**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2013] NZEmpC 157**
**ARC 63/12**

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| IN THE MATTER OF | an application under the Equal Pay Act |
| BETWEEN | SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC<br>Plaintiff |
| AND | TERRANOVA HOMES AND CARE LIMITED<br>Defendant |

**WRC 30/12**

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| IN THE MATTER OF | of proceedings removed from the Employment Relations Authority |
| BETWEEN | KRISTINE ROBYN BARTLETT<br>Plaintiff |
| AND | TERRANOVA HOMES AND CARE LIMITED<br>Defendant |

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| Hearing: | 24-26 June 2013 |
| Court: | Chief Judge GL Colgan<br>Judge Christina Inglis<br>Judge ME Perkins |
| Appearances: | Peter Cranney and Anthea Connor, counsel for plaintiffs<br>Harry Waalkens QC and Elizabeth Coats, counsel for defendant<br>Matthew Palmer, counsel for Human Rights Commission (HRC) as intervener<br>Bruce Corkill QC and Jock Lawrie, counsel for New Zealand Council of Trade Workers (NZCTU) and Pay Equity Challenge Coalition (PECC) as interveners<br>Stephanie Dyhrberg, counsel for Coalition for Equal Value Equal Pay (CEVEP) as intervener<br>Wendy Aldred, counsel for New Zealand Aged Care Association Inc (NZACA) as intervener<br>Peter Kiely and Jo Douglas, counsel for Business New Zealand Inc (BNZ) as intervener |

Judgment: 22 August 2013

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**JUDGMENT OF THE FULL COURT**

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## Background

[1] The defendant operates rest homes in the residential aged care sector and is, we are told, relatively typical of residential elderly care providers in New Zealand. It provides rest home services, continuing care hospitalisation services, specialist dementia services and psycho-geriatric services. The plaintiff union has brought the claim on behalf of a number of its members – each of whom is female. They provide care to the elderly residents of the Riverleigh Home, one of the defendant company's residential facilities.

[2] It is common ground that there is a preponderance of female workers in the aged care sector. In 2009 there were 33,000 workers in the sector, 92 per cent of whom were women (mainly older women).[1] Many work part-time.[2]

[3] The defendant employs 106 female and four male caregivers. They are all paid at caregiver rates, which are around $13.75 to $15.00 per hour. The minimum wage is currently set at $13.75 per hour.[3]

[4] Contracted care services are purchased by the relevant District Health Board (DHB) from providers such as the defendant company. The work and training standards expected of staff are set out in a contract between the provider and the DHB. The Ministry of Health monitors the provider's performance.

[5] In essence the claim is that the female caregivers employed by the defendant are being paid a lower rate of pay than would be the case if caregiving of the aged

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[1] Juthika Badkar and Richard Manning "Paid Caregivers in New Zealand: Current Supply and Future Demand" (2009) 35 New Zealand Population Review 113 at 116-117.
[2] Grant Thornton *New Zealand Aged Residential Care Service Review* (September 2010) at 108.
[3] Minimum Wage Order 2013, cl 4.

were not so substantially female dominated, because those caregivers are female. While the claim is brought on behalf of a limited number of plaintiffs it has potentially broad implications, not only within the residential aged care sector but more generally. It is for this reason that a number of organisations sought leave to intervene.

[6] The substantive claims have not been heard. Rather the Court is concerned with a number of preliminary issues, the resolution of which will inform the scope of any subsequent inquiry conducted by it under s 9 of the Equal Pay Act 1972 (Equal Pay Act). The preliminary issues[4] involve questions of law which are novel. The Court is not, at this stage, embarking on questions of fact but has been asked to consider and determine issues of principle and law for later application. That is why a full Court was convened. The substantive hearing will be conducted by a judge alone.

[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 (which sets out the criteria to be applied in determining whether an element of differentiation in remuneration based on sex exists) and s 9, which relates to the Court's jurisdiction under the Act.

## The statutory framework

[8] The long title to the Act sets out its objective, namely to "make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment, and for matters incidental thereto."

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[4] As set out in the interlocutory judgment of the Chief Judge in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51. Issues relating to Sch 1B of the Equal Pay Act were not pursued by the plaintiffs at hearing.

[9] Remuneration is defined as meaning the salary or wages actually and legally payable to any employee.[5]

[10] The Act provides that it is unlawful to refuse or omit to offer or afford any person the same terms of employment that are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.[6]

[11] Section 9 confers jurisdiction on the Court to state principles for the implementation of equal pay. It provides that:

> The court shall have power from time to time, of its own motion or on the application of any organisation of employers or employees, 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.

[12] "Equal pay", for the purposes of the Act, is defined as:[7]

> …a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees.

[13] The criteria to be applied in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male and female employees for any work or class of work payable under any instrument, are set out in s 3. The provision distinguishes between work which is not "exclusively or predominantly performed by female employees" and that which is.

[14] Section 3(1)(a) relates to the former category, and provides that for work which is not exclusively or predominantly performed by female employees, consideration is to be given to:

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[5] Section 2.
[6] Section 2A(1).
[7] Section 2.

> (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
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> (ii) the extent to which the conditions under which the work is to be performed are the same or substantially similar.

[15] The criteria that apply to the latter category are set out in s 3(1)(b) as follows:

> [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.

[16] What approach is required by s 3(1)(b) 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?

[17] The defendant urges us to adopt a narrow approach. Mr Waalkens QC, counsel for the defendant, submitted that an appropriate comparator must be identified within the workplace itself, having regard to the rate paid to others within the workplace taking into account the skills, responsibilities and effort required for those roles. He submitted that an assessment must then be made to ensure that the applicable pay rates are not influenced by the fact that the work is exclusively or predominantly performed by women. This assessment, it was said, would be carried out having regard to factors such as the defendant's record of employing males, its employment policies as to how it goes about employing staff, its advertising practices, and its pay rates.

[18] It was submitted that in this case the four male caregivers in the defendant company's employ, who are each apparently paid at the same or a substantially similar rate to the female caregivers, provides a useful point of reference.[8] It was also submitted that the rate of remuneration paid to a male gardener within the workplace may be relevant in determining whether an unlawful element of differentiation exists. Mr Waalkens ultimately conceded that it may be necessary in

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[8] We note that there was no suggestion that this number of men overcame the "predominant" threshold in s 3(1)(b), and we do not need to decide, in the circumstances of this case, what percentage or other means of assessment would apply to meet that requirement.

some cases (although not the present) to look outside the workplace to identify a suitable comparator, although this, it was said, would only be permissible very rarely and would be limited to the relevant sector. In advancing its submission the defendant places particular reliance on the linkage in s 3(1)(b) of the rate of remuneration that "would" be paid to male employees performing "the" work, and use of the term "the employees" in both s 3(1) and the long title. This, it was argued, points to the Court's inquiry being limited to the workplace or (in rare instances) the sector concerned.

