Equal Pay and the Employment Contracts Act 1991

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Introduction

The Equal Pay Act 1972 was intended 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".[1] Its scope was limited since it did not provide for equal pay for work of equal value.[2] However, with the repeal of the short-lived Employment Equity Act 1990, and the replacement of the Labour Relations Act 1987 with the Employment Contracts Act 1991, the industrial landscape has been transformed. Consequently, the provisions of the Equal Pay Act ("the Act") are of renewed importance.[3] This article examines whether the Act would be helpful if formal differentiation between pay rates for men and

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1 Long Title of Equal Pay Act 1972. For the purposes of this article, a claimant will be referred to in the female gender. While a male can seek relief under the Act, the vast majority of claimants will be women.

2 In *NZ Clerical Administrative IAOW v Farmers Trading Co Ltd* [1986] ACJ 203 the Arbitration Court held that it had no jurisdiction to hear such claims. See the Report of the New Zealand Working Group on Equal Employment Opportunities and Equal Pay, *Towards Employment Equity* (1988) 15.

3 Possible remedies under the Human Rights Commission Act 1977 will not be considered here.

women again became the norm.[4]

It will be argued that serious difficulties would arise if an employee tried to use the Equal Pay Act. The Act was designed to operate in the old award system and never made effective provision for employees outside that system. The Employment Contracts Act makes the individual employment contract the paradigm. Industry-wide collective contracts no longer exist. The philosophy of the Employment Contracts Act and the institutional system within which an equal pay claim would now have to be brought are so different that the Equal Pay Act is virtually useless.

The Equal Pay Act 1972

In 1972, forty per cent of wage and salary earners were covered by awards and agreements. Another twenty-five per cent were covered by the Government Service Equal Pay Act 1960.[5] The residual group included workers with individual contracts and those covered by specialist wage fixing tribunals. The Commission of Inquiry, whose report led to the enactment of the Equal Pay Act, rejected a suggestion that the Act only applies to workers covered by awards, with others cared for by a "flow-on" effect.[6] However, it did not recommend, and the Act did not provide, any special procedures for these workers. The primary focus of the Equal Pay Act is on employees covered by awards and agreements.

The Act was intended to end formal differentials in the pay of male and female employees. This was seen as a one-off task.[7] All "instruments" in force after 1 April 1973 which did not provide for equal pay were to introduce equal pay provisions over a five-year period. The Arbitration Court was empowered to make determinations implementing equal pay[8] and to examine the provisions of an instrument.[9] In some circumstances it could adjust an instrument, or it might send it back to the parties for renegotiation.[10] A claim that pay levels were unequal was dealt with as if it were a claim for wages.[11]

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4 In *The Impact of the Employment Contracts Act on Women at Work*, Working Paper (VUW) 1/93, Hammond and Harbridge note that "men have done much better than women in their wage packets [since the Employment Contracts Act came into effect]. Men are more likely to receive larger wage increases than women and the male-female wage differential is likely to widen owing to the gender pattern that is emerging in changes to clock hours. Men are more likely to attract penal and overtime rates whereas many women workers have lost these allowances .... Men are also more likely to receive productivity based payments." (at p13). While these differentials are probably across different occupational groups, where individuals are negotiating their own pay rates, they are quite likely to arise within a work category in a single enterprise.

5 Report of the Commission of Inquiry, *Equal Pay in New Zealand* (1971) 43.

6 Ibid,45.

7 Ibid, 51.

8 Section 12.

9 Section 10(2). The powers in ss 10(2) and 12 are now vested in the Employment Tribunal.

10 Section 10(2)(b).

11 Section 13(2). This procedure has been retained.

The original scheme of the Act

The fundamental definitions in the Act are "instrument" and "equal pay".[12] The focus on workers covered by awards is evident in the definition of "instrument". This includes awards and agreements, orders such as waterfront industry orders and also enterprise-level individual and collective pay determinations. Two paragraphs of the definition are relevant for employees not covered by awards. Originally, these read as follows:[13]

> (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:
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> (f) Any decision, whether recorded in writing or not, made by an employer fixing the rate of remuneration for an individual employee or a group of 2 or more employees; and for the purposes of this Act the employer and the employee or, as the case may be, each of the employees who are members of that group shall be deemed to be parties to the instrument ....

