IN THE COURT OF APPEAL OF NEW ZEALAND

CA631/2013
[2014] NZCA 516

BETWEEN	TERRANOVA HOMES & CARE LIMITED Appellant
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED First Respondent
	KRISTINE BARTLETT Second Respondent

Hearing:	3–4 February 2014 (further submissions received 12 May 2014)
Court:	O'Regan P, Stevens and French JJ
Counsel:	A H Waalkens QC and E J Coats for Appellant P Cranney, S A Dyhrberg and A J Connor for Respondents P T Kiely and J M Douglas for Business New Zealand Inc as Intervener B A Corkill QC and J Lawrie for New Zealand Council of Trade Unions Inc as Intervener J C Holden and C Fleming for Attorney-General as Intervener P A McBride for New Zealand Aged Care Association Inc as Intervener M S R Palmer for Human Rights Commission as Intervener (appearance excused)
Judgment:	28 October 2014 at 10.00 am

JUDGMENT OF THE COURT

A **We answer the question of law submitted for determination by this Court:**

"Were the answers given by the Employment Court to the 1st and 6th questions at [118] of its decision [set out at [12] of this judgment] wrong in law?"

No.

B **The appeal is dismissed.**

C **The respondents are granted leave to file an application for costs within 10 working days of the date of this judgment in the event they disagree with the Court's provisional view that there should be no award of costs.**

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] For 42 years the Equal Pay Act 1972 has remained "largely mute".[1] This case seeks to reactivate it.

[2] Ms Bartlett is a rest home caregiver. She contends that the wage rates paid to her by her employer, Terranova Homes & Care Ltd (Terranova), do not provide for equal pay within the meaning of the Equal Pay Act (the Act).

[3] Ms Bartlett, along with 14 other caregivers employed by Terranova, is a member of the Service and Food Workers Union Nga Ringa Tota Inc (the Union). In a separate proceeding the Union has applied to the Employment Court under s 9 of the Act for a statement of principles to be observed for the implementation of equal pay.

[4] The judgment under appeal relates to both proceedings, and we describe both in more detail below.

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1 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157, (2013) 11 NZELR 78 [Employment Court judgment] at [95].

[5] Equal pay is defined under the Act as:[2]

> a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees

[6] It is accepted that Terranova pays Ms Bartlett the same wages as it pays its male employees doing the same work. However, what is claimed in effect is that both male and female caregivers are being paid a lower rate of pay than would be the case if care giving of the aged were not work predominantly performed by women.

[7] The case has potentially far-reaching implications, not only for the residential aged care sector, but for other female-intensive occupations as well. It raises important issues about the scope of the Act, in particular whether it was intended to provide for pay equity (meaning equal pay for work of equal value) or whether it is limited to requiring equal pay for the same (or substantially similar) work.

[8] At the request of the parties, the Employment Court agreed to hear and determine certain preliminary questions of law.[3]

[9] It convened a full Court to decide the preliminary questions and also granted leave to several interveners to be represented.[4]

[10] In its subsequent decision, the Employment Court answered eight preliminary questions.[5] It identified the key issue raised by the questions as being "the scope of the requirement for equal pay for female employees for work exclusively or predominantly performed by them, and how compliance with that requirement is to be assessed".[6] The eight questions and the Court's answers are set out in a schedule attached to this judgment.

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2 Equal Pay Act 1972, s 2.

3 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51.

4 The Employment Court granted leave to the following interveners: the Human Rights Commission; the New Zealand Council of Trade Unions Inc; the Pay Equity Challenge Coalition; the Coalition for Equal Value Equal Pay; the New Zealand Aged Care Association Inc; and Business New Zealand Inc.

5 Employment Court judgment, above n 1.

6 At [7].

[11] Terranova now challenges two of the answers given by the Employment Court. The two answers concern the interpretation of s 3(1)(b) of the Act. Section 3(1)(b) sets out the criteria to be applied in determining whether an element of sex-based differentiation exists in wage rates being paid for work that is exclusively or predominantly performed by female employees.

[12] The relevant questions asked of the Employment Court and its answers were as follows:[7]

> [Question 1]
>
> In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:
>
> (a) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or
>
> (b) Identify the rate that her employer would pay a male employee if it employed one to perform the work?
>
> *Answer:* Section 3(1)(b) requires that equal pay for women 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.
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> ...
>
> [Question 6]
>
> In considering the s 3(1)(b) issue of "…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", is the Authority or Court entitled to have regard to what is paid to males in other industries?
>
> *Answer:* They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

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[7] At [118]. Unfortunately the Employment Court did not number the questions, but for ease of reference we have done so.

[13] Terranova applied for leave to appeal to this Court under s 214 of the Employment Relations Act 2000. The Union and Ms Bartlett consented to the application and to the formulation of the question of law for determination. Leave to appeal was subsequently granted.[8]

[14] As we shall explain, the wording of the question of law was further refined after the hearing of the appeal. The question for determination in its final form is:

> Were the answers given by the Employment Court to the 1st and 6th questions at [118] of its decision wrong in law?

[15] The two answers are interrelated. Both are based on the premise that correctly interpreted the Act is not limited to providing equal pay for the same work.

Background

An historical overview of equal pay in New Zealand

[16] In order to be able to understand the question for determination, it is necessary for us to provide a brief historical overview.

[17] According to its long title, the Act is intended to make provision for the removal and prevention of sex-based discrimination in the rates of remuneration of males and females in paid employment.

[18] The Act had its genesis in the 1971 report of the Commission of Inquiry into Equal Pay (the Commission report).[9]

[19] As noted in the Commission report, equal pay between women and men had already been implemented in the public sector by the Government Service Equal Pay Act 1960 (affecting around 25 per cent of the total workforce).[10] However, there was no legal requirement for equal pay in the private sector.

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8 *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2013] NZCA 575.

9 Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (September 1971) [Commission report].

10 At [4.28].

[20] At the time, wage fixing in the private sector was primarily regulated by the Industrial Conciliation and Arbitration Act 1954 and was highly centralised. The predominant bargaining system was compulsory conciliated bargaining for blanket-coverage awards that set minimum terms and conditions of employment.[11] Some awards were limited to local industry labour markets but many of them were regional or national in scope. The awards were negotiated by unions and employer representatives and then submitted for approval to the Court of Arbitration. If the parties could not reach agreement the dispute would be resolved by state-sponsored arbitration.[12]

[21] Approximately 40 per cent of all employees in New Zealand were covered by awards and industrial agreements under the Industrial Conciliation and Arbitration Act.[13] That Act was subsequently replaced by the Industrial Relations Act 1973 but national awards remained common.[14]

[22] Prior to 1972, awards often expressly provided separate rates for female employees.[15] The female rates were invariably lower than the male rates. In some awards, gender bias took the form of different job titles being allocated to men and women undertaking substantially the same work. Again, the men received higher rates of pay.[16]

[23] The New Zealand (except Canterbury) Rest Homes Employees Award was

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11 Barry Foster and Ian McAndrew "Growth and Innovation Through Good Faith Collective Bargaining: An Introduction" (2003) 28(2) NZJIR 1.

12 For a more detailed account of the history of compulsory arbitration in New Zealand, see G Anderson and others (eds) *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [Intro.5]–[Intro.8]; and J Holt *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland University Press, Auckland, 1986).

13 Commission report, above n 9, at [4.28].

14 This later changed following the enactment of the Employment Contracts Act 1991: Anderson and others, above n 12, at [Intro.9].

15 Commission report, above n 9, at [1.5] and [1.12].

16 Ministry of Women's Affairs *Report on the Effectiveness of the Equal Pay Act 1972* (September 1994) at [30]–[34]; and Urban Research Associates, PJ Hyman and A Clark *Equal Pay Study Phase One Report* (Department of Labour, 1987) at 35–41.

typical of the times.[17] As the name suggests, it covered workers in all rest homes throughout the country except those in the Canterbury region. The names of the rest homes were listed. Under the heading "Industry To Which Agreement Applies", it stated that "this agreement shall apply to all workers employed in old people's Homes" and that it was not lawful for either employer or worker to contract out of the agreement.

[24] The Award set out rates of pay for cooks, cook-generals (defined as a person engaged in cooking in addition to duties beyond the kitchen) and "other workers including general aids". For each category, there were separate male and female rates.

[25] The Act came into force on 20 October 1972. It has remained in force ever since, subject to some amendments. Its key features are as follows:

(a) It defines equal pay as "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees".[18]

(b) It sets out equal pay criteria to be used for two purposes.[19]

(c) The first purpose is for determining whether an element of sex-based differentiation in the pay rates of male and female employees exists.

(d) The second purpose (now spent) was that using the criteria those responsible for wage fixing in employment agreements in force as at 1 April 1973 were required:[20]

(i) to undertake job classification exercises whereby work performed by female employees was required to be classified in relation to work performed by male employees; and

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17 *New Zealand (except Canterbury) Rest Homes Employees – Collective Agreement for the Year 1975* (Department of Labour, Wellington, 1976).
18 Section 2.
19 Section 3.
20 Section 4(1).

(ii) to determine the rate of remuneration that would represent equal pay for each such classification.

(e) The criteria differ depending on whether the work in question is or is not performed exclusively or predominantly by female employees.

(f) Implementation of equal pay was to be achieved progressively over a five year period ending 1 April 1977, with an ongoing obligation to provide for equal pay after that date.[21]

(g) The Court of Arbitration was charged with oversight of the Act in its arbitral and wage recovery functions.

[26] By the end of the initial five year implementation phase, the Act had been effective in eliminating separate male and female rates in awards and other types of employment agreements.[22] Between 1972 and 1978, the ratio of female to male hourly earnings increased from approximately 70 per cent to 78.5 per cent.[23]

[27] However, in a report written in 1979, a review committee appointed by the Minister of Labour recorded concern that despite this progress, in some agreements the equal pay rate for work that had been traditionally performed by women was too low to attract males and was therefore still a female rate. It recommended that future reviews of the Act should compare earnings in female-intensive occupations with those in male-intensive occupations to determine whether despite the Act there was still sex discrimination in pay treatment of women in predominantly female occupations.[24] The recommendation was never adopted.

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21 Sections 6 and 7.

