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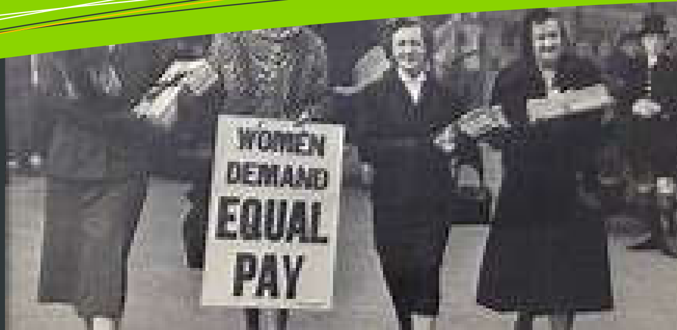

Equity for Women

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
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The Equal Pay Amendment Act 2000 was passed into law by parliament on 23 July 2020, bringing in the latest change to gender equality laws in New Zealand. The Amendment Act will, (once it comes into force - which is expected to occur in October 2020), ultimately become part of the Equal Pay Act 1972. However, the Amendment Act isn't about paying women the same as men for doing the same job (this has already been the law since 1972!). Despite its misleading name, the Amendment Act is actually about Pay Equity.

Pay Equity means paying employees who work in traditionally female dominated industries, a rate of pay that is equal to employees in a male dominated comparator role. It arises from the fact that many employees in traditionally "*female*" roles are, for a variety of reasons seen as being disadvantaged in terms of their remuneration.

Andrew Little, the newly appointed Minister for Workplace Relations, says the Amendment Act will make it easier for industry-level pay disputes to be resolved and help people avoid the Courts:

"*This bill makes it easier to raise a pay equity claim, and encourages collaboration and evidence-based decision-making to address pay inequity, rather than relying on an adversarial court process.*"

For readers who may be wondering if Pay Equity is a New Zealand initiative, New Zealand did not lead the charge in this area of the law. Pay Equity has already been implemented in many European countries (and the UK) for some years now.

While you may be familiar with Pay Equity in the context of Care Workers (such as in the aged care sector) and more recently Teacher Aides, the increased payments in these sectors ultimately came about as a result of negotiated settlements which in turn were the result of gender discrimination claims brought in the Courts. Until the Equal Pay Amendment Act was passed, suing one's employer was the only way that pay equity could be addressed (if the employer would not agree to an increase).

Readers may recall that in 2017, care worker Kristine Bartlett brought a claim of sex discrimination all the way to the Supreme Court, where it was confirmed that Kristine's occupation was underpaid as the result of systemic gender-based discrimination. The government stepped in and negotiated the Care and Support Workers (Pay Equity) Settlement Agreement with relevant unions, to prevent further legal claims.

As a consequence of the settlements for Care and Support Workers (and more recently Teacher Aides), the government has acknowledged that there will be other sectors where there is gender bias in terms of pay, due to certain sectors having been historically dominated by one gender. It is likely the sectors affected by this new legislation will include nursing, retail, education/teaching, caregiving, and cleaning.

The Amendment Act does not stipulate which sectors, industries, or types of roles have gender bias in their levels of pay or are at risk of gender bias. Nor does it prescribe a level of increase. Instead, the stated purpose of the Amendment Act is two-fold:

- To set a low threshold in order to raise a Pay Equity claim; and
- To provide a simple and accessible process to progress a Pay Equity claim.

A Pay Equity claim can be raised by an individual in order to challenge the status quo, or the claim may be brought by a union (or multiple unions) on behalf of members who perform the same or substantially similar work for the employer. In practice it is likely that unions will be the key players in raising Equal Pay claims and individual employee claims may be less common.

The threshold for raising a claim merely requires the initiating party considers their claim to be at least arguable. The Amendment Act defines a Pay Equity claim as "*arguable*" if:

- the claim relates to work that is or was predominantly performed by female employees; and
- it is arguable that the work is currently undervalued or has historically been undervalued.

In respect of the first limb of the test, "*predominantly*" means work that is currently (or was historically) performed by a workforce of 60% or more of women.

In respect of the second limb, work that is currently or historically undervalued will require an analysis of factors including the origins and history of the work, any social or cultural factors, characterisation as "*women's work*", the skills/qualities of the role, which have been generally associated with women and regarded as not requiring monetary compensation, and any sex-based systemic undervaluation.

All Pay Equity claims must be raised in writing and must state that the claim is being raised in accordance with the Equal Pay Act 1972. An employer who receives the claim must acknowledge it, and then has 45 days to decide whether it accepts the employee or union(s) has an arguable claim.

If an employer accepts that the employer or union(s) have an arguable claim, bargaining must then commence.

The parties must first assess whether in fact the work in question is being undervalued and must also consider a suitable male-dominated comparator workforce.

A suitable male comparator workforce will be one where the job itself may be different, but the male comparator role will have the same, or substantially similar, skills, responsibility, and service. An example that is often discussed is comparing Nurses (typically a female role) with Police Officers (historically male dominated).

Once a suitable comparator role can be identified, the parties must then work together to try and establish what fair remuneration might look like through bargaining. Similar good faith principles will apply to Pay Equity bargaining as apply to Collective Bargaining.

If terms can be agreed as to fair and equitable levels of remuneration, the agreement must be ratified and will then be incorporated into the relevant employees' terms and conditions.

If the parties cannot agree on whether a claim is arguable, or an appropriate comparator, or simply cannot reach settlement, the parties will likely be referred to Mediation. Ultimately a party can apply to the Employment Relations Authority for facilitated bargaining and may request the Authority to fix terms. The Authority may do so where it believes all other options (negotiation) have been exhausted.

While the bar to raise a Pay Equity claim has been set deliberately low, this does not signal that a change in pay rates must be negotiated and agreed. The aim of the Amendment Act is to provide simple and easy opportunities for discussions to take place between the employer and employee (or union(s)). However, where bargaining occurs, it is likely that considerable negotiation and debate will occur between the parties to identify whether the work is undervalued and to identify a suitable male comparator role. This may not be a straight-forward task. Whether, as the Minister suggests, parties will be able to avoid the involvement of the Authority, is yet to be seen.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart**, **Dean Kilpatrick or Jane Taylor.**

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