All the way for *equal pay*

By Economist, Prue Hyman for the New Zealand Nurses Organisation
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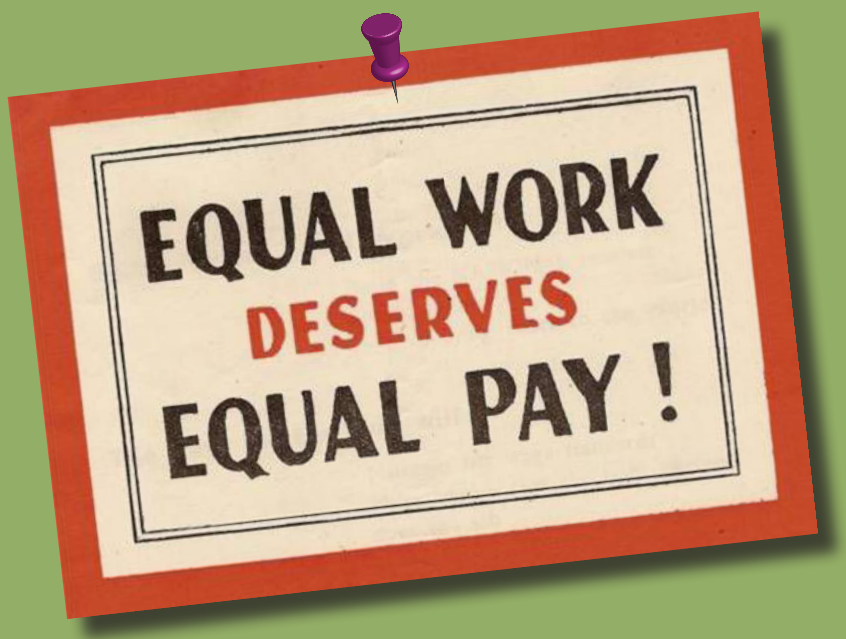
The 2013 New Zealand labour market is lightyears away from equality between women and men, with a significant earnings gap still evident, despite some progress on equal pay and opportunity over the last half century. Most nurses would doubtless agree that despite some improvements in pay, female dominated caring work continues to be undervalued by the market – as are most types of female dominated work. The Human Rights Commission's report 'Caring Counts' points to the particular inequities facing lower paid caring work, with such carers receiving little over the minimum wage. There is also a significant gap between the pay of carers in the private and public sectors, with the lower private sector pay level being primarily due to inadequate funding of private rest home under the contracting system – combined with prioritising profits over staff conditions.

There are about 35,000 workers in the residential aged care workforce, over 90% female. The current government has no intention of improving the situation facing lower paid and female employees so it is particularly brave of the Service and Food Workers Union to take a case for carers at this time. The three day hearing in June was about how the 1972 Equal Pay Act should be properly interpreted. If the Union is successful, there will be a second hearing more concerned with the pay and value of the caring work itself.



Equal pay for equal work has been mandatory in New Zealand since the 1972 Act (fully implemented by 1977). While this outlawed paying a lower wage to women doing identical work to men, it has been controversial as to whether it also covered equal pay work of equal value. This is the broader concept under which work assessed as requiring similar overall levels of skill, responsibility, effort and working conditions (in total, not necessarily on each component separately) should be paid equally. Many of us have long argued that the intent and wording of the Act covers equal value, and this is required by ILO 100 and by the UN Convention for the Elimination of Discrimination Against Women, both of which New Zealand have ratified. However, the Act was never properly interpreted in this way, despite Clause 3 which states: "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, the following criteria shall apply... (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 with the same, or substantially similar, degrees of effort." How such a 'notional male rate' is to be established is, of course, a major issue.

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The Service and Food Workers Union case (supporting Kristine Bartlett) against Terranova Homes and Care Ltd is a belated new attempt to test the 1972 Act and this clause in particular, the first major effort since the Clerical Workers Union case in 1986, which failed. Many believe that case was not well argued, the judgement was faulty, and only lack of resources prevented a successful appeal. But the Act is somewhat arcane in its wording and geared mostly to the 1972/77 implementation period. Hence after 1986, attention shifted to attempting to secure improved and clearer pay equity legislation, culminating in Labour's Employment Equity Act 1990. Its repeal by the incoming National government before it could be tested brought in a period where any movement towards pay equity was difficult and could only be secured by employer/employee bargaining. Such bargaining did occur, with equal value type arguments used by all the unions covering nurses, and they were also instrumental in the legal case which saw midwives awarded equal fees to doctors for services related to normal birth. At the beginning of this century, there were prospects of movement in the public sector, at least, with the work of the Department of Labour's Pay and Employment Equity Unit. Some of the resulting research will be helpful in the current case and future developments, even though it has been disbanded.

