Caregivers score significant victory, 27 September 2013

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The full bench of the Employment Court has recently issued an important judgment (*Service and Food Workers Union Nga Ringa Tota Inc* v *Terranova Homes and Care Ltd* [2013] NZEmpC 157) concerning the interpretation of the Equal Pay Act 1972 (the Act).

Despite being on the statute book for more than 40 years, the Act's recent impact on wage rates and bargaining has been limited. The outcome of this case signals that this could be about to change with the prospect that, if the Court finds that there has been discrimination against female employees because of their gender, higher wage rates could be imposed by the Employment Court under the Act. The possibility of the Court setting a rate of pay for employees would, to a limited extent, be a return to the days when the Arbitration Court could and did set pay rates.

The matter has been appealed but the application for leave to appeal has yet to be heard.

Equal pay act: background

In essence, the purpose of the Equal Pay Act is to remove discrimination based on the sex of employees and to prevent discrimination based on the sex of employees in the rate of remuneration they receive. At the time the Act was passed, awards and instruments containing terms and conditions for employees permitted male and female employees to receive different rates of pay. The Act set up a process by which pay rates would be equalised over time so that, by steps, male and female employees would eventually receive the same pay for the same work. This process took place over a five-year period.

However, the Act continues to have significance today even after the five-year period for equalisation of awards expired in 1977. That is in part because the Act provides that it is unlawful to refuse or omit to offer or afford any person the same terms of employment that 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.

And specifically with regard to pay, the Act requires that male and female employees be paid the same if they have the same, or substantially similar, skills, responsibility and service; perform the work under the same, or substantially similar, conditions; and use the same, or substantially similar, degrees of effort.

Equal pay act: statutory provisions

Section 2 of the Equal Pay Act states that equal pay means 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*.

The test for determining whether there has been an element of differentiation based on the sex of the employee is set out in s 3 of the Act. The Act states in s 3(1)(a) that for work which is not exclusively or predominantly performed by female employees the court must take into account:

- the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort and responsibility, and
- the extent to which the conditions under which the work is to be performed are the same or substantially similar.

For work which *is* exclusively or predominantly performed by female employees, the Act states in s 3(1)(b) that the court must take into account "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".

As the parties accepted that in this case the work of caring for elderly people in rest homes was carried out predominantly by women, the Court's analysis focused on the effect of s 3(1)(b).

Finally, s 10 of the Act gives the Employment Court or Employment Relations Authority the power to consider a proposed collective agreement or existing individual employment agreement and, if the rates of pay do not comply with s 3, require the parties to further consider the employment agreement or the court/Authority can fix the pay rate.

Factual background

Terranova Homes and Care Ltd (Terranova) is a relatively small provider of residential aged care. It provides rest home services, continuing care hospitalisation services, specialist dementia services and psycho-geriatric services. The Service and Food Workers Union Nga Ringa Tota Inc (the union) brought a claim on behalf of a number of its female members who provide care to the elderly residents of the Riverleigh Home, which is one of Terranova's residential facilities.

In total, Terranova employs 106 female and four male caregivers. They are all paid at the same caregiver rates, which are around $13.75 to $15.00 per hour. The Court also noted that in 2009 there were 33,000 workers in the sector, 92% of whom were women and these were mainly older women.

In the residential care industry, a District Health Board (DHB) purchases care services from providers such as Terranova through contracts. The work and training standards expected of staff are set out in a contract between the provider and the DHB. The Ministry of Health also monitors the provider's performance. As with the health sector generally, DHBs are provided with a budget by the Ministry to contract for the services they require.

The union's claim

The union's claim was that its female members are being paid at a lower rate of pay than would be the case if the caregiving of the aged were not so substantially female dominated. The union claimed that there has been in New Zealand historical and structural gender discrimination in relation to jobs which have traditionally been classed as "women's work". This explains the low rate of pay in these sectors.

The union claimed that in assessing under s 3(1)(b) the pay rate that would be paid to men performing the work, in order to establish if the female employees are being underpaid, an assessment of the rate that would be paid to males performing the work considering all relevant probative evidence must be made. This would include the pay rate which Terranova was paying its male employees and which was identical to the pay rate for female employees.

However, the union also claimed it was necessary to compare the rate of pay of the female employees with the pay rate of similar types of male employees not engaged in the sector concerned. This could mean comparison of the rate of pay in the aged care sector with pay rates in other industries such as healthcare workers employed in hospitals.

The Court's approach

The Court noted that a full Court had been convened to consider how the Act was to be applied and answer questions of law about the interpretation of the Act. The Court would later hear evidence and apply the law as stated in the judgment to the facts.

The Court began by stating that the Act was crafted broadly and its purpose was to remove and prevent gender discrimination in women's rates of pay. It rejected the argument for Terranova that all that was generally required was comparison of the rate of pay between male and female employees within the workplace itself and checking within the workplace that the employer had not allowed gender to influence its pay rate.

Interpreting s 3 in accordance with the purpose of the Act, the Court stated that it struggled to see how the effects of gender discrimination on women's rates of pay could be removed and prevented if Terranova's interpretation was correct. This was because "any current, historic and/or structural gender discrimination entrenched within a particular female dominated industry would simply be perpetuated" by Terranova's approach ([40]).

In addition, the Court stated that the fact males are employed to perform the same or similar role and are paid the same or similar rate of remuneration within the workplace or industry may simply reflect the point that there is an artificially depressed rate because the male employees are performing "women's work". The Court concluded at [46] that:

> In practice, the assessment required by s 3(1)(b) could be made by way of reference to the rate of remuneration paid to men in the workplace or sector if their pay is uninfected by current or historical or structural gender discrimination. If a comparator that is uninfected by gender discrimination cannot be found within the workplace or the sector it may be necessary to look more broadly, to jobs to which a similar value can be attributed using gender neutral criteria.

The Court also rejected Terranova and Business New Zealand's (as intervener) submissions that making comparisons outside the workplace or sector are unworkable. While accepting that it would be somewhat difficult for the parties to identify and assess pay rates in different industries because information on pay rates was not always publically available, the Court stated this could be overcome by information provided by employer and employee groups and publically available information.

The Court further considered that Business New Zealand's submission that the union approach was inconsistent with the modern statutory bargaining framework was incorrect. The Court noted that freedom to bargain was confined by a number of other existing statutes providing statutory minima for employees and did not justify a reading down of the Act.

The Court also considered the legislative history of the Act and New Zealand's international obligations supported its interpretation of the Act.

Comment

The Court's judgment in this case is significant. It means that in female-dominated industries, the Act permits comparison of the wages of the female employees with pay rates in other industry sectors which are similar.

The Court mentioned in its judgment submissions that a ruling in favour of the union could increase costs for Terranova and the health funding authorities. The Court noted that, while that may be true, Parliament was aware of the costs implications of the Act when it was passed. Further, the Court referred to the unquantifiable social cost of adopting an approach which may have the effect of perpetuating gender discrimination.

The next step in the case (which will probably be suspended while Terranova applies for leave to appeal) is for the Employment Court to hear evidence concerning the aged care industry and other similar industries and determine if the female employees are receiving equal pay under the Act. In order to do so, the Court may have to establish an appropriate similar job to compare the aged care employees to. Importantly, there has been no finding by the Court at this stage that Terranova has not complied with the Act.

It is clear that this judgment is very much a test case. Depending on the final outcome of the case further claims from female employees, particularly in female-dominated industry sectors, are likely. And there may

be greater pressure on employers and government to increase wage rates for female employees in such sectors.