

Legislation Update

Employment (Pay Equity and Equal Pay) Bill

This Bill was introduced on the 26th of July 2017 and had its first reading in the house on the 10th of August 2017. It is currently at select committee stage.

The purpose of the Bill is to eliminate and prevent discrimination on the basis of gender in remuneration and other terms and conditions of employment. It is also to promote enduring settlement of claims relating to discrimination on pay equity grounds. Submissions close for the Bill on the 1st of November 2017 and the Labour Party has said it will re-write this legislation if elected.

The Bill has its genesis in the Settlement for Care Workers legislation.

The Bill prohibits an employer from discriminating on the basis of sex, in remuneration and other terms and conditions:

- Enables employees to make claims relating to sex discrimination in employment
- Distinguishes between three types of claims (equal pay, unlawful discrimination on matters other than remuneration, and pay equity)
- Sets out the process for resolving the different types of claims
- Re-enacts, in an up-to-date in accessible form, the relevant provisions of the Equal Pay Act 1972. It would require amendments to the Employment Relations Act and repeals and replaces the Equal Pay Act 1972 and repeals and replaces the Government Services Equal Pay Act 1960

What is in the Bill

Equal pay claims are treated as claims for recovery of wages under the Employment Relations Act 2000.

Unlawful Discrimination in relation to other aspects of employment, so non-remuneration claims, are treated as claims for discrimination under the Employment Relations Act 2000.

Pay equity claims are made and resolved in accordance with new legislation using the Employment Relations Authority.

The process for making and resolving pay equity claims

The Bill provides employees with the right to make pay equity claims where a pay equity claim has merit, if it relates to work primarily performed by women and there are reasonable grounds to believe that the work has been historically undervalued and continues to be undervalued.

If the claim has merit then the employer and the employee must enter into a pay equity bargaining process to agree on an enduring settlement comprising remuneration and terms and conditions of employment. Pay equity bargaining ordinarily must involve an assessment of nature of remuneration of the work in comparable work and must be undertaken free from assumptions based upon gender.

There is also a dispute resolution process.

The pay equity claim process is distinct from the collective bargaining process.

There are penalty provisions for non-compliance, consistent with other employment legislation.

Under the Bill employees cannot make a complaint under the Human Rights Act 1993 and the Authority about equal pay, unlawful discrimination (non-remuneration) or pay equity claim in relation to the same matter.

There is a six year limitation period for equal pay claims so remuneration that relates to period of greater than six years before a claim is filed cannot be recovered.

The Authority and the Employment Court must consider the following factors when determining whether work is the same, or substantially similar:

- Whether the work calls for the same or substantially similar, skills, degrees of skill, effort, experience and responsibility from male and female employees; and
- Whether the conditions under which the work is to be performed are the same, or substantially similar from male and female employees.

Pay Equity

Whether a claim will have merit will relate to whether the work is predominantly performed by female employees and reasonable grounds to believe that the work has been historically undervalued and reasonable grounds to believe whether the work continues to be undervalued. The under valuation of work takes into account:

- Historical factors such as the origins and history of the work including the manner in which wages have been set.
- Any social, cultural or historical factors.
- Characterisation of the work as women's work;
- That the nature of the work requires an employee to use skills or qualities that have been -
 - Generally associated with women; and
 - Regarded as not requiring monetary compensation.

The Authority/Court will need to take into account the historical reasons for the continued under valuation of work and defines the relevant labour market as well.

Timeframes

There are tight timeframes for responding to a pay equity claim which includes acknowledging receipt of the claim within 5 working days and giving notice of the claim to all of the employer's other employees who perform the work which is not later than 20 working days after the employer receives the claim.

The employer has then got 90 days (maximum) to decide whether it has merit and make a decision on the claim. If the employer decides that the claim does not have merit a notice to the employee must set out the reasons for that decision and provide information to the employee about how to challenge the decision.

If the claim does have merit then the pay equity bargaining process starts.

The Bill goes on to set out the process for bargaining including how comparatives are selected.

The Bill also provides a process for how a pay equity claim is settled.

The Bill prevents the reduction of any of the other terms and conditions of employment for the purposes of settling a pay equity claim.

Collective bargaining does not settle or extinguish an unsettled pay equity claim and vice versa the existence of an unsettled pay equity claim is not justification for failure to conclude collective bargaining.

The Mediation services available for pay equity claims and facilitations available.

Facilitation will be difficult to get (as it is with collective bargaining). The Authority may accept a reference for facilitation when the Authority is satisfied that its expertise may be useful to resolve the issue and one or both of the following grounds exist:

- A party has failed to comply with their duty in good faith in a way that is seriously sustained and it has undermined progress of the claim; and/or
- Sufficient efforts (including mediation) have failed to resolve an issue relating to the claim.

Employers are required to keep certain records in respect of pay equity claims.

Employers may not treat adversely an employee who makes a claim and any employee who believes they have been treated adversely because of the claim may take a personal grievance.

The failures to comply with the Bill include up to \$10,000 for an individual and \$20,000 for a Corporate.

The Education Service is somewhat different with claims being able to be made to the State Services Commissioner rather than the Employer.

Employment Relations (allowing high earners to contract out of personal grievance provisions) Bill

You will remember last time we reported that this Bill had been pulled from the ballot and related to employees earning more than \$150,000 were able to, with their employer, contract out of the personal grievance provisions of the Employment Relations Act. The Bill has gone through the select committee processes and is at the stage of the second reading with the select committee having reported on the 15th August.

The Bill has had some changes at select committee stage which includes changing the provisions inserted into the Employment Relations Act 2000 and includes provisions that are similar to the ninety trial period provisions around prevention of bringing a grievance. There must be an agreement in writing, that the employer and employee have contracted out of the personal grievance provisions in relation to remuneration.

It also now says that the employee must have received the remuneration at the rate of \$150,000.00 or more. The \$150,000 threshold includes not just gross salary or wages but the agreed monetary value of any non-monetary benefit.

The threshold excludes discretionary payments or payments, the amount of which cannot be determined in advance such as bonus payments and commission payments or any payments to reimburse the costs incurred by the employee relating to the employee's employment or any payment of an employer contribution to a superannuation scheme.

It has retained the independent advice certification process that was there originally.