CEVEP: Note on final Equal Pay Amendment Act, August 2020

Considerable changes have been made to the Amendment Bill through SOPs put forward by the Minister at the Third Reading. There was no opportunity for public submissions on these changes. They are mainly negotiated between NZCTU and MBIE, about the role of unions in single employer or multi-employer/multi-union claims, and related processes (consolidation of claims, opting out, coverage, etc.). The Bill aligns with bargain under the Employment Relations Act (ERA), as we knew; it now also aligns with CTU/Labour proposals for Fair Pay Agreements for occupations or sectors. That's fine; we would have supported most of it, had NZCTU steering group told the Pay Equality Coalition what they were trying to negotiate.

The 79% of the female workforce don't have union coverage. Under the current enterprise bargaining regime, it is difficult to organise the small private sector workplaces in which most women work. Non-union employees in unionised workplaces will be included in any union claims made. Other non-unionised can only make individual claims, directly to their employer. The employer who is probably underpaying you has to tell you if your workmate makes a pay equity claim – on a very slow time frame – but it's up to the employer whether to include you in any pay-out (see Sch.2 at the back of the Act). This despite the new stronger onus on employers to ensure gender equity in pay rates. How will this work out in practice? Along with the long time frame for employers to decide whether a claim is 'arguable', how will this not discourage women in the largely un-unionised private sector from making a claim?

In replacing earlier employer-led processes with the new union role clauses, the snakes-and-ladders seems reduced, but still possible, as are opportunities for employer delaying tactics. And there's a few new fishhooks.

After trawling through the text of the final Amendment Bill, here's what I think are the main fishhooks. This focuses mainly on individual claims, and the points CEVEP has raised in submissions, rather than the new union claim processes. If I were in a private sector un-unionised workplace, I can't imagine reading this new legislation and still wanting to take an individual pay equity claim for my job.

- Part 4 Pay Equity has a new purpose section and 'good faith' has moved up to cl.3:

  The purpose of this Part is to facilitate resolution of pay equity claims, by—
  (a) setting a **low threshold** to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and
  (b) providing a **simple and accessible process** to progress a pay equity claim.

  But the processes set out in the rest of the text are still not simple or accessible.

- There's a specific statement that a union is entitled to raise a claim on behalf of members.
  A claim for female- dominated work ('is or was' 60% female) can be raised by:
  (i) a union,
  (ii) 2 or more unions or
  (iii) an individual, unless there's already a claim in progress (or Human Rights claim or personal grievance under the ERA).

- The claim still goes to the employer (no longer the ERA) who decides whether it's **'arguable'** (**using a 'light touch' approach**, whatever that means!). 'Arguable' is spelled out (13F) as the same list of historical and structural factors already in the Bill. The claim needs to 'briefly set out

the information that the employee relies on'. Employers must decide jointly if a multi-employer claim is arguable.

- A union can only raise a claim with an employer if they have a member doing the described work for that employer. They don't have to name their member(s) (13I(2)).

- Unions (not just employers as in the earlier Bill) can consolidate claims or opt out of claims, etc. Consolidated claims 'must' do assessment and comparison as in prescribed in 13ZD and 13ZE.

- A union claim ***automatically*** **covers 'affected employees**', even if not a union member, unless the employee opts out. Non-union employees get any settlement but can't be asked for union fees. New employees join the claim unless they give an opt-out notice to their employer. ('You want the job? Just sign here.')

- **A claim by an individual** – i.e. the workplace is not unionised or the union doesn't want to take a claim (yet) – is just that, individual. Maybe a lawyer could represent several 'individual' claims? The employer has to **notify** '**affected employees'** (13U) – but see time frames below. And see Sch.2 at the end: the employer **'*may* offer'** any eventual settlement to affected employees, who can accept or make their own claim. There's nothing about consolidation of individual claims – in versions of the Bill before the union role, it was employer(s)' choice whether to consolidate (any) claims.

- So for the 79% of women whose workplace isn't unionised, they can only make individual pay equity claims one at a time, unless the employer who turns out to be undervaluing the work in one claim decides themselves to give everyone the settlement pay rate. Sch.2 on notification doesn't even say the employer has to tell everyone how much the settlement rate for the individual claim is.

- **Time frames still are very long** and open to delay. The employer gets 45 working days to decide whether any claim is arguable or not; or can get an extension of 20 working days, giving reasons – or 80 working days' extension for multi-claims. The employer then gets 20 working days + 25 possible extension to notify 'affected employees' of a claim by an individual. So that could be up to 110 working days (4 months) before your workmate hears about it – unless you make sure they know! If the employer says it's not arguable, the claimant can seek mediation. Or seek a Determination by ERA, who will consider whether there's been mediation or facilitation – so probably you can't seek a Determination at this point.

