

24 May 2016

Hon Paula Bennett
Minister of State Services
Parliament Buildings
Wellington

Hon Michael Woodhouse
Minister for Workplace Relations and Safety
Parliament Buildings
Wellington

Dear Ministers

Recommendations of the Joint Working Group on Pay Equity Principles

The Joint Working Group on Pay Equity Principles (JWG) has completed its work and is now pleased to provide you with its recommendations.

The Government established the JWG in 2015, following a Court of Appeal decision in *Terranova v Service and Food Workers Union and Bartlett* (the "Terranova case"). That decision held that the *Equal Pay Act 1972* required equal pay for work of equal value (pay equity), not simply the same pay for the same work. This changed the way the Act was understood to have applied in the past. The JWG, facilitated by Dame Patsy Reddy and consisting of government, employer and union representatives, was tasked with recommending universally applicable pay equity principles for consideration by Government.

Government indicated that its preferred response to addressing pay equity issues was to determine pay equity principles that could be supported by employers (private and public) and by unions.

Since its establishment the JWG has been meeting to identify principles to recommend to Government which:

- Guide the implementation of pay equity for government, private and public sector employers, employees and unions, and
- Provide practical and specific guidance on how and in what circumstances matters of pay equity can be raised and the processes for progressing pay equity, and the nature and scope of evidence that may assist the process.

The JWG met on ten occasions and has agreed to a set of pay equity principles and the process through which pay equity claims may be addressed.

Approach

Pay equity is a complex issue, involving multiple historical and current factors.

The recommended approach therefore is based upon the notion of the parties to a pay equity claim resolving these issues at the earliest time at the most appropriate level, using the existing good faith bargaining arrangements of the *Employment Relations Act 2000* as the platform. The benefit of this approach is that it uses the existing good faith provisions in the law, and where necessary, the Employment Relations Authority and the Court to assist parties in settling pay equity claims.

Having pay equity claims treated as grievances addressed solely by the courts was not seen as conducive to good faith reconciliation of this type of employment issue.

Our preferred approach may be summarised as having the parties who would benefit from the claim bargain in good faith, using a set of principles designed to identify and confirm, assess and resolve a claim.

Main elements

The process and principles envisaged by the JWG are attached as Appendices 1 and 2. The main elements are:

- Pay equity claims may be made by any employee(s) to their employer at any time. The merit of the claim as a pay equity claim involves consideration of whether the work is predominantly performed by women, may have been historically undervalued and subject to systemic undervaluation.
- Employers receiving claims will be required to immediately notify those of their employees that might also be affected by (or benefit from) the claim.
- Once accepted as a pay equity claim the parties will bargain to resolve the claim, with guidance from the pay equity principles, including:
 - A thorough assessment of the skills, responsibilities, conditions and degrees of effort must be undertaken.
 - The assessment must be objective, free of assumptions based on gender and fully recognise the importance of skills, responsibilities, effort and conditions that are commonly overlooked or undervalued in female dominated work.
 - Comparators may be used so long as the comparator is not distorted by also being undervalued due to systemic undervaluation due to being “women’s work”.
- If the employer does not accept it is a pay equity claim within an established timeframe of receiving the claim the employee(s) raising the claim may test its merit as a pay equity claim with the Employment Relations Authority or revise their claim.

- Settlement of a collective agreement does not settle or extinguish an unresolved pay equity claim and failure to settle a pay equity claim is not a justification for not concluding collective bargaining.
- If parties reach an impasse on an aspect of bargaining over pay equity (or a dispute over whether a claim has merit) recourse is available through existing dispute processes, including mediation, facilitation and determinations from the Employment Relations Authority.
- Our recommended process includes enhancements to these mechanisms to ensure they are appropriate to address important and complex pay equity issues. This includes:
 - Providing improved access to facilitation for employees with pay equity claims.
 - Improving access to facilitation for bargaining over collective and individual employment agreements on pay equity by applying less restrictive grounds for applications for facilitation.
 - Providing the Authority with clear jurisdiction to make determinations on pay equity points of dispute.

