VICTORIA
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O TE ŪPOKO O TE IKA A MĀUI

Centre for Labour, Employment and Work

'Achieving Pay Equity' Seminar – dealing with a complex issue

Notes as compiled by Sue Ryall

Sue Ryall, Centre Manager at the Centre for Labour Employment and Work (CLEW) organised a seminar on Pay Equity for 28 April 2017, not knowing that the settlement for the workers who took that case to court and the draft legislation would be announced in the same week. "It was perfect timing and the range of speakers, all of whom have been closely involved with this issue, provided an excellent overview of both the case and what needs to happen in the workplace to achieve pay equity."

These notes cover the presentations in the first part of the seminar. They outline the work of the Joint Working Group on Pay Equity and the principles for pay equity established by the group as well as the implications for the draft legislation and the future work in the workplace. A summary of Izi Sin's presentation on her research on measuring the gender pay gap is also included.

A further article for the next CLEW'd IN will be developed from the notes on the application of the principles in workplace as presented by the speakers.

What has happened and what has changed?

Phil O'Reilly – Director, Iron Duke Ltd

The Joint Working Group on Pay Equity

The 1972 Act was developed under a different industrial relations environment but rather than change the legislation following the Appeal Court decision in '*Terranova'* the Government chose to set up the Joint Working Group (JWG). The group had representatives from the NZ Council of Trade unions, the key unions (E tū, NZNO and the PSA) the Ministry of Health, MBIE, SSC and Business NZ. The group was chaired by Dame Patsy Reddy.

Phil O'Reilly commented that it is unusual in the current environment for the Government to undertake a tri-partite process. It was common under the Labour-led government but rare over the last nine years of the National-led government. But the agreement on the principles required by the court had to be negotiated by the three social partners.

The group was there to agree principles that were fit for purpose in the world that we live and in the context of current legislation, not develop law. The JWG met for a much longer time than originally planned and were allowed to do so by the officials. The focus was the first principles – not what is but what could be and what was agreed rather than what was opposed. The employment relations principle of 'good faith' was the basis for discussion and decision-making and a constructive social dialogue that displayed the maturity of the relationship between the parties.

There was a lot of consultation back to the constituent groups – union members, employer parties and government agencies. There was consideration of other jurisdictions such as the UK and EU, Canada and Scandanavia. From the business perspective nothing seemed to fit and it was agreed that they needed to find a New Zealand solution. The social partnership framework is not well developed in New Zealand as compared with European and Scandinavian countries but there is a strong relationship between Business NZ and the NZCTU.

The principles that were agreed:

1. Agreed that pay equity is an important issues needs to be resolved
2. Agreed that we would bargain to outcomes. This is unique to New Zealand as elsewhere a Tribunal decides the outcome with unlimited arrears. This means that the cases can go on for years.
    a. So reach a settlement - not have a winner and loser
    b. Settlement can be staged.
    c. The workplace is in control of the outcome (through the bargaining process) not a tribunal who have no idea of the workplace.
3. Once a deal is made, it is a deal.
4. The definitions around pay equity, equal pay etc. are to be clear but not prescriptive and limiting.
5. No *compulsory* arrears in the draft legislation. The focus is the future rather than arguing over what has gone before. Arrears can still be bargained.

There was debate over the relevance of comparators - if comparators should be proximal (in the industry) or can go outside to include work that has similar demands, working conditions and skill-base.

O'Reilly commented that the level of expertise of workplace actors in bargaining will vary and favoured the provision of specialist expertise to assist to offer advice. Possibly a special unit in MBIE, possibly alongside the labour inspectorate, could take responsibility for publishing good practice, settlements. This role sits in Government.

Erin Polaczuk – General Secretary, NZ Public Service Association
Erin was one of the union representatives on the Joint Working Group.

After the Task-force – what's next?
The JWG was working on the settlement of part of the Bartlett case. Erin endorses the work of the JWG and it was a great outcome.

But what wasn't achieved?

1. An industry wide solution – the settlement was only for the publicly funded part of the industry and not the privately funded. The unions were aiming for rates for all of the industry (like an award or an industry-wide agreement).
2. Cohesion and coordination of claims – an agency to provide this service that is not just employer based. The agency would notify other employers in the industry when claims are made.
3. The resourcing of equal pay claims with quick processing systems through mediation and the courts.

