Paid in Full?
An Analysis of Pay Equity in New Zealand

Rochelle Hume

Winner of the Inaugural Law Review Symposium Prize for 1993

I: INTRODUCTION

It is undeniable that a wage gap exists between men and women.[1] This can be partially attributed to the systematic and historic devaluation of "women's work", and subsequent gender segregation in employment. There is ample evidence of such devaluation in Western society.[2] As a result, those involved in occupations traditionally performed by women are paid less, not because the work is inherently worth less, but simply because the position has traditionally been filled by women.

Although this is discrimination, it is not the direct, intentional discrimination outlawed by equal pay and equal employment opportunity legislation. Indeed, such legislation ignores the issue of job segregation and undervaluation of women's work, focusing instead on individual opportunity. A good example of this is provided by the Human Rights Commission Act 1977 which forbids advertising for job applicants on the basis of sex.[3]

This article focuses on a different method of reducing the wage gap; the implementation of pay equity, also known as "comparable worth" or "equal pay for work of equal value". It is acknowledged that pay equity cannot be a complete answer to gender discrimination in employment, and if implemented will only be useful if included in a package of equal opportunity and anti-discrimination legislation.[4]

---

1 See New Zealand Working Group on Equal Employment Opportunities and Equal Pay, *Toward Employment Equity* (1988).

2 See for example, Reiter (ed), *Toward an Anthropology of Women* (1975).

3 Section 32. See also Equal Pay Act 1972.

4 Supra at note 1.

Pay equity schemes require employers to institute equal remuneration for different jobs that are comparable in worth, but are filled by women and men respectively. Widely accepted job evaluation techniques[5] are used to ensure that employees are paid what they have always been worth to that employer. Thus, pay equity schemes are not affirmative action programmes.

II: CHALLENGES TO PAY EQUITY

Pay equity schemes take many forms,[6] yet there is a consistent pattern. A job traditionally filled by women is compared with a similar job traditionally filled by men. If, after evaluation by a mutually acceptable job evaluation scheme, the jobs are considered to be of comparable value, any differential in remuneration which cannot be explained by reference to gender-neutral criteria, such as supply and demand, is removed on the basis that it is discriminatory. In most pay equity schemes the incumbents compared work for the same employer, or at the very least work in the same industry, but this does not have to be the case.

There has been a substantial amount of debate surrounding the pay equity issue, both in academic journals and the media. It is important to correct some of the misconceptions surrounding pay equity. A serious objection to the implementation of pay equity systems is based on the possible consequences of this type of market regulation. Courts in the United States have asserted that employers must be free to set wages in reliance on the free market.[7] Furthermore, Smith contends that the wage gap is merely due to supply and demand, and therefore does not warrant intervention by pay equity schemes.[8] This argument ignores the potentially discriminatory nature of market forces.[9] Indeed, when the wage setting system is inherently discriminatory, it is clear that discrimination cannot be eliminated without effecting a change in the system. In addition, free market principles have not always escaped government intervention. Examples include the Minimum Wage Act 1983. Consequently, while the implementation of pay equity is necessary to end discrimination, economic arguments demonstrate that the implementation of any scheme must proceed very carefully, and incorporate economic considerations.

Thus, the potential impact of judicial or legislative interference in wage setting on the economy is important. For example, one fear expressed in submissions to the New Zealand Working Group on Equal Employment Opportunities and Equal

---

5 Burton, *Women's Worth: Pay Equity and Job Evaluation in Australia* (1987) 1-25.

6 A good discussion of the possible shapes of pay equity schemes can be found in Szyszczak, "Pay Inequalities and Equal Value Claims" (1985) 48 MLR 149.

7 *Lemons v City and County of Denver* 620 F 2d 228 (10th Cir 1980); *Christensen v State of Iowa* 563 F 2d 353 (8th Cir 1977).

8 Smith, "The EEOC's Bold Foray Into Job Evaluation" *Fortune*, 11 Sep 1978, 58, cited in Brown, Baumann & Melnick, "Equal Pay For Jobs of Comparable Worth: An Analysis of the Rhetoric" (1986) 21 Harv CR-CL LR 127, 134.