22 *Progress of Equal Pay in New Zealand: Report of a Committee Appointed by the Minister of Labour* (June 1979) [1979 report] at [5.3].

23 1979 report, above n 22, at [5.8]. See also *Progress of Equal Pay in New Zealand: Report of a Committee Appointed by the Minister of Labour* (October 1975) [1975 report] at [4.1]–[4.18] for progress by 1975.

24 1979 report, above n 22, at [8.35].

[28] In the years that followed the gender wage gap remained largely constant, prompting calls for a new review of the Act.[25]

[29] Although the Act provided for Department of Labour Inspectors to take enforcement proceedings in the Arbitration Court, very few complaints were received after the initial implementation phase.[26] Our research was only able to find a total of 10 cases decided under the Act.

[30] Opinions differed as to whether the small number of complaints was evidence of widespread compliance with the Act or whether it was due to the overly restrictive way in which the Arbitration Court was applying the Act in the few cases it did hear.[27]

[31] In 1986 the Clerical Workers Union submitted a case to the Arbitration Court designed to test the continuing applicability of the Act and whether the Act encompassed pay equity. The Clerical Workers Award at the time covered 30,000 workers, of whom 90 per cent were women.[28] The Union sought to argue that the wage rates under the award were lower than the rates payable under other awards covering work of equal value, such as the Building and Related Industries Tradesmen and Other Workers Award, and that this had come about because the great majority of clerical workers were female and the great majority of building tradespersons were male.

[32] The Arbitration Court confirmed that the Act was "still alive", but rejected the Union's case.[29] It held that the choice of the Act as "a vehicle for remedy of the

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25 Ministry of Women's Affairs, above n 16, at [30]–[34]; Urban Research Associates, Hyman and Clark, above n 16, at 12–13; and Equal Pay Steering Committee *Equal Pay Study Phase Two Report* (Department of Labour, 1987) at 7–8 and 16–17.

26 For example, during 1984 and 1985 only six complaints were received by the Department of Labour, with two found justified: Ministry of Women's Affairs, above n 16, at [65].

27 Ministry of Women's Affairs, above n 16, at [70]; and Elizabeth Orr "Equal Pay for Work of Equal Value in New Zealand: A History of the 1960 and 1972 Equal Pay Acts" (paper presented to Women's Studies Conference, Palmerston North, November 2003).

28 *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203 at 204.

29 At 207.

perceived problems in the present case" was an error of law and that the Act contained "no powers or other provisions by which the Court [could] address the issue raised by the union and [gave] no powers to the Court to do what the union ask[ed]".[30] In the Court's view, its jurisdiction under the Act was limited to ensuring equal pay between male and female employees covered by the same award.

[33] That decision further heightened calls for a review of the Act.

[34] In response, the Department of Labour commissioned an equal pay study to canvass issues such as the existence and extent of the gender pay gap, the reasons for it, the justifications for reducing it and the most effective ways of doing so.

[35] The 1987 Phase One Report of that study confirmed that there was still a substantial gender pay gap in New Zealand[31] and that although the causes of the gap were complex and interrelated, many contained elements of discrimination.[32] One of the main causes identified by the report was the segregation of women into occupations and industries characterised by low rates of pay. There was found to be a strong statistical link between female dominance in an occupation and low pay rates.[33]

[36] As the report also observed, there was growing literature supporting the view that the lower level of earnings in many female-dominated occupations was

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30 At 207.

31 Female hourly earnings remained constant at approximately 78 per cent of the male equivalent: Urban Research Associates, Hyman and Clark, above n 16, at 12–13.

32 At 13–44. The following causes were discussed: occupational segregation – the concentration of women in a narrow range of low paying occupations; seniority – woman are underrepresented in managerial and senior positions across all occupations, including female-dominated occupations; supply and demand factors, although the effect of these factors is controversial and almost impossible to quantify; work experience and training – women's access to formal training is largely confined to traditionally female-dominated areas of work and women's perceived lack of work experience may in part be accounted for by the undervaluing of unpaid work done by women in the home and community; time out of the labour force; a lack of equal opportunity for women in employment, not only because of intentional discrimination but also because of other factors such as inflexibility in work patterns, and a need for better childcare options and maternity leave provisions; and other factors, including the tendency for the skills required for work traditionally performed by men to be more highly valued than the skills required for work traditionally performed by women.

33 At 17–22.

discriminatory, being in large measure attributable to historical factors no longer relevant – such as the fact that paid employment for women was seen as a stopgap until marriage and therefore not deserving of higher earnings – and to the undervaluation of skills needed in female-intensive jobs, such as manual dexterity.[34] Such skills were undervalued because they were seen as innate or natural skills (as opposed to acquired skills) and/or as an extension of women's unpaid work in the home.

[37] We pause here to interpolate that it is this view that is encapsulated in the Employment Court's phrase "systemic undervaluation of the work derived from current or historical or structural gender discrimination" (systemic undervaluation).[35]

[38] If the analysis above at [36] is accepted (and the 1987 report acknowledged it was controversial), it follows that one of the most effective ways of reducing the gender pay gap would be to apply an equal value principle in wage fixing.

[39] As for the effectiveness of the Act, the 1987 report concluded that the Act had failed to reduce the gender pay gap significantly and had failed to deliver equal pay for work of equal value to working women in New Zealand. It recommended that work should be undertaken to deliver legislation on equal pay for work of equal value.

[40] This recommendation was well-received and following further reports[36] Parliament enacted the Employment Equity Act 1990. That Act included both pay equity and equal opportunity provisions. Within three months, however, there was a change of government and the Employment Equity Act was repealed.

[41] In 1991 Parliament enacted the Employment Contracts Act 1991, which radically changed wage fixing structures. The underlying philosophy of the legislation was to decentralise wage fixing and foster individualism in employment

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34 At 37.

35 Employment Court judgment, above n 1, at [44] and [118]. See above at [12].

36 *Towards Employment Equity: Report of the Working Group on Equal Employment Opportunities and Equal Pay* (1988); and Working Group on Equal Employment Opportunities and Equal Pay *Report on Submissions on Towards Employment Equity Report* (November 1988).

relationships.[37] It abolished the award system and provided that the type of employment contract and its content were matters of negotiation between the parties.

[42] Since then the Employment Contracts Act has itself been repealed and replaced by the Employment Relations Act. Although the Employment Relations Act places more emphasis on promoting collective bargaining, it did not reinstate the award system.

[43] According to information provided to us by Terranova, as at 2008 only 15 per cent of the total New Zealand workforce was covered by a collective employment agreement.[38] Further, the majority of collective agreements are single-employer agreements.[39] Collective bargaining is now very much a public sector phenomenon, with around 50 per cent more public sector employees employed under collective agreements than in the private sector.[40]

Factual background to this case

[44] As at 2009, there were 33,000 workers in the aged care sector in New Zealand, 92 per cent of whom were women.[41]

[45] Terranova operates five rest home facilities including the rest home where Ms Bartlett is employed. Every caregiver employed by Terranova is employed on a standardised individual employment agreement.

[46] As at June 2012, Terranova employed four male caregivers out of a total of 110 caregivers. It is not suggested in this case that those four males are paid higher wages than female employees doing the same work.

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37 Anderson and others, above n 12, at [Intro.9].

38 Department of Labour "Effect of the Employment Relations Act 2000 on Collective Bargaining" (2008) Ministry of Business, Innovation and Employment <http://www.dol.govt.nz>.

39 Stephen Blumenfeld, Sue Ryall and Peter Kiely *Employment Agreements: Bargaining Trends & Employment Law Updated 2010/2011* (2011) at [2.4].

40 Blumenfeld, Ryall and Kiely, above n 39, at [2.3].

41 Juthika Badkar and Richard Manning "Paid Caregivers in New Zealand: Current Supply and Future Demand" (2009) 35 NZ Popul Rev 113 at 116–117.

[47] Terranova says the wages it pays to its caregivers are based on an assessment of their competence. Caregivers are assessed as having a competence that falls within one of four wage bands. In June 2012, these ranged from $13.50 per hour to $15 per hour.

[48] Although Terranova is a private provider, its level of income is largely fixed by central government. It is funded by the relevant District Health Board under the Social Security Act 1964.[42]

[49] In 2012 the aged care sector was the subject of an inquiry by the Human Rights Commission. The subsequent report stated that low wages, pay inequality and inequity were three issues that had dominated the inquiry.[43] It further stated:[44]

> The fact that thousands of (mainly women) are caring for vulnerable older people for barely the minimum wage is an injustice grounded in historical undervaluation of the role. … Pay inequality between home and residential based caring and those doing much the same work in public hospitals cannot continue to be condoned when it is publicly funded.

[50] This report appears to have been the catalyst for the current proceedings.

The current proceedings

[51] Two proceedings have been filed.

[52] The first proceeding was filed against Terranova in the Employment Relations Authority by Ms Bartlett and was subsequently removed to the Employment Court.

[53] The statement of claim for that proceeding pleads two causes of action, both alleging that the wage rate paid to Ms Bartlett by Terranova fails to provide for equal pay. The first cause of action claims that failure breaches the Equal Pay Act. The

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42 Residents may be required to fund their own care if their assets are above the statutory threshold for eligibility for the residential care subsidy.

43 Human Rights Commission *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* (May 2012) at 60.

44 At 60.

second claims it breaches sch 1B of the Employment Relations Act, which includes an obligation for employers to have a policy requiring the identification and elimination of gender inequality. The relief sought includes an order determining the rate that would represent equal pay under the Equal Pay Act and an order amending Ms Bartlett's employment agreement accordingly.

[54] The second proceeding was issued in the Employment Court by the Union. The statement of claim pleads that 15 caregivers employed by Terranova are members of the Union and that the Union considers the wage rates paid to those caregivers do not provide for equal pay within the meaning of the Act. The Union seeks a statement pursuant to s 9 of the Act of the general principles to be observed for the implementation of equal pay.

[55] We assume that the reason why two separate proceedings were issued is that individual employees do not have the right to make applications under s 9. Only organisations of employers or employees have that right.

[56] Section 9 confers a power on the Employment Court to state general principles to be observed for the implementation of equal pay. For reasons discussed below, we consider this power to be an important one. We note that rather unhelpfully the general principles sought by the Union in its statement of claim consist simply of a restatement of the statutory provisions.

