



New Zealand Employment Relations Authority Decisions

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Alo v Emerge Aotearoa Limited (Wellington) [2017] NZERA 2121; [2017] NZERA Wellington 121 (29 November 2017)

Last Updated: 15 December 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 121
3013394

BETWEEN POLYANNA ALO, HUIA BROUGHTON, ANGELA RUBADUCA and NGAIRE SHORTLAND

First Applicants

AND EMERGE AOTEAROA LIMITED First Respondent

BETWEEN FEMKE DE FEIJTER Second Applicants

AND HEALTHCARE OF NEW ZEALAND LIMITED

Second Respondent

BETWEEN SHENNAH JARDINE and WENDY MURPHY

Third Applicants

AND MASH TRUST Third Respondent

BETWEEN JULIE WELLINGTON and JACLYN WIREMU

Fourth Applicant

AND ODYSSEY HOUSE TRUST Fourth Respondent

BETWEEN KAREN BROUGH, VERITY BROWN and

TARN EVANS Fifth Applicant

AND PATHWAYS HEALTH LIMITED Fifth Respondent

BETWEEN DONNA-MARIE DAVIES Sixth Applicant

AND PUKEKO BLUE LIMITED Sixth Respondent

BETWEEN NELLIE KATIPA Seventh Applicant

AND TE AWHI WHANAU CHARITABLE TRUST

Seventh Respondent

BETWEEN KIM BALDWIN Eighth Applicant

AND WALSH TRUST Eighth Respondent

Member of Authority: T G Tetitaha

Representatives: P Cranney/C McNamara, Counsel for Applicants

P Shaw, Counsel for First Respondent

E Warden, Counsel for Second Respondent

A Hall, Counsel for Third Respondent

B Smith, Counsel for Fourth Respondent

A Shadbolt/A Twaddle, Counsel for Fifth Respondent

T McGinn, Counsel for Sixth Respondent

E Anderson, Counsel for Seventh Respondent

A Shadbolt/A Twaddle, Counsel for Eighth Respondent

L Sijbrant, Counsel for Platform Trust as Intervener

Investigation Meeting: On the papers

Submissions Received: 20, 26 and 31 July, 6 October 2017 from applicants

24, 28 and 31 July, 6 October 2017 from respondents

Date of Determination: 29 November 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The first, second, fifth, seventh and eighth applicants cannot bring an action before the Authority seeking a determination about remuneration provisions in a collective employment agreement meeting the requirements of s3 of the [Equal Pay Act 1972](#). It must be filed in the Employment Court.

B. There is no justiciable application pursuant to s10 EPA for the third, fourth and sixth parties to seek a determination about remuneration provisions in their individual employment agreements meeting the requirements of s3 of the [Equal Pay Act 1972](#).

C. All of the applications before the Authority are dismissed. Costs are reserved.

Employment Relationship Problem

[1] The applicants have applied under the [Equal Pay Act 1972](#) (EPA) for a determination about the remuneration of female employees of the named respondents.

[2] There is an issue about the Authority's jurisdiction to determine this matter.

Relevant Facts

[3] All of the applicants are female workers employed in the Mental Health Addiction Treatment sector. Various District Health Boards contract with and provide funding to the respondents to service their clientele. The respondents then employ the applicants to provide those services.

[4] All of the applicants are members of the Public Service Association Te Pūkenga Here Tikanga Mahi or E Tu Unions (the Unions). This application is being brought by the Unions although the applicants are named individually. The parties have an assortment of collective and individual employment agreements.

[5] A statement of problem was filed in the Authority on 19 June 2017. The applicants initially sought a declaration that the minimum wages payable to the applicants pursuant to [s3\(1\)\(b\)](#) EPA are no less than those provided in the Care and Support Workers (Pay Equity) Settlement Agreement effective 1 July 2017.

Care and Support Workers (Pay Equity) Settlement Agreement

[6] By way of background, a settlement of claims under the EPA was achieved by employees in the aged care sector. This settlement is known as the Care and Support Workers (Pay Equity) Settlement Agreement effective 1 July 2017.

Joint Working Group

[7] The previous Government had established the Joint Working Group on Pay Equity Principles (the JWG) in November 2015. The JWG made recommendations for dealing with both equal pay and pay equity claims. The JWG included representatives from employers and the Unions.

Employment (Pay Equity and Equal Pay) Bill

[8] The JWG's recommendations resulted in the Employment (Pay Equity and Equal Pay) Bill (Bill) currently before Parliament. The Bill seeks to replace the EPA. A feature of this proposed legislation is the discontinuance of claims under the EPA. Those claims may be recommenced under the Bill but in limited circumstances.¹ This appeared to be the driver for filing this application with urgency. Since the filing of the statement of problem in the Authority, there has been a change of Government.

The Bill has not progressed into law.