9 That is, that undervaluation of women's work has led to current supply and demand discrepancies.

Pay was that if employers are forced to pay more for workers, they may either close down or resort to redundancies.[10] This is not a new argument. Under New Zealand's previous industrial relations regime it appeared in many wage raising exercises, but was usually rejected. It seems spurious to argue that employers should not be compelled to end discrimination because they cannot afford to pay an equitable wage. Nevertheless, economic realities cannot be ignored. Legislation can be harmful where its impact has not been fully assessed.

Some have argued that the fact that female occupations are paid less does not mean sex discrimination is occurring. For example, Mincer and Polachek[11] argue that women's lower wages reflect smaller "investments" in education and experience. Therefore, were it not for these individual choices, the employment market would be gender-neutral.

Such theories do not account for the fact that pay equity does not concern discrimination in job access.[12] Thus, a pay equity claimant will already have established that the job requires equivalent qualifications, experience and skills to that of the male comparator. Nevertheless, he or she is still being paid less. If the two jobs are equivalent in all other areas, any remaining wage gap cannot be attributable to the lower investments in human capital[13] claimed by Mincer and Polachek.

Finally, it has been argued that comparable worth is "a fallacious notion that apples are equal to oranges and that prices for both should be the same".[14] The language is impressive but ignores the fact that although a job evaluation scheme is by no means entirely objective, it is a detailed, systematic and, perhaps more importantly, long-established tool used to determine the worth of those jobs to the employer. Such schemes have been described as "a wholly rational hierarchy ... on the basis of relative worth to the employer".[15]

III: JOB EVALUATION SCHEMES

The most appropriate type of job evaluation scheme in the pay equity context is the "consensus-capturing" method. This utilises "position descriptions" which describe the skills, responsibility, working conditions and experience required for the job.[16] The position description is evaluated by a panel which includes union representatives, employer representatives and some workers who occupy or have occupied the position being evaluated. Number values are ascribed to factors such as "know-how", responsibility and working conditions. A pay equity claim does

10 Supra at note 1, at 13.

11 "Family Investments in Human Capital: Earnings of Women" (1974) 82 J Pol Econ 76, cited in Brown, Baumann & Melnick, supra at note 8, at 135.

12 Brown, Baumann & Melnick, ibid.

13 Supra at note 11, cited in Brown, Baumann & Melnick, ibid, at 135.

14 Smith, supra at note 8, at 142.

15 Supra at note 8, at 133.

16 There may be variations on this. For job evaluations generally see Burton, supra at note 5, at 1-25.

not become possible unless two jobs are evaluated as being of equal worth to the employer. The theory of job evaluation is that it provides an objective measure for determining the worth of jobs to employers.

However, in *Women's Worth*,[17] Burton demonstrates that job evaluation techniques include an element of subjectivity. She provides the example of the Hay Associates, who specialise in job evaluations using the consensus-capturing method. They discovered prejudice creeping into the writing of position descriptions, including reference to office personnel who "only typed". This insinuated that little skill was required. Skills such as knowledge of medical spelling, redrafting of letters and general spelling checks were ignored.[18]

There is another particularly noticeable stereotype emerging in relation to the description of childcare. The failure to recognise childcare as a skill assumes that it is "natural" for women to look after children. The necessity for one year of training at a Technical Institute, in addition to ongoing training and the acceptance of a huge responsibility for the next generation, is overlooked in assessing the low remuneration awarded to childcare workers.

Thus, it is clear that an element of subjectivity will influence the evaluation of any differences. Nevertheless, it appears that any inaccuracies in job evaluation will not favour low status positions. Indeed, although such schemes can be inaccurate, they can be carefully checked and balanced. In summary, the implementation of job evaluation schemes is not perfect. Nevertheless, such schemes are an improvement on the current wage-setting environment which is based on discriminatory market values and tainted perceptions of the status of women's work.

IV: PAY EQUITY AND THE LAW

Pay equity claims are either framed under equal pay legislation,[19] human or civil rights legislation,[20] international obligations[21] or specific pay equity legislation.[22]

Many claims are originally framed under equal pay legislation. Such claims are generally unsuccessful, due to statutory requirements that equal pay be awarded for men and women performing the same or substantially similar work.[23] The theory of pay equity acknowledges job segregation, whereas that of equal pay legislation generally does not.