[57] When the Employment Court agreed to consider the preliminary questions, it did so on the ground that the hearing was likely to be lengthy and complex and answers to the preliminary questions might reduce the evidential ambit of the case.[45] Unfortunately the Court did not specify which hearing it was alluding to – the hearing of Ms Bartlett's claim or the Union's claim. The intituling of the judgment includes both proceedings.

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[45] *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd*, above n 3, at [1].

[58] Subsequently, in its decision answering the preliminary questions, the Employment Court stated that resolution of the preliminary issues would inform the "scope of any subsequent inquiry conducted by it under s 9".[46] There is no reference to the hearing of Ms Bartlett's claim. That claim does, however, feature in the intituling.

[59] The Court also did not explain how it envisaged the s 9 application would be conducted or how a s 9 hearing would differ from a determination of the substantive claim filed by Ms Bartlett.

[60] The notice of appeal filed in this Court cites both the Union and Ms Bartlett as respondents.

[61] The lack of clarity is regrettable.

[62] The fact the issues before us are preparatory to another hearing has influenced our approach. So too has the fact that we are being asked to decide a difficult question of law without there having been a full examination of the facts in the Court below. To a very real extent, particularly in relation to Question 6, we are being asked to decide questions of admissibility in the abstract.

[63] In our view, those circumstances make it incumbent on us to take an approach that does not prejudge the outcome of the next inquiry before it even gets underway. We have therefore been careful, for example, not to identify appropriate comparators or give guidance on how evidence of other comparator groups or systemic undervaluation should be adduced. We have limited ourselves to answering the specific questions put to us.

The question of law on appeal

[64] Under s 214 of the Employment Relations Act, appeals to this Court from decisions of the Employment Court are limited to questions of law. Leave is required.

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[46] Employment Court judgment, above n 1, at [6].

[65] On 25 November 2013, a consent order was made granting leave to the parties in this case to submit the following question of law for decision:[47]

> Did the Employment Court err in law in finding that, in determining *"the rate of remuneration that would be paid to male employees ... performing the work"* for the purposes of s 3(1)(b) of the Equal Pay Act 1972, reference may be made to:
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> - Rates that are paid to men who are employed by other employers or by employers in other sectors; and
>
> - Any systemic undervaluation of the work derived from current or historical or structural gender discrimination?

[66] At the conclusion of the appeal hearing, it became apparent that this wording did not accurately reflect the Employment Court decision. In particular, the wording asked whether reference "*may* be made", whereas the actual answer given by the Employment Court to the first question under appeal was formulated in terms of what s 3(1)(b) *required*.

[67] Accordingly, we suggested a reformulation of the question. Terranova agreed to the reformulation. The respondents objected and sought different wording again.

[68] Our proposed reformulation was the minimum necessary to bring the agreed wording into better alignment with the Employment Court decision. We were not willing post-hearing to entertain any more wide-reaching amendment and accordingly directed that the question of law would be as we proposed.[48]

[69] The question of law for determination is therefore:

> Were the answers given by the Employment Court to the 1st and 6th questions at [118] of its decision wrong in law?

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[47] *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, above n 8.

[48] *Terranova Homes and Care Ltd v Food Workers Union Nga Ringa Tota Inc* CA631/2013, 5 March 2014 (Minute of the Court).

Arguments on appeal

[70] For convenience we set out s 3(1) in full and repeat the two rulings of the Employment Court under appeal:

> **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, the following criteria shall apply:
>
> (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 with the same, or substantially similar, degrees of effort.
>
> [Question 1]
>
> In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:
>
> (h) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or
>
> (i) Identify the rate that her employer would pay a male employee if it employed one to perform the work?
>
> *Answer*: Section 3(1)(b) requires that equal pay for women 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.

…

[Question 6]

In considering the s 3(1)(b) issue of "…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", is the Authority or Court entitled to have regard to what is paid to males in other industries?

Answer: They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

[71] As mentioned, both of the Employment Court's answers are of necessity based on the premise that the Act is not limited to equal pay for the same work. The answers are also interrelated. Answer 6 says the Court may be entitled to have regard to what is paid to males in other sectors (meaning dissimilar sectors) if enquiries within the same sector would not yield an appropriate comparator group. The main reason why intra-sector enquiries might not yield an appropriate comparator group is likely to be because of systemic undervaluation, the subject matter of Question 1.

[72] On appeal the following is common ground between the parties:

(a) Section 3(1) creates two categories of cases.

(b) In each category a comparative assessment is required.

(c) In the first category (work not exclusively or predominantly performed by females) the comparison is between the female complainant(s) and male employees doing the same or substantially similar work.

(d) The present case is a second category case (a s 3(1)(b) case).[49] The

[49] In light of this agreement, it is not necessary for us to determine the meaning of "predominantly". One commentator suggests the conventional yardstick is 70 per cent: Elizabeth Orr "The Equal Pay Scene Revisited" (New Zealand, 1986) at 2.

parties diverge on whether this is because Terranova's care giving workforce is female-dominated (Terranova's view) or because rest home care giving work in New Zealand generally is predominantly performed by women (the Union's view).[50]

(e) Section 3(1)(b) is premised on a comparison being made between the rate paid to the complainant(s) and the rate 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.

(f) The test under s 3(1)(b) is an objective one and the comparator is a notional man.

(g) The rate that is or has been paid by the complainant's employer to male employees in the same role is relevant evidence of the rate that would be paid to the notional man but is not necessarily determinative.

[73] However, where the parties and interveners differ is as to the evidence that may be taken into account in determining what would be paid to the notional man featured in s 3(1)(b).

[74] The respondent union argues that s 3(1)(b) requires an assessment of the rate that would be paid to a male performing the work considering all relevant probative evidence, including evidence of what is paid to similar male employees not engaged in the sector and evidence of systemic undervaluation. The Union, the Human Rights Commission and the New Zealand Council of Trade Unions Inc seek to uphold the Employment Court decision.

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[50] It is not necessary in this case for us to determine whether the assessment of exclusivity/ predominance is workplace or sector-based.

[75] Those who submit the Employment Court got it wrong are themselves divided as to the correct approach.

[76] Business New Zealand Inc contends that the inquiry under s 3(1)(b) must always be limited to the particular workplace or employer.

[77] Terranova and the New Zealand Aged Care Association Inc submit that the assessment will usually be limited to the workplace but not always. They accept there may be exceptional circumstances where the Court would be entitled to have regard to rates paid by other employers in the sector, but never another sector (not even a similar sector) and never for the purpose of considering systemic undervaluation.

[78] According to their analysis, on the facts of this case Terranova's four male caregivers are a useful point of reference for the s 3(1)(b) enquiry. So too is the rate Terranova pays to a male gardener it employs at its rest homes, as well as its general policies and practices including recruitment policies. The reason it is not necessary to look outside Terranova's workforce to identify a suitable male comparator is said to be that it does employ male caregivers. But had it been necessary to look elsewhere (such as if Terranova had an exclusively female workforce), the comparator could as a matter of law only be found in the rest home sector.

[79] The Attorney-General's position is that evidence of what employers pay male employees in comparable roles in other sectors is unlikely to be relevant but in the abstract, as a matter of law, it is impossible to say it could never be relevant. Systemic undervaluation is in a different category however. It is clearly outside the scope of the Act and accordingly evidence about it can never be relevant. In effect, it was a step too far.

[80] The position of the Attorney-General, therefore, is that the Employment Court's answer to Question 1 was wrong but the answer to Question 6 can stand.

[81] For reasons we shall explain, we have decided to dismiss Terranova's appeal. It has therefore not been necessary for us to review the Employment Court decision in any detail, other than to identify some aspects of the Court's reasoning with which we disagree. We consider the issue is more finely balanced than the Employment Court's decision suggests. Ultimately, however, we consider that in answering the two questions in the way it did, the Employment Court has not misinterpreted the Act.

The difficulties

[82] At the outset, we acknowledge the considerable difficulties facing the parties, the interveners and the Employment Court in this case.

[83] The first difficulty is that the Act is very poorly worded. The syntax is cumbersome and the drafting elliptical.

[84] The second (and related) problem is that critical passages of the Commission report which led to the Act are ambiguous. This is particularly unfortunate because the wording of s 3(1)(b) is essentially the same as the wording recommended by the Commission.[51] We examine the problems relating to the Commission report in more detail in the following section.

[85] A third difficulty is the paucity of previous cases decided under the Act.

The Commission report

[86] The ambiguity in the Commission report is such that all parties in this case were able to identify passages that supported their competing interpretations. The same ambiguities are evident in the parliamentary debates as recorded in Hansard.[52]

[87] In its decision the Employment Court placed significant weight on the fact

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51 Commission report, above n 9, at [2.12]–[2.13].

52 (29 August 1972) 380 NZPD 2176–2180; (11 October 1972) 381 NZPD 3231–3257; and (19 October 1972) 381 NZPD 3497–3498.

that the Commission recognised the phenomenon of the "crowding of women" into certain occupations that attract lower rates of pay than male-dominated occupations.[53] However, in the same section the Commission appears to suggest that the reason for this phenomenon may be that women are less likely to find employment in higher paid fields (in other words, that it is an issue of equality of opportunity rather than pay equity).[54] Systemic undervaluation of skills is not mentioned.

[88] The Employment Court also placed weight on the Commission's rejection of the United Kingdom and Australian approaches to equal pay. At the time, the relevant United Kingdom legislation restricted equal pay comparisons to men working for the same employer as the complainant or an associated employer.[55] However, the Commission report simply notes the United Kingdom position in passing. There is neither a comprehensive discussion of the approach nor any clearly articulated reasons for diverging from it. We can draw little meaning from this brief mention.

[89] The Australian approach is discussed in more detail and rejected on the basis that it would not protect the position of women in female-dominated sectors. However, the Australian approach at the time included the principle that equal pay did not apply "where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed".[56] Such an approach means that women in female-dominated sectors are not protected from even direct discrimination of the kind that equal pay for the same work is intended to address. If all that the Commission was rejecting was that extreme position, then the Commission's rejection of the Australian approach does not necessarily undermine Terranova's argument. Again, the intention is not clear.