[19] Mr Waalkens also sought to emphasise the distinction between the concepts of equal pay and pay equity, taking us to a number of governmental publications that discussed these terms. Mr Waalkens submitted that pay equity subsumes the narrower concept of equal pay, and that what the plaintiffs are seeking to achieve is pay equity which cannot be accomplished under the auspices of the Equal Pay Act.[9] While it is clear that the terms have distinct meanings we prefer to focus on the wording of the Act itself, and to interpret it in light of its text and purpose.

[20] We do not need to, and cannot at this preliminary stage, decide which comparator is appropriate in the circumstances of this case. However, we note two things. First, it is unclear to us how a gardener can be said to have the same or substantially similar skills, responsibility, and service as the plaintiff female employees of the defendant. In any event, and somewhat ironically, it appears that gardeners (who tend to be male) are generally remunerated at a higher rate (around $16.56 per hour) than the plaintiff employees in this proceeding (around $13.75 to $15.00 per hour).[10]

[21] Secondly, comparisons with the rate of remuneration paid to a small number of males in a workplace predominantly occupied by women raises issues about a possible link between low rates of pay in the caregiving sector and women being the dominant workers in that sector. A significant amount of academic and other writing suggests that this reflects historical and structural gender discrimination. We were

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[9] A submission echoed by Business New Zealand.
[10] Referred to in Human Rights Commission *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* (May 2012) at 52, citing a NZACA salary survey.

referred to a report of the Human Rights Commission, *Caring Counts, Tautiaki Tika*, which followed an inquiry into employment opportunities in the aged care sector. The inquiry was wide ranging, involving all major stakeholders, including the Ministry of Health, District Health Boards, residential aged care providers, academic experts, and unions. It concluded that carers are one of the lowest paid groups in the country, with many receiving the minimum wage for physically, mentally and emotionally demanding work, and that the low value placed on care work and its consequent low remuneration was "undoubtedly gendered." That, the Report said, was because:[11]

> Care work is predominantly done by women, is seen as women's work and has traditionally been unpaid work.

[22] Des Gorman, Professor of Medicine at the University of Auckland and executive chair of the Health Workforce, is quoted as stating:[12]

> The pay parity issue is historical. It used to be that women would become nurses or teachers until they could find a good husband. Vocational history is the baggage that those particular professions carry.

[23] These observations are echoed in international literature. For example, in the final report of the Canadian Pay Equity Task Force, it was noted that the "prejudiced belief that perceived 'female' characteristics are innate has a negative effect on the value of women's work."[13] A 2009 Working Paper of the International Labour Organisation (ILO) on the connection between unpaid care work and paid work observed that occupational segregation by gender is a common pattern throughout the world:[14]

> ... gendered patterns of occupational and industrial segregation summarized above are associated with women undertaking occupations that resemble the characteristics of unpaid care work. As a result, *women's work is often undervalued.* The occupations and sectors that are dominated by women are generally seen as being less important, requiring lower skills, and, thus, deserving of lower earnings than the occupations and sectors dominated by

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[11] At 50.
[12] Ibid.
[13] Pay Equity Task Force *Pay Equity: A New Approach to a Fundamental Right* (Minister of Justice and Attorney-General of Canada, J2-191/2003e, 2004) at 27.
[14] Rania Antonopoulos *The Unpaid Care Work – Paid Care Work Connection* (Policy Integration and Statistics Department, International Labour Office, WP/086, May 2009) at 17.

> men. Men working in such occupations and sectors are also penalized in terms of pay.

[24] The potential for discriminatory distortion of any comparator used underpins the arguments advanced in favour of a broader interpretation of s 3(1)(b).

## Analysis

[25] The plaintiffs submit 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. While the plaintiffs accept that the rate of remuneration paid to the four male caregivers may be relevant as part of any assessment it cannot be determinative if the purposes of the Equal Pay Act are to be met. The plaintiffs accordingly reject the narrow interpretation advanced on behalf of the defendant.

[26] Both interpretations are open on a literal reading of the provision in isolation. The correct interpretation of s 3(1)(b) is to be arrived at applying well established principles of statutory interpretation.

[27] The starting point is s 5 of the Interpretation Act 1999. It provides that:

> **Ascertaining meaning of legislation**
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> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[28] As Tipping J observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[15]

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[15] [2007] 3 NZLR 767 (SC) at [22].

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[29] And, as the learned authors of *Statute Law in New Zealand* point out:[16]

> The actual meaning of the text, the purpose of the legislation, the context, both internal and external, and the practical desirability of a particular interpretation, all play their part.

[30] In considering the purpose of an Act it is necessary to put any preconceptions, even prejudices, about the subject matter to one side.[17]

[31] The purpose of the Equal Pay Act is plain, and is reflected in its long title. It has two stated purposes – first to remove, and secondly to prevent, the effects of gender discrimination on women's rates of pay. These overarching purposes are reinforced by s 2A ("unlawful discrimination"), which underscores the prohibition on discrimination based on sex within the workplace.[18] Section 2A(2) links to the Human Rights Act 1993, which prohibits both direct and indirect discrimination on the ground of sex.

[32] Sections 2 and 3 are drafted in similarly broad terms. Equal pay is defined in s 2 as requiring no element of differentiation between male employees and female employees based on the sex of the employees. Section 3 contains criteria for determining whether or not there is an element of differentiation based on sex,

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[16] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 182.
[17] At 239.
[18] Section 2A provides that no employer shall refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.

emphasising similarity in skills, responsibility and service, and conditions and degrees of effort.

[33] Section 3(1) refers to differentiation based on the sex of "the" employees. It was submitted that this involves an analysis of the rates of remuneration of the employer's employees and not the rates of remuneration for those employed elsewhere. However we conclude that this cannot be so, as it would render the statutory recognition of an exclusively female workplace meaningless. And while there is a similar reference to "the" employees in the long title, the long title is expressed in broad terms and without any immediately apparent restriction. Certainly, there is no express reference to either the workplace or sector within which the relevant employee works.