---

17 Ibid.

18 Ibid.

19 For example, *New Zealand Clerical Administrative IAOW v Farmers Trading Co* [1986] ACJ 203 was a pay equity claim framed under the Equal Pay Act 1972.

20 For example, in the United States, *County of Washington v Gunther* 452 US 68 (1981) was a claim under Title VII of the Civil Rights Act 1964.

21 For example, in the United Kingdom and other European Community countries, Article 1 of Council Directive 75/117/EEC, under Article 119 of the Treaty of Rome 1957 has led to municipal legislation requiring equal pay for work of equal value.

22 See Pay Equity Act 1987 (Ontario).

23 See also US Equal Pay Act 1963, 29 USCA § 206(d); s 2A Equal Pay Act 1972 (NZ).

New Zealand Clerical IAOW v Farmers Trading Co[24] illustrates the inability of the Equal Pay Act 1972 to redress pay equity concerns. In that case, members of the clerical union challenged the registration of their award on the ground that the proposed remuneration was less than awards of comparable worth in industries predominantly filled by male workers. It was alleged that the reason for this was that the clerical workers' union is predominantly filled by women. The Court, while accepting that the Equal Pay Act was still in force, refused to accept that such a claim was within its jurisdiction, stating:[25]

> It is our clear view that while the Equal Pay Act 1972 is available pursuant to sections 10, 3(3) and 6(8) to enforce amendment in any proposed award of rates of remuneration to ensure that there is no element of differentiation in that proposed award between male employees and female employees based on the sex of the employees, it is acknowledged that there is no such differentiation in the present case.

The Court concluded that the choice of the Act as a vehicle to remedy pay inequity was an error in law, and declared that it had no jurisdiction to address the issue raised.

According to this interpretation of the Act, the difficulties caused by job segregation cannot be addressed. This is due to the fact that under a pay equity claim the comparator must do "the same or similar work" to the extent that he is covered by the same industrial award. Under the Equal Pay Act, the claimant must show that there is a differentiation in the remuneration of one job based on that individual employee's sex. Pay equity is less concerned with specific individual cases of sex discrimination. It instead concentrates on the historical devaluation of an occupation because of its association with women.

The Human Rights Commission Act 1977 prohibits discrimination in employment on the basis of sex, marital status, religious or ethical belief, or age.[26] However, in passing the Act, Parliament neatly avoided controversy regarding pay equity by inserting the "equal work" standard into s 15(1)(b) of the Act. Section 15(1)(b) outlaws refusing or omitting to offer or afford any person the same rights relating to employment as are made available for persons:

> [O]f the same or substantially similar qualifications employed in the same or substantially similar circumstances.

The Human Rights Commission Act, like the Equal Pay Act, emphasises direct discrimination. Section 38(8) provides that an unintentional breach of the Act is no defence to civil proceedings under that provision. Nevertheless, the Act still focuses on fines or civil actions against *individuals* where complainants have proved a specific instance of direct discrimination on the basis of gender. For example, s 15(1) states that it "shall be unlawful to refuse or omit to offer the same terms of employment ... by reason of the sex, marital status, religious or ethical belief or age of that person."

24 Supra at note 19.

25 Ibid, 207.

26 Section 15.

This requirement is fatal to pay equity claims, as they are intended to remedy unconscious, unintentional biases which pervade wage-setting systems and supposedly neutral market forces. The issue of indirect discrimination is important, and s 27 of the Human Rights Commission Act appears, prima facie, to provide some redress. It establishes the offence of "discrimination by subterfuge". This is defined as follows:

> Where a requirement or condition which is not apparently in contravention of any provision of this Part of this Act ... *has the effect* of giving preference to a person of a particular colour, race, ethnic or national origin, sex, marital status, or religious or ethical belief, or age. [Emphasis added]

This definition appears to describe the conditions in which pay equity claims may be brought. The words "not apparently in contravention of any provision of ... this Act" mean that even if the s 15(1)(b) equal work standard were not met, which would establish that the employer has not directly committed an offence, the practice may still be illegal under s 27.