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53 Employment Court judgment, above n 1, at [79] referring to Commission report, above n 9, at [2.4].
54 At [2.3]–[2.4].
55 Equal Pay Act 1970 (UK).
56 Commission report, above n 9, at [2.9].

[90] Similarly, the report includes several comments about the difficulty of designing a method of determining whether equal rates are paid for work of equal worth. Certain passages suggest that the Commission considered it was too difficult and that its preference was to leave pay equity for another day.[57] That is to say, the passages suggest the Commission made an active choice to limit the scope of the reform to equal pay for the same work. Other passages, however, suggest that the Commission intended the proposed legislation to include pay equity and was prepared to leave the mechanism by which that would be achieved to the parties and in default the Arbitration Court.[58]

[91] Another perplexing feature of the Commission report is its treatment of the Government Service Equal Pay Act.

[92] The long title of that Act says it is an Act to make provision for the application to the government service of the principle that "women should receive the same pay as men where they do equal work under equal conditions". Section 3(1)(b) says that where female employees perform work of a kind that 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 sections of employment where the principle of equal pay for equal work has been implemented.

[93] The Commission report contains no discussion of s 3 of the Government Service Equal Pay Act or of the reasons why the Commission chose not to adopt the same formula.

[94] The problems in interpreting the Commission report are further compounded by consideration of the fact that the Commission was operating in a very different legal environment and is likely to have had a different mindset to that of a person trying to make sense of the legislation in 2014. As mentioned, in 1972 enterprise

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57 For example at [1.20], [2.5] and [2.8].
58 For example at [2.13], [2.14] and [5.19].

bargaining was not the norm. The norm was centralised wage fixing and large industry multi-employer agreements. In that context, an "instrument" was often the same thing as a whole industry or sector. Questions then arise such as if the Commission did contemplate cross-employer comparisons, was that only because the employers were parties to a common instrument?

[95] For all these reasons, we consider the weight placed on the Commission report by the Employment Court was not justified.

The text

[96] Terranova stresses that the test posited by s 3(1)(b) is what would "*that* employer pay a man to do *that* work". To put it that way, however, begs the question, which is how does one determine what that employer would pay, especially when it has been agreed that the test is an objective one and the man a notional man? What sort of evidence may be taken into account?

[97] The starting point must be the wording of the Act. We therefore turn to the text.

Two categories of cases

[98] In our view, the critical and ultimately decisive feature of s 3(1) is the fact that there are two separate categories in respect of which different tests are to apply. The creation of the two categories was plainly deliberate and any interpretation must make the distinction meaningful.

[99] The test for s 3(1)(b) situations uses the language "the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills...". The use of the phrase "would be" indicates that the comparator is intended to be a hypothetical one and so is not limited to actual rates paid to males employed by the employer. That in turn means it is likely that evidence of rates paid by other employers was contemplated.

[100] That interpretation is reinforced by the following considerations.

[101] First, in an exclusively female workforce, there would obviously be no male employees doing the same work. Of necessity, the comparison cannot be internal. It must be external. And it is reasonable to assume that what applies to an exclusively female situation was also intended to apply to a predominantly female situation. Section 3 subjects them both to the same test and does not distinguish between them.

[102] Secondly, if all that was required was for an employer to point to what it pays male employees doing the work predominantly performed by women, there would be no point in having predominantly female workforces as part of the second distinct category. They would be subsumed within the category one cases.

[103] We therefore reject the argument that the sole mischief the Act was intended to address was different rates paid by the same employer to males and females for the same work. We similarly reject the argument that in a predominantly female workforce what was intended was a solely internal comparison limited to the wage rates and policies of the employer concerned.

Purpose of the Act and the definition of equal pay

[104] The issue then becomes what sort of external evidence can be considered? That is, in determining the rate that would be paid to the notional man contemplated by s 3(1)(b), to what can extent can evidence of rates paid by other employers or in other sectors and evidence of systemic undervaluation be taken into account?

[105] Section 3(1)(b) places no restrictions on the scope of external comparisons other than to require that any evidence must bear on what would be paid to a hypothetical male with the same or substantially similar skills, responsibility and service performing the work.

[106] In the absence of any express restrictions or guidelines, we agree with the

Employment Court that the purpose of the Act and the definition of "equal pay" become particularly important. As mentioned above, the purpose of the Act is to remove and prevent sex-based discrimination in the rates of remuneration of males and females in paid employment. The definition of equal pay is a rate of pay for work in which rate there is "no element" of sex-based differentiation.[59]

[107] The phrase "no element" makes it difficult to argue, as Terranova did, that Parliament did not intend the Act's purpose to the fullest possible extent.

[108] If it could be proved that there was systemic undervaluation of care giving work derived from current, historical or structural gender discrimination, then in our view it would be consistent with the Act's purpose and the definition of equal pay for such evidence to be taken into account in determining what the employer would pay the hypothetical male. A rate of pay that is depressed because of sex-based undervaluation of the work is not a rate in which there is no element of sex-based differentiation.

[109] Looking at it another way, if Parliament did not intend it to be a complete answer for an employer to point to its male employees in the case of a predominantly female workforce, the question has to be asked "why not"? If the Act were limited to requiring equal pay for the same or similar work, it would make sense for the inquiry to end there. It is reasonable to assume the answer can only be that it was because of concern that a male rate in a predominantly female workplace might contain gender bias due to the work in question being considered women's work. That is to say, the male rates might also be depressed because of gender bias.

[110] It also seems to us that once it is accepted (as in our view it must be) that Parliament intended the inquiry to extend beyond the particular workplace and employer, it is very difficult to justify excluding evidence of male rates in other

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[59] Equal Pay Act, s 2.

sectors and evidence of systemic undervaluation by reference to the language of the Act and its purpose.[60] There is nothing in the language of the Act to justify exclusion. And good reason to admit it in terms of the purpose and the definition of equal pay.

Arguments made by Terranova

[111] Terranova and some of the interveners argue to the contrary. They submit the Employment Court's interpretation does mischief to the plain words of the statute. In support of that contention, they advance the following arguments.

The title of the Act

[112] Counsel point out that the title of the Act refers to equal pay, not pay equity, and that the words "pay equity" do not appear anywhere in the legislation.

[113] However, in our view no significance can properly attach to the use of the term "equal pay" or the absence of the phrase "pay equity", especially when the statutory definition of equal pay is so broad and capable of embracing pay equity. It is hardly surprising that the Act does not contain any express reference to pay equity. That term does not appear to have been in common parlance in 1972, although the concept was known and understood. Pay equity is about equal pay. It is equal pay for work of equal value.

[114] We see no merit in this argument.

[115] We accept, as submitted by the Attorney-General, that courts should be wary of updating legislation in a way that would have extensive social, cultural and economic impacts not contemplated by Parliament. However, the existence of entire industries that may be underpaid because they are female-dominated was undoubtedly something of concern to the 1972 Parliament.

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[60] The Attorney-General suggests a principled basis to exclude such evidence might be the single source doctrine. For the reasons discussed below at [232]–[235], we do not accept that suggestion.

Use of the definite article

[116] Terranova relies on the following uses of the definite article in the Act:

(a) in the long title – "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 …";

(b) the references in s 3(1) and (2) to differentiation "based on the sex of *the* employees"; and

(c) the references throughout s 3 to "the" work.

[117] This is said to support the interpretation that it is the rates of pay the relevant employer pays to *its* employees that are relevant in determining whether equal pay has been achieved.

[118] The use of the word "the" in the long title is curious but in our view it can easily be read as a description of employees generally. The long title is expressed in terms of high generality and, as the Employment Court noted, without any immediately apparent restriction.[61] In any event, the existence of the exclusively female category means that it simply cannot be the case that the only rates of pay that are relevant are those the particular employer pays.

[119] Similarly, the use of the definite article in the phrase "the work" is inconclusive. The definite article is only used because the test is formulated in the way it is; that is, in terms of a male performing the same work as the female complainant. Hence the reference to "the" work. But that cannot in itself preclude a pay equity analysis, not when the test posits a hypothetical male and when the test is to be applied when there are in fact no actual males doing the work.

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[61] Employment Court judgment, above n 1, at [33].

"Any instrument"

[120] According to Terranova, the phrase "under any instrument" in s 3(1) supports the requirement for a confined analysis, as it appears to refer to a single instrument.

[121] We disagree. Under the Act, "instrument" is defined so as to mean, in essence, a contract of employment.[62] The phrase "under any instrument" is preceded by the word "payable" and so is clearly a reference to the rates of remuneration. The only limiting effect of the word "instrument" is therefore to confine the Act to being an Act about payments made under employment contracts, as opposed to other types of contracts. It does not in our view take matters any further on the issues before us. In particular it does not indicate a restrictive comparison to work covered by the same instrument.

Section 2(2)

[122] Section 2(2) provides an exception to coverage under the Act.

[123] It states that nothing in the Act shall apply to an agreement that fixes a rate of remuneration that is special to an individual employee:

> … by reason of special qualifications, experience, or other qualities possessed by that employee and does not involve any discrimination in relation to that employee or any other employee based on the sex of the employee.

[124] Terranova submits that this section contemplates a comparison between two employees *within* the employer's workforce, and therefore supports Terranova's approach to s 3(1)(b).

[125] We agree the relevant comparison under s 2(2) is within the relevant workplace, but that is because of the category of case it concerns. Its purpose is to exclude from the ambit of the Act a situation where an employer rewards an individual employee by paying him/her more than its other employees on the grounds of factors such as his/her qualifications. So long as the reason for singling

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62 Section 2.

out the favoured employee is not gender-based, the Act does not apply. In our view, this provision can have little or no bearing on the interpretation of s 3(1)(b).

Section 2A

[126] Section 2A was inserted into the Act by s 3(1) of the Equal Pay Amendment Act 1991.

[127] Section 2A states:

> **2A Unlawful discrimination**
>
> (1) No employer shall refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.
>
> (2) Where an employee would be entitled to make a complaint in respect of a breach of this section or make a complaint under the Human Rights Act 1993, the employee may choose 1 of those entitlements but not both.

[128] Terranova and some of the interveners argue that s 2A reinforces the singular nature of the inquiry and the focus on a particular employer, not employers generally.