[34] Reliance was also placed on the words "in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument" in s 3(1), as indicating a restrictive comparison to work covered by the same instrument (namely an award). As Mr Waalkens pointed out, s 2(2) provides an exception to coverage provided by the Act. However, this exception is limited and is itself subject to a proviso (the special rate of remuneration must not involve any element of discrimination on the grounds of sex).

[35] It is also notable that the definition of "instrument" was amended (by way of the Equal Pay Amendment Act 1991) to make it clear that the Act covered employment agreements within the meaning of the Employment Contracts Act 1991 (which included individual agreements). While the Equal Pay Act was enacted during the height of the awards system, and awards were subsequently abolished by the Employment Contracts Act, it is evident that the Equal Pay Act was always intended to operate more broadly. In introducing the Bill the Minister of Labour, the Hon David Thomson, stated that "equal pay shall be provided in instruments of *all* types covering employer-employee relationships,"[19] and later clarified that equal pay applied to actual rates of pay however they were fixed, contrary to a perception of

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[19] (29 August 1972) 380 NZPD 2177.

some organisations at the time that the Bill only applied to award rates.[20] Further, the fact that express provision is made for work performed by women in female intensive industries tells against an interpretation that would require no more than an intra-award/workplace analysis. Such an interpretation would render s 3(1)(b) inoperative in cases involving exclusively female workplaces. Rather, the words "under any instrument" refer to the requirement that there must be no element of differentiation based on sex in each rate in every instrument.

[36] It is clear 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. This is reinforced by the two different categories of female workers identified in s 3, and the different criteria for determining unlawful differentiation that applies to each. It is also reflected in use of the phrase "*would* be paid." 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.

[37] We agree with the submission advanced by Mr Palmer on behalf of the Human Rights Commission that comparators are a means to an end. Clearly identifying that end – the purpose of the Act – helps illuminate what means are required.

[38] The point is reinforced by the Supreme Court's judgment in *McAlister v Air New Zealand Ltd*.[21] There the majority observed that, in cases of alleged discrimination:[22]

> The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all the facets of the scheme, including particularly any defences available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

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[20] At 3232.
[21] [2009] NZSC 78, [2010] 1 NZLR 153.
[22] At [34] per Elias CJ and Blanchard and Wilson JJ.

[39] The purpose of the Equal Pay Act - removing and preventing discrimination based on the sex of the employees, in the rates of remuneration of males and females in paid employment – is accordingly pivotal.

[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" (a phenomenon referred to by the 1971 Royal Commission of Inquiry into Equal Pay, referred to in greater detail below).

[42] It would be illogical to use a small percentage of men as a comparator group if they are paid less because they are undertaking "women's work." Such an approach would distort the objective analysis required under s 3(1)(b) and fall well short of meeting the dual purposes of the Act. It would also be a simple matter to employ and then identify a self-defeating comparator (the token male), either deliberately or for subconscious systemic reasons. This is something that has been firmly denounced, for obvious reasons.[23]

[43] The effect of the comparison the defendant proposes would be to compare the rates of pay of female employees with men who may be paid a depressed rate for

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[23] See, for example, *Pickstone v Freemans plc* [1989] AC 66 (HL), where Lord Keith observed, albeit in the context of a different statutory scheme, that the fact that a man is employed in the same job and on the same pay as a woman should not prevent her from claiming equal pay for work of equal value. To do so would, it was said, leave a large gap in the equal work provision, enabling an employer to evade it by employing one token man on the same work as a group of potential women claimants who were deliberately paid less than a group of men employed on work of equal value with that of the women.

reasons relating to systematic undervaluation. Put another way, rather than comparing apples with oranges, as s 3(1)(b) plainly requires, the comparison would be between apples and apples.

[44] We do not consider that a lack of intention to discriminate is relevant to establishing whether or not an unlawful element of differentiation exists for the purposes of s 3(1)(b). If it were otherwise, the twin purposes of the Act would be thwarted. 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.

[45] As the Supreme Court emphasised in *McAlister,* the approach to the comparator issue should be guided by the underlying purpose of anti-discrimination laws which are designed to prohibit employment decisions being influenced by any feature which amounts to a prohibited ground of discrimination. The Court went on to state that:[24]

> ... A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation...

[46] In practice, the assessment required by s 3(1)(b) could be made by way of reference to the rate of remuneration paid to men in the workplace or sector if their pay is uninfected by current or historical or structural gender discrimination. 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.

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[24] At [51] per Elias CJ and Blanchard and Wilson JJ.

[47] We are fortified in our interpretation of the Act by relevant provisions of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), New Zealand's international obligations, and the legislative history of the Act, which we now turn to.

## Rights consistent interpretation

[48] Section 6 of the Bill of Rights Act requires that:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[49] While the Bill of Rights Act postdates the Equal Pay Act it is well established that it applies in respect to the interpretation of earlier Acts.

[50] Section 19(1) of the Bill of Rights Act provides that:

> Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[51] Section 21(1)(a) of the Human Rights Act provides that "sex" is a prohibited ground of discrimination.[25]

[52] As the learned authors of *The New Zealand Bill of Rights Act: A Commentary* note:[26]

> The purpose of s 19 of BORA is to ensure that a person (or group of persons) is not improperly treated differently than other persons with whom they can be fairly compared. Different treatment will be improper if it is based on one of the prohibited grounds of discrimination set out in s 21(1) of the HRA and it cannot be objectively and reasonably justified. Different treatment can be manifested in a variety of ways: it can be done directly (that is, a prohibited ground of discrimination is the very basis for different treatment) or indirectly (that is, a criterion for different treatment is chosen, which corresponds closely to the characteristics of one of the groups of persons protected by a prohibited ground of discrimination). ... The non-

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[25] The Employment Relations Act 2000 prohibits discrimination against employees on a number of grounds, including sex, although the formulation is different to the one contained in the Equal Pay Act (s 104(1)(a).

[26] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary*, (LexisNexis, Wellington, 2005) at [17.4.1].

> discrimination principle is a substantial contributor to a society based on equality, and a core feature of a society based on democracy and freedom where each individual is valued as a person, worthy of dignity and respect.

[53] While the defendant submitted that the narrow interpretation of s 3(1)(b) upholds the right to freedom from discrimination, it is difficult to see how this is so. As we have observed, rather than removing and preventing discrimination a narrow approach may simply perpetuate discrimination in rates of pay to women in female dominated workplaces or sectors in circumstances where lower rates of remuneration are paid on the basis of sex.

