



CEVEP...coalition for equal value equal pay

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Dame Patsy Reddy
Crown Facilitator
PO Box 1432
WELLINGTON

Dear Dame Patsy

Joint Working Group on General Principles for Pay Equity

Thank you for your invitation to submit in writing to the government's Joint Working Group on General Principles for Pay Equity.

We wish to make some comments on the Terms of Reference for the work of the Group. We also offer our suggestions for General Principles. Some points of this are drawn from the Equal Pay Act and from the recent judgments. We believe it is important that the General Principles should read as a stand-alone document for use by employers, employees and the general public.

Terms of Reference

1. We are pleased that the Terms of Reference clearly and correctly identify that "The recent Court of Appeal decision in *Terranova v Service and Food Workers Union (SFWU) and Bartlett* (the Terranova Case) has held that in female dominated work the Equal Pay Act 1972 (Act) requires equal pay for work of equal value (pay equity), not simply the same pay for the same work."

However, the next sentence states that "This is a change to the way the Act has been understood to apply in the past." This is incorrect, as the Court of Appeal recognised in its judgment. Further, while there was a view following the 1986 Clerical Union case that the Act's continuing effect was narrower, that interpretation has long been disputed, with a considerable literature including writings by members of CEVEP upholding the interpretation recently made by the Courts.

2. We are concerned that the Terms of Reference omit to mention one aspect of the Courts' judgments which is highly relevant to general principles to provide guidance on comparators and evidence. As both Courts acknowledge, equal pay will require looking for comparators beyond the female dominated workplace or sector for which the claim is made.

Terranova's pay comparison between its female and male caregivers was rejected as an answer to the claim as the rate paid to those males is unlikely to be free from gender bias. As the Employment Court in its judgment states:¹

If a comparator that is uninfected by gender discrimination cannot be found within the workplace of the sector, it may be necessary to look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria.

The Appeal Court agreed:²

In our view....a male employee whose pay rate is distorted by systemic undervaluation cannot be an appropriate counterfactual.

The Terms of Reference do not indicate this important ruling, but we trust it will be a feature of the General Principles developed by the Working Party.

3. The Terms of Reference at 7a focus on a paragraph that first appeared in the Human Rights Commission's submission and was quoted in the Judgments:

The Joint Working Group is asked to recommend principles that are:

7a. Consistent with the Equal Pay Act and Court of Appeal decision in the Terranova Case – that is, 'that equal pay for work predominantly or exclusively performed by women, is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort, as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination'.

We have three concerns with this quoted paragraph.

The first is that, where the paragraph uses the language of the Act's 3(1) criteria, it inadvertently omits the word 'service' – 'skills, responsibility, service... conditions ...and degrees of effort'. The issue of service needs to be addressed by the Principles Working Party. Service as a criterion may be tainted by gender bias, given women's labour market experience of interrupted work patterns and casualised employment. In addition, many women workers, such as Kristine Bartlett and other carers may have few formal qualifications but have significant years of hands-on experience that must be properly recognised in any equal pay assessment.

Second, taking the paragraph out of its context leaves some uncertainty as to what is meant by 'abstracted from'. From reading the full HRC submission, it is clear that it was intended to mean that equal pay for work predominantly or exclusively performed by women is to be determined by reference to what men would be paid for the same or similar skills, responsibility, service, conditions and degrees of effort – and removing the impact of any systemic undervaluation of the work.

Our third and related concern is that the paragraph appears to give equal weight to the criteria in 3(1)(b) of the Act and to 'historical or structural gender discrimination', which are not part of the Act. This aspect has been clarified by the Court of Appeal which stated that the s 3(1)(b) factors are mandatory and exclusive.³ Rather than being a separate factor, the Court has made it clear that evidence of systemic historical or structural undervaluation is an inherent aspect of the present test – a lens through which the statutory factors need to be viewed.

¹ *Service and Food Workers Union Nga Ringa Tota v Terranova Homes and Care Ltd* [2013] NZEmpC 157 at [46].

² *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota* [2014] NZCA 516 at [135].

³ Above at [132].

Historical perspectives provide helpful context, and the gendered structure of the labour market reveals how male or female dominated different occupations and sectors are. However, as outlined in the Courts' judgments, New Zealand legislators of the 1970s looked at contemporary laws in other jurisdictions and chose to focus on objective job appraisal (as called for in Convention 100) to ensure that women in the female dominated sectors of the labour market are paid fairly and equitably for their skills, responsibilities, service, conditions and effort in comparison with men, including those who do not work in such sectors.

General Principles for Pay Equity

Purpose

Equal pay is defined in the Equal Pay Act 1972 as a rate of remuneration in which there is no element of differentiation based on the sex of the employee.⁴ New Zealand has ratified UN Conventions 100 and CEDAW which require equal pay for women and men for work of equal value based on objective appraisal of the value of their jobs. Recent Court judgments confirm that the Equal Pay Act covers both equal pay for women and men in the same job, and equal pay for work of equal value in different typically male and female jobs.

Under New Zealand's employment and human rights laws, employers must ensure their pay rates and other conditions of employment are free from all forms of discrimination. Employers cannot 'contract out' of requirements for equality and human rights. Nor does the Act permit 'market forces' or 'ability to pay' to be used as a reason for paying women less than men.⁵

We have drawn on the requirements of the Equal Pay Act, as well as those of the Employment Court and Court of Appeal judgments, in developing the set of General Principles below. To the extent that any aspect of these may be seen as 'restating the Act', we believe that General Principles should be a stand-alone document for best use by employers, employees and unions.