This definition is crucial because equal pay is to be provided to employees covered by the same instrument.

Equal pay is defined as "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".[14] Two sets of criteria are given for determining whether differentiation exists within an instrument. Where work is not exclusively or predominantly performed by female employees, the criteria are:[15]

> (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 ....

Where work is female-dominated, the criterion is "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] This is qualified by s 2(2) in the case of those employees covered by paragraphs (e) and (f) who have individual contracts. For this group, the Act does not apply at all if the "rate of remuneration ... is special to that employee by reason of special qualifications, experience, or other qualities possessed by that employee and does not involve any discrimination in relation to that employee or any other employee based on the sex of the employee".

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12 Section 2(1).

13 These definitions still apply but para (f) now expressly includes an employment contract as defined by the Employment Contracts Act 1991.

14 Section 2(1).

15 Section 3(1)(a)(i) and (ii).

16 Section 3(1)(b).

The Act in operation

Despite the intention that the Act should apply to all employees, those not covered by awards were disadvantaged. Under the old regime, awards were negotiated annually by professional union negotiators and equal pay would become one of the issues in each negotiation. For non-award employees, no formal negotiation procedures existed. This placed the onus on an employee to raise the question of equal pay with an employer or the Department of Labour and, if necessary, to bring an action. The Committee examining the implementation of equal pay in 1975 recommended that the Department of Labour carry out regular inspections,[17] but the 1979 report, *Equal Pay Implementation in New Zealand*, found that shops and offices were rarely inspected, as priority was given to health and safety. The Committee commented:[18]

> Although we know this will not be easy for them, the committee can only hope that women who think they are not on equal pay will have the courage to speak up or to seek the help of the Department of Labour. Individuals, as well as employers, unions and the department have a part to play in making the Equal Pay Act work.

It is clear that a dual system was in place. Where a worker was covered by an award, equal pay was to be systematically implemented, without the worker needing to take the initiative. For employees in the residual category – which even then was quite large – it was a matter of "courage". They might not be covered by the Act at all if an employer could establish that s 2(2) applied.

Other difficulties were caused by the requirement in the Act that equal pay be provided within an instrument. Where an instrument covered only one workplace, there was little room for comparison. If there were no male employees in such a workplace, there could not be a finding of unequal pay under the Act, even though male employees doing the same job in very similar workplaces were paid more. Widespread unequal pay practices within an industry could only be tackled under the Equal Pay Act if an award covered the industry as a whole.

Employment Contracts Act 1991: A New Framework

Following the enactment of the Employment Contracts Act 1991, consequential amendments were made to the Equal Pay Act. These amendments were piecemeal. Some sections of the 1972 Act refer to institutions that no longer exist[19] and other provisions are now obsolete, since they relate to specific time periods.[20] However, the Act still appears to have some relevance. First, an action can be brought in the Employment Tribunal to recover remuneration on the ground that an

17 Report of a Committee appointed by the Minister of Labour, *Progress of Equal Pay in New Zealand* (1975) 78.

18 Report of a Committee appointed by the Minister of Labour, *Equal Pay Implementation in New Zealand* (1979) 42.

19 For example, in s 4 of the Act, references to the Arbitration Court remain.

20 For example, s 4(1), (2) and (3).

employer has not "implemented" equal pay.[21] It is not clear whether this phrase would cover the situation where an employer had formerly provided for equal pay but was no longer paying male and female employees the same rate. "Implement" seems, rather, to refer to the one-off staggered pay increases from 1973 to 1979.

Secondly, a new section has been inserted into the Equal Pay Act:[22]

> 2A. Unlawful discrimination – (1) 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 or 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.
>
> (2) Where an employee would be entitled to make a complaint in respect of a breach of this section or make a complaint under the Human Rights Commission Act 1977, the employee may choose one of those entitlements but not both.

