

Pay Equity 101

Prepared for Health and Disability
Service Provider Employers

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History - 'Terranova' case

- 2013 Terranova case – SFWU (now E Tu) union filed against residential aged care employer for 'care and support workers' under the out-dated Equal Pay Act 1972 (Kristine Bartlett, union member, was named employee in the case)
- Government agreed to sector settlement negotiations – across the wider aged care, home and community, disability, and mental health and addictions sectors.
- June 2017 - Settlement between Unions (NZCTU, PSA, E Tu, NZNO) and Government (note employers were excluded)
- Led to 2 other related settlement agreements (vocational workers/MHA workers) in 2017/18
- Led to Support Worker legislation across aged care, home and community, disability and mental health and addiction sectors – effective 1 July 2017

Support Workers (Pay Equity) Settlements Act 2017

- This Act reflects the 3 historic settlement agreements (which all expired on 30 June 2022).
- This Act was originally set to expire on 30 June 2022. The Government decided to amend this Act to extend it for 18 months to 31 December 2023 (the amendment act was passed under urgency at the end of June 2022).
- This Act continued to set minimum wage rates and qualification requirements for support workers across the 4 sectors.
- This Act allowed for new pay equity claims to be filed under the Equal Pay Act from 1 July 2022 (for the same work covered by the previous settlement agreements).
- This Act has now been repealed (except for the clauses relating to the previous framework).
- *NB: This was a unique mechanism for this particular workforce – it is not expected to set a precedent for other future pay equity settlements (which can be implemented via other means).*

New Claims for Care & Support Workers (CSWs)

- Representative claim filed by 3 unions (PSA, E Tu, NZNO) on 1 July 2022 against 15 employers across 4 sub-sectors in home and community, disability, mental health & addictions, and aged residential care (“the original CSW claim”).
- The unions have filed subsequent claims against hundreds more employers with CSWs performing the same work in September 2023 (‘second claim’), and again in December 2023 (‘third claim’)
- The original CSW claim has significantly progressed, along with Government Oversight with Te Whatu Ora nominated as Lead Funding Agency. All representatives (ie unions, employers and funders) have acknowledged that this is a representative claim, with intentions for wider sector implementation ultimately.
- The original CSW claim process has been impacted/ slowed down recently following the General Election and incoming new Government, and a recent review commissioned by Te Whatu Ora into the claim process to-date.
- There is potential for all CSW claims to be consolidated into one process – parties are waiting for further proposed plans and intentions from the unions and funders in this regard...

Equal Pay Act 1972

- This Act provides for pay equity in female-dominated workforces (60% or more) subject to systemic undervaluation.
- Amended in 2020 to modernise the framework for future claims
- Allows employees (and unions) to lodge claims against their employer or multiple employers
- Does not contemplate any other parties (eg funder, wider sector workforce)
- “Good faith” obligations apply (including using best endeavours to progress and settle the claim in an orderly, timely and efficient manner)
- Claim is focused on “the work” performed by employees (including “the same or substantially similar”)
- Allows for multi union and multi employer consolidated claims
- Requires parties to progress to settlement (similar to CEA bargaining)
- Settlement must include an agreed review mechanism to maintain pay equity into the future

Equal Pay Act 1972 (cont...)

2AAC Differentiation in rates of remuneration prohibited

An employer must ensure that—

- (a) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer to employees of the employer who perform the same, or substantially similar, work; and
- (b) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—
 - (i) have the same, or substantially similar, skills, responsibility, and experience; and
 - (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.

3 Criteria to be applied

- (1) In determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male employees and female employees for any work, the following criteria shall apply:
 - (a) for work which is not exclusively or predominantly performed by female employees—
 - (i) the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility; and
 - (ii) the extent to which the conditions under which the work is to be performed are the same or substantially similar:
 - (b) for 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 experience performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.

MEPEPA required

- Section 13K of the Act requires each employer who receives a claim raised by a union with multiple employers to enter into a **multi-employer pay equity process agreement (MEPEPA)*** for the purpose of:
 - Deciding whether the claim is arguable; and
 - for the purposes of the pay equity bargaining process.
- The MEPEPA must set out:
 - whether there will be 1 or more representatives for the employers and who that representative or those representatives will be; and
 - how decisions relating to the claim will be made.
- Based on past examples, representation options include: 1/ direct (employer only); 2/ hybrid (along with peak body or other); or 3/ full (fully represented by another party such as peak body).
- Past examples for process and decision-making typically rely on a Steering Group format (with nominated people committed to attend regular meetings and provide input), and specific working groups (focused on specific topics), and bargaining teams comprising certain representatives during the different stages.