The Authority will be able to make determinations to fix provisions in employment agreements, including pay, when all other reasonable alternatives for reaching agreement on pay equity claims have been exhausted within a reasonable period.

While the JWG has reached broad consensus on the process outlined above, one area that we have not resolved is the extent to which the principles provide guidance on identifying comparators in terms of industry or sectoral proximity to the employees in the pay equity claim. The attached principles are currently silent on this issue.

Legislative amendments

If the JWG's recommendations are accepted, it will be necessary to amend the *Employment Relations Act 2000* to recognise the special characteristics of pay equity claims. This includes setting appropriate processes and criteria for access to the various levels of jurisdiction should recourse to the authorities become necessary, including a lower threshold than currently exists to access facilitation. It will also be necessary to amend the *Equal Pay Act 1972* to accommodate the principles.

Resources

Recognising that pay equity is a complex matter, it will be essential that parties bargaining on pay equity matters have ready access to adequate information and resources to assist them in their deliberations. We know some information and resources exist, much of it in the form of proprietary pay surveys, past job evaluation methodologies, current job sizing tools based on the Court decision in the Terranova case, and research into the nature and history of sector or industry or occupational pay rates. However, it is fair to say that this is only available in a limited sense and some of it is now out of date.

Furthermore, some of the information is not free of cost, which may be an inhibiting factor in addressing some pay equity issues. Employers and unions believe there is a need for additional support, as much as anything to provide a readily accessible "shop front" for information and resources, including any possible financial implications of successful claims in order to assist employers to plan. We suggest that government give further consideration to its role in supporting pay equity information.

It will be also necessary for the regulatory and support agencies to have the necessary skills, training, knowledge and resources to effectively support the resolution of pay equity issues. This may require some specific investment on the part of government, for example in areas such as the mediation service, at the Authority and court level, and specialists available to provide information and support.

The parties did not envisage the process leading to protracted settlements of pay equity claims, and stress that a timely and efficient resolution to matters will be more likely with additional specialist resources such as information, research and subject matter experts.

Other issues

The JWG recommendations focus on the matters set out in the terms of reference for the Group. However during our discussions it was recognised that there are other associated matters that we felt warranted further comment.

Government as employer

As New Zealand's largest employer, it is of course open to the government to respond more broadly to this issue, for both its own benefit and that of the wider employment community. A range of options could be considered, such as engaging, participating and leading in reaching equal pay settlements in female dominated workforces for which the government is the monopsony or primary funder (such as is currently underway in the care and support workforce negotiations) ranging down to enterprise-based processes which may be more common in the private sector.

Equal employment opportunity

During our discussions the JWG recognised that there are other workplace issues that can lead to the existence of a gender wage gap.

In the wider context of gender equality, issues such as equal opportunity in employment, including advancement, transparency of remuneration processes used to set and maintain remuneration levels and the effect of caring responsibilities contribute to the gender pay gap.

While these are important issues in their own right, they were not considered to be within the scope of the JWG discussions.

That said, the parties accept that these are serious issues and we invite you to consider means of ensuring appropriate attention is paid to such issues in the future.

We note that, as the largest employer in the country, the government is well placed to develop and showcase good practices in all aspects of employment.

Recommendations of the JWG on pay equity

The JWG recommends that the government:

1. Adopts the process for addressing pay equity claims as illustrated in Appendix 1 that supports the parties to reach a bargained resolution while retaining the ability to access the authority or courts to ultimately resolve any impasses.
2. Adopts the set of principles as attached, to guide parties to identify, assess and resolve pay equity claims.

Conclusion

Overall, this has been a fascinating and challenging exercise. All the participants have worked constructively and positively together to reach the consensus reflected in the recommendations. We believe that we have identified a sustainable and workable approach that will serve well into the foreseeable future and we commend it to you.