However, the next phrase requires that the existing preference must be illegal under Part II. No other provision makes inequitable pay rates across industries illegal. Furthermore, s 27 provides employers with the opportunity to plead financial necessity by establishing "good reasons" for their practice and demonstrating that the practice is not a subterfuge designed to avoid compliance with the Act.

Thus, the Act emphasises direct discrimination and the requirement that an accused employer prove that he or she did not intentionally subvert the Act to avoid liability under s 27. This indicates that the provision was not intended to remedy inherent biases in wage-setting which lead to inequitable wage rates. It appears that s 27 has little to offer pay equity claimants.

If pay equity is to be implemented, either new legislation must be enacted, or society must wait until equal opportunity legislation eradicates discrimination and equitable rates are paid. If the second option is adopted, pay equity will be very slow in developing, if it develops at all. Legislation therefore appears to be the most effective method of implementation. The Working Group on Equal Employment Opportunities and Equal Pay also reached this conclusion.[27] That Group proposed the Employment Equity Act 1990. This Act was duly passed by the Labour Government in July 1990 but swiftly repealed by the National Government in December the same year by the Labour Relations Amendment (No 2) Act 1990.

However, the implementation of pay equity in New Zealand is no longer as simple as merely re-passing the Employment Equity Act in its 1990 form. The Employment Equity Act was based on the regulation of awards,[28] and relied on the existence of a strictly controlled bargaining arena. The Employment Contracts Act 1991 significantly altered New Zealand's industrial bargaining environment

---

27 Supra at note 1, at 22.

28 Supra at note 1, at 16: "Although recent reforms to the wage fixing system are designed to decentralise that system, the national award is likely to retain its importance in the medium term in setting wages and conditions in low paid female intensive industries."

through deregulation. It also rendered any legislation based on the Employment Equity Act unworkable. Sections 55 to 68 of the Employment Equity Act illustrate its reliance on the award system in implementing pay equity. Under s 56 a pay equity claim could form part of the dispute of interest between the union and employers. There was provision in ss 57 to 64 for the dispute to be referred to the Arbitration Commission for determination by way of final offer arbitration, and s 65 provided for the adjustments resulting from a successful claim to be incorporated in subsequent awards.

The change is likely to have a detrimental effect on the fight to end wage disparity. Australia and New Zealand have traditionally controlled employment bargaining strictly. Statistically, these two countries have considerably smaller wage gaps than Great Britain, Canada and the United States, where the employment environment has always been somewhat more deregulated.[29]

The Employment Contracts Act aims to "promote an efficient labour market".[30] This will not empower lower-paid, lower-status groups of workers, which include a disproportionate number of women. The Act seeks to promote labour efficiency by removing compulsory unionism. In Britain, where there is no compulsory unionism, women are less likely to be unionised than men.[31] Unions generally increase bargaining power and therefore wages. De-unionisation is likely to have a detrimental effect on wage disparity. The fact that women's occupations tend to be low-paid and low-status reduces their negotiating power in such a "free" bargaining environment. Lower-paid workers who are not perceived as occupying valuable positions have less to bargain with and very little which they can afford to lose.

This is particularly pertinent following the Employment Court's decision in *Adams v Alliance Textiles NZ Ltd.*[32] It was held that even if employees engage the union to bargain as an agent,[33] the employer can still offer greater remuneration to employees who disassociate themselves from the union. This decision further disempowers low-paid workers who must eschew the protection of the union in order to obtain a better rate of pay. Without union membership, the possibility of instituting court action is simply not an economic reality for many workers. Even if female occupations remain unionised, a decrease in membership is the inevitable result of voluntary unionism. This is likely to further deplete union resources. There are also practical problems. For example, many women's occupations are in small enterprises and are isolated. It is virtually impossible for such unions as the Service Workers Union to obtain the authority necessary to represent their workers. It is also difficult to actually represent such workers in ongoing negotiations.

---

29 See Thornton, "Reply to Linda Dickens' "Road Blocks on the Route to Equality"" (1991) 18 Melb U L Rev 298.

30 From the Long Title of the Act.

31 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain"(1991) 18 Melb U L Rev 277, 281.