* = it should be noted that an employer may choose to 'opt out' of a MEPEPA for genuine reasons (per s 13L)

“Arguability”

- Unique to pay equity claims / first gateway to the pay equity claim process
- Section 13F states that a claim is arguable if:
 - the claim relates to work that is (or was) performed predominantly by female employees; and
 - it is arguable that the work is currently under-valued (or has been historically under-valued).
- After receipt of a claim, an employer must consider whether, in their view, the Claim is ‘arguable’ (s 13Q) – within specified time period (extension of up to 80 working days per s 13R)
- As this is a multi employer consolidated claim, arguability will be jointly agreed under the MEPEPA
- The Equal Pay Act requires a “light touch approach” when determining arguability
- Where an employer indicates agreement that a claim is arguable, the Act states that this does not necessarily mean that the employer agrees that there is a ‘pay equity issue’, or that there will be any settlement as a result of following the claim process. It simply means that the claim can be explored and progress through the required stages.

13F Meaning of arguable

- (1) A pay equity claim is **arguable** if—
 - (a) the claim relates to work that is or was predominantly performed by female employees; and
 - (b) it is arguable that the work is currently undervalued or has historically been undervalued.
- (2) For the purposes of this Act, work is or was **predominantly performed by female employees** if it is work that is currently, or that was historically, performed by a workforce of which approximately 60% or more members are female.
- (3) In deciding whether it is arguable that work is currently undervalued or has historically been undervalued, consideration may be given to any relevant factor, including the following:
 - (a) the origins and history of the work, including the manner in which wages have been set:
 - (b) any social, cultural, or historical factors:
 - (c) characterisation of the work as women’s work:
 - (d) that the nature of the work requires an employee to use skills or qualities that have been—
 - (i) generally associated with women; and
 - (ii) regarded as not requiring monetary compensation:
 - (e) any sex-based systemic undervaluation of the work as a result of any of the following factors:
 - (i) a dominant source of funding across the relevant market, industry, sector, or occupation:
 - (ii) a lack of effective bargaining in the relevant market, industry, sector, or occupation:
 - (iii) occupational segregation or occupational segmentation in respect of the work:
 - (iv) the failure by the parties to properly assess or consider the remuneration that should have been paid to properly account for the nature of the work, the levels of responsibility associated with the work, the conditions under which the work is performed, and the degree of effort required to perform the work:
 - (v) any other feature of the relevant market, industry, sector, or occupation.

Section 13F: inserted, on 6 November 2020, by [section 18](#) of the Equal Pay Amendment Act 2020 (2020 No 45).

Government Funded Framework for PE

- Creates Framework with Milestones 1-7 (setting out a claim's progress towards settlement and related funding)
- Responsible Agency (with key leadership role):
 - Public Service Commission (PSC) – Te Kawa Mataaho (TKM)
 - PSC Pay Equity Taskforce (skilled and resources in pay equity matters)
- In November 2021, Cabinet approved a new framework for addressing sector workforce pay equity matters in parallel with a pay equity claim (“Pay Equity in the Funded Sector”, 8 Nov 2021)
- The Funded Framework process allows Government to consider how to fund any settlement of a claim, in addition to extending the benefits of a settlement to the relevant sector workforce (and service providers).
- This framework requires a lead ‘oversight agency’ – responsible for coordinating relevant agencies (eg multiple funders), and keeping Cabinet and Ministers informed.

Role of Peak Body

- Key role in representing and supporting members (and non-members) in both the Claim and Funded Framework processes
- Key role in coordination, maintaining consistency, and managing consistent messaging across the sector
- Bridge between the Claim's employers and the wider sector – especially in relation to proposed extension of any settlement benefits to wider sector workforce
- In the current claims for support workers, the relevant 4 Peak Bodies are working together under an agreed MOU.

What happens next?

In this case, there is currently uncertainty around the latest new claims for CSWs and how they should proceed (especially under the new Government). We are waiting to hear further from the unions and funders re proposed process and options for the wider sector solution required for the overall CSW workforce.

Usual next steps required (after MEPEPA and arguability confirmed):

- Bargaining Process Agreement (BPA) between union and employer representatives – including establishment of Joint Working Group (JWG)
- Milestone 2 – Employer Initial Bargaining Strategy / Government funding process (and oversight) established
- Milestone 3 – ‘Work Assessment’ stage
- Milestone 4 – ‘Comparators’ / undervaluation determined by the parties
- Milestone 5 – ‘Bargaining’ for settlement

Other recent pay equity claims & settlements

- Recent NGO Social Worker settlement (July 2022)
- Current care and support worker claim process underway (15 employers/4 sub-sectors)
- Recent settlements in Health and Disability sector:
 - Nurses
 - DHB Admin workers
 - Allied health workers
- Of note:
 - The 3 above are all historic and began before the Equal Pay Act was amended.
 - The 3 above are all Government employees (the settlement is therefore implemented via one simple CEA/sector variation)
- So, we are in new and developing territory...!