IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 56
EMPC 62/2022

IN THE MATTER OF	applications for declarations under the Equal Pay Act 1972 and the Employment Relations Act 2000
BETWEEN	TE WHATU ORA – HEALTH NEW ZEALAND Plaintiff
AND	PUBLIC SERVICE ASSOCIATION, TE PŪKENGA HERE TIKANGA MAHI Defendant

Court:	Chief Judge Christina Inglis Judge K Smith Judge B Corkill
Hearing:	14 and 15 November 2022 (Heard at Wellington)
Appearances:	S Hornsby-Geluk and M Vant, counsel for the plaintiff P Cranney and C Mayston, counsel for the defendant
Judgment:	5 April 2023

JUDGMENT OF JUDGE B A CORKILL FOR THE FULL COURT

Introduction

[1] This judgment considers the interface between the current provisions of the Equal Pay Act 1972 (EP Act) relating to pay equity settlement processes on the one hand, and the current provisions of the Employment Relations Act 2000 (ER Act) relating to collective bargaining and the right to strike on the other.

[2] In March 2022, the 20 District Health Boards which then existed (the DHBs – whose rights were subsequently subsumed by Te Whatu Ora – Health New Zealand, referred to herein as Te Whatu Ora) asserted that strike notices issued by the Public Service Association, Te Pūkenga Here Tikanga Mahi (the PSA) related to an illegal strike.

[3] In general terms, it was argued that the requirements of s 83(b) of the ER Act would not be met since the proposed strikes did not relate to bargaining for a collective agreement but to bargaining about a pay equity claim.

[4] The application was heard on a very urgent basis on 3 March 2022, with an interlocutory judgment being issued later that day in which the injunction was granted.[1] Reasons for the judgment were issued the following day.[2] Amongst its findings, the Court concluded Te Whatu Ora had an arguable case that the proposed strike would be illegal.

[5] Because the issues were considered to be of some significance, the substantive claim has proceeded even though the strikes did not take place and there are now no outstanding claims in relation to them. It is well established that although a matter such as this may in effect be moot, if the issue could still be of importance in the future, it is appropriate for the Court to consider the matter at a substantive hearing.[3]

[6] Given the significance of the issues, the Chief Judge determined that a full Court would hear the case.

[7] Turning to the formal pleadings, Te Whatu Ora stated that, because the PSA and its members intended to undertake strike action which was unlawful since it related to bargaining for a pay equity claim and not to bargaining for a collective agreement, a declaration of unlawfulness should be made.

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1 *Capital and Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 32.

2 *Capital and Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 33.

3 *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZCA 595, [2011] ERNZ 360 at [30].

[8] For its part, the PSA sought a declaration that the proposed strikes were not unlawful. Initially damages were sought arising from the cancellation of the strikes in light of the interim injunction, but that claim was not pursued at the hearing.

[9] The PSA also sought a declaration that the 20 DHBs were not entitled to refuse to bargain on the matters which had been in contention.

[10] Prior to the hearing, it was agreed that the PSA would present its case first. The Court received evidence and submissions, which will be referred to where relevant.

Core facts

[11] At the relevant time, the PSA had amongst its members persons who worked in the Allied, Public Health and Technical (Allied) workforce, employed by the DHBs which then existed.

[12] Currently, Te Whatu Ora employs approximately 15,700 staff who fall within the broad coverage of the applicable multi-employer collective agreements (MECAs). The PSA represents approximately 10,000 of these staff. They provide a range of therapy, diagnostic, public health and technical services, as well as other support for patients. The Court understands there is considerable variety in these roles.

Allied claims

[13] In July 2018, pay equity claims were raised by the PSA in respect of Allied roles in the 20 DHBs.

[14] Later, in July 2020, the PSA also raised pay equity claims for Allied roles at Capital and Coast DHB (radiation therapy roles), and in October 2020 for yet further Allied roles (genetic counsellor/associate roles) at Capital and Coast DHB, and the Auckland DHBs.

[15] In July 2020, the Association of Professional and Executive Employees Inc (APEX) raised a related pay equity claim for members undertaking Allied roles at the then DHBs.

[16] The Equal Pay Amendment Act 2020 came into force on 6 November 2020. The foregoing claims were consolidated into one claim in 2021, as required under s 13M of the (amended) EP Act. We refer to the consolidated claim as the Allied claim.

[17] Parallel to these developments other pay equity claims were raised on behalf of the nursing and midwifery workforces. Those claims were raised in the context of MECA bargaining in 2017 and 2018, which was prior to the EP Act amendments of 2020. Until those amendments, the parties followed pay equity principles and methodologies, which had been developed by the Public Service Commission.

[18] After the nursing and midwifery claims were raised, the necessary assessment took place. This entailed the parties gathering data on the claimant and potential comparator workforces. They then worked together to compare the skills, responsibilities, efforts and working conditions of the claimant and comparator groups, using a gender-neutral work assessment tool. This took place from 2019 to 2021. The data thus gathered was then analysed, followed by negotiations. These commenced for the nursing claim in September 2021, and for the midwifery claim in October 2021. As we will explain later, formal agreements between the parties were agreed in the later part of 2021.