[129] However, in our view, the section is at best ambiguous on that point. While there is reference to a single employer at the beginning of s 2A(1), that is plainly a reference to the employer of the female worker alleging a breach of the Act. Crucially, in discussing the appropriate comparator, the section simply uses the phrase "as are made available". It does not say "as are made available by that employer".

[130] The wording does not in itself provide strong support for a cross-employer or cross-sector comparison. But nor does it support Terranova's position.

The s 3(1)(b) criteria are exhaustive

[131] Counsel argue that the criteria specified in s 3(1)(b) (similar skills, responsibilities and so on) are exhaustive and that in requiring evidence of any systemic undervaluation to be taken into account, the Employment Court has inserted an additional criterion that is not there.

[132] We agree the criteria are mandatory and exclusive. However, in our view, correctly analysed what the Employment Court has done is to identify an inherent aspect of the existing test, rather than insert an additional criterion.

Hypothetical comparator

[133] Terranova emphasises that the test is not formulated in terms of what is paid to an actual or real male comparator elsewhere performing other types of work, but a hypothetical male performing the same or substantially similar work to the complainant.

[134] We agree. Section 3(1)(b) assumes a comparison with a hypothetical male performing *the* work, in this case care giving work. The drafting of s 3(1)(b) is cryptic, but the hypothetical male does not exist in a vacuum and the only way of making sense of the provision is to identify an appropriate counterfactual and the evidence that is relevant to determining that counterfactual. As the Attorney-General acknowledged, it is difficult to say in the abstract that as a matter of law particular types of evidence will never be relevant. The evidential value can only be determined on a case by case basis.

[135] In our view, it can however be said with some confidence that a male employee whose pay rate is distorted by systemic undervaluation cannot be an appropriate counterfactual.

The same or substantially similar conditions

[136] It is also argued that to look at work done for other employers, especially those in other sectors, would be to look beyond work done under the same or substantially similar conditions.

[137] That may or may not be the case. This is a factual issue. Further comment in the absence of known facts is undesirable.

Section 4

[138] For completeness in this section, we should record that we have considered whether the interpretation of s 3(1)(b) can be informed by s 4.

[139] Section 4(1) states as follows:

> **4 Determination of equal pay**
>
> (1) Where any instrument in force at the passing of this Act or coming into force before 1 April 1973 makes separate provision for the remuneration of female employees or makes provision for the remuneration of female employees only, then, subject to subsection (5) and to section 5, and notwithstanding anything in any other Act, the following determinations shall be made not later than the first increment date for the purpose of implementing equal pay, namely:
>
> (a) the classifications of the work performed by those female employees in relation to work performed by male employees, those classifications being determined in accordance with the criteria set out in section 3; and
>
> (b) the rates of remuneration that would represent equal pay for each such classification, those rates being determined in accordance with the criteria set out in section 3; and
>
> (c) the minimum percentage, determined,—
>
> (i) in the case of any award to which section 6 applies, in accordance with the said section 6; or
>
> (ii) in the case of any other instrument, in accordance with the said section 6 as applied to that other instrument by section 7,—
>
> that the rate of remuneration for female employees in each classification shall bear, on the first, second, third, fourth, and fifth increment dates (as determined pursuant to the said

> section 6), respectively, to the rate of remuneration for male employees in relation to whom the classification has been made in accordance with the criteria set out in section 3.

[140] Section 4(2) goes on to state that the persons who must carry out the determinations required by s 4(1) are the parties to the instrument or their representatives.

[141] At the time of enactment s 4 was a key operative provision, if not *the* key operative provision, of the Act. It has no direct application to this case because it applies only to instruments that were in force at the time the Act was passed or that came into force before 1 April 1973. However, it is potentially significant because it outlines a procedure for bringing employment agreements into line with equal pay principles by applying the s 3(1) criteria.

[142] Unfortunately, s 4 raises more questions than it answers.

[143] It is expressed to apply only to instruments that:

(a) make separate provision for the remuneration of female employees; or

(b) make provision for the remuneration of female employees only.

[144] Presumably the latter category includes not only instruments that explicitly provide solely for females, but also those under which only women are in fact employed.

[145] But what of instruments that do not have separate male and female rates and under which both men and women are employed? Section 4 appears to exclude them altogether, which is inconsistent with s 3(1) and its reference to work that is exclusively or *predominantly* performed by women.

[146] The two are irreconcilable and we have been driven to the conclusion that

this tension between the two sections is the result of poor drafting rather than nuanced legislative intent. We have not found s 4 to be of any practical assistance in interpreting s 3.

Conclusion on text

[147] Based in particular on the existence of the two categories in s 3(1), the purpose of the Act and its definition of equal pay, we have reached the preliminary conclusion that the Act is not limited to providing for equal pay for the same or similar work. Our interpretation of the Act's text leads us to the view that in determining what would be paid to the hypothetical man posited by s 3(1)(b), it may be relevant to consider evidence of wages paid by other employers and in other sectors. Further, any evidence of systemic undervaluation of the work in question must be taken into account.

Workability, the absence of guidelines and s 9

The arguments

[148] Terranova relies heavily on the principle of statutory interpretation that if a provision is capable of several meanings, the court should select the one that is the most practical and sensible.[63] This is a key plank of Terranova's argument. It is submitted that the Employment Court's interpretation in this case leads to an unjust and unworkable result, which Parliament should not be taken to have intended.

[149] The reason the interpretation is said to be unjust and unworkable is that it requires individual employers to "shoulder the burden of rectifying society-wide structural discrimination" and to undertake assessments that are simply beyond their expertise and resources.[64] Counsel emphasise the complexity of issues relating to

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63 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 329; *Director-General of Education v Morrison* [1985] 2 NZLR 430 (CA) at 435; *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC) at 620; and *Official Assignee v Noonan* [1988] 2 NZLR 252 (CA) at 255.

64 This quote is from the Attorney-General's written submissions, but also reflects the argument made by Terranova.

systemic undervaluation, as well as the inability of employers to access information about the wage structures of other employers, especially in this age of individual employment agreements. In answer to an observation made by the Employment Court about parties being able to access information from employer groups and unions,[65] counsel also point out that the vast majority of modern employment relationships are between a single small employer, who may or may not belong to an industry body, and an individual employee who is not a union member.

[150] Another related argument is that if Parliament had intended to impose such a significant burden on employers, with such far-reaching social and economic implications, it would have said so expressly and unequivocally and provided a mechanism by which those issues could be addressed, as it did in the later Employment Equity Act. The absence of any express reference to other sectors and other employers and the absence of guidelines is said to be telling. So too is the absence of any indication as to how equal value is to be assessed, the factors to be taken into account or how the necessary cross-sector comparisons are to be made.

[151] Also said to be telling is the relatively short period of the implementation phase under the Act. It is submitted that if Parliament had intended the sort of complex inquiries the Employment Court interpretation requires, it would have allowed more than five years for implementation.

[152] In response, the Union argues that it is wrong to claim the Act does not provide any guidelines. The Union submits that guidelines have been provided in the form of the power conferred on the Employment Court under s 9 to state general principles for the guidance of the parties in implementing equal pay.

Section 9

[153] Section 9 features large in the arguments and it is convenient at this point to turn to a more detailed consideration of it.

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65 Employment Court judgment, above n 1, at [105].

[154] Section 9 states:

> **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.

[155] On any view of it, the power conferred by s 9 is very open-ended.

[156] Unfortunately, its legislative history sheds little light as to its intended function.

[157] Section 9 is the result of a recommendation in the Commission report. The only discussion of the purpose of the section in the report is the following passage:[66]

> We contemplate that the Court of Arbitration will have a positive role to play in the implementation of equal pay. In particular, it should have the authority to state guidelines by annexing to its decisions on early cases before it, especially those that may be regarded as "test" cases, an extended memorandum setting out the reasons for its decision and the rules it would adopt in future.

[158] The section is mentioned only once in the debates relating to the Equal Pay Bill 1972. At the second reading of the Bill, the Hon David Thomson (then Minister of Labour) stated:[67]

> Provision is made for the Court of Arbitration to state general principles to be observed for the implementation of equal pay in accordance with clauses 3 to 8 of the Bill for the guidance of parties in negotiations. It may well seem desirable to the court to make a statement after considering early applications to it, as this could be of great assistance in guiding the parties in later negotiations.

[159] No other mention is made of s 9 in the materials accompanying the Equal Pay Act. The Select Committee that reviewed the Bill did not amend or comment on the section.

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66 Commission report, above n 9, at [4.30].

67 (11 October 1972) 381 NZPD 3234.

[160] As far as we are aware, neither the Court of Arbitration nor any of its successors has ever exercised the powers under s 9.

[161] As mentioned above, the Union submits that s 9 provides the vehicle for establishment of otherwise absent guidelines for the implementation of pay equity. However, it is arguable that the fact s 9 received so very little attention indicates it was never intended to be particularly important in the operation of the Act. If Parliament had intended the section to fill such a crucial gap in the legislative machinery, one might for example have expected at least some discussion about it during the Bill's passage through the House.

[162] On the other hand, if the obligation of an employer was simply to pay its female employees the same wages as its male employees doing the same work, it is difficult to understand why Parliament thought it necessary to confer any guidelines-making power on the Court at all.

[163] In our view, attributing weight to the lack of historical analysis of s 9 is problematic having regard to the "hands-off" and question-begging approach to legislative drafting evident in the rest of the Act. The unfortunate reality is that it is simply not possible to read the Act as a carefully drafted and well thought-out piece of legislation.

Our assessment

[164] We accept that there is force in Terranova's workability argument and that this case is likely to be complex and difficult when it does eventually come to trial.

[165] We accept too that a "hypothetical male performing the work" test is a rather unusual and oblique way of achieving cross-sector comparisons if that was what was intended. Usually pay equity schemes contain guidelines as to how the value of work is to be determined and/or a detailed model job evaluation system.[68]

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[68] See Commission of Inquiry into Equal Pay *The Implementation and Administration of Equal Pay for Equal Work in Some Other Countries* (March 1971); Urban Research Associates, Hyman and Clark, above n 16, at 39–45; and Michael Rubenstein "Discriminatory Job Evaluation and the British Equal Value Law" (1986) 7 Comp Lab L 166.