Funders

[9] The respondents are currently in negotiations with the various DHBs regarding their funding contracts. The respondents submit there is insufficient current funding available to increase the wages paid to the applicants.

¹ Schedule 1 Transitional, savings, and related provisions, Part 1 Provisions relating to this Act as enacted, Clause 3 of the Bill.

Can the Authority do what the applicants seek?

[10] This application has been progressively refined through a series of statements of problem. The third pleading/second amended statement of problem still seeks a declaration about the applicants remuneration under [s3\(1\)\(b\)](#) of the [Equal Pay Act](#)

1972.

[11] [Section 3\(1\)\(b\)](#) of the [Equal Pay Act 1972](#) states:

3 Criteria to be applied

(1) Subject to the provisions of this section, 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 or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of [section 4](#) of this Act, the following criteria shall apply:

...

(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 service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.

[12] The above section sets out the criteria to be applied to applications under the EPA. It does not expressly provide for an applicant to seek declaratory relief. As a consequence submissions about the Authority's jurisdiction to grant any declaratory relief under that section were sought.

[13] The applicants have filed a Memorandum submitting there is jurisdiction for the Authority to grant the declaratory relief sought under [s12\(c\)](#) supported by (d) to (e) of the EPA set out below:

12 Further powers of [[Employment Relations Authority]]

Without limiting any other power of the [[Employment Relations Authority]], whether under this Act or otherwise, the [[Employment Relations Authority]] may—

...

(c) Determine any other question relating to the implementation of equal pay that may be referred to it pursuant to this Act:

(d) Determine any question of law, including the interpretation of this Act, in relation to

any instrument arising out of this Act that is referred to it by any party to any instrument or the representative of any party, or by the appropriate authority, or by an Inspector:

(e) Determine such other questions and give such rulings as may be necessary for the exercise of its jurisdiction under this Act.]

Section 10 EPA

[14] In my view this application for declaratory relief falls squarely within [s10](#) of the EPA

not [s12](#), [Section 10](#) of the EPA states:

10 Approval by Court or Employment Relations Authority of instruments or proposed instruments

(1) Despite anything in the [Employment Relations Act 2000](#), the Court may, of its own motion or on the application of any party, examine the provisions of any proposed collective agreement under that Act fixing any rate of remuneration of employees, whether or not those provisions have been agreed upon in conciliation, in order to determine whether the provisions of the proposed collective agreement meet such of the requirements of [sections 3](#) to [6](#) of this Act as are applicable.

(2) After hearing the parties or, if the Court thinks fit, without hearing the parties, the

Court may,—

(a) if the Court is satisfied that those provisions meet the requirements of [sections 3](#) to [6](#) of this Act, approve those provisions:

(b) if the Court is not so satisfied,—

(i) refer the proposed collective agreement back to the parties for further consideration and amendment of those provisions in order to meet the requirements of [sections 3](#) to [6](#) of this Act and, if it does so, the Court may state principles for the guidance of the parties for the implementation of equal pay in that collective agreement; or

(ii) amend the provisions of the proposed collective agreement in order to meet the requirements of [sections 3](#) to [6](#) of this Act, and make the collective agreement as so amended. (3) Despite anything in any other Act or in any rule of law, the Employment Relations Authority may, of its own motion or on the application of an Inspector, examine the provisions of any instrument or proposed instrument (not being a collective agreement under the [Employment Relations Act 2000](#)) in order to determine whether the provisions of the

instrument or proposed instrument fixing any rate of remuneration for employees meet such of the requirements of [sections 3](#) to [7](#) of this Act as are applicable. [Emphasis added]

[15] This application seeks for the Authority to examine the remuneration provisions in the parties collective and individual employment agreements and determine if those provisions meet the requirements of [s3](#) of the EPA. It proposes if the applicants wages are less than those in the Care and Support Workers (Pay Equity) Settlement Agreement effective 1 July 2017 than it does not meet those requirements.

[16] Section 10 EPA expressly restricts the availability of that type of declaratory relief in the Authority. Under [s10](#) parties to collective agreements must seek that type of determination about their remuneration pursuant to [s3](#) of the EPA from the Employment Court (Court).

[17] Section 10 EPA must also limit the powers of the Authority to act under [s12\(c\)](#) of the EPA.

Section 12 applies but “without limiting any other power of the Employment Relations Authority, whether under this Act or otherwise”. Therefore s12(c) must be read as subject to any other express power or limitation upon a power of the Authority set out in the EPA. This means the express limitations of s10 cannot be superceded by s12(c) of the EPA. Otherwise part of s10(3) EPA would be made redundant.

Is s10 limited to proposed agreements?

[18] I reject the applicants submission s10 is limited to proposed agreements and does not apply to existing collective or individual agreements. The statutory context of s10 and the EPA indicates it applies to existing as well as proposed agreements. The heading to s10 refers to “instruments” as well as “proposed instruments”.