It is also an offence for an employer to fail to comply with the Act, with provision for a fine of $400 for an individual or $1000 for a body corporate.[23]

This is not as reassuring as it seems. Assuming that an employee may complain about a failure to implement equal pay, all the difficulties of a complaint-initiated system arise. In the first place, there are two practical problems. An employee may be reluctant to contact the Labour Department or to discuss the matter with her employer because of fear of reprisal. While it is an offence to dismiss or penalise a worker who makes a claim,[24] problems of proof may arise, and at a time of high unemployment, a worker may not wish to take the risk. Even if she is successful in pursuing a personal grievance, reinstatement is no longer the primary remedy for an unjustified dismissal. Taking the risk may indeed require "courage".

Secondly, it may be difficult to gather enough information to substantiate a complaint. While labour inspectors have powers to interview employers and inspect wage records,[25] a complaint cannot be made unless the employee knows she is not receiving the same pay as her male counterpart. For employees covered by individual contracts, pay rates are usually confidential. There is provision in s 4(2A) of the Act for employers to supply information relevant to implementing the Act, but this only arises where there is a "decision ... fixing the rate of remuneration for an individual employee or a group of 2 or more employees".[26] Not all employers will have made such a decision.

This problem with the application of s 4(2A) highlights the major difficulty with the application of the Equal Pay Act to employment contracts under the Employment Contracts Act. The demise of awards and the reduced number of

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21 Section 13(1).
22 Equal Pay Amendment Act 1991, s 3(1).
23 Section 18.
24 Section 15.
25 Employment Contracts Act 1991, s 144.
26 Definition of "instrument" in s 2(1)(f).

collective agreements have narrowed the scope of an equal pay claim. The larger the number of employees covered by an instrument, the greater the scope for comparison between different employees. The focus of the Equal Pay Act is on equal pay *within instruments.* This might have been effective under the old industrial relations system, where one instrument often covered a large number of employers and different classes of employees. It is, however, very restrictive in a regime where most instruments cover one employer, and possibly only one employee.

In the Employment Contracts Act regime, an "instrument" is either an individual employment contract or a collective employment contract. The number of employees covered by a collective contract may not be large. If the employment contract is an individual one, no comparison is possible unless there has been the type of determination about pay rates that is described in paragraph (f) of the definition of "instrument". The result is that equal pay does not have the same meaning as it did under the award system. Defining "equal pay" begs the question – "equal with whom?" The answer to this question is no longer "employees covered by the same award", but typically will be a far more limited number of employees of the same employer. It is also likely that many more workers will be affected by s 2(2). Indeed, the individualisation of pay rates is often thought to have been a goal of the Employment Contracts Act.

Since the first type of action that can be brought under the Equal Pay Act is now so limited, what of an action for discrimination under s 2A? First, it should be noted that the scope of an action under s 2A is narrow and the provision makes no reference to equal pay. The right it creates is of a different character. Consistent with the philosophy of the Employment Contracts Act, it focuses on the individual employee and her relationship with her employer. No discrimination in pay rates will be found under s 2A unless there is another employee who has at least substantially similar qualifications and who is engaged in the same or substantially the same work. As with a claim that equal pay has not been implemented, a claim that an employer has discriminated is difficult to establish in a small workplace where employees carry out a variety of tasks. The definition of discrimination is much narrower than the criteria applied in determining equal pay where, although work is predominantly performed by females, some comparison with male employees is possible.

The other difficulty with s 2A is the absence of a remedy. The editors of Brooker's *Employment Law* suggest that the Employment Tribunal can only award arrears.[27] However, this conclusion appears to be based on s 13, which provides for claims to be treated as if they were for recovery of wages. Section 13 may not apply to a complaint under s 2A, since it applies specifically to "proceedings ... for the recovery of remuneration" and does not refer to s 2A.

In fact, the effect of this apparent omission will not be great. Section 2A(1)

27 Vol 2, App 4, p App-42, 30/5/91 update.

defines discrimination in the same terms as s 28(1)(a) of the Employment Contracts Act, so conduct that is in breach of s 2A will also give rise to a personal grievance claim under that Act. Remedies provided in the Employment Contracts Act include compensation for humiliation, loss of dignity and injury to feelings, reinstatement and reimbursement of remuneration lost as a result of the personal grievance. It may be, therefore, that the introduction of s 2A was redundant.

