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Here we go again: Snakes, ladders and hurdles in Equal Pay Act changes

If Kristine Bartlett's 2013 claim had been taken under this new Bill, she'd still be waiting for pay equity.

The Ministers for Workplace Relations and for Women tell us that their purpose in amending the pay equity provisions of the Act is to incorporate the Principles developed by the Joint Working Group of employers and unions, and – in the words of the Amendment Bill – 'to facilitate resolution of pay equity claims, by (a) setting a low threshold to raise a claim....; and (b) providing a simple and accessible process to progress a pay equity claim'.

In the *Bartlett v Terranova* case, the Courts confirmed that the Equal Pay Act 1972 was intended to address pay equity as well as equal pay. The Judgments provided clarification of the core criteria in the Act (s.3(1)(a) and (b)) and useful comment on the selection of appropriate male comparators for female dominated work. The Act is working, and several state sector claims are progressing. So we expect that any amendments made by government will be improvements and that all current rights under the Equal Pay Act will continue.

Is that the case with this Amendment Bill? No, but with some changes it could be.

Here are the key points, in CEVEP's view.

✓ **Onus on employers** (cl.2ACC). This is stronger and clearer than the current s.2A, incorporating the core equal pay and pay equity criteria. As now, equal pay or pay equity claimants cannot also make a Human Rights claim or take a personal grievance. They also can't take a claim under s.2A of the current Act, which includes EEO elements. Why not? S.2 was introduced in 1991 to ensure New Zealand's compliance with ILO 111 on Equal Employment Opportunity, and was one of the sections considered by the Courts to establish Parliament's intentions for the Act. Discrimination or differentiation by sex may well include both pay and other employment conditions such as training or promotion opportunities – as acknowledged in the State Services Commission's 2018 Gender Equity Principles. CEVEP proposes that the EEO elements be included as (c) of 2ACC. Claims can be made under (a) or (b), and/or (c).

✓ **Lodging a claim** (cl.13C). After consultation, the Ministers have ensured that the section on lodging a pay equity claim (cl.13D) incorporates Principle 2 in a way that provides clarity without raising the barrier. The claim relies on 'arguable' factors, an unusual term best avoided: it will require judicial interpretation. ✖ The Bill requires the claim to be lodged with the employer, not the Authority. Under the current Act (and other laws) claims are made to an authority or court. Claimants may or may not try to debate or negotiate with the defendant first, and defendants can apply to have an unmeritorious claim 'struck out'. This Bill gives the employer 65 days to say no, before the claimant can apply to the Employment Relations Authority to accept the claim. CEVEP opposes this change as highly unusual, time-wasting, and likely to disadvantage the claimant. ✖ The

'arguability' of a claim should not be a matter for mediation (and certainly not for facilitation – a process only used for collective bargaining) as this Bill legislates clear criteria, which were agreed by the Joint Working Group. It will simply result in delay and increase expense.

✘ **Employer responses** (13F-13I). These clauses allow unreasonable delays and unilateral decisions by employers about what groups of women claims or settlements will cover. It is unclear how long these unilateral extinguishments of women's right to claim will last for. While consolidation and extension of claims may be helpful, they should be mutually agreed – as with all employment agreements under the Employment Relations Act 2000.

✓ **'Good faith'** (13J), as in the Employment Relations Act.

✓ **Duty to provide information** (Pay transparency) (13K). This applies to the parties to a claim, but ✘ not to employers of appropriate male comparators. Access to basic average occupational wage data will also be needed, so women can know whether they might have an arguable claim.
✓ Cl.13ZE requires employers to keep records of pay equity claims; this should stipulate a period of **6 years** (as for wage and time records).

✓ **Matters to be assessed** (13L). These are 'skills, responsibilities, experience, effort and conditions of work', as in the s.3(1)(a) and (b) and this Bill's cl.2ACC. 13L(1): It is current work and pay rates that are to be assessed; at this point historical disadvantage is irrelevant. ✘ 13L(1)(c) incorrectly states equal pay for men doing the same jobs (not relevant to pay equity); it should read 'the remuneration that is paid to male comparators who perform different work involving comparable levels of skill, responsibility, experience, effort and conditions of work. as required by 13M.' This section 13L provides the legislation's core criteria for pay equity, as verified by the courts. ✘✘ Yet (3) and (4) allow the parties to side-step this completely. These sub-sections must be deleted. Human rights laws (and other laws) cannot not be avoided by privately contracting out of them.