[19] “Instruments” in s2 of the EPA are defined as:

Instrument means—

...

(e) Any other agreement, whether in writing or not, made between an employee and an employer or an employers' union or a society or body of employers, or between a group of employees and an employer or an employers' union or a society or body of employers; [and

includes an employment contract within the meaning of the Employment Contracts Act

1991:].

...

[20] The word “instruments” in the subheading of s10 includes “employment contracts” within the meaning of the [Employment Contracts Act 1991](#) (ECA). Under the ECA “employment contract” means “a contract of service”. “Collective employment contract” means “an employment contract that is binding on one or more employers

and 2 or more employees.”² The individual and collective employment agreements

between these parties would fall within the definition of employment contracts and therefore instruments under the EPA.

[21] Further s10(1) empowers the Court to examine any remuneration provision “whether or not those provisions have been agreed upon in conciliation”. The phrase “agreed upon in conciliation” clearly includes agreed remuneration provisions such as those in these parties agreements.

[22] To limit the express provisions of s10(1) to “proposed” agreements would limit the Authority (and Courts) jurisdiction to when agreements were being negotiated or renegotiated. That would leave these applicants very limited legal remedies under the EPA. A number of employees do not have regular negotiations about remuneration. There may be little or no basis to enact the provisions. This would largely defeat the intention of the EPA to prevent unlawful discrimination on the basis of sex.³

[23] Therefore the statutory scheme allows for both existing and proposed agreements to be examined for compliance with s3 of the EPA.

Application to Collective Employment Agreements

[24] However that does not override the legislative requirements about who must deal with these types of applications. There are existing collective employment agreements

between the Unions and the first, second, fifth, seventh and eighth respondents.

² Section 2 ECA.

³ Section 2A EPA.

[25] Given the above interpretation, the first, second, fifth, seventh and eighth applicants cannot bring an action before the Authority seeking a determination about remuneration provisions in a collective employment agreement meeting the requirements of s3 of the [Equal Pay Act 1972](#). It must be filed in the Employment Court.

Application to Individual Employment Agreements

[26] The third, fourth and sixth parties have individual employment agreements. These parties to individual agreements may only be granted a determination about their remuneration pursuant to s3 EPA upon the Authority's own motion or on application by a Labour Inspector.

[27] There is no application by the Labour Inspector before the Authority. There is no application for the Authority upon its own motion to consider the individual employment agreements under s10.

Should the Authority consider an application upon its own motion?

[28] For completeness I have turned my mind to whether the parties should be granted further opportunity to consider seeking an own motion application. I decline to do so in these circumstances.

[29] There are several reasons. Firstly there should be recourse to the Court in the first instance not the Authority. Section 9 empowers the Court to state principles for implementation of equal pay in accordance with s3:

9 Court may state principles for implementation of equal pay

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 of this Act.

[30] The fact the Court has yet to state those principles indicates the Authority should not grant an application upon its own motion before that occurs. At best a case stated to the Court about s9 may be required.

[31] The necessity for the Court to state those principles first was also expressed by the

Court of Appeal about how equal pay applications should progress:⁴

In our view, the best way forward would be for the Employment Court to be asked to state principles under s 9 before embarking on the hearing of [the applicant's] substantive claim. The ensuing statement of principles should provide the Employment Court and the parties with a workable framework for the resolution of [the applicant's] claim and so enable the parties to bring that claim before the Court in an orderly and manageable way. As mentioned, the Court may for example in its statement of principles identify appropriate comparators and guide the parties on how to adduce evidence of other comparator groups or issues relating to systemic undervaluation.

[32] That exercise may also be superceded by the Bill or other proposed legislation that may be introduced by the Government.

[33] This application is also somewhat premature. The respondents have not concluded their negotiations with their respective funders. It is only then a review of the applicants' remuneration can be undertaken with the Unions.

[34] The Unions have initiated bargaining with the first to third and eighth respondents.

The fourth to seventh respondents have not commenced bargaining with the Unions. The parties have also approached the Crown to negotiate a settlement of these proceedings as well. As a consequence there is no urgency to this matter because of these outstanding other actions. I would not be inclined to grant an own motion application in those circumstances.

[35] There is no justiciable application pursuant to s10 EPA for the third, fourth and sixth parties to seek a determination about remuneration provisions in their individual

⁴ *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc and Bartlett*

[2014] NZCA 516 at [236].

employment agreements meeting the requirements of s3 of the [Equal Pay Act 1972](#). All of the applications before the Authority are dismissed.

[36] Costs reserved. Given the novel law involved in this application and the speedy and cost efficient way in which this matter has been managed to determination, costs should lie where they fall. If any party seeks costs it shall file an application within

14 days. Parties shall have 14 days thereafter to file any reply. A decision shall be made on the papers.

TG Tetitaha

Member of the Employment Relations Authority