General Principles

1. As the Equal Pay Act applies to all employment instruments⁶, the **General Principles for Implementing Pay Equity must also apply to all employers**, public or private. Further principles may apply to a particular sector or kind of work. Parties to a claim may continue to apply for further guidance from the Employment Court under s 9 of the Act if needed.
2. **Every woman has the right to equal remuneration without discrimination** on grounds of sex, under New Zealand laws and international conventions. Under our equal pay, employment and human rights laws, she has the right to raise matters of discrimination or illegal underpayment and arrears at any time, individually or as a group or raised by her union.
3. **Pay transparency** is fundamental to ensuring both equal pay and equal pay for work of equal value for women. Remuneration includes all forms of wages or salary, as well as any other benefits or rewards, that are payable directly or indirectly, whether in cash or in kind.⁷ No employer may discriminate by reason of sex in terms of employment, conditions of work,

⁴ Section 2.

⁵ The only defence is that provided in s 2(2), which is limited to the experience, qualifications or other special qualities of an individual male employee.

⁶ Section 2.

⁷ Section 2.

fringe benefits, and opportunities for training, promotion and transfer.⁸ The Act requires employers to provide any employee on an individual contract with all information relevant to equal pay on request.⁹ This right should be extended to all employees and to their union. If a pay system is not transparent, the employer must prove its gender neutrality and justify the rates paid.

4. Evidence of **current, historical or structural gender discrimination** demonstrates the systematic undervaluation of work done predominantly or exclusively by women. To arrive at an 'equal pay rate' requires comparative investigation of the skills, responsibilities, service, conditions and effort in specific jobs as required by the Act.
5. The 'equal pay rate' is determined based on the **skills, responsibility, service, conditions and degrees of effort** in work performed by women compared to work performed by men.¹⁰ The Act distinguishes between work done by both women and men and work performed predominantly or exclusively by women, who must be paid at the same rates as men whose work is of equal value based on these criteria. Conditions means conditions of employment as well as physical working conditions.
6. Comparative assessment of predominantly or exclusively female jobs requires the identification of appropriate male comparators. A male employee doing the same work whose pay rate is also distorted by systemic undervaluation cannot be an appropriate comparator. It is necessary to look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria. Males whose pay is most clearly unaffected by structural or other discrimination against women are those in jobs, sectors or industries that employ predominantly or exclusively men. The equal pay comparison should therefore be between the female job or job class and **two or more named comparators in different male jobs in two or more different male dominated sectors or industries.**
7. Assessment of the statutory factors must give full recognition to the importance of the kinds of skills, responsibilities, service, effort and conditions of the work that are commonly overlooked or undervalued in female dominated jobs, such as those related to **human interactions**. Examples include but are not limited to social and communications skills, responsibility for the well-being of people, emotional effort, cultural knowledge and sensitivity, responsibility for safety.
8. Any job comparison system used for determining an equal pay rate must be able to capture and assess the content requirements of the female and the male jobs being compared and establish a process to assess their relative value. For the system to be **gender neutral**, it must be able to analyse and rectify systemic patterns of wage discrimination. If an existing job evaluation system is used, it must be shown to be gender neutral. Assessments of work value reached under existing systems cannot be assumed to be free of assumptions based on gender, despite the claims of the firms involved.¹¹

⁸ Section 2A(1).

⁹ Section 4(2A).

¹⁰ Section 3(1)(b).

¹¹ See for example *Ontario Nurses' Association v Regional Municipality of Haldimand-Norfolk, Respondent* (1991), 2 P.E.R. 105. The Mercer system held not to be gender neutral in this case is very similar to the Hay system. See also *Ontario Nurses' Assn (ONA) v Women's College Hospital* [1992] O.P.E.D. No. 20.

9. The **equal pay rate** should be set to the **same rate as the comparators' pay** if the assessment shows the jobs to be of equal value. Where the work value assessment rates the women's job more highly (or less highly) than that undertaken by her male comparator or comparators, a **proportional calculation** will be needed to derive an equal pay rate. No employer may reduce men's pay or other conditions of employment in order to achieve gender equality in pay.
10. The purpose of the Equal Pay Act is the **removal and prevention** of discrimination based on the sex of employees.¹² As the Employment Court stated, this purpose is ongoing - 'legislation always speaks'. In an unequal and gendered labour market, equal pay rates fairly arrived at may nevertheless need to be revisited in later years, with the possibility of differentiation on the basis of sex re-occurring as pay rates change.
11. In pay negotiations, settlement by the parties is an option at any stage, but the outcome will not constitute an '**equal pay settlement**' unless this has been demonstrated on the basis of the Principles above.

Yours sincerely



Rachel Brown
For CEVEP

About CEVEP

The Coalition for Equal Value Equal Pay is an independent voluntary organisation committed to reducing the gender pay gap in New Zealand through policy and initiatives to advance pay and employment equity in general and equal pay for work of equal value in particular. Since 1986, CEVEP has worked for effective policy and legislation in line with international Human Rights Conventions, such as Convention 100 which requires equal remuneration of women and men for different work shown to be of equal value by objective appraisal.

CEVEP is a specialist group whose current members have considerable legal and policy expertise that spans the breadth of this issue, including expert knowledge of reasons for and identification of factors contributing to the undervaluation of work predominantly performed by women, along with other causes of gender bias in pay rates. Our expertise has been recognised not just within New Zealand, including through provision of specialist advice to Ministers, but also internationally.

CEVEP was an intervening party in the Employment Court hearing in *Service Workers Union Nga Ringa Tota v Terranova Homes and Care Ltd*¹³ following a direction of the Chief Judge that CEVEP be served with a copy of the proceeding. We were able to assist the courts with long-standing legal and policy expertise in this area, together with historical and research documents in evidence.

www.cevepnz.org.nz, rsb@xtra.co.nz

¹² Section 1.

¹³ [2013] NZEmpC 157 at [46].