CEVEP...campaign for equal value equal pay

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10 August 2017

Employment (Pay Equity and Equal Pay) Bill is a disaster for women

The Coalition for Equal Value Equal Pay opposes this Bill because it will make it harder, not easier, for women to claim equal pay for work of equal value. We prefer to keep the Act we've got, which has just delivered wage increases to 55,000 undervalued care and support workers.

The key aspects opposed are:

1) New hurdles that require women to confront their employer to prove the initial merit of their pay equity claim.
2) A hierarchy for selecting male comparators that is contrary to courts' interpretation of the Equal Pay Act.
3) Convoluted processes, with no expert advice or assistance.
4) Sub-clauses that contradict definitions and criteria or allow them to be sidestepped.
5) Removal of the right to 6 years' back pay as per other wage and commercial money claims. This is discriminatory.
6) Demotion of women's right to equal pay to men doing the same job to become just an arrears claim under the Employment Relations Act.
7) Prevents normal continuation of existing claims under existing legislation.

Hurdles to making a claim

- The Bill requires an employee to prove initial 'merit' of claim to her own employer (cl.17), rather than register it with a neutral authority.
- It requires merit to be based on historical and labour market evidence (cl.14(3) and (4)). This is inconsistent with the court judgments, which allowed historical, social and structural evidence as part of the substantive evidence for the claim, not as additional criteria for being allowed to make a claim. This will discourage claims for occupations with little historical or labour market documentation, and could exclude claims for gendered jobs in new industries.
- It encourages delaying tactics by employers – they may take 90 days to decide whether employee's claim has 'merit' and then extend this to any date they choose – *before* the employee can seek help from the mediation service (cl.16, 17)
- It does includes a duty of employers to provide information but not until cl.21, as part of bargaining. To prove initial merit, women will have to research and provide all pay, job, historical and labour market information themselves.
- It is only after a dispute has arisen that a claimant may seek any assistance or advice from the mediation service or Employment Relations Authority (ERA) (cl.27).
- CEVEP supports cl.22 on the provision of information, much of which reflects the 2012 Private Member's Equal Pay Amendment Bill. However, we note that Schedule 2 omits a requirement

for employment records under s.130 of the Employment Relations Act to require the recording of sex or gender.

Legislative criteria must not be sidestepped

- Like the current legislation and as confirmed by the court judgments, this Bill centres on assessing the comparative value of women's work based on skills, responsibility, experience, effort and conditions of work - see cl.8(3), cl.13 and cl.23(1) (cf. current EPA s.3(1)(b)). But cls. 23(3) and (4), added after MBIE's consultation process, allow these key criteria to be sidestepped by agreement. This makes nonsense of the Bill. Cls. 23(3) and (4) should be deleted.
- It is the legal requirement to assess women's work to eliminate any element of discrimination that enables women to dispute their pay rate. There is no reason why settling a claim at any point in negotiations should require or allow the key legislative criteria to be set aside.

Equal pay for same work, pay equity for different work

- The Bill is confused and confusing in its use of the term 'same or similar work' in its criteria for pay equity. The matter is stated clearly in cl.8 (cf. s.3(1)(a) and (b) of the Equal Pay Act, interpreted by the courts), but not in later statements of criteria in cl.13 and cl.24(1)(a). If enacted, this may required interpretation by the courts. Where women and men do the same or similar work, the issue is equal pay (which this Bill diverts to the Employment Relations Act). Where the work is done predominantly by women, the comparison is not of 'same or similar work' but of ***different*** work by women and men and what levels of skills, reponsibility, experience, effort and conditions of work each requires.

Identifying appropriate male comparators

- Cl. 24 is of core importance to this legislation and needs rewriting if it is to provide both effective policy and legislative clarity.
- As stated above, Cl.24(1) describes equal pay and should be deleted.
- Cl.24(2) defines male work as more than 50% male, whereas cl.5(1) definites female work as 66% female. This definition for male comparators will allow highly female-dominated work to be compared with mixed gender occupations rather than highly male-dominated occupations typically paid at higher rates than typically female work. This defeats the purpose of the Bill, and also the court's interpretation of the current Act.
- At the *Bartlett vs Terranova* hearing, Judge Colgan verbally directed argument away from defining 'predominantly female', saying it was unnecessary, as the predominantly female jobs likely to attract pay equity claims were very highly female-dominated, e.g. caregivers 94%, and claims for work with more even proportions of women and men were likely to be lodged as equal pay claims. The 1990 Act defined both at more than 60%.
- CEVEP strongly opposes the hierarchy of male comparators in cl.24(3), which prioritises selection of males working for the same employer, then for similar employers, then in the same sector or industry, then a different sector or industry. Comparing female dominated work with male jobs in the same workplace revisits Terranova arguments that the courts rejected. The courts ruled that achieving the purpose of the Act requires male comparators in jobs and sectors that are clearly unaffected by gender bias undervaluing women. That is, male-dominated jobs and male-dominated sectors.
- CL.24(4) gives a nod to the court judgments with a proviso that comparators selected under cl.24(3) are not appropriate if there are reasonable grounds to believe that male work has

historically been and continues to be undervalued. That is, the claimant must produce evidence about males at each level of the cl.24(3) hierarchy until she reaches one both she and her employer consider appropriate. As NZCTU says, this will be time-wasting and expensive for all parties.

- Cl. 24(5) throws confusion into the entire clause, and should be deleted as nonsense. It allows cl.24(3) the male selection hierarchy and cl.24(4) the proviso about history and undervaluation to prevail over cl.24(1) the definition of male work and the job factors to be compared (skills, responsibility, etc.). If the claimant must pick the male work according to (3) and (4), but that selection overrides the requirement to examine the factors in the male work, what is the point of the selection? This contradicts cl.8(3) Equal Treatment and cl.23(1) Matters to be assessed.
- **CEVEP recommends comparisons of female dominated work be made with at least two comparators in different male-dominated jobs in two or more different male dominated sectors or industries.** This past policy on male comparators will be the most effective way of achieving the purposes of the Act.