[19] Returning to the Allied claims, although terms of reference for the two claims advanced by the PSA in 2018 were agreed in December 2019, no such document had been agreed in respect of the consolidated claim by the time of the hearing in this Court. In 2020, the parties began discussing the approach to assessing that claim. In early 2021, the parties agreed to follow a similar process to the nursing and midwifery claims, including the conduct of in-depth interviews with a range of role-holders.

[20] These interviews showed that there was significant variation across the Allied workforce. This conclusion led to further information being sought in March and July 2022, followed by targeted interviews in October 2022.

[21] Ms Jennifer Downes, a Pay Equity Specialist with the DHB's Technical Advisory Service (now part of Te Whatu Ora), said this was a longer process than had been required for the nursing and midwifery claims. It is plain from her evidence that the process was comprehensive.[4]

[22] Mr Aaron Crawford, an Employment Relations Specialist involved in bargaining for the DHBs and then Te Whatu Ora, said that as at February 2022, the pay equity settlement process was at a relatively early stage.

[23] As will become evident, it is apparent that the PSA and its members were frustrated that their pay equity claims had not been advanced under a timeframe similar to that adopted for the nursing and midwifery workforce claims.

The commencement of bargaining for fresh MECAs

[24] The 20 DHBs and the PSA were party to two MECAs which covered the Allied workforces. One related to the former Auckland, Waitamatā and Counties Manukau DHBs. The other related to the remaining 17 DHBs.

[25] Both MECAs commenced on 7 December 2018 and expired on 31 October 2020.

[26] Bargaining was initiated by the PSA in respect of the two expired MECAs, by two separate notices dated 1 September 2020.

[27] A meeting was held to set the broad framework for engagement in bargaining between the parties' bargaining teams on 28 October 2020. A bargaining process agreement relating to MECA bargaining was agreed in November 2020.

[28] The first bargaining meetings took place on 10 and 11 November 2020. The PSA tabled a document setting out its bargaining claims, which did not include reference to any pay equity-related matters.

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[4] Gathering claimant work and remuneration information; gathering potential comparator work and remunerative information; undertaking gender neutral work assessment of claimant and potential comparator work; analysing and comparing work assessment, outcomes, remuneration, and terms and conditions to establish undervaluation; negotiating a pay equity settlement.

[29] On 24 and 25 November 2020, the DHBs provided a high level response to those claims. The DHB teams made it clear that the pay equity claim process was a separate pathway outside of MECA bargaining, where issues relating to internal and external relativities and the value of work could be appropriately considered.

The issue of backdating

[30] On 24 June 2021, the PSA issued a newsletter to its Allied members which made reference to the fact that the New Zealand Nurses Organisation (NZNO) had, in their separate bargaining, advanced a MECA which had been linked to the backdating of their pay equity claim. The PSA stated that the Allied pay equity claim was not as advanced as the NZNO claim, but the union was confident that gender-based undervaluation would be readily identified and remediated. Accordingly, support from the PSA's Allied members was sought to ensure that they would receive equitable backdating from their pay equity process in line with the nurses and midwives pay equity claims.

[31] On 3 August 2021, Mr Andrew Skelly and Ms Sue McCullough, National Sector Leaders of the PSA who were engaged in Allied bargaining with the then DHBs, emailed Mr Crawford stating that they understood the pay equity processes were quite separate to MECA bargaining, but that members wished the same principles to apply to them as applied to other bargaining offers in the sector. They referred to the fact that there was significant work under way to identify and remedy gender-based salary undervaluation for PSA members covered by the Allied MECAs. Accordingly, as part of a settlement offer in the bargaining, the PSA sought the following to support this work:

- an agreed implementation date of 31 December 2019;
- appropriate resourcing for the Allied pay equity claim to enable the claims to be completed by August 2022; and
- an interim payment when/if undervaluation was identified.

[32] Mr Crawford said this was the first time the PSA had formally raised pay equity-related claims in the context of MECA bargaining. Accordingly, he replied to the PSA's email on 4 August 2021, noting that pay equity matters were not issues that the DHBs alone would be able to decide. The DHBs would be willing to put the first and third points to the relevant decisionmakers, but that would take some time to work through, and there would be no guarantee of agreement. He also said it was not clear exactly how it was envisaged an agreed finding of undervaluation – to which any interim payment might be attached – would work across the Allied groupings given the potentially different findings and timings of commencement which could transpire for the various roles involved.

[33] Going on to discuss the resourcing request, he said this was challenging, given the pay equity claim had been raised in respect of more than 100 listed jobs. He also said the DHBs were currently providing significant resources to the pay equity claims. However, he would take advice on that point.

[34] In August 2021, the DHBs provided a draft terms of settlement (TOS) for the proposed Allied MECAs. Under "Pay Equity", there was an entry "Review clause given current Pay Equity process". Mr Crawford said this referred to clauses in the existing MECAs and signalled an intention to update that clause rather than an intention to introduce new pay equity terms.[5] He said the clauses had reflected the parties' commitment to pay and employment equity, as set out in the 1999-2008 