IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 51
ARC 63/12

IN THE MATTER OF	an application under the Equal Pay Act 1972
AND IN THE MATTER OF	an application for orders
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC Plaintiff
AND	TERRANOVA HOMES AND CARE LIMITED Defendant

WRC 30/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for orders
BETWEEN	KRISTINE ROBYN BARTLETT Plaintiff
AND	TERRANOVA HOMES AND CARE LIMITED Defendant

Hearing: By memoranda of submissions filed on 15 February, 8, 19, 22, and 26 March 2013
And telephone directions conference on 8 April 2013

Appearances: Peter Cranney, counsel for plaintiffs
Rob Towner and Elizabeth Coates, counsel for defendant
Matthew Palmer and Sylvia Bell, counsel for Human Rights Commission as intervener
Bruce Corkill QC, counsel for New Zealand Council of Trade Unions and Pay Equity Challenge Coalition as interveners
Rachel Brown, advocate for Coalition for Equal Pay Equal Value as intervener
Wendy Aldred, counsel for New Zealand Aged Care Association as intervener

Judgment: 8 April 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Counsel for the parties are agreed that the Court should hear and determine some preliminary questions of law before embarking upon what will, by any account be a lengthy and complex hearing into issues of equal pay and/or pay equity in employment in the residential aged care sector. The parties agree, and the Court accepts, that, depending upon the answers to these preliminary questions, the evidential scope of the case should be able to be reduced or perhaps even, in some instances, eliminated.

[2] This is one of the very few occasions on which this Court or its predecessors have been asked to determine such issues. Certainly the last time that an equal pay or pay equity case came before the Court was many years ago. These issues are important ones in the burgeoning residential care sector of the community and the principles that may emerge from the litigation will probably have a broader ripple effect on other sectors where there is a combination of female-dominant and low-paid workforces.

[3] In these circumstances, I wish to offer the parties the facility of a full Court, a majority of the Judges of the Employment Court, to give both a considered judgment and guidance. The ability to use three of the Court's five Judges for an extended period of factual inquiry is not available, so that a preliminary hearing on legal issues followed, if necessary, by a further hearing conducted by a single Judge on factual questions, is an ideal way to accommodate those considerations.

[4] Finally, also, there are already several interveners who have been given leave to be represented and appear in the proceeding. The assistance that the Court anticipates having from these interveners will be on such legal questions rather than dealing with the factual minutiae of Terranova's workplaces, so that a discrete preliminary hearing on legal issues in which the interveners can participate will also be beneficial to the Court, to the interveners, and to the parties.

[5] There is much, although not complete, agreement between the parties as to the particular questions that the Court should be asked to determine at a preliminary hearing.

[6] Following exchanges of memoranda which both exhibit a large measure of agreement between counsel but also seek to rephrase the others' questions, I consider that the most just course at this very early stage of the proceeding is to agree to the proposed questions of both the plaintiffs on the one hand, and the defendant on the other, in their final form. Rather than attempt to identify overlap at this stage, I think it would be preferable to hear argument, and for the full Court to identify any overlap and deal with it accordingly in its judgment.

[7] So, the questions for preliminary determination are as follows:

A. The plaintiffs' and defendant's joint questions:

1. In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified at s 3(1)(b) of the Equal Pay Act 1972 require the Court to:

   (a) identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact

   or

   (b) identify the rate that her employer would pay a male employee if it employed one to perform the work?

2. What is the extent of the Employment Court's jurisdiction to state principles pursuant to s 9 of the Equal Pay Act 1972?

3. Is a female employee or relevant union required to initiate individual or collective bargaining before that jurisdiction can be exercised?

4. Does the defendant have a complete defence to the claim if it alleges and proves it pays the four male caregivers the same pay rates as the 106 females, and it would pay additional or replacement males those rates?

5. Does s 9 of the Equal Pay Act 1972 contemplate "general principles" to be stated by the Employment Court which would do no more than summarise or confirm the existing law?

B. The plaintiffs' additional question is as follows:

6. In considering the s 3(1)(b) issue of "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, condition and with the same or substantially similar, degrees of effort", is the Authority or Court entitled to have regard to what is paid to males in other industries?

7. Does schedule 1B of the Employment Relations Act 2000 apply to the defendant?

C. The defendant's additional questions in WRC 30/12 are:

8. Does an employment agreement provide for equal pay in terms of s 6(8) of the Equal Pay Act 1972 if there is no element of differentiation in the rates of remuneration that the relevant employer pays to its female employees as compared to its male employees for the same work, where the female

employees and male employees have the same or substantially similar skills, responsibility and service?

9. Does an employment agreement provide for equal pay in terms of s 6(8) if there is no element of differentiation in the rates of remuneration that the relevant employer would pay to its female employees as compared to what the relevant employer would pay to its male employees for the same work, where the female employees and male employees would have the same or substantially similar skills, responsibility and service?

10. If the answer to questions 8 and/or 9 above is "no", can an employment agreement fail to provide for equal pay in terms of s 6(8) solely because:

    (a) another employer in the same industry differentiates in the higher rates of remuneration that that other employer pays to its employees as compared to the employer for the same work, where the other employer's female employees and male employees have the same or substantially similar skills, responsibility and service; or

    (b) most employees of the relevant employer and other employers in the relevant industry who are employed to perform the work in the relevant industry are female, and they are paid less than male employees of other employers in other industries who have the same or substantially similar skills, responsibility and service, and perform work under the same or substantially similar conditions and with the same or substantially similar degrees of effort?

11. Does Schedule 1B of the Employment Relations Act 2000 apply where an employer provides services to a district health board in the district health board's role as a funder of services rather than as a provider of services?

[8] These questions will be the subject matter of the preliminary hearing at Auckland on 24, 25 and 26 June 2013.

GL Colgan
Chief Judge

Judgment signed at 4.50 pm on Monday 8 April 2013