Act. A further option was partial approval, reserving the equal pay issue to be settled within three months (s.11). The present application had been made by a union as well as by Ms Bartlett and it was their view that the Act did not require end-of-agreement bargaining to be initiated before the Court could exercise its powers under these sections.

Terranova considered that the Act required bargaining to be initiated (as per the Employ-

ment Relations Act) before the Court could exercise s.9 powers. Any principles stated should not change or extend the proper interpretation of the criteria, and this did not require unworkable comparisons with other occupations or other employers' pay rates.

The Human Rights Commission submitted that reading s.9 and s.10 together suggested Parliament intended s.9 to provide a general enabling power, rather than one limited to guiding particular parties already in negotiation, as in s.10. The NZCTU submitted that the Act itself imposed no limits on the general principles that may be stated by the Court.

Judgment of the Employment Court

In its Judgment (Inglis, 2013), the Employment Court saw the essence of the plaintiffs' claim as caregivers employed by Terranova being paid lower wage rates than would be the case if caring for the elderly were not a female dominated occupation. The Judgment reviewed the long title of the Act, the definition of equal pay, and the s.3 criteria which it identified as the key issue requiring interpretation.

The Court noted that this section distinguished between work which was 'exclusively or predominantly' done by women and work which was not, providing separate criteria for each. The defendant urged a narrow interpretation, restricting comparison to male employees within the same workplace. The Court considered it did not need, at this stage, to decide on appropriate comparators. However, it was unclear to the judges how Terranova's male gardener, paid \$16.56 an hour, could be said to have the same or substantially similar skills and responsibility as the carers, paid \$13.75-\$15.00 an hour. Comparison between the four male carers and the gardener raised the possible link between low rates of pay and women being the predominant employees in care-giving work. A significant body of academic and other writing suggested this reflected historical and structural gender discrimination. The Court quoted *Caring Counts* (Human Rights Commission, 2012) on the 'undoubtedly gendered' nature of low pay in care work, and a 2009 ILO report *The Unpaid Care Work/Paid Care Work Connection* (Antonopoulos, 2009, p.17):

The occupations and sectors that are dominated by women are generally seen as being less important, requiring lower skills, and, thus, deserving of lower earnings than the occupations and sectors dominated by men. Men working in such occupations and sectors are also penalised in terms of pay.

The plaintiffs had argued that, to identify differentiation based on sex, 3(1)(b) required assessment of rates that would be paid to males, including what was paid to 'similar' males *not* engaged in a female dominated occupation, workplace or sector.

The Court arrived at a correct understanding of s.3(1)(b) by applying well-established principles of statutory interpretation; that is, from the text of the Act in the light of its purpose, including indications provided in enactment (Interpretation Act 1999, s.5). The Act's purpose was plain in its long title: first to remove, then to prevent gender discrimination in women's pay rates. This was reinforced in 1991 by adding s.2A on unlawful discrimination and allowing the option of a complaint to the Human Rights Commission. Equal pay was defined in the Act (s.2) as 'no element of differentiation between male and female employees based on sex', and s.3 provided criteria for determining that, emphasising similarity in skills, responsibility, service, conditions and degrees of effort.

It had been submitted that reference to '*the*' employees in s.3(1) meant the employer's employees and not those employed elsewhere. The Court concluded this could not be so, as it would render the statutory recognition of exclusively female workplaces meaningless. There was no express reference in the text to the workplace or the sector in which the employee worked. The Court noted the definition of pay 'instrument' was amended in 1991 to make

clear that the Equal Pay Act covered all employer-employee relationships under the Employment Contracts Act and applied to actual pay rates, not only to award minimums, quoting the Minister of Labour to this effect.

In the Court's view, the express provision for female intensive industries 'under any instrument' meant there must be no element of differentiation based on sex 'in each rate in every instrument'. They agreed with the Human Rights Commission that male comparators were a means to this end, and the purpose of the Act was pivotal:

'We struggle to see how the effects of gender discrimination on women's rates of pay can be removed and prevented if a narrow interpretation is adopted... If a comparator that is uninfected by gender discrimination cannot be found within the workplace or sector, it may be necessary to look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria.' (pp.12-13)

The Judgment reviewed the legislative history of the Act, making links in concepts, legislative intentions and language between the two Equal Pay Acts, and between the report of the 1971 Royal Commission of Inquiry into Equal Pay and the Equal Pay Act 1972. Given the complexity and diversity of wage fixing systems, the Commission had decided against providing a detailed mechanism for comparison, instead recommending principles and criteria. It specifically rejected the UK's and Australia's narrower approaches, as they did not believe pay for work done exclusively or predominantly by women should be 'swept under the carpet' and left to market forces. The Judgment quoted the Commission's report: 'Very often, while men are paid according to their worth as individuals, women are paid as members of a category of less economic worth.'

The Court was fortified in its interpretation of the Act by consistency with the Bill of Rights Act, the Human Rights Act, and New Zealand's international obligations. It found it significant that the government felt able to ratify Convention 100 after passing the 1972 Equal Pay Act, and quoted a Cabinet paper showing clear understanding that 'ratifying countries are required to ensure the application to all workers of the principle of equal remuneration for work of equal value'. In 1999 the ILO's Committee of Experts noted the government's view that the Act still met the requirements of the Convention and expressed the hope that it would be applied so as to give it full effect. In regard to limited judicial consideration of the Act, the Court commented that *Clerical Workers vs Farmers Trading*:

'...fell on fallow ground and was given relatively short shrift, without detailed analysis. The judgment does not amount to a definitive view on the scope of the Act, although it may have been understood by many as doing so.' (p.20)

On powers to state general principles, the Court noted that s.9 did not contain the limiting language of s.10 or require there to be a live issue between parties. It conferred a broad jurisdiction on the Court to state general principles for the implementation of equal pay. The Court thought it likely, depending on the outcome of Ms Bartlett's case, that the union would initiate collective bargaining for the caregivers, for which s.9 guidance would be significant.