[54] The defendant also submitted that if a narrower reading would otherwise be inconsistent with the rights recognised in s 19, it is nevertheless justified under s 5 of the Bill of Rights Act. This submission was not developed but we understood it to be advanced on the basis that a wider reading would lead to an unworkable result. We do not accept, for the reasons set out below, that a broader interpretation presents the sort of practical implications contended for by the defendant. Nor would we have been satisfied, based on the material before the Court, that they otherwise constituted a justified limitation on the right to be free from discrimination.

[55] There is a positive obligation on courts to develop the law consistently with the rights and freedoms contained in the Bill of Rights Act. The exercise is not to be approached as if to do no more than preserve the status quo.[27] We consider that a broader interpretation of s 3(1)(b) is to be preferred, as being consistent with s 19 of the Bill of Rights Act and the purpose of eliminating both direct and indirect discrimination against women. Such an interpretation does not require the language of s 3(1)(b) to be unnecessarily strained.

## Consistency with international obligations

[56] Statutes should be interpreted in a manner that is consistent with New Zealand's international obligations. While international obligations cannot affect the

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[27] *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 676.

meaning of statutory words that are clear, they may influence the interpretation adopted where they are open to different meanings.[28]

[57] New Zealand is a party to the International Labour Organisation's *Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value* (ILO 100), which it ratified in 1983. ILO 100 is explicitly based on the principle of equal pay for work of equal value, with Article 2 providing that:[29]

> (1) Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

[58] "Equal remuneration" is defined under the Convention by way of reference to "rates of remuneration established without discrimination based on sex."[30]

[59] Contemporaneously with its ratification of ILO 100, New Zealand also ratified the Organisation's *Convention Concerning Discrimination in Respect of Employment and Occupation* (ILO 111).[31] Article 2 of the Convention materially provides that:

> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

[60] "Discrimination" is defined for the purposes of the Convention as:[32]

> [A]ny distinction, exclusion or preference made on the basis of ... sex ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

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[28] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]-[25].
[29] *Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value*, 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953).
[30] Article 1(b).
[31] *Convention (No. 111) concerning discrimination in respect of employment and occupation,* 362 UNTS 31 (opened for signature 25 June 1958, entered into force 15 June 1960).
[32] Article 1(b).

[61] New Zealand's broader commitments to the principles of equal remuneration are reflected in a number of other international instruments to which it is party to. The *Treaty of Versailles*[33] stated a number of principles said to be of "special and urgent importance", including the that "men and women should receive equal remuneration for work of equal value." The *Declaration of Philadelphia* concerned the aims and purposes of the ILO and recognises the obligation of the organisation to achieve "policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all."[34]

[62] The *Universal Declaration of Human Rights* declares that:[35]

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

And, under Article 23(2), that:

> Everyone, without any discrimination, has the right to equal pay for equal work.

[63] Under Article 7 of the *International Covenant on Economic, Social and Cultural Rights*, [36] States Parties are required to recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

[64] Under Article 11 of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), States Parties are required to take all

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[33] *Treaty of Peace between the Allied and Associated Powers and Germany* (signed 28 June 1919, entered into force 10 January 1920), art 427.

[34] *Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944*.

[35] *Universal Declaration of Human Rights GA Res 217A, III, A/810 (1948)*, art 7.

[36] *International Covenant on Economic, Social and Cultural Rights,* 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality between men and women, the same rights, in particular:[37]

> (d) the right to equal remuneration, including benefits, and to *equal treatment in respect of work of equal value*, as well as equality of treatment in the evaluation of the quality of work.

[65] The preamble to the Convention notes that:

> Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

[66] These international instruments reflect the concern to eliminate all forms of discrimination in the payment of workers based on gender, even if having arisen unintentionally or through historical attitudes. While they do not prescribe the way in which the principle of equal pay is to be implemented, they make it clear that pay rates for women should not reflect the effects of gender discrimination. As Mr Palmer points out, while they do not specify that that includes the effects of historical or structural discrimination affecting whole industries or sectors, the principles they espouse do extend to prohibiting such discrimination.

[67] Significantly, the Government felt able to ratify ILO 100 following the enactment of the Equal Pay Act. As already observed, the Convention requires States Parties to adhere to the principle of equal pay for work of equal value.[38]

[68] The position adopted by the Government of the day is reflected in a Cabinet paper dated March 1983 which was referred to us (without objection) and which proposed that New Zealand ratify ILO 100 and ILO 111. Relevantly the Cabinet

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[37] *Convention on the Elimination of All Forms of Discrimination against Women,* 1249 UNTS 13 (opened for signature 1 March 1980, 3 September 1981), art 11(1)(d).
[38] Article 2.

paper (under the hand of the Hon Mr J B Bolger, the then Minister of Labour) notes that:[39]

> Convention No 100 ... provides that equal remuneration shall be paid to men and women workers for work of equal value without discrimination based on sex. *Ratifying countries are required to ensure the application to all workers of the principle of equal remuneration for work of equal value*. The principle may be applied by means of national laws or regulations, legally established or recognised machinery for wage determination, collective agreements between employers and workers or a combination of these various means. Differential wage rates between workers which correspond, without regard to sex, to differences in job content are not regarded by the Convention as being contrary to the principle of equal remuneration. ...
>
> ...
>
> It is New Zealand practice to ratify selected ILO Conventions only when there is compliance of law and practice with the Articles of the Convention. *The Equal Pay Act 1972*, the Government Service Equal Pay Act 1960, and the Human Rights Commission Act 1977, *implement the provisions of Convention 100*.

[69] The paper recommended that Cabinet approve the ratification of the two Conventions, and this is what occurred soon after.

[70] The defendant makes the point that New Zealand's compliance with ILO 100 has been the subject of ongoing criticism by the ILO Committee of Experts on the Application of Conventions and Recommendations over the years. We do not draw any real assistance from this. A number of comments are directed at the paucity of case law under the Equal Pay Act and other criticisms may simply reflect a misapprehension as to the scope of its provisions. In any event, we note that when the Equal Pay Act was enacted, Parliament evidently considered that it was meeting its obligations under the Convention and the Convention was ratified by the Government on the basis that it saw the Act as being compliant with its Articles. Subsequent to its ratification the Government has reiterated this view to the Committee. In 1999, for instance, the Committee recorded the Government's view

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[39] Memorandum for Cabinet "International Labour Organisation, Convention No 100: Equal Remuneration" (March 1983) CM 7.01/10 at [1], [3].

that the Equal Pay Act and related legislation did meet the requirements of the Convention.[40] In response, the Committee expressed the hope that:[41]

> …the equal remuneration legislation currently in force in New Zealand will be applied in such a manner as to give full effect to the provisions of the Convention … The Committee also requests the Government to indicate whether any judicial or administrative tribunals have interpreted the equal remuneration laws as permitting cross-contractual complaints and to provide copies of any such decisions.