✘✘ **Identifying appropriate male comparators** (13M). This is not yet fit for purpose. ✘ Sub-clause 13M(1)(a) describes equal pay, not pay equity and must be deleted. This would allow exactly the argument by Terranova that the Courts rejected. ✘ Sub-clause (b) re-writes Principle 11 in a way that requires evidence that the male comparators' work was *not* both historically and currently undervalued before the claimant can offer evidence that her own work was. This doubles the burden on the claimant**.** CEVEP recommends a sub-clause allow the claimants to propose appropriate male comparators in her claim (as in the Bartlett and other current claims). If the employer disagrees, they can provide argument or evidence as to why they are inappropriate. Principle 11 requires ✓ avoiding any risk of comparing the claimant's work with male work that is also undervalued, but ✘ fails to take up the Court's suggestion for resolving this. The *Bartlett vs Terranova* Employment Court Judgment said at para.46:

> "If a comparator that is uninfected by gender bias cannot be found in the workplace or sector, it may be necessary to go look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria."

CEVEP recommends the following wording, which is consistent with the judgments and past policy approaches:

> (a) A male comparator is not an appropriate comparator if there is a risk that his remuneration may also be affected by undervaluation based on gender in a female-dominated sector or industry.

(b) To avoid this risk, comparison should be made with at least 2 comparators in different male jobs in 2 different male-dominated sectors or industries.

✓ **Written settlement document** (13N). This should also require a short account of the comparators selected, the assessment and outcome or at what point any prior settlement was reached. This is in the interests of transparency for everyone and the acceptability of extending claims and outcomes to other groups of employees.

✘✘ **Mediation AND Facilitation before Determination.** The clauses on Mediation and Facilitation are exactly the snakes and ladders processes at any or potentially all stages that were the subject of criticism by this government when in Opposition, and (in part) led to 2017 Bill being withdrawn by the incoming government. They are more succinctly written this time, but are still too likely to result in unscrupulous employers gaming the system, and will undoubtedly cause delay. Many women will give up, or won't have the resources to even start these claims. In our view, 'arguability' is not a matter for mediation as this Bill provides legislated criteria, as well as a right to ERA Determination. Delete 13P(2)(a). Secondly, if the parties can't agree, the whole claim should go to mediation (once) before Determination, not potentially repeatedly for each issue or stage. This Act is a mediation/ arbitration model. It differs from the Employment Relations Act in that these are human rights issues, not just matters for negotiation in collective wage bargaining. The inclusion of facilitation for preliminary stages or assessment issues *before* bargaining about the equitable pay rate is inappropriate: facilitation is a process suitable only to broken down collective bargaining. The current Bill will result in three stages to be navigated by pay equity claimants compared to two for regular wage claims. When acting under the Equal Pay Act, the Authority must have full use of its powers granted by the Employment Relations Act. CEVEP recommends that the Facilitation section and all reference to Facilitation be dropped from the Bill other than for helping bargaining parties who are stalemated when trying to negotiate the final rate. Parties who have attended mediation should not be required also to attend facilitation before the Authority will issue a determination. We recommend retaining the Mediation process (except on the legislated criteria for lodging a claim) and the current right to Determination by the Authority sections (dropping repetitions of matters already required, e.g. 13ZA&B).

✘✘ **Recovery of remuneration for past work (back pay)** ((13ZC and D). The Equal Pay Act allows for back pay for a maximum of 6 years before the date the equal pay or pay equity claim is lodged. This is the standard for all unpaid or under-paid wages and all commercial invoices, currently covered by the Limitations Act 2010. Bill of Rights advice on this Bill omitted to consider this. It is **discrimination against women** to reduce this right for pay equity claimants only. The 2017 Bill tried to drop this right entirely. This Bill proposes a shifting entitlement related to settlement date and the date of enactment – but is also discriminatory treatment. 13ZC: The 'ability of the employer to pay' should be removed from the factors the Authority considers when awarding back pay: the *Bartlett* judgment explicitly excluded cost/ability to pay as a justification for differentiation by sex ([2013] NZEmpC 157/ARC 63/12 para.110). CEVEP notes that the spectre of back pay potentially being awarded is a vital negotiation tool for women, that provides leverage to achieve negotiated equitable outcomes quickly. Delete 13ZC and D, and allow the Limitations Act to apply.

✘ **Penalty for non-compliance** (cl.18). $20,000 would be the annual pay equity increase for just two of Terranova's carers. A penalty this small will be ineffective as a deterrent – unless it were to apply to each and every employee affected by the non-compliance. This is why the threat of six years' back pay is so important to redress the power imbalance between under-paid women and their employers.

✘ **Transition** (Schedule 1 (2)). The Bill, when passed, invalidates all pay equity claims currently in progress, requiring claimants to re-lodge their claim under the changed legislation. As state sector unions and employers are currently following the Principles agreed by the unions, the main reason for this must be to remove the right to six year's back pay as a bargaining tool for women. As noted, this is discriminatory.

This is the short list. CEVEP will be making a detailed clause by clause submission on the Bill to the select committee.

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