[166] Equally, however, it could be said that if Parliament intended to confine any comparison to a single workplace or employer, it would have been an easy matter for it to have said so expressly, as was done by the United Kingdom Parliament. It is likely the New Zealand Parliament was aware of the United Kingdom legislation. Certainly it was expressly mentioned in the Commission report.

[167] Further, we have concluded that the existence of s 9 does temper concerns about complexity and the lack of guidelines and that it has an important function to play.

[168] We envisage an important part of the Employment Court's task under s 9 as being to state general principles that will ensure substantive claims are able to be processed in an efficient and manageable way. It will be for the Court in the s 9 context, for example, to identify appropriate comparators and to guide the parties on how to adduce evidence of other comparator groups.

[169] Another important counterbalance to concerns about the potentially open-ended nature of this type of litigation is the duty imposed on all courts by s 8 of the Evidence Act 2006. Under s 8, the Employment Court will be required to exclude evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding. The Court also has a responsibility to manage the case closely to keep it within reasonable bounds.

[170] We also agree with the Union and the Human Rights Commission that some of the claims about workability have been overstated. The Human Rights Commission points out that there is in fact a variety of data about comparative wage rates available in the public domain and that it had no difficulty obtaining comparative data for the purposes of its study on aged care workers. The New Zealand Council of Trade Unions says there is no doubt that relevant information and expertise is available to inform the issue of what comparators may or may not be relevant and gives examples.

[171] Further, it appears from reports submitted by the New Zealand Government to an International Labour Organisation committee that considerable work on pay equity has already been done in New Zealand (albeit in the public sector) by the former Pay and Employment Equity Unit in the period 2004 to 2009.[69] In a 2011 report, the New Zealand Government also informed the Committee that an equitable evaluation tool was available for employers on the Department of Labour website.[70]

[172] Our conclusion on the issue of workability is that it is a fair point and one we have taken into account. However in our assessment, for the reasons identified above, it is not determinative and in particular it does not persuade us to depart from the meaning derived from the language and the purpose of the Act.

[173] In our view, issues of workability are best left to the Employment Court in the context of its s 9 inquiry. It is for the Employment Court to give guidance as to how the exercise can be done efficiently.

[174] Finally, for completeness in this section we note that a further aspect of workability raised by Terranova relates to the extent of its dependence on government funding. Counsel described this as "a unique characteristic" of the rest home sector and illustrative of the difficulties an employer may face if required to conduct cross-industry comparisons. We have considered whether an employer's source of revenue or ability to pay form part of the "conditions" under which the hypothetical male comparator is performing the work, in which case they would be able to be taken into account under s 3(1)(b). However, we have concluded that they do not. The word "conditions" must refer to the terms and conditions of employment as well as (possibly) the physical conditions under which the work is

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69 New Zealand Government *Report for the period 1 July 2004 to 31 May 3006 made by the Government of New Zealand on the Equal Remuneration Convention, 1951 (No 100)* (2006); New Zealand Government *Report for the period 1 July 2006 to 31 May 2008 made by the Government of New Zealand on the Equal Remuneration Convention, 1951 (No 100)* (2008); and New Zealand Government *Report for the period 1 July 2008 to 31 May 2010 made by the Government of New Zealand on the Equal Remuneration Convention, 1951 (No 100)* (2010).

70 International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2011, published 101st ILC session, 2012).

being performed. In any event, Terranova was at pains to stress that it was not suggesting that affordability should drive the Court's interpretation of s 3(1)(b).

[175] We turn now to consider other issues raised by the parties that were said to bear on the interpretation of s 3(1)(b) and the correctness of the Employment Court's answers.

The existence of a settled interpretation

[176] According to some of the submissions we have received, for 40 years the Act has been interpreted as a statute about equal pay, not pay equity. It is also claimed that there is no evidence of anyone attempting to conduct cross-occupational or cross-industry surveys for the purpose of the Act until the test case brought by the Clerical Workers Union in 1986.[71] Yet the determinations were required to be made by 1977.

[177] Clearly nothing that happens after an Act has been passed can affect the actual legislative intention at the time it was enacted. We must accordingly be careful not to place too much weight on subsequent events in interpretation. In any case, it is apparent that s 3(1)(b) was recognised as problematic from the outset by employers and unions alike. In 1975, the Review Committee appointed by the Minister of Labour expressly recorded that of all the provisions in the Act, s 3(1)(b) was proving to be the most difficult to interpret and implement.[72] The Committee was also highly critical of the restrictive and in its view erroneous way in which the Arbitration Court was applying the Act. In those circumstances it is not possible to be categorical about the reasons for what happened in practice.[73]

[178] The 1986 decision of the Arbitration Court, which held the Court had no

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71 *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd*, above n 29.

72 1975 report, above n 23, at [5.72].

73 According to one commentator, publications issued by the New Zealand Employers' Federation in 1973 show that it was of the understanding that the Equal Pay Act had introduced pay equity: Orr, above n 27.

jurisdiction to make comparisons outside the relevant award, is of course directly on point and does support the Terranova position.

[179] It is not, however, binding on this Court. Further, its persuasive value is limited, as it was an oral judgment and not closely reasoned. The Court did not even examine the wording of s 3(1)(b) because it erroneously concluded that the s 3(1) criteria were only relevant for making equal pay determinations under the spent s 4. It overlooked that s 3 expressly states that the criteria are to be used not only for the purpose of s 4 but also for the purpose of determining whether an element of sex-based differentiation in pay exists.[74]

[180] We note too that the Arbitration Court did not consider an earlier decision of its predecessor, the Industrial Commission, in which the Commission had looked for a comparator outside the award in issue.[75]

[181] We agree with the Employment Court that the 1986 Clerical Workers decision does not amount to a definitive view on the scope of the Act and that little weight can be placed on it.[76]

The enactment and repeal of the Employment Equity Act

[182] Terranova submits that the enactment and repeal of the Employment Equity Act in 1990 demonstrate that Parliament never intended the Equal Pay Act to provide a remedy for systemic undervaluation or to allow cross-sector comparisons. Otherwise, there would have been no need for the Employment Equity Act. It submits that the courts should interpret the 1972 Act as being consistent with the 1990 Act and that this requires the 1972 Act to be limited to equal pay for the same work.

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74 The Employment Court found that the reason the Arbitration Court did not consider s 3(1)(b) was because of a Union concession that there was no differentiation: Employment Court judgment, above n 1, at [72]. However our reading of the decision is that the concession the Union made was there was no differentiation in the rates paid to male and female workers covered by the Clerical Workers Award.

75 *Dunedin City Council Women's Rest Room Attendants* [1976] ICR 7067.

76 At [72].

[183] As for the subsequent repeal of the Employment Equity Act, Terranova submits that was a policy decision against legislating for pay equity, which the courts should not subvert through the back door by reinterpreting the Equal Pay Act.

[184] Terranova also points to the fact that the Employment Equity Act contained comprehensive machinery for the achievement of pay equity. It included the creation of a new statutory body charged with undertaking pay equity assessments in accordance with prescribed criteria. Terranova argues that such a detailed scheme stands in stark contrast to the absence of any such scheme in the 1972 Act and further evidences Parliament's intention both in 1972 and in 1990.

[185] Similar arguments were addressed to the Employment Court and rejected. The Court held it did not draw assistance from a subsequent Parliament's expressed view as to what an earlier and differently constituted Parliament may or may not have intended when enacting legislation.[77]

[186] Official reports leading up to the enactment of the Employment Equity Act suggest that opinion was divided as to why the Equal Pay Act had failed to deliver pay equity. In some reports, the view is expressed that the true intention of the Equal Pay Act was frustrated by inadequate policing and unduly restrictive attitudes on the part of employers, unions and the Arbitration Court.[78] In later reports it appears to have been accepted that the Equal Pay Act did not provide a remedy for a claim based on equal pay for work of equal value and that accordingly a new Act was required.[79]

[187] The parliamentary debates leading to the enactment of the Employment Equity Act reveal the same tension.[80] The Chairwoman of the relevant Select

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77 At [100].

78 For example, Urban Research Associates, Hyman and Clark, above n 16; and Equal Pay Steering Committee, above n 25.

79 For example *Towards Employment Equity*, above n 36.

80 (5 December 1989) 503 NZPD 14333–14352; (31 May 1990) 507 NZPD 1908–1918; (13 June 1990) 507 NZPD 2021–2039; (14 June 1990) 507 NZPD 2073–2084; (17 July 1990) 509 NZPD 2819–2835.

Committee is recorded as having stated that it was always intended the Equal Pay Act would provide not only equal pay for equal work but also equal pay for work of equal value.[81] Other speakers however, including the Minister of Labour introducing the Bill and the Prime Minister, appear to proceed on the basis that the Equal Pay Act did not permit cross-sector comparisons and that pay equity was something new.

[188] Yet if the materials relating to the enactment of the 1990 Act are inconclusive as to Parliament's understanding of the Equal Pay Act (which is arguable), the same cannot be said of the materials relating to its repeal.

[189] Those materials strongly suggest that the reason the Employment Equity Act was repealed was because a differently constituted Parliament was opposed in principle to legislating for pay equity. That is to say, it was not because Parliament considered pay equity or some equivalent was already available under the Equal Pay Act and preferred the mechanism of that Act to the mechanism provided in the Employment Equity Act. The prevailing view appears to have been that there were more effective means of reducing the pay gap than pay equity, such as bolstering human rights legislation and ensuring women had equal opportunities for promotion in the workplace and access to higher paid occupations. At the same time as the Employment Equity Act was repealed, the Equal Pay Act was amended to include a new anti-discrimination provision – s 2A.[82] The Employment Contracts Act was enacted several months later.

[190] A further dimension arises out of an argument that the Employment Court's interpretation cuts across existing bargaining structures and is inconsistent with the modern emphasis on individual employment agreements and enterprise bargaining. One response to that argument is to point out that on every occasion Parliament has changed wage fixing systems, it has at the same time updated the definition of "instrument" in the Act. Thus when the Employment Contracts Act was enacted, the definition of "instrument" was amended so as to include individual employment

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81 (14 June 1990) 507 NZPD 2074.

82 Section 2A is discussed above at [126] to [128].

agreements, thereby indicating that Parliament saw no difficulty in the Act continuing to apply under the new employment framework.