In summary, the main effects of the Employment Contracts Act have been to place all responsibility for initiating claims upon employees and to reduce the size of groups within which pay can be compared.

An Alternative: Equal Pay in the United Kingdom

The system for implementing equal pay in the United Kingdom is of interest because it was designed to operate in an individual contract environment. The English Equal Pay Act 1970 deems an "equality clause" into the terms of a contract under which a woman is employed at an establishment.[28] The clause operates in three situations:

(i) where the woman is employed on like work with a man in the same employment;
(ii) where the woman is employed on work rated as equivalent with that of a man in the same employment;
(iii) where the woman is employed on work which is of equal value to that of a man in the same employment.[29]

The clause modifies any term in the woman's contract which is less favourable to her than a similar term in the contract of the male comparator.[30] If the woman's contract does not include a term corresponding to one in the man's, and that term benefits the man, her contract will be treated as including such a term. It appears that the claimant has the right to select a comparator. He must be employed by the same employer[31] and be engaged in like work or work that has been found to be similar.

Employers can resort to the "material factor" defence.[32] Equality clauses do not operate in relation to a variation that is genuinely due to a factor other than sex, and that factor is or may be a material difference between the two cases. The choice of the wrong comparator can therefore be fatal to a claim.

In this individual contract environment, the focus is on actions by individual employees to establish that they should be paid more. Claims can be brought by employees, employers, the Secretary of State for Employment, and the Equal

28 Section 1(1).
29 Section 1(2).
30 *Ainsworth v Glass Tubes and Components Ltd* [1977] ICR 347.
31 This need not be contemporaneous. The Act also applies where a woman receives less pay than her male predecessor in the same job: *Macarthys Ltd v Smith* [1981] QB 180.
32 Section 1(3).

Opportunities Tribunal. The Secretary may act in cases where it is not reasonable to expect the women concerned to take action themselves.[33] Money orders for arrears of remuneration and/or damages are available[34] and an employer can obtain a declaration as to the effect of equality clauses.[35]

Conclusion

This article commenced by asking whether the Equal Pay Act would be helpful in cases of differentiation between pay rates for men and women. This is only one aspect of the pay equity problem,[36] but one which was thought to be under control following the introduction of equal pay legislation in the 1970s. However, as the analysis here shows, if an employee is not already receiving equal pay, or if an employer gradually (whether intentionally or not) reintroduces differentials, it may be very difficult to take action against the employer. The principal reason for this is the emphasis in the Equal Pay Act on collective pay determinations, and the failure to amend the Act to operate effectively in an environment of mainly individual pay determinations.

It may be that the individual model is not appropriate to resolving equal pay issues. The English legislation is far from perfect, with comparisons limited to employees of the same employer. It is difficult to see how any equal pay legislation that takes an individual contract as its model can do more. Comparison between employers is inconsistent with this view of the employment relationship, which emphasises the employer's freedom to contract with an employee on whatever conditions it wishes.

However, given the model within which any fresh attempts to address equal pay must operate, it is suggested that the Equal Pay Act should be amended so that the fundamental clash of philosophies is eliminated. This clash makes the Act even less effective than ever. An amendment[37] should at the least require equal pay for all employees of the same employer doing the same or comparable work. It would need to apply to both individual and collective contracts. This would be similar to the English model, but with provision for collective contracts covering more than one employer. In this situation, the relevant comparison group for equal pay purposes would appropriately be all employees of the group of employers, rather than those covered by one instrument. Such an amendment is a long way from the ideal of pay equity but would at least provide more protection for the "right" it was thought women had already won.

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33 Section 2(2).

34 Section 2(1).

35 Section 2(1A).

36 See, for example, the alternatives discussed by Hume, in "Paid in Full? An Analysis of Pay Equity in New Zealand" (1993) 7 AULR 471.

37 Or perhaps the legislation should be completely rewritten, given that much of it was only applicable from 1973 to 1979, and the Act contains many references to defunct institutions.