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EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

Issue 222 | September 2013

Equal Pay for Similar Work

Service & Food Workers Union Nga Ringa Rota Inc & Bartlett v. Terranova Homes and Care Limited

In this preliminary hearing, the full Employment Court, assisted by some eleven barristers and solicitors from the parties and other interested parties, considered the interpretation of the Equal Pay Act 1972. Terranova Homes and Care Limited employed 106 female and 4 male staff as caregivers in the residential aged care sector. The employees were paid between $13.75 and $15.00 per hour. Nationwide (in 2009) the caregiving industry employed 33,000 workers some 92% of whom were women. The union argued that the women employed by Terranova Homes and Care Limited were being paid at a lower rate of pay than would be the case if the industry were not so substantially dominated by female employees. They argued that this was a breach of the Equal Pay Act. In this preliminary decision the Court considered a number of questions of law surrounding this case including the ability of the Court to look outside the employees workplace to determine whether or not wages paid breached the Act:

"[7] The key issue for determination at this preliminary stage is the scope of the requirement for equal pay for female employees for work exclusively or predominantly performed by them, and how compliance with this requirement is to be assessed. This involves consideration of the scope of s 3 of the Equal Pay Act. . .."

Section 3 of the Equal Pay Act establishes the criteria to be applied in deciding whether or not there is a differentiation based on sex in the pay rates for males and females in any given class of work. It distinguishes between work that is predominantly performed by female employees and that which is not. The criteria at s.3(1)(b):

"[F]or 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."

All parties accepted that caregiving work fell within this category. The employer argued that the provision should be narrowly interpreted claiming that any comparison of pay rates must be restricted to the actual workplace and that the Court must then determine whether or not actual rates paid distinguished between the sexes. He argued that the rates paid to the four male caregivers was evidence that there was no distinction. He emphasised *"the distinction between the concepts of equal pay and pay equity"* suggesting that pay equity was not the role of the Court under the Equal Pay Act.

The union and those supporting it however argued that s.3(1)(b) *"requires an assessment of the rate that would be paid to males performing the work considering all relevant probative evidence, including what is paid to "similar" male employees not engaged in the sector concerned."* In other words they argued that the Court could look outside the caregiving industry when looking at comparative wage rates.

Ultimately the Court unanimously supported this interpretation of the act and in so doing has opened the way for a further hearing on the merits of the claim on that basis.

To arrive at this decision it considered the interpretation of the Equal Pay Act, starting with the purpose of the Act which it held had *"two stated purposes – first to remove, and secondly to prevent, the effects of gender discrimination on women's rates of pay."*

The Court determined firstly that an interpretation of section 3 (1)(b) that restricted the comparators of the differentiation between male and female wage rates to a single workplace would be in conflict with this stated purpose because it would *"render the statutory recognition of an exclusively female workplace meaningless."*

The Court held that:

"s 3(1)(b) assumes a comparison with a hypothetical male. That is because it expressly relates to situations involving predominantly or exclusively female workplaces."

and

"The use of the word "would" in s 3(1)(b) means that the rate of remuneration is discriminatory if it is not the rate that would be paid to a man."

and

"[40] Section 3 provides the mechanism by which the dual purposes of the Act are to be achieved. It must be interpreted consistently with those purposes. We struggle to see how the effects of gender discrimination on women's rates of pay can be removed and prevented if a narrow interpretation of the provision is adopted. It would mean that any current, historic and/or structural gender discrimination entrenched within a particular female dominated industry would simply be perpetuated.

[41] The fact that a man is employed to perform the same or similar role and is paid the same or similar rate of remuneration within the workplace or industry does not necessarily advance matters, and may reflect nothing more than receipt of an artificially depressed rate because he is performing what is colloquially (and pejoratively) known as "women's work" . . ."

"[44] . . . 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. In essence the comparator to be identified must be free from any gender bias affecting the rate of pay if the purposes of the Act are to be achieved."

and

"[46] . . . 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 further determined that such an interpretation was consistent with the NZ Bill of Rights Act and specifically the right to freedom from discrimination; s.19. The purpose of which as to:

". . . ensure that a person (or group of persons) is not improperly treated differently than other persons with whom they can be fairly compared."

It then went on to conclude that such an interpretation was consistent with New Zealand's international obligations and specifically the variety of international treaties and conventions where we had accepted the concept of equal pay for equal rights. The Court quoted from a variety of such conventions from the Treaty of Versailles to the Universal Declaration of Human Rights all of which required New Zealand's compliance with equal pay.

The Court also referred to the legislative history of Government Service EPA (the precursor to the EPA) quoting from the then Prime Minister, Walter Nash, who described the Government as wanting to *"affirm the principle of equal pay for equal work under equal conditions" and to "revalue the work performed either exclusively or principally by women."* and to Syd Holland's reference to the creation of a "*notional or mystical man*" to be used as a comparator in female intensive industries.

In response to a claim from the employer that the use of external comparators would be unworkable, the Court accepted that it would be simpler to use only internal comparators but did not accept that a broader approach was either unworkable or impracticable:

"It may be inconvenient or even burdensome, but that is the effect of much employment legislation and must be taken to have been intended by the legislature as a consequence of human rights legislation."

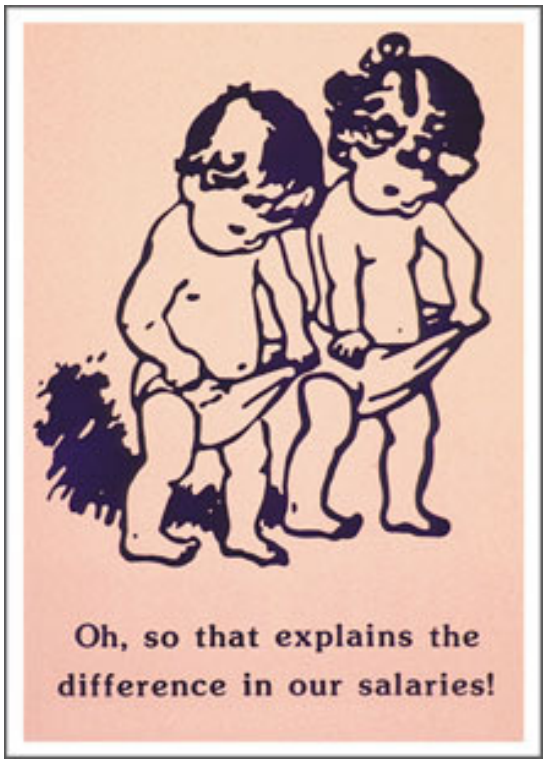
In conclusion the Court accepted that, when determining whether a rate paid to a woman in an industry predominantly performed by females, the Court would be entitled to have regard to what is paid to males in other industries if there was no appropriate comparators in the same industry, enterprise or sector.

The matter will now be returned to the Court for a consideration of the facts where, without doubt, comparators from industries outside the caregiving sector will come to be considered. If ultimately the Court determines that there are differentials in remuneration based on sex, they will use their jurisdiction under s.9 of the Equal Pay Act 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."

If the question arises during the negotiation of collective agreements the Court may ultimately amend the provisions of the collective to meet the requirements of the Equal Pay Act. The Employment Relations Authority has the same jurisdiction for individual employment agreements.

The potential exists that this is merely the first of a series of cases in both the Court and the Employment Relations Authority where wage and salary rates are challenged as being in breach of the Equal Pay Act.



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