[191] However, that may not be a valid answer if the reason why Parliament did not amend the Equal Pay Act in any significant way was because it saw no need to do so, relying on the 1986 Arbitration Court decision. Had the 1991 Parliament appreciated that the Act required consideration of cross-sector pay equity issues, then, so the argument runs, it would have been likely to have made more radical amendments.

[192] We have been troubled by these issues.

[193] The general rule is that subsequent statutes are irrelevant as an interpretative aid.[83] This is because, as mentioned above and emphasised by the Employment Court, nothing that happens after an Act has been passed can affect the intention of the Parliament that enacted it. There are, however, two established exceptions to that rule worth mentioning in relation to this case.

[194] The first is where the two statutes have a single subject matter, so it can be assumed that uniformity of language and meaning was intended.[84] This is sometimes referred to as the *in pari materia* principle. Although Terranova has sought to rely to some extent on this principle, it does not apply here. The fact that the two Acts both broadly deal with gender discrimination in rates of remuneration is not sufficient to justify a unified interpretative approach.

[195] The second potentially relevant exception is based on legislative harmony and the desirability of keeping the statute book as a whole as rational and consistent

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83 Burrows and Carter, above n 63, at 250; and *R v Central Criminal Court, ex parte Francis and Francis* [1989] AC 346 (HL) at 395.

84 FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 603–604 and 708.

as possible.[85] Thus the courts have held that where there are two competing interpretations of an Act, and one interpretation means a later Act was unnecessary, the other interpretation should be preferred. Parliamentary time is sufficiently precious for Parliament not to pass unnecessary Acts.[86]

[196] Similarly, it has been held in an English case that if Parliament drafting an Act did so on the assumption that an earlier Act had a particular meaning, then although the later Parliament may have been mistaken in its interpretation, the court should assume it was not so mistaken and in the absence of clear words seek to construe the earlier Act so as to accord with Parliament's understanding of its effect.[87]

[197] Counsel for Terranova seeks to extend the principle of legislative harmony still further by contending, in effect, that even if the words are clear and a court concludes the later Parliament *was* mistaken in its interpretation, it may still be necessary to give effect to that understanding in order to avoid the overall legislative scheme being subverted. In support of that submission, Mr Waalkens QC referred us to the following passage from the Supreme Court decision *West Coast Ent Inc v Buller Coal Ltd*:[88]

> [174] Legislatures sometimes enact legislation on the basis of an understanding of existing law. If the understanding is incorrect, such an enactment does not usually retrospectively alter the effect of the law as it was at the time of enactment. But where, as here, an amendment Act is based on a particular understanding as to the effect of the principal Act it may sometimes be necessary to give effect to that understanding to avoid the overall legislative scheme being subverted. As is apparent, we see such an interpretation as necessary to avoid a subversion of the scheme and purpose of the RMA as amended.

[198] We accept that arguments based on the 1990 legislation have some merit and that the Employment Court was too dismissive of them.

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85 Burrows and Carter, above n 63, at 247 and 250; Kent Greenawalt *Statutory and Common Law Interpretation* (Oxford University Press, New York, 2013) at 110; Aharon Barak *Purposive Interpretation in Law* (Princeton University Press, Princeton, 2005) at 353–354; and *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [41].

86 *Murphy v Duke* [1985] QB 905 (QB).

87 *Re Billson's Settlement Trusts* [1985] Ch 409 (CA).

88 *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 (footnotes omitted).

[199] However, while we are prepared to take the subsequent legislation into account, the assistance that can be derived from it must be limited having regard to the following considerations:

(a) The 1990 Act has been repealed and so even if inconsistency between the two Acts would arise from a pay equity interpretation of the 1972 Act (which is itself debatable), the case for preserving legislative harmony is obviously weaker.

(b) The 1990 Act is not necessarily inconsistent with the Employment Court's interpretation of the Equal Pay Act. That is to say, a pay equity interpretation of the 1972 Act does not necessarily render the 1990 Act a waste of parliamentary time. The long title of the 1990 Act says it is an Act to establish *procedures* that have as their purpose the achievement of employment equity. It is therefore possible to view the 1990 Act as introducing a mechanism by which the principle of pay equity (already provided for in general terms in the 1972 Act) could be more effectively implemented.

(c) To the extent any inconsistency does arise, it results not so much from the provisions of the Acts themselves but rather from the parliamentary materials relating to the 1990 legislation and its repeal. This somewhat lessens the importance of the inconsistency.

(d) It is not possible to conclude with confidence that it is necessary to give effect to the 1990 Parliament's understanding of the Equal Pay Act in order to avoid the overall legislative scheme being subverted (in terms of the test in *West Coast Ent Inc*).

(e) It is also not possible to conclude with confidence that the limited nature of the amendments made to the Equal Pay Act in 1991 is attributable to a mistaken interpretation of the Equal Pay Act, nor that the limited nature of those amendments will subvert the overall legislative scheme if the mistaken interpretation is not adopted.

[200] In short, Terranova has raised some highly arguable issues about the implications of the 1990 legislation but, for the reasons explained, we do not consider them to be determinative.

The Employment Court's reliance on the New Zealand Bill of Rights Act 1990

[201] The Employment Court said it was "fortified" in its interpretation of the Act by the New Zealand Bill of Rights Act 1990 (the Bill of Rights), New Zealand's international obligations and the legislative history of the Equal Pay Act.[89]

[202] The Employment Court's reliance on these three matters was the subject of much argument at the hearing before us.

[203] For the reasons already discussed, we do not consider the legislative history of the Act (the Commission report and the parliamentary debates) lends much assistance.

[204] We now turn to consider what support can properly be derived from the Bill of Rights.

[205] Section 19(1) of the Bill of Rights provides that everyone has the right to freedom from discrimination on the grounds of discrimination identified in s 21 of the Human Rights Act 1993. Sex is a prohibited ground of discrimination under s 21.

[206] The Employment Court held that Terranova's reading of s 3(1)(b) was a narrow approach and would be inconsistent with s 19. It stated that:[90]

> … rather than removing and preventing discrimination a narrow approach may simply perpetuate discrimination in rates of pay to women in female dominated workplaces or sectors in circumstances where lower rates of remuneration are paid on the basis of sex.

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89 Employment Court judgment, above n 1, at [47].
90 At [53].

[207] Having found that Terranova's interpretation was inconsistent with s 19, the Court then considered whether it could be justified under s 5, which provides that the rights and freedoms in the Bill of Rights may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, the Court held that no basis had been made out by Terranova for a finding that a limited approach to s 3(1)(b) could be justified on those grounds and so concluded that Terranova's interpretation would be inconsistent with the Bill of Rights.[91]

[208] The Court then applied s 6 of the Bill of Rights and found it mandated a broad interpretation of the Equal Pay Act. Section 6 states:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[209] The Employment Court concluded:[92]

> [55] There is a positive obligation on courts to develop the law consistently with the rights and freedoms contained in the Bill of Rights Act. The exercise is not to be approached as if to do no more than preserve the status quo. We consider that a broader interpretation of s 3(1)(b) is to be preferred, as being consistent with s 19 of the Bill of Rights Act and the purpose of eliminating both direct and indirect discrimination against women. Such an interpretation does not require the language of s 3(1)(b) to be unnecessarily strained.

[210] We disagree with this analysis. In our view, the Bill of Rights does not impact on the interpretation of s 3(1)(b) of the Equal Pay Act and the Employment Court was wrong to rely on it.

[211] It is important to bear in mind that the present case is not a claim filed under the Human Rights Act alleging that Terranova's conduct is a substantive breach of the standard in s 19 of the Bill of Rights. Rather, the issue is about the interpretation of a statute and whether it is correct to use ss 6 and 19 of the Bill of Rights to assert that the courts must adopt a particular interpretation of the Equal Pay Act.

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91 At [54].

92 Footnotes omitted.

[212] Section 6 requires the court to prefer a meaning that is consistent with the rights and freedoms contained in the Bill of Rights over "any other meaning". In this context, the phrase "any other meaning" can only refer to a meaning that is inconsistent with the rights and freedoms contained in the Bill of Rights. Section 6 thus only applies where on one interpretation of a provision, the provision is inconsistent with a protected right or freedom.

[213] That is not the case here. Even on Terranova's interpretation, the Act is not discriminatory. The Act does not itself infringe s 19. It simply may provide either greater or lesser protection against discrimination by employers. To put it another way, Terranova's interpretation does not mean that the Act breaches s 19 but simply that the scope of the protection it provides may be narrower than the scope of the protection provided by s 19. And there is nothing in the Bill of Rights requiring courts to read all other statutes as positively replicating the extent of the protection in the Bill of Rights itself.

[214] In our view, it follows that s 6 is not engaged because there can be no initial finding that Parliament's intended meaning is inconsistent with a relevant right or freedom.[93]

The Employment Court's reliance on New Zealand's international obligations

[215] As mentioned in the Employment Court decision, New Zealand is a party to a number of international instruments concerned with equal pay and the rights of women.[94]

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93 As per the statutory sequence set out by Tipping J in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92].

94 At [57]–[65]. International Labour Organisation Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (No 100) 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953), art 2; International Labour Organisation Convention Concerning Discrimination in Respect of Employment and Occupation (No 111) 362 UNTS 31 (opened for signature 25 June 1958, entered into force 15 June 1960), arts 1(b) and 2; Treaty of Peace between the Allied and Associated Powers and Germany 225 CTS 188 (opened for signature 28 June 1919, entered into force 10 January 1920); Declaration Concerning the Aims and Purposes of the International Labour Organisation (adopted 10 May 1944); *Universal Declaration of Human Rights* GA Res 217A, III, A/810 (1948), arts 7 and 23(2); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 7; and Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981), art 11.

[216] Of these international instruments, the most directly relevant and the one that dominated argument before us is the International Labour Organisation (ILO) Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value (Convention 100), adopted in 1951 by the International Labour Conference.

[217] Article 2(1) of Convention 100 provides:

> Each member shall, by means appropriate to the methods in operation for determining rates of remuneration and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

[218] Compliance with ratified ILO conventions is monitored by the Committee of Experts on the Application of Conventions and Recommendations (the ILO Committee).