[71] We do not understand the Committee to be expressing a concluded view as to the ambit of s 3 or the reach of the Court's jurisdiction under the Act. In any event, it is for the New Zealand courts to clarify those issues.

[72] As it happens, the Act has been the subject of very limited judicial consideration, most recently in 1986 in *New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd.*[42] In that case the claim fell on fallow ground, and was given relatively short shrift, without detailed analysis, and in the context of a concession having been made by the union that there was no element of differentiation. The judgment does not amount to a definitive view on the scope of the Act, although it may have been understood by many as doing so.[43]

## Legislative history

*The Government Service Equal Pay Act 1960*

[73] It is apparent that there has been a long standing concern about discrimination in rates of pay in both New Zealand and overseas. This is reflected in the various international instruments identified above, as well as domestic legislation. Parliament's concern to eliminate discrimination against women in their

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[40] Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No. 100) – New Zealand* LXXXVII (1999) at [5].
[41] At [6].
[42] [1986] ACJ 203. The judgment itself was in relation to an application under s 10, and contains little reasoning or analysis of the purposes of the Act.
[43] See, for example, Ministry of Women's Affairs *Next Steps Towards Pay Equity: A Background Paper on Equal Pay for Work of Equal Value* (Ministry of Women's Affairs, September 2002) at 38 which referred to the judgment of the Arbitration Court as having "blocked [the] avenue to equal pay for work of equal value".

pay rates initially found statutory expression in the Government Service Equal Pay Act 1960 (Government Service Equal Pay Act). It is tolerably clear that the Act was a response to ILO 100, although New Zealand did not ratify the Convention until 1983, apparently for fiscal and practical reasons.[44] In moving the second reading, the then Prime Minister (the Rt Hon W Nash) described the Government as wanting to "affirm the principle of equal pay for equal work under equal conditions"[45] and to "revalue the work performed either exclusively or principally by women."[46]

[74] While the Government Service Equal Pay Act had limited application (given that it applied to the State Sector) it bears a resemblance to the subsequently enacted Equal Pay Act in many material respects. Section 3(1)(a) of the 1960 Act requires that: "differentiations based on sex in scales of salary or wages of Government employees shall be eliminated, to the end that women shall be paid the same salaries or wages as men where as Government employees they do equal work under equal conditions." Section 3(1)(b) provides that where women perform work of a kind which is exclusively or principally performed by women and their pay cannot be fairly related to men's scales, "regard shall be had to scales of pay for women in other sections of employment" where the principle of equal pay for equal work under equal conditions has been implemented. These provisions reflect an intention to provide for equal pay in industries dominated by women, by relating them to the wages of women in other sections of the government service who work with men under conditions of equal pay.[47]

[75] The Government Service Equal Pay Act 1960 and the later Equal Pay Act 1972 play a dual role, for both the public and private sectors. Both reflect a clear Parliamentary concern to eliminate discrimination in pay based on sex.

*The Commission of Inquiry into Equal Pay*

[76] It is apparent that the Government's concern to implement the principles in ILO 100 domestically did not stop at the enactment of the Government Service

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[44] (25 October 1960) 325 NZPD 3223, 3224.
[45] At 3222.
[46] At 3224.
[47] See, for example, at 3241.

Equal Pay Act. In 1971 a Royal Commission of Inquiry into equal pay was established. The Commission (headed by Mr Denis McGrath) was asked to inquire into and report on a suitable formula to give effect to the principle of equal pay having regard to the provisions of ILO 100, the timing of the introduction of equal pay, the machinery for introducing equal pay and the economic and social implications of doing so.[48]

[77] We refer extensively and in detail to the Royal Commission's Report because it is clear that Parliament enacted the Equal Pay Act in significant reliance upon it.

[78] As the Commission noted:[49]

> The origins of inequalities between the rewards of men and women in paid employment are deeply rooted in the conventions and behaviour patterns of our society…
>
> In the early stages of industrialisation, women workers constituted a reserve army of temporary and cheap labour. Neither the male employer nor the male trade unionist had any incentive at this stage to press for equality of pay.
>
> One important reason for the difference in the earnings of men and women is that, by and large, men and women do different jobs even within the same establishment. As one authority puts it "the finer the breakdown one makes in branches, occupations, and job categories, the stronger is one's impression of the sex cleavage in working life. Few occupations are really 'mixed'. To be sure, there are some exceptions…but these are insufficient to disprove the rule."…
>
> Very often, while men are paid according to their worth as individuals, women are paid as members of a category of lesser economic worth.

[79] Relevantly, the Commission recognised the phenomenon of "the crowding of women in general, into certain occupations which have traditionally been performed either mainly or wholly by women."[50]

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[48] The Commission of Inquiry into Equal Pay *Equal Pay in New Zealand: Report of the Commission of Inquiry* (September 1971) at 5.
[49] At [1.1]–[1.5].
[50] At [2.4].

[80] The Commission observed that there was no doubt that these jobs tended to be paid at a lower rate than those occupations and tasks which are traditionally those performed by males in society.[51]

[81] The Commission had regard to the approach adopted in a number of overseas jurisdictions in considering the scope of the criteria for determining equal pay.[52] It is not without significance that while noting that the United Kingdom had adopted an approach that is broadly consistent with the interpretation advanced on behalf of the defendant in these proceedings, namely a restriction of comparisons to "the same undertaking or group of undertakings", the Royal Commission ultimately rejected such an approach.[53]

[82] It also rejected the approach adopted by a ruling of the Australian Commonwealth Arbitration Commission which held that although the principles of equal pay would extend to work performed by women workers "of the same or a like nature and of equal value," there would be no application where "the work in question is essentially or usually performed by females, but is work upon which male employees may also be employed."[54] The Royal Commission referred to a submission by the New Zealand Employers' Federation and the New Zealand Manufacturers' Federation that the rules adopted in Australia offered the most appropriate model for New Zealand in implementing equal pay but stated that:[55]

> Despite the cogent reasons advanced by the employers for this approach, we found ourselves unable to accept the proposition that the "principle of equal pay for male and female employees", which our Commission was asked to consider, did not include the removal of any element of sex discrimination from the rates of pay for work exclusively or predominantly performed by women. We do not believe these groups of workers can be "swept under the carpet" and left to have their position clarified and determined by market forces and potential conflict.