An historic consensus has been achieved and it will reduce gender discrimination. The Principles were what the unions would have taken to court and they reflected what the court had come to – assessed on skill, effort, experience/service, responsibility and work conditions.

The delays by the Government in adopting the principles was frustrating and the Cabinet added a further principle of '*proximity of the comparator*'. This was a surprise and limits what can be used as often there is no comparator in an industry. The Unions are concerned that this is a roadblock – it creates a barrier. It was also against what the Court had determined – while there was a need for a male comparator, proximity was not a requirement, particularly in female-dominated industries.

The key principle of a bargained settlement means that the comparator(s) will also be agreed in the bargaining process. There may not be one perfect comparator but rather a range reflecting different aspects of a role/occupation. The PSA and the Crown brought different comparators for the Bartlett case but that did not mean that a settlement couldn't be reached. The need to determine the comparator prior to bargaining would have been an impediment to the process.

The PSA has cases under way for DHB Clerical and Admin workers, CYFs social workers and negotiations with State Services Commission around collective agreement provisions that will prevent further gaps developing.

We did not ask for a new Equal Pay Act – the new draft Act is more limiting and the Bartlett case has proved that a settlement is possible without getting stuck on comparators. The tripartite process where social partners work together is key and that will also apply to any changes in the Act.

Peter Cranney - Partner, Oakley Moran (lawyer for Christine Bartlett and SFWU)
The legal case and the implications for future law
The 1972 Equal Pay Act contained a definition of work of equal value that had not been recognised by the Courts until 2014. This definition has been retained in the new Bill. There are, however, issues with the proposed legislation, in particular, it limits access to equal pay cases by narrowing section 3(1) b (Criteria to be applied) of the Equal Pay Act. In Cranney's view, these limitations also reflect the current limitations on collective bargaining.

The settlement was made under the 1972 Act which, as previously commented on by Phil O'Reilly, was under a different industrial relations system and which provided for Arbitration. The Government knew they had to reach a settlement or the Authority or Court would determine the settlement and it would be outside their control. The existence of Arbitration ensured a bargained settlement and this provision in some form needs to be in any new Act. The statute is effectively the biggest collective employment agreement in New Zealand.

Some key aspects of the settlement:

1. It is a staged settlement – a compromise to achieve all that was required.
2. In the new statute employers will be defined as those who are funded by the Crown. This includes 1100 employers.
3. The rates are protected by statute for 5 years. It is effectively a statutory minimum rate for the sector.
4. Workers can move up levels to get different pay rates either by service or qualification.
5. Employers will be required to provide upskilling and a new type of PG will allow workers to appeal when this is not happening.

This process began with Judy McGregor in 2011 and her investigation that resulted in the *Caring Counts* report (2012). It exposed the plight of aged care workers. While there is more social dialogue needed we have come to a uniquely New Zealand solution that will now give a huge boost the achievement of equal pay.

What does the gender pay gap look like?

Izi Sin – Motu Economic and Public Policy Research; School of Economics and Finance, Victoria University of Wellington
The median hourly wage gap has tended to increase after 2010. Some of the features of the gender wage gap:

1. More than half of the gap cannot be explained by hours of work, industry, qualification levels etc.
2. The wage gap is larger in the higher income levels and this has even fewer explanations.
3. Most of the wage gap is not explained by industries or firms where women work.

Fabling, Sin and Stillman (2017) explored if productivity differences were driving the wage gap. By exploring the firm level data from Statistics NZ they could compare

firms in the same industry, similar size and other characteristics. They explored how the firm level output varied with the fraction of female employees; the variation in the total wage bill with fraction of female employees; and then used these two sets of data to calculate the % to which women are paid less for the same work. They found that in all cases.

The findings showed that women are receiving 82% of men's wages and there is an unexplained wage gap of 16%. In all cases there is a substantial pay gap unexplained by productivity differences. Further, there are differences by industry in the unexplained wage gap, with a higher level wage gap in industries that are more profitable, have more high-skilled workers and where firms have little competition in their product markets. Sin suggested that profits that accrue to employees (by way of, performance payments, profit shares and bonuses) are accrue at a higher level for male employees.

Sin is currently undertaking further research on the impact of birth and child care on women's earning and the contribution this makes to the gender pay gap.