Yours sincerely



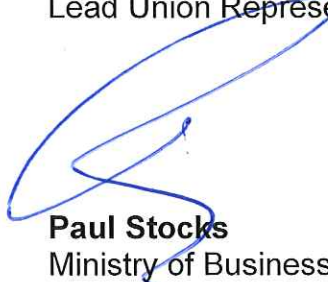
Dame Patsy Reddy
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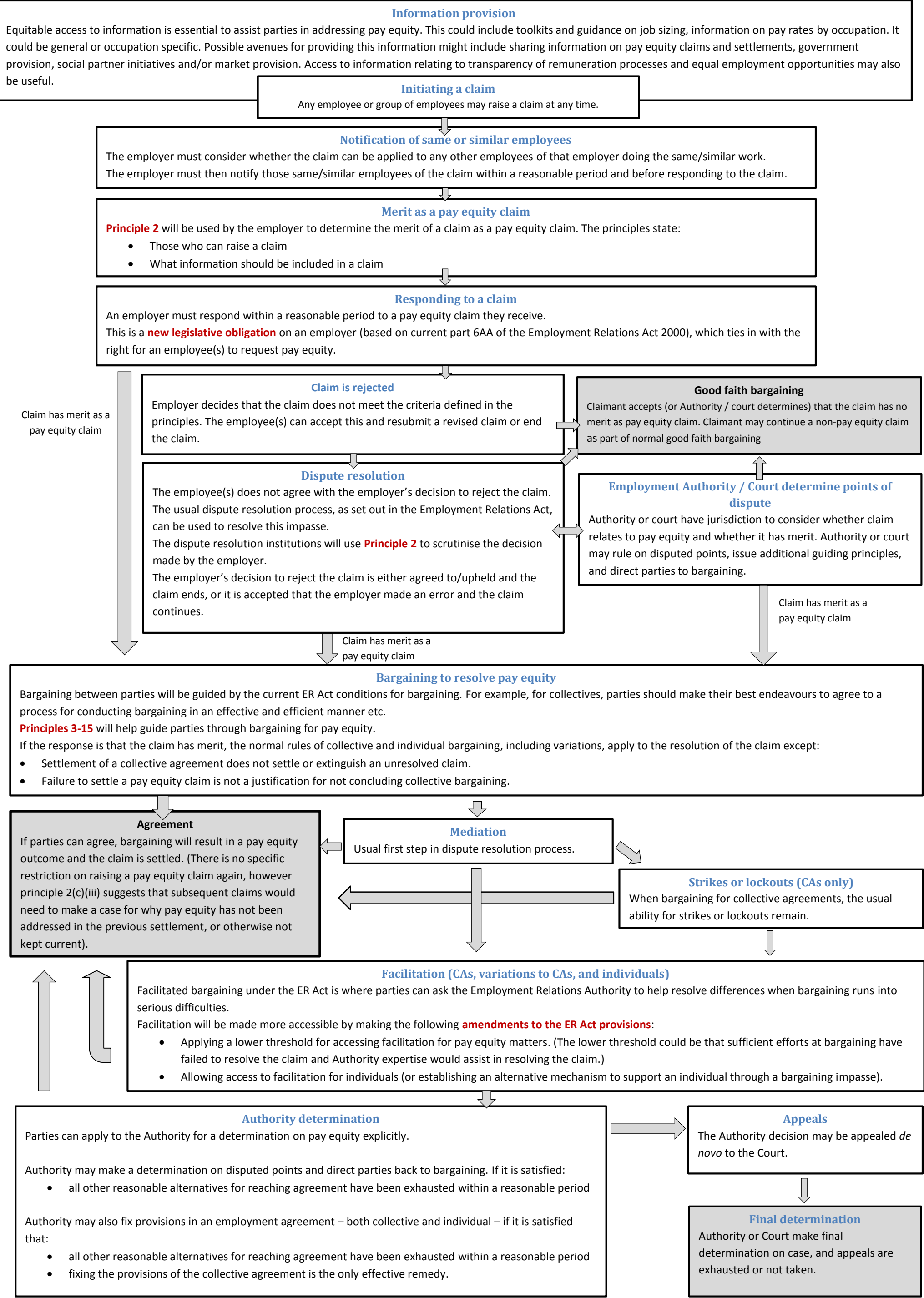