Settling the claim

- Cl.25 describes what constitutes settlement of a claim by the parties or by determination of the ERA or Court. Cl 25(2) states an employer may not reduce terms and conditions in order to settle a claim. After the words 'of an employee who has made a pay equity claim', the words 'or of any male comparator' should be added.
- Cl.25(4) states that any settlement is a pay equity settlement for the purposes of this Bill whether or not the parties followed the processes required by the Bill. That must be a regulatory first! In addition, cl.25(4) contradicts cl.8 which defines what equal remuneration is and s.23(1) Matters to be assessed. These are the core criteria by which policy on pay equity through objective assessment (ILO Convention 100) is delivered both in this Bill and in the current Act. Cl.25(4) also risks contradicting cl.21 which requires cls.22 to 40 to be followed in good faith. It should be deleted.
- Any wage or money claim, including pay equity claims, may be settled by the parties at any point in negotations, and the claim withdrawn. However, the purpose of the legislation - a pay equity rate – is only achieved by meeting the criteria and definitions in the legislation. The Bill cannot defeat this logic by simply contradicting itself. Cl.24(4) appears to be a response to CEVEP's concerns to the Select Committee on the Care and Support Workers Settlement Bill. CEVEP pointed out that a settlement acceptable to the parties may not necessarily be a full or properly assessed pay equity rate and, whatever the terms of the agreement, *government legislation* should not extinguish (other) women's future rights to claim pay equity. Cl.25(4) does just that.

Snakes and ladders processes

- Under the current Equal Pay Act (1972), the carers settlement benefiting 55,000 women took just 17 months of negotation. Under the snakes-and-ladders processes in this Bill, claims could take several years, say CEVEP lawyers.
- At each, and potentially every, stage of negotiation with the employer (merit, apropriate comparators, labour market factors, job asessment processes and outcomes), the claimant may seek mediation, then facilitation, then recommendation or determination by the ERA. Over five pages the Bill details *and restricts* the matters on which mediation, facilitation or further intervention may be sought, and matters on which the ERA may accept reference. These do not necessarily match up.

- There is nothing to provide claimants with the expertise advice and assistance that Dame Patsy Reddy recommended. During facilitation the ERA is expressly restricted from using its investigative powers (cl.32(3)). The Bill's convoluted processes raise barriers and limit assistance at every stage of the claim.
- The good faith threshold in this Bill is higher than in the Employment Relations Act. The parties are required to bargain in good faith (cl.21, cl.33) and to deal with the ERA in good faith (cl.36), but the ERA is restricted from facilitating unless the lack of good faith is '(i) serious and sustained' and '(ii) has undermined the progress of the pay equity claim' (cl.30(2)(a)). This places an extra burden of proof on the claimant. This higher threshold may require expensive testing in the courts. Cl. 30 should be amended to be consistent with Employment Relations Act rights and powers, with cl.32(a) deleted.

Removing right to claim back pay is discriminatory

- Cl.40 limits pay equity determinations by the ERA to applying only from the date at which the pay equity claim was made, not the 6 years' back pay to claimants are entitled in all other wage recovery claims and commercial money claims for non- or under-payment. This restriction of a right under the Limitations Act 2010 affects only women who make a claim for equal pay for work of equal value. Cl.40 is gender discrimination and should be deleted.
- As with any money claim, the claimant's right to six years' back pay (though no more) removes a financial incentive to continue non-payment. The right to back pay in equal pay and pay equity claims is an important tool to help redress the imbalance in bargaining power that has enabled low wages for women.
- This issue in particular reveals how this Bill treats pay equity as simply another issue for bargaining, not an important human right for women under international and New Zealand law. New Zealand employers and governments have been well aware since the mid 1980s that women's typical occupations were once again undervalued. Policies to investigate and redress this were twice repealed by incoming governments. Without the Limitations Act women could justifiably claim 27 years' back pay, not a mere six.

Pay equity claims in progress must continue under 1972 Act

- This Bill at Schedule 1(3) proposes to discontinue existing claims under the Equal Pay Act and recommence them under this new legislation. This is strongly opposed by CEVEP as contrary to the Legislation Advisory Committee Guidelines. Guideline 11.1 provides that legislation should not have direct retrospective effect and Guideline 11.4 states that legislation should not pre-empt matters that are currently before courts.

Equal pay for the same job as men

- The Bill defines equal pay for women doing the same or similar work as men (cl.9) and transfers this to be deal with under the Employment Relations Act 2000 s.131 'Recovery of wages' (1)(b) 'Arrears'. S. 131 does not mention equal pay or discrimination or even gender. Shifting equal pay to the Employment Relations Act separates it from the criteria for equal pay (skills, responsibility, experience, effort, conditions of work) which will remain in cl.8 of this Bill.
- In this generalised treatment, women's right to equal pay for doing the same work as men disappears and becomes invisible as an international human right for women.
- In 2004 a similar proposal to separate equal pay from pay equity and shift it to the Employment Relations Act was dropped after considerable opposition from women's organisations.

Formed in 1986, the Coalition for Equal Value Equal Pay is a voluntary organisation committed to reducing the gender pay gap in New Zealand through policy and initiatives to advance equal pay in general and equal pay for work of equal value in particular. Our members' expertise and experience spans the breadth and history of this important policy issue. We were an invited intervening party in the 2013 *Bartlett vs. Terranova* case.

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