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[51] At [2.4].
[52] At [2.8]–[2.10].
[53] At 20.
[54] *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1969) 127 CAR 114 [*Equal Pay Case*]. The position referred to in the Commission's report was subsequently abandoned by the Commonwealth Arbitration Commission in *Commonwealth Telephone and Phonogram Officers Assoc v The Post-master General and the Public Service* (1972) 147 CAR 142.
[55] The Commission of Inquiry into Equal Pay, above n 48, at [2.10].

[83] The Commission's observations about the position of women in the exclusive and predominant work category are apposite. They were immediately followed (in terms of the structure of its report) by its recommendations as to an appropriate interpretation of equal pay. That was recommended to mean a rate of remuneration for work in which rate there is no element of differentiation between male and female employees based on the sex of the worker. The basic approach that should apply was for work which is "exclusively or predominantly" performed by women, the remuneration should be fixed as though a male with similar skills, responsibility, and service were performing that work.[56] The former is reflected in the s 2 definition of equal pay; the latter in s 3(1)(b).

[84] The Commission plainly turned its mind to whether a detailed mechanism ought to be adopted, but decided against such an approach on the basis that it might present difficulties in application given the diversity in employment and systems of wage fixing. Rather it recommended a broad brush approach, "to be used by all parties and wage fixing authorities in determining whether there is any element of differentiation based on the sex of the worker between the rates of remuneration for work performed by male and female employees."[57] It noted that: "[t]he problem of equal pay is so to arrange matters that rates are fixed by reference to the factors which apply to a particular category of work as such and to eliminate distinctions which are now made on the basis of sex."[58] The Commission concluded that its task was not to replace the present complex basis for wage determination, but to ensure that whatever other considerations are relevant, the sex of the worker is not taken into account in fixing rates of pay.[59]

[85] The Commission's report was presented to the House of Representatives in September 1971.

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[56] At 21-22.
[57] At [2.13].
[58] At [1.6].
[59] At [2.11].

*The Equal Pay Bill*

[86] The Government accepted the recommendations of the Commission of Inquiry and the Equal Pay Bill was introduced to Parliament in 1971. It was heralded as a significant piece of social legislation, the Prime Minister of the day (the Rt Hon J R Marshall) referring to it as:[60]

> ... one of the most important pieces of legislation the House will have to consider this session. *It is a significant forward move in the social legislation of this country, and it will be recognised as a landmark in our social history.* It is in my view a matter of social justice that this should be done.

[87] At the second reading the Minister of Labour, the Hon David Thomson, said that:[61]

> The criteria in the Bill for the application of equal pay now generally require female employees to be doing work which calls for the same or substantially similar degrees of skill, effort, and responsibility under the same or substantially similar conditions. I am satisfied that the words "the same or substantially similar" generally give effect to the recommendation of the commission, which proposed the term "the same or broadly similar", and will be less difficult to interpret than the words "identical or substantially identical" used in the Bill when it was introduced.

[88] The Minister of Finance, the Hon R D Muldoon, stated that: "every member on this side of the House accepts the principle of equal pay for women in accordance with the value of the tasks they perform."[62] And the Minister of Labour observed that:[63]

> This Bill, which gives effect to the recommendations of the Commission of Inquiry into Equal Pay, in almost every respect more clearly eliminates discrimination in the rates of remuneration of males and females than generally applies in many other countries. This is so in two respects. First, the Bill applies to all work performed by women, including work in the female-intensive industries where very few males are engaged. Secondly, the Bill applies to all actual rates of remuneration, however fixed…

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[60] (29 August 1972) 380 NZPD 2180.
[61] (11 October 1972) 381 NZPD 3234.
[62] (29 August 1972) 380 NZPD 2178.
[63] (11 October 1972) 381 NZPD 3231-3232.

[89] The Bill received cross-party support, and there are consistent references in the debates to the intention of removing and preventing discrimination in the rate of remuneration for males and females. The need for comparisons with the hypothetical man was also referred to, with the Hon E S F Holland observing (in relation to what was to become s 3(1)(b)) that it involved the creation of what a "notional or mystical man" would be paid as a comparator for pay in female intensive industries. He said that:[64]

> When you get too simple a definition, inevitably you get problems. The obvious one is how do you apply this criterion in totally female occupations? The Bill proposes, and the evidence supported the view, that a notional or mythical man must be created, indicating that the principle of equal pay is something more than a rate for the job. It is to bring the pay of women up to the pay of men if men have the job but, men not having the job, there is no rate that they can logically be brought up to. That rate has to be created, and I imagine that this is obviously the case in some of the female-intensive industries ... Many jobs are almost exclusively carried out by women, and it is not possible to say, "You will be paid the same as a man", because there is no man. … As was said by the Employers Federation, the notional or mythical man is created, and we assess what in fact he would be paid if he were doing the job.

[90] The Minister of Labour emphasised the scope for equal value comparisons, stating that: [65]

> … the really significant words of these criteria are not whether the work should be the same, broadly the same, or substantially similar, but the extent to which the work calls for the same or substantially similar "degrees of skill, effort, and responsibility", in which case the rates of pay should be the same. That really is the essence or substance of equal pay.

[91] The Commission recommended a definition of equal pay materially identical to that later included in the 1972 Act ("a rate of remuneration for work in which rate there is no element of differentiation between male and female employees based on the sex of the worker").[66] This definition is very similar to the meaning of "equal remuneration for men and women workers for work of equal value" in ILO 100 (that

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[64] At 3252.
[65] At 3256. Not all articulated the position as clearly as the Minister of Labour, who was responsible for the Bill.
[66] The Commission of Inquiry into Equal Pay *Equal Pay in New Zealand: Report of the Commission of Inquiry* (September 1971) at 21.

is, "rates of remuneration established without discrimination based on sex"). It is apparent that the Bill was intended to give effect to the principle of equal pay according to the provisions of ILO 100, just as the Commission had been asked to do in formulating its recommendations.[67] While the defendant submits that the absence of detailed legislative machinery for determining whether an unlawful element of differentiation exists reinforces a narrow interpretation of s 3(1)(b), it is apparent to us that such an omission reflects a legislative endorsement of the model that commended itself to the Royal Commission, as one likely to best meet the overriding objectives it had been asked to inquire into.

## Legislation always speaks

[92] The defendant contends that Parliament did not intend (at the time it enacted the Equal Pay Act) for s 3(1)(b) to have such a broad meaning ascribed to it. It was submitted that, at the time it was enacted, it was predominantly aimed at preventing discrimination in awards.