- **Matters to be assessed** (13ZD). Includes anything added later in Regulations (by Cabinet and Governor General). Skill, responsibility, experience, effort and conditions of work are the core criteria confirmed by the courts. Remuneration and terms and conditions are now stated as matters to be assessed. Recognition must be given to matters 'commonly overlooked or undervalued in female-dominated work (for example, social and communication skills, taking responsibility for the well-being of others, cultural knowledge, and sensitivity). However, the 'arguable' factors in 13F(3) are now also part of the assessment – all new historical and structural evidence which was not in the 1972 Act. This is '*must* be considered', not '*may*'. In law there is a big difference between must and may. In CEVEP's view, for many low-paid jobs that women typically do, this evidence will be hard to find, and is not relevant to whether *current* pay rates can or cannot be justified on the basis of the required skills, responsibility, experience, effort and conditions of work.

- Consolidated claims – which only employer(s) or union(s) can do – must carry out assessments as in 13ZD and identify comparators as in 13ZE.

- **Comparators** (13ZE). No improvement despite CEVEP's best efforts to get comparison with male-dominated work and male-dominated sectors, as the clearest way of ensuring that male pay is not also undervalued in female-dominated sectors, as required by the court. See reply to CEVEP from the Ministers. Specific reference to allowing Regulations on comparators, but s.19 at end now says these **can't include any ranking or weighting** of comparator. Does this mean that Regulations can't specify a particular gender neutral job evaluation system, or just can't specify the detail?

- **Settlement.** A new requirement accommodates union processes for getting approval from all members/non-members covered – by a simple majority. Individual settlements – as in s.63A ERA i.e. 'bargaining' – the employer must give the offer in writing, advise the claimant to get independent advice, give opportunity to consider, and respond to issues raised. 'The claim is settled when…' uses word 'remuneration', not 'terms and conditions'. New: 'may include terms and conditions other than remuneration if parties agree but employer may not reduce terms and conditions…etc.' It must include regular review.

- A copy of the settlement document goes to the Head of Department responsible for this Act (MBIE), who can use it for statistical or analytical purposes only. The select committee's proposal to exclude settlement documents from discovery under the Official Information Act has been removed.

- New sections on unfair bargaining and remedies for unfair bargaining by the Authority taken from ss.68 and 69 of ER Act 2000.

- Offer settlement to other employees and new employees doing same work – the employer 'must' do this for union settlements, 'may' do so for individual settlements. 'May' contradicts the 2AAC prohibition against employers differentiating by sex. Then a **new fishhook**:
  "Nothing in this section prevents an employer and an employee from agreeing to a term or condition of employment in an employment agreement that is **more favourable to the employee than** the terms and conditions of employment in **a pay equity claim settlement**." To a male doing the same work? The same thing is in next section on the effect of pay equity settlements on employment agreements.

- **Mediation.** No changes in this section. Either party may seek mediation on 1 or more issues.. including but not limited to…. ERA Ss. 145 to 154 apply. Issues now include whether work by others should also be covered by a union claim.

  The replacement of a lot of earlier employer-led process by the new union and individual sections make it appear less snakes-and-ladders than it was. It might work now for taking the whole claim forward for mediation, rather than issue by issue. The Ministers' letter to CEVEP (21.7.2020) says claimants 'can wait to take', and mediators are able to look at, several issues at a time. But you've still got to get past the arguability hurdle, which may require mediation before getting a determination – before you progress to other issues which may require mediation (hopefully all issues together) and possibly facilitation by the Authority before your right to a Determination. So the potential for snakes-and-ladders is still there.

- Facilitation. Facilitation on 'arguability' is only with the agreement of both parties. Otherwise, any party may seek facilitation by the Authority for 'difficulties resolving the claim', on same

'including but not limited to' set of issues as for mediation. (Or you can use 'seek assistance from another person'). There are barriers to the Authority agreeing to facilitation: only if bad faith, serious and sustained, undermines progress of PE claim, and after sufficient effort by the parties including mediation.

- **Determination** can be sought by either party, including on arguability, whether work is covered by a union claim, whether work is undervalued, assessment and comparison, fixing remuneration or reviews. **Whether 'work is comparable for assessment purposes' is listed as an issue for mediation and facilitation but is not in the Determination section.** Unions have to notify members first before applying for Determination. ERA may direct the parties to mediation and/or facilitation as above.

- **Recovery of past underpayment.** The discriminatory limitation for female dominated work on the standard right to back pay (compared to wage claims for male work or for commercial payments) is still there. The financial and political benefits of this to the Crown as employer may match this government's years in office. The **'ability of the employer to pay'** still has to be taken into account by the ERA or court for back pay (13ZZD(2), despite the Appeal Court in *Bartlett vs Terranova* saying it does not [174].

- **Penalties** have been extended to union multi-claims re notifications etc.

- **Regulations** – a new sub-section: "Regulations may not be made under this section that require the comparators against which a pay equity claim is to be assessed to be ranked or weighted."

Linda Hill, 31.8.2020