Discussion

The Employment Court's Judgment was a clear and strong ruling that claims for equal pay for work of equal value can indeed be made under the Equal Pay Act. That enables Kristine Bartlett's case to proceed to its next stage: job evaluation and negotiation on male comparators. It also allows women and their unions to make comparisons with men's job tasks and pay rates in other occupations and other industries. The Court has said they may do so, if male employees in the same predominantly female occupation, enterprise, industry or sector would be an inap-

propriate comparator group to achieve the purpose of the Act.

The Judgment confirmed that the Act's purpose goes beyond ensuring that women and men doing the same job are paid the same. It aims also to remove historic structural discrimination in the pay rates of work that women are typically employed to do, though objective assessments of skills, responsibilities, service, conditions and effort.

The Judgment suggested the Employment Court would be receptive to an application for a statement of general principles to guide equal value claims. Even on its own, however, the Judgment is important case law that not only clarifies the scope and meaning of the legislation but gives broad direction on the question of comparators.

At the time of writing, Terranova is appealing the Judgment. Under the Employment Relations Act, wage rates are negotiated by the parties with recourse to the Court only on disputes, but a first claim of this importance, with implications for so many carers and for other female dominated occupations, can be expected to be conducted almost entirely through the courts. Union lawyers have confidence in the strength of the ruling and of the evidence for the next stages of Kristine Bartlett's claim. CEVEP and the Pay Equity Challenge have been invited to assist the Service & Food Workers Union on job evaluation methodology and locating their comparisons in the international literature on structural discrimination in labour markets. Employer organisations will also continue their close interest. Those employers include the state itself. The case is *sub judice*, but National's Minister of Labour said the government was considering whether to 'intervene in the proceedings' (Cowlshaw, 2013). On whose behalf was not specified, but this government is gaining a reputation for changing legislation that does not suit its interests or ideology.

The *Bartlett* case relates to low paid care work that is publicly funded from New Zealand's health budget. This equal pay claim by one woman against one privately owned rest home could potentially affect the wages of around 33,000 carers, 92 percent of whom are women. As Chief Judge Colgan stated in convening a full court for the preliminary hearing, the principles that emerge could have a broad ripple effect on other predominantly female low paid workforces (Colgan J, 2013). If the next stage of the case succeeds in placing a higher value on the skills involved in caring work and 'emotional labour' (Steinberg, 1990; Steinberg & Figart, 1999), this too could have flow-on effects to other typically female occupations in health, education and the service sector.

The possibilities for other claims are already being discussed by the unions. As well as duplicating this claim for aged care workers employed by private rest homes and public hospitals, claims may be taken for other occupations for which evidence of gendered undervaluation is already available. These include the social workers and special education workers whose job evaluations were halted in 2007. A united strategy by the unions might involve a few well-chosen test cases based on detailed evidence, leading on to negotiations on pay equity by other occupations, backed by union numbers, media advocacy and possible industrial action.

In celebrating New Zealand's first-stage success, union lawyers expressed satisfaction that the *Bartlett vs Terranova* case could benefit some of the lowest paid women in the health sector (Cranney, 2013). The 2009 pay equity case for community services in Queensland achieved increases of 19-41 percent, followed by increases in Federal award rates in 2011 (Fair Work Commission, 2012; Queensland Industrial Relations Commission, 2009). These cases were taken under legislation that is less detailed than New Zealand's criteria about skills, responsibilities and other job components. The higher end of the Queensland pay increases were for administration roles involving formal qualifications rather than revaluing work related to women's traditional roles, such as caring (Heaps, 2003). As a strategy, comparable worth assessments have been criticised for developing into slow bureaucratic processes (Steinberg,

1987), and this could be said of New Zealand's five year programme within the public service. Both the size of the administrative burden and avoiding the centralised wage fixing Business NZ so dislikes will depend on employers' willingness to accept equity principles and negotiate.

That includes political will. The return to the courts after 27 years was driven by a reversal in policy and an impasse in politics – again. The Service & Food Workers Union thought it was 'worth a punt' and put forward an excellent case. The Court has ruled that the Equal Pay Act does provide for pay equity claims, but will that law be allowed to stand?

It seems the hardest equality for New Zealand women to achieve is one that costs employers – and governments – money. Low paid women workers like Kristine Bartlett are asking for a fair go under New Zealand employment laws and a few extra dollars to keep their families out of poverty. Women are asking for equal pay for work of equal value, as promised by New Zealand and international law.

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Notes

- 1 *Kristine Bartlett and the Service & Food Workers Union vs Terranova Homes & Care Ltd*, ARC 63/12, WRC 30/12. Judgment [2012] NZEmpC 199 WRC 22/12.
- 2 Until December 2012, Terranova deducted the *employer's* contribution to the KiwiSaver compulsory retirement savings plan from its caregivers' wages, bringing the hourly rate for some below the legal minimum. Both the Employment Court and the Appeal Court ruled this to be illegal ([2012] NZEmpC 199 WRC 22/12).
- 3 'Pay equity' has been used as a common term for 'equal pay for work of equal value' since the 1980s, but was not current when the 1972 legislation was enacted. The US term 'comparable worth' is less usual in New Zealand.
- 4 These Conventions, and also CEDAW, are now considered to be human rights and recently shifted to the responsibility of the UN Office of the High Commissioner of Human Rights, www.ohchr.org

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