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With the Equal Pay Act and anti discrimination clauses in the Employment Relations and Human Rights Act the only remaining possibilities for action, attention turned again to the 1972 Act and its original intentions. And the Act does at least clearly state that it was designed to prevent any ongoing or future discrimination, not to become inactive after 1977. Also both the anti discrimination legislation and the Bill of Rights Act post date the 1972 Act, with some cases decided under BORA providing useful arguments in the current case. An example is judgements requiring appropriate comparators, not ones so narrowly selected that they inevitably support the defendants' case. Further, in the current environment there is an improved understanding of the concepts of direct, indirect, and systemic discrimination, with differential impacts sufficient to indicate that there may be an issue, without necessarily any intent to discriminate.

So Kristine Bartlett and her Union argue that her hourly wage of $14.46 is lower than should be paid on the basis of the value of the work, because the work is female dominated. The fact that Terranova's six male caregivers out of 117 in total are paid similarly is immaterial, as they too are paid essentially a depressed female rate. Clause 3 of the Equal Pay Act above is crucial to remedying this. The claimants argue that correct statutory interpretation allows and needs comparisons in such work to go beyond the firm and identical work to some type(s) of relevant comparators in work that is not largely done by women. The argument in this first part of the case, ably led by counsel Peter Cranney, thus had several components - a detailed examination of the text and purpose of the Act, the implications of cases taken under BORA, international obligations, and the Act in the present day, including principles of statutory interpretation more generally – the Union argues for a broad and liberal interpretation and there is some hope that this is line with several recent Employment Court judgements.

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Terranova conceded that there might be a need to compare the rates for the caring jobs with others within its workforce, such as the gardeners, although Business NZ did not agree, arguing that paying the few males the same pay rates as the female caregivers meant that it was complying with the Act, the narrowest interpretation. Business NZ and the Aged Care Association were approved 'interveners' related to the employers' side, although ACA submissions related mainly to the structure of the industry and were not totally unhelpful to the union case. They argued that if the case succeeded, more funding must be supplied under government contracts' funding formulae to increase wage rates for carers. By contrast Business NZ were totally hostile to the case, emphasising the primacy of the market, the 'pandora's box' that would be opened up if the case was successful, and that interventionism was totally and appropriately contrary to the current industrial relations environment

Interveners supportive of the broader reading of the Equal Pay Act integral to the Union case included the Human Rights Commission, with counsel Matthew Palmer helpful on NZ's international obligations on equal pay for work of equal value. Two

pay equity groups, the Pay Equity Challenge Coalition and the Coalition for Equal Value Equal Pay, made submissions as interveners, with CEVEP represented pro bono by feminist lawyer, Steph Dyhrberg. CEVEP's submission emphasised the practicability of making broad comparisons of the value of different types of work, using gender neutral job evaluation systems developed and readily available in NZ and overseas, contrary to the near impossibility of such comparisons asserted by the defence. The CTU and PECC were represented by Bruce Corkill, with NZNO lawyer Jock Lawrie as junior counsel, and reinforced the union case.

For more information on the case, see the PECC website http://payequity.wordpress.com/, which has links to reports and to the excellent TV3 Campbell coverage. John Ryall of SWFU has written a good summary at http://thestandard.org.nz/awaiting-equal-pay-case-decision/. For more general background, the government website section on pay and employment equity remains a good source, despite the abolition of the Unit and current policies – see http://www.dol.govt.nz/services/PayAndEmploymentEquity/

I have assisted the union with the case and was in Court for the hearing. Overall, I was impressed by the process and the judges' reactions. Chief Judge Colgan asked many excellent questions, pressing the defendants on justifications for making comparisons only within the workplace, where there might be no suitable comparators. He also questioned the cost arguments, pointing out that similar ones were made against the abolition of slavery. Look out for the judgement in two or three months (which may be appealed) and hopefully the next stage.

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