32 [1992] 1 ERNZ 982.

33 See s 10 Employment Contracts Act 1991.

Another practical consideration is the difficulty of establishing a male comparator for the purpose of job evaluation schemes. The now repealed Labour Relations Act 1987 operated in a national award system of wage-setting. This allowed for the possibility that the award for a predominantly female occupation could be compared with the award of a predominantly male occupation. A pay equity claimant had a very good chance of establishing a suitable comparator in order to demonstrate the inequities of the present wage-setting order. In a deregulated industrial relations arena, bargaining often occurs on an enterprise by enterprise basis. In the United States[34] and Britain[35] this means that a male comparator must be chosen from within that enterprise.[36] This may be difficult due to the extent of job segregation. Indeed, even if a male works in a female dominated enterprise, his remuneration may also be depressed because the position is identified as a female occupation.

There are also problems for very small enterprises with less than ten employees[37] as it is difficult to find a suitable comparator, and difficult to prove that any pay differentiation includes discriminatory factors. The number of employees is not high enough to provide statistically significant results. This is particularly relevant in the New Zealand context as the number of small enterprises with less than five employees is rising significantly, while the number of enterprises with over one hundred employees, where pay equity can most effectively be implemented, is decreasing.[38]

These are some of the more specific difficulties for pay equity caused by the Employment Contracts Act, and should be understood in the context of the more general observation that a "freer" bargaining environment almost inevitably means less power for the weak and more power for the strong, and results in a larger wage disparity.[39] The approach of the Employment Equity Act of allowing voluntary implementation of pay equity at the choice of the employer, thus leaving the option open for specific claims to be brought, is no longer appropriate under the Employment Contracts Act.

The question now becomes which system is appropriate for implementing pay equity in the new industrial relations environment. Considering the difficulties confronted without specific pay equity legislation in both New Zealand and the United States, it seems that a pay equity statute is the most likely method of

---

34 See Brown, Baumann & Melnick, supra at note 8, at 140.

35 See Szyszczak, supra at note 6, at 153.

36 See Szyszczak, ibid, on whether a comparator ought to be chosen from another industry: "It could be argued that it might confuse issues of national labour market structure with intentions of individual employers."

37 This is recognised in the Pay Equity Act 1987 (Ontario), where, under Part III, compulsions to implement pay equity in the private sector exist only if there are more than nine employees.

38 Department of Statistics, "NZ Businesses by Size 1987-1991", in *New Zealand Social Trends: Work* 42.

39 Sayers, "Women, the Employment Contracts Act, and Labour Flexibility", in Harbridge (ed) *Employment Contracts: New Zealand Experiences* (1993) 210, 214-215.

implementing pay equity. For an appropriate model from a bargaining environment similar to that which exists in New Zealand under the Employment Contracts Act, one could look to the Ontario Pay Equity Act 1987. The Ontario industrial relations system is similar in many respects to New Zealand's. It is characterised by enterprise-based bargaining. Unions, where they exist, represent all of the workers in one workplace, rather than all of the workers in one occupation from a particular geographical area.[40] This appears to be the approach which will be adopted in New Zealand.

The Ontario Pay Equity Act provides for the compulsory implementation of pay equity schemes for all public and private sector employers who employ more than nine workers. The New Zealand Working Group on Equal Pay rejected the notion of a compulsory scheme under the previous industrial relations statute. However, with the new aggressive bargaining tactics utilised by employers[41] and sanctioned by the Employment Contracts Act, it is evident that compulsory implementation has become the more appropriate option.

Aside from the compulsory element itself, the Ontario Pay Equity Act provides some useful models to help overcome practical problems. Section 6(2) provides that if no suitable male comparator can be found, a male job class which performs work of a lesser value can be used as a comparator if its remuneration is higher. Section 8 of the Act provides for "allowable differences" – giving employers the opportunity to show that differences in remuneration between an employee in a male job class and an employee in a female job class are due to genuine gender-neutral reasons.

One concern with the Act is that s 8(2) tends to be inconsistent with a recognition of the history of powerlessness associated with female job classes. It states that:

> After pay equity has been achieved in an establishment, this Act does not apply so as to prevent differences in compensation between a female job class and a male job class if the employer is able to show that the difference is the result of differences in bargaining strength.