[219] The ILO Committee has repeatedly emphasised that Convention 100 provides for equal pay for work of equal value and that this is a wider concept than equal pay for the same or similar work.[95]

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[95] International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 1992, published 79th ILC session, 1992); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 1994, published 81st ILC session, 1994); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 1998, published 87th ILC session, 1999); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2001, published 90th ILC session, 2002); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2003, published 92nd ILC session, 2004); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2005, published 95th ILC session, 2006); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2007, published 97th ILC session, 2008); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2009, published 99th ILC session, 2010); and International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2011, published 101st ILC session, 2012).

[220] Terranova acknowledges that the principle of equal remuneration for work of equal value under Convention 100 extends beyond requiring equal pay for the same work.

[221] New Zealand ratified Convention 100 on 3 June 1983. At the time of ratification, the New Zealand Government reiterated that its practice is to ratify a convention only when satisfied New Zealand is compliant.[96] The Government further stated that the Equal Pay Act, the Government Service Equal Pay Act and the Human Rights Commission Act 1977 implemented the provisions of Convention 100.[97] The New Zealand Government has repeated those statements in subsequent reports to the ILO Committee. The ILO Committee disagrees and says New Zealand has not given full legislative effect to the principle of equal remuneration for men and women for work of equal value.[98]

[222] Terranova's position is that the ILO Committee is correct and that while the New Zealand Government wrongly claimed New Zealand was compliant, it must be taken to have later recognised it was not given that it enacted the Employment Equity Act.

[223] Business New Zealand, however, submits the Act does comply with Convention 100 but offers no explanation as to how it reconciles that assertion with its interpretation of the Act being limited to equal pay for the same work.

[224] Ironically, the New Zealand Council of Trade Unions has previously submitted to the ILO Committee that the Equal Pay Act does not comply with Convention 100. In 1992 it told the ILO Committee that under the Act, comparisons

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96 Hon Jim Bolger *Memorandum for Cabinet: International Labour Organisation Convention No 100: Equal Remuneration and Convention No 111: Discrimination (Employment and Occupation)* (March 1983) at [3].

97 At [3].

98 International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2007, published 97th ILC session, 2008); International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2009, published 99th ILC session, 2010); and International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2011, published 101st ILC session, 2012).

can only be made between workers employed by the same employer. For the purposes of this case, the Council of Trade Unions now submits that correctly interpreted the Act is compliant.

[225] In his submissions for the present case, the Attorney-General says it was never intended that the Equal Pay Act be the sole mechanism by which compliance would be achieved. The Attorney-General does, however, accept it is arguable New Zealand is not compliant with Convention 100.

[226] Against this confused background, what weight should a court endeavouring to interpret s 3(1)(b) of the Equal Pay Act place on Convention 100?

[227] It is now settled law that there is an interpretative presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations.[99] It was on this basis that the Employment Court derived support for its interpretation of the Equal Pay Act from Convention 100.[100]

[228] In doing so it appears to have assumed that at the time the Equal Pay Act was enacted, New Zealand had obligations under the Convention. However that is not correct. New Zealand did not ratify Convention 100 until 1983. There is also no mention of Convention 100 in the parliamentary debates leading up to the passing of the Act.

[229] On the other hand, the terms of reference for the Commission of Inquiry required it to report on, among other things, "a suitable formula to be adopted in giving effect to the principle of equal pay, *having regard, inter alia, to the provisions of International Labour Organisation Convention 100*".[101] Further, the Commission report expressly records that one of the factors in bringing forward a demand for equal pay was the existence of relevant international conventions.[102] The report goes

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99 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 298; *Sellers v Maritime Safety Inspector* [1992] 2 NZLR 44 (CA); *New Zealand Air Line Pilots' Assoc v Attorney-General* [1997] 3 NZLR 269 (CA); and Claudia Geiringer "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300.

100 At [56].

101 Commission report, above n 9, at 5 (emphasis added).

102 At [1.9].

on to refer to evidence the Commission heard from the Deputy Secretary of Labour regarding Convention 100:[103]

> It is an accepted position of the New Zealand Government that it does not ratify an international labour convention… (or)… any other international agreement unless it is satisfied without any doubt that its laws and, as appropriate, its practices comply with the terms of the convention. At the moment there is no provision for requiring equal pay in the private sector. Therefore New Zealand is not in a position to ratify this Convention.

[230] It is therefore reasonably arguable that Parliament enacted the Equal Pay Act in part to allow it to ratify Convention 100. This suggests Parliament considered the introduction of the Act brought New Zealand into line with the provisions of the Convention. However, there is still a need for some caution in relying on the Convention to support an expansive interpretation of s 3(1)(b). The obligations under the Convention are expressed at a high level of generality and importantly are subject to a qualification, namely that the means by which the principle of equal pay is implemented must be consistent with the member state's methods of remuneration. The effect of this qualification is not clear and potentially it could well bear on the scope of the permitted comparisons. That issue was not addressed by the Employment Court.

[231] In our view, in all the circumstances, the usefulness of Convention 100 as an interpretative aid is limited. We do not place the same weight on it as the Employment Court.

The single source doctrine

[232] Counsel for the Attorney-General submits that we should adopt an approach developed by the European courts called the "single source" doctrine.

[233] Article 157 of the Treaty on the Functioning of the European Union provides that each member state shall ensure that "the principle of equal pay for male and female workers for equal work or work of equal value is applied".[104]

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[103] At [1.10].

[104] Consolidated version of the Treaty on the Functioning the European Union [2008] OJ C115/47, art 157.

[234] Under art 157 there is no requirement that the selected comparator must be employed by the same or an associated employer. However, as interpreted by the European courts, the differences in pay between the complainant and the comparator must be attributable to a single source. That is to say, there must be a single body both responsible for and capable of remedying the pay inequality.[105]

[235] The single source approach has a certain logic to it. However, we are not persuaded it should inform the interpretation of s 3(1)(b). There is no evidence Parliament intended to adopt that approach and it is not supported by the wording of the Act or its purpose.

Conclusion

Our view

[236] As will be readily apparent, we have found this a difficult case to decide. There are strong arguments favouring both sides of the debate. We consider the issue more finely balanced than did the Employment Court. That is primarily because we place less weight than the Employment Court did on the Commission report, Convention 100 and the Bill of Rights, and place more weight than the Employment Court did on the enactment and repeal of the Employment Equity Act. Ultimately, our decision to dismiss the appeal has been driven by the language and purpose of the Act itself.

[237] In light of that language and the purpose, we agree with the answers given by the Employment Court.

[238] We emphasise that the questions have come before us in the context of a preliminary hearing, necessitating us to take an approach that does not prejudge the outcome of the hearing(s) to come.

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[105] Case C-320/00 *Lawrence v Regent Office Care Ltd* [2003] ICR 1092; Case C-256/01 *Allonby v Accroginton and Rossendale College* [2004] ICR 1328; *North Cumbria Acute Hospitals NHS Trust v Potter* [2009] ILRL 176 (EAT); *Armstrong v Newcastle Upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608; and *South Ayrshire Council v Morton* [2002] ICR 956 (OH).

Where to from here?

[239] In our view, the best way forward would be for the Employment Court to be asked to state principles under s 9 before embarking on the hearing of Ms Bartlett's substantive claim. The ensuing statement of principles should provide the Employment Court and the parties with a workable framework for the resolution of Ms Bartlett's claim and so enable the parties to bring that claim before the Court in an orderly and manageable way. As mentioned, the Court may for example in its statement of principles identify appropriate comparators and guide the parties on how to adduce evidence of other comparator groups or issues relating to systemic undervaluation.

[240] If the outcome of the s 9 inquiry is to be meaningful and provide the necessary guidance contemplated by the Act, that will require the Union to amend or supplement its s 9 statement of claim. As mentioned, the current pleading simply seeks a statement of the statutory provisions.

Costs

[241] Our provisional view is that because this is very much a test case of general public importance, costs should lie where they fall and not follow the event. The parties did not address us on the issue of costs. Accordingly, if the respondents take a different view and seek an award of costs, leave is granted to make such an application within 10 working days of the date of this judgment. The appellant is to have the opportunity to file any submissions in response within five working days following receipt of the respondents' submissions. Submissions are to be no longer than five pages in length.

Solicitors:
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Oakley Moran, Wellington for Respondents
Kiely Thompson Caisley, Auckland for Business New Zealand Inc as Intervener
Simon Meikle, Wellington for New Zealand Council of Trade Unions Inc as Intervener
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SCHEDULE

Questions answered by the Employment Court

Question 1

In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:

(a) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or

(b) Identify the rate that her employer would pay a male employee if it employed one to perform the work?

Answer: Section 3(1)(b) requires that equal pay for women 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.

Question 2

What is the extent of the Employment Court's jurisdiction to state principles pursuant to s 9?

Answer: The Court has jurisdiction to state general principles for the implementation of equal pay that will be generally available to guide any parties who negotiate about such matters.

Question 3

Is a female employee or relevant union required to initiate individual or collective bargaining before that jurisdiction can be exercised?

Answer: No.

Question 4

Does the defendant have a complete defence to the claim if it alleges and proves it pays four male caregivers the same rates as the 106 females, and it would pay additional or replacement males those rates?

Answer: No.

Question 5

Does s 9 of the Equal Pay Act contemplate "general principles" to be stated by the Employment Court which would do no more than summarise or confirm the existing law?

Answer: No.

Question 6

In considering the s 3(1)(b) issue of "…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", is the Authority or Court entitled to have regard to what is paid to males in other industries?

Answer: They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

Question 7

Does an employment agreement provide for equal pay in terms of s 6(8) of the Equal Pay Act if there is no element of differentiation in the rates of remuneration that the relevant employer pays to its female employees as compared to its male employees for the same work, where the female and male employees have the same or substantially similar skills, responsibility and service?

Answer: Not if the rate of remuneration is affected by gender discrimination.

Question 8

Does an employment agreement provide for equal pay in terms of s 6(8) if there is no element of differentiation in the rates of remuneration that the relevant employer would pay to its female employees as compared to what the relevant employer would pay to its male employees for the same work, where the female employees and male employees would have the same or substantially similar skills, responsibility and service?

Answer: Not if the rate of remuneration is affected by gender discrimination.