[93] Even if this is correct, an approach that asks solely what the original lawmakers intended can blind one to the function the Act ought to be performing today.[68] Legislative fossilisation is undesirable, and that is particularly so in the context of employment relations which are dynamic, the subject of changing social attitudes and values, and ongoing development over time. As Professor John Burrows QC and Ross Carter point out:[69]

> To investigate the original causes and motivation of the Act may, particularly in the case of an old Act, blind one to the fact that with the passage of time the Act, by dint of the normal meaning of its language, may have come to have other effects also. ... *It would be a pity if undue concentration on the past prevented a statute from developing and doing new jobs with the passage of time.*

[94] The fact that the long title to the Act includes the prevention, as well as the removal, of discrimination based on the sex of employees, reflects its continued

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[67] The Commission of Inquiry into Equal Pay, above n 48, at 5.
[68] Burrows and Carter, above n 16, at 185.
[69] At 254.

application. Since the passage of the Equal Pay Act there have been significant developments in human rights law and society's attitudes to discrimination. New Zealand has committed itself to a number of international obligations and the Bill of Rights Act has been enacted. These instruments are relevant in construing the provisions of the Equal Pay Act.

[95] All of this is reflected in s 6 of the Interpretation Act 1999, which provides that an enactment applies to circumstances as they arise. Statutes are always speaking, and the Equal Pay Act is no exception, despite the fact that it has remained largely mute for the past 41 years.[70] That is perhaps because no-one has initiated a conversation with it over that period.

[96] In any event, despite a careful reading of the materials placed before us setting out the legislative history and context of the Equal Pay Act we have been unable to detect anything that points to an intention to carve out an exception relating to discrimination in whole industries or sectors.

## Subsequent legislative initiatives – an aid to interpretation?

[97] In 1990 the Employment Equity Act came into force. It set out detailed machinery for determining equal pay, and provided (amongst other things) for the appointment of an Employment Equity Commissioner. It enjoyed a short and uneventful life, and was repealed within three months. The defendant submits that the enactment and subsequent repeal of the Act reflected a Parliamentary acknowledgment that the Equal Pay Act did not achieve the broader purposes contended for by the plaintiffs.

[98] While the Act contained detailed machinery for determining whether there was discrimination in remuneration between men and women that does not, of itself, indicate that the earlier Act had a much narrower focus. As we have already observed, the Royal Commission had eschewed the need for what it called a "sophisticated scheme or system of job evaluation" because of the "extreme

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[70] Although it has been subject to ongoing amendments, the most recent of which in 2000 when s 2A was inserted. It was also amended following the enactment of the Employment Contracts Act 1991.

difficulty of having a system of job evaluation that would cover all jobs".[71] Rather, the Commission formulated broad criteria for determining whether there was differentiation based on gender, and a principles-based approach that could be followed in such circumstances.[72]

[99] We were invited to have regard to the Parliamentary debates leading up to the enactment of the Employment Equity Act 1990 and the provisions of that Act. The Court may have regard to other statutes in a comprehensive legislative scheme as part of the interpretative exercise.[73] However while the 1972 (Equal Pay) and 1990 (Employment Equity) Acts were plainly related, it is equally clear that the 1990 sat alongside the earlier Act. The repeal of the latter Act did not affect the 1972 Act. In *Databank Systems Ltd v Commissioner of Inland Revenue*[74] the Privy Council observed that a 1989 amending Act could not be employed to construe the earlier 1981 Act, although it could be taken to indicate what Parliament - in 1989 - was seeking to achieve.

[100] Ultimately we do not draw assistance from a subsequent Parliament's expressed view of what an earlier and differently constituted Parliament may or may not have intended when enacting legislation.

[101] Nor do we consider that the interpretative exercise is illuminated by the way in which subsequent bills, such as the Employment Equity Bill (No 2) 1990 and the Employment Relations Law Reform Bill 2003, have been crafted or dealt with.

## Workability

[102] The defendant submits that an approach that may involve comparisons outside the workplace or sector is unworkable. These concerns were echoed by two interveners, Business New Zealand and (to a lesser extent) the New Zealand Aged Care Association.

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[71] The Commission of Inquiry into Equal Pay, above n 48, at [4.42], [4.38].
[72] At 50. We note too that s 19 of the Act enables regulations to be made, providing for such matters as are contemplated by or necessary for giving effect to the provisions of the Act, although none have been made to date.
[73] See, for example, *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [49].
[74] [1990] 3 NZLR 385 (PC) at 394.

[103] We note the observations of the ILO Committee of Experts in 1992 with respect to the practical difficulties that can arise from broad legislative provisions designed to achieve equal pay:[75]

> While acknowledging the difficulty in determining how broadly comparisons between the jobs performed by men and women should be permitted, *the Committee observes that adequate possibilities for comparison must be available if the principle of equal pay for work of equal value is to have any application in a sex-segregated labour market.* In order to ensure implementation of the principle in an occupation or industry employing mostly women, *it is essential that there be a basis of comparison outside the limits of the establishment of enterprise concerned*.

[104] We accept that it will be more difficult for parties to identify and assess differentials in rates of remuneration based on a comparator that has the potential to go beyond the workplace or sector concerned. Plainly, it would be a simpler process to compare rates with a male employee doing the same or substantially the same work within the workplace, or the sector, although such comparisons are not automatically excluded under the broader approach we have identified. We accept too that the assessment of rates of remuneration would have been easier under the previous awards system.[76] As Mr Kiely pointed out, a considerable amount of information relating to remuneration is not publicly available and may be difficult to access.

[105] However, we do not see the problems that have been identified as insurmountable, and it is evident that there are a number of resources available that may provide some useful guidance. As Mr Corkill QC observed, it can safely be assumed that parties will negotiate in good faith utilising the resources available to them, including information from various union and employer groupings. If an application comes before the employment institutions the parties will lead evidence as to why they say certain comparators are or are not relevant. It is plain, from the material that was referred to us, that there is a significant amount of information and expertise available in New Zealand (and internationally) to inform these issues.

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[75] Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No. 100) – New Zealand* LXXIX (1992).

[76] Abolished under the Employment Contracts Act 1991.

[106] While we accept that workability may be relevant to the interpretative exercise[77] we are confident (drawing on our experience of the way in which employment relationship issues are often resolved and having regard to the obligations on employers and employees to deal with one another responsively and in good faith), that many of the spectres that concern the defendant[78] will not, in practice, arise. We are not satisfied, based on the material before the Court, that a broader interpretation of s 3(1)(b) is either unworkable or impractical. Nor do we accept that the issues that are likely to arise provide a defensible basis for reading down the important protections afforded by s 3(1)(b). 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.