Paul Stocks
Ministry of Business, Innovation and
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Co-Lead Government Representative



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Appendix 1



Appendix 2

PRINCIPLES FOR THE IMPLEMENTATION OF EQUAL PAY

RAISING A CLAIM

1. Any employee or group of employees can make a claim.
2. In determining the merit of the claim as an equal pay claim, the following factors must be considered:
 - A. The work must be shown to be predominantly performed by women and may also include areas where remuneration for this work may have been affected by:
 - i. any occupational segregation;
 - ii. any occupational segmentation;
 - B. The work may have been historically undervalued because of:
 - i. any relevant origins and history of the work and the wage setting for it;
 - ii. any social, cultural or historical factors which may have led to undervaluing or devaluing of the work and the remuneration paid for it;
 - iii. there is or has been some characterisation or labelling of the work as “women’s work”;
 - iv. any social, cultural or historical phenomena whereby women are considered to have “natural” or “inherent” qualities not required to be accounted for in wages paid;
 - C. Whether gender-based systemic undervaluation has affected the remuneration for the work due to:
 - i. Features of the market, industry or sector or occupation which may have resulted in continued undervaluation of the work, including but not limited to:
 - 2.i.1. a dominant source of funding across the market, industry or sector;

2.i.2. the lack of effective bargaining;

- ii. The failure by the parties to properly assess or consider the remuneration that should be paid to properly account for the nature of the work, the levels or responsibility associated with the work, the conditions under which the work is performed, and the degree of effort required to perform the work.
- iii. Any other relevant work features.

ASSESSING THE CLAIM

- 3. A thorough assessment of the skills, responsibilities, conditions of work and degrees of effort of the work done by the women must be undertaken.
- 4. The assessment must be objective and free of assumptions based on gender.
- 5. Current views, conclusions or assessments of work value are not to be assumed to be free of assumptions based on gender.
- 6. Any assessment must fully recognise the importance of skills, responsibilities, effort and conditions that are commonly over-looked or undervalued in female dominated work such as social and communication skills, responsibility for the wellbeing of others, emotional effort, cultural knowledge and sensitivity.
- 7. To establish equal pay, there should be an examination of
 - i. the work being performed and the remuneration paid to those performing the work; and
 - ii. the work performed by, and remuneration paid to, appropriate comparators.
- 8. An examination of the work being performed and that of appropriate comparators requires the identification and examination of:
 - i. the skills required;
 - ii. the responsibilities imposed by the work;
 - iii. the conditions of work;
 - iv. the degree of effort required in performing the work;

- v. the experience of employees;
 - vi. any other relevant work features.
9. An examination of the work and remuneration of appropriate comparators may include:
- i. male comparators performing work which is the same as or similar to the work at issue in circumstances in which the male comparators' work is not predominantly performed by females; and/or
 - ii. male comparators who perform different work all of which, or aspects of which, involve skills and/or responsibilities and/or conditions and/or degrees of effort which are the same or substantially similar to the work being examined; and
 - iii. any other useful and relevant comparators.
10. The work may have been historically undervalued because of:
- i. any relevant origins and history of the work and the wage setting for it;
 - ii. any social, cultural or historical factors which may have led to undervaluing or devaluing of the work and the remuneration paid for it;
 - iii. there is or has been some characterisation or labelling of the work as "women's work";
 - iv. any social, cultural or historical phenomena whereby women are considered to have "natural" or "inherent" qualities not required to be accounted for in wages paid.
11. A male whose remuneration is itself distorted by systemic undervaluation of "women's work" is not an appropriate comparator.

SETTLING A CLAIM

12. Equal pay is remuneration (including but not limited to time wages, overtime payments and allowances) which has no element of gender-based differentiation.

13. Equal pay must be free from any systemic undervaluation, that is, undervaluation derived from the effects of current, historical or structural gender-based differentiation.
14. In establishing equal pay, other conditions of employment cannot be reduced.
15. The process of establishing equal pay should be orderly, efficient, kept within reasonable bounds and not needlessly prolonged.
16. Any equal pay established must be reviewed and kept current.