This section seems to assume that the implementation of pay equity will immediately empower those in low-status job classes, resulting in an "level playing field" in the bargaining arena. However, although it may be a legitimate concern to reduce interference in the free-bargaining system, the implementation of pay equity will only produce an equal playing field over time, and with the appropriate equal employment opportunity legislation and education. This provision ignores these two factors.

However, the Act is instructive in so far as it attempts to use methods which are gender-neutral in evaluating job worth.[42] It recognises the discrimination inherent in the subjective process of job evaluation, which can instil devaluation of

---

40 As was the case in New Zealand under the Labour Relations Act 1987 and its predecessors.

41 See *Adams v Alliance Textiles NZ Ltd*, supra at note 32.

42 Section 13(2)(a) of the Act instructs employers to describe the gender-neutral comparison system used for evaluating job worth.

women's job classes into the wage-setting process. Nevertheless, by requiring a gender-neutral wage-setting system, the legislature may be asking the impossible. It would perhaps be more beneficial to enable any job evaluation process to be challenged by a claimant or official on the basis that discriminatory values were incorporated into it. Other useful elements in the Act are the use of a specialist agency and review officer to administer the requirements of the legislation.[43] The educative function of such an agency would be particularly essential in the context of a compulsory scheme where many employers throughout the country are being compelled to participate in the scheme. The use of a phase-in period before implementation is probably necessary in order to allow for the possibility of financial difficulties of employers who in some cases may be facing heavily increased wage bills. The Act allows for a phase-in period of up to five years.[44]

Although other countries have seen a necessity for reducing the wage gap by introducing pay equity legislation, it is likely to be a very long time before such reform is introduced in New Zealand, if it is introduced at all. This is due to the ideologically-driven policies of the present government, New Zealand's current economic conditions, and the existence of the Employment Contracts Act. In the meantime, without pay equity, the wage gap is likely to continue. Even the New Zealand Bill of Rights Act 1990 is of no assistance. It is clear from s 3 that the Act only applies to acts of the legislative, executive, or judicial branches of the New Zealand government or any person or body in the performance of any public function, power, or duty conferred or imposed by or pursuant to law. As such, any claim under the Bill of Rights could only be brought by a public employee, a class of persons declining in number due to privatisation of the state sector.

IV: CONCLUSION

There exists in New Zealand, as in many countries, a wage disparity between the sexes which is detrimental to women. This appears to be partially the result of an historical devaluation of women's work, rather than a reflection of the inherent worth of the work itself. Pay equity claims are an attempt to remedy this disparity by attacking the heart of its cause – the discriminatory values indirectly entering the wage-setting process of women's work, which lead to lower wages than the inherent worth of the work would dictate. Job evaluation schemes are an integral part of the identification of inequitable pay rates, and of the identification of a comparator performing work of equal value to provide a guide of more appropriate wages.

The purported objectivity of job evaluation schemes has been attacked, and rightly so as the process involves subjective decision-making at virtually every step. However, the process also has much merit, particularly as the subjective nature, once identified, can be controlled, and the process is more likely to lead to

43 Sections 24 and 27.

44 Section 10(d).

equitable pay rates than are market forces steeped in indirectly discriminatory values.

In New Zealand, there is currently no legislation allowing low-paid workers to bring pay equity claims, as the previous Employment Equity Act had a very short life. The Human Rights Commission Act and Equal Pay Act are of little value in implementing pay equity, and even the New Zealand Bill of Rights Act would provide little hope for a successful pay equity claim. Furthermore, with the introduction of the Employment Contracts Act in 1991 the chances of pay equity being implemented have been reduced further. The Act is likely to have a significantly negative effect on wage disparity. It also makes implementation of pay equity more difficult should Parliament ever wish to pass another pay equity statute. Nevertheless, the Ontario Pay Equity Act provides a model for how pay equity can be implemented in a harsh bargaining environment as exists in New Zealand under the Employment Contracts Act.

In conclusion, pay equity in New Zealand under current legislation is not a reality. Given the right political environment however, there are models available on which to develop equitable pay levels, and a fairer deal for New Zealand women.