[107] Nor are we drawn to Mr Kiely's submission, on behalf of Business New Zealand, that a broader approach is inconsistent with the modern bargaining and employment framework. He makes the point that parties are free to bargain and that statutes such as the Minimum Wage Act 1983 already provide a safety net for the most vulnerable workers. While there are a number of Acts that provide a statutory minima against which wages and conditions are set, that does not mean that there is otherwise an untrammelled freedom to bargain, and nor does it justify a reading down of the provisions of the Equal Pay Act. Similarly we do not regard the fact that the Act contains offence provisions as a reason for adopting a narrow interpretation.[79]

[108] Reference was also made to the likely high costs of adopting a broader approach, if it leads to a significant wage increase for the plaintiff members. The Aged Care Association made the point that it receives funding from the Government, via the Ministry of Health, on a per bed basis and that it would not be able to absorb any increase. Although the Ministry was invited to appear as intervener it apparently

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[77] Ross Carter and Jason McHerron "Statutory Interpretation – a 2012 Guide" (paper presented to the New Zealand Law Society, 1 October 2012) at 106.

[78] Including concerns about the potential for employees to "cherry-pick" comparators and make repetitive requests.

[79] Such provisions include a prohibition on dismissing an employee for making a claim under the Act and s 18(1)(b), which makes it an offence to do any act with the intention of defeating any provision of the Equal Pay Act.

declined to do so. Accordingly, we did not have the benefit of hearing from it. In any event, it is apparent that the Government of the day, in promoting the Bill, was aware of the potential financial implications of the legislation. The Minister of Labour made the point that female industries would feel the greatest impact in terms of cost,[80] a point later echoed by the Hon E S F Holland.[81] Somewhat prophetically the Minister of Labour observed that:[82]

> This is a technical Bill, and it is one that has given grounds for considerable argument and a considerable amount of concern, particularly by the employers in our female-intensive industries. I am certain that, under the aegis of the Court of Arbitration, fair and equitable arrangements can be made. But this measure has a cost to it and the cost will be borne by our society as a whole – I hope willingly, because it will remove an anachronism which has been detrimental to New Zealand women.

[109] Further, and more fundamentally, the expressed concerns relating to cost overlook one important point, namely the unquantifiable cost (including societal cost) of adopting an approach which may have the effect of perpetuating discrimination against a significant and vulnerable group in the community simply because they are women, doing what has been described as undervalued women's work.

[110] History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have been acceptable as the short term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.

## The scope of the Court's jurisdiction

[111] It is common ground that the plaintiff Ms Bartlett is, and many of her colleagues are, employed on individual employment agreements (IEAs). There are no current negotiations between the parties about the equal pay issue. This, the

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[80] (11 October 1972) 381 NZPD 3233.
[81] At 3252.
[82] At 3235.

defendant says, presents a jurisdictional stumbling block for the plaintiff having regard to s 9 of the Act.

[112] Section 9, entitled "Court may state principles for implementation of equal pay", provides that:

> The court shall have power from time to time, of its own motion or on the application of any organisation of employers or employees, 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.

[113] The defendant submits that live, or at the least imminent, negotiations are a prerequisite for the exercise of the Court's powers under this provision, although Mr Waalkens acknowledged the difficulties associated with a temporal reading of s 9.

[114] Section 9 does not contain the limiting language found in s 10. Section 10 provides that the Court may examine the provisions of a proposed collective agreement that fixes the remuneration rate of employees. If the Court is satisfied that the provisions meet the requirements of the Act it may approve the provisions.[83] If not it may refer the proposed collective agreement back to "the parties" for further consideration and amendment. Guidance may also be provided on the principles of equal pay at that time.[84] Alternatively, the Court may simply amend the proposed terms of the collective agreement so that the principles of equal pay are met.[85] The Employment Relations Authority is also empowered to examine the provisions of an instrument or proposed instrument, other than a collective agreement, to determine whether those provisions meet the requirements of the principles of the Act.[86]

[115] While s 10 refers to "the parties" s 9 does not. Rather the Court's powers are directed generally at providing guidance for parties in negotiations. If s 9 was intended to limit the Court's powers to instances in which there were current or

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[83] Section 10(2)(a).
[84] Section 10(2)(b)(i).
[85] Section 10(2)(b)(ii).
[86] Section 10(3).

imminent negotiations between parties it is likely that it would have expressly said so in the same or a similar manner to s 10.

[116] Section 9 confers a broad jurisdiction on the Court to state general principles to be observed for the implementation of equal pay. It is not possible to precisely define the ambit of the Court's jurisdiction, however it would not be confined to simply restating or summarising the existing law. To do so would be of limited assistance, and it cannot have been intended that the Court's powers would be constrained in this way.

[117] We do not consider that s 9 requires there to be a live issue between identifiable parties. Such an interpretation is consistent with the broader objectives of the Act, to ensure progressive moves towards equal pay. It is likely, depending on the outcome of the case, that collective bargaining may be initiated by the Union that is the plaintiff, for caregivers for which s 9 guidance would be significant.

## Preliminary questions

[118] The preliminary questions and our answers to them are as follows:

- 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 in s 3(1)(b) of the Equal Pay Act 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?

  *Answer:* 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.

- What is the extent of the Employment Court's jurisdiction to state principles pursuant to s 9?

  *Answer:* The Court has jurisdiction to state general principles for the implementation of equal pay that will be generally available to guide any parties who negotiate about such matters.

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

  *Answer:* No.

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

  *Answer:* No.

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

  *Answer:* No.

- 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, conditions 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?

*Answer:* They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

- Does an employment agreement provide for equal pay in terms of s 6(8) of the Equal Pay Act 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 and male employees have the same or substantially similar skills, responsibility and service?

  *Answer:* Not if the rate of remuneration is affected by gender discrimination.

- 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?

  *Answer:* Not if the rate of remuneration is affected by gender discrimination.

[119] We wish to record our appreciation for the assistance that all counsel were able to give to the Court and for the preparedness of their clients to contribute to these important issues.

[120] Costs are reserved although our inclination is that the circumstances are such that no orders may be warranted to this point at least.

[121] The Registrar is to convene a directions conference of counsel for the parties (but for clarity, not of representatives of the interveners), before a judge alone, about

a month hence and for which we invite counsel to confer and file memoranda of proposed directions.

Judge Christina Inglis
for the Full Court

Judgment signed at 3.15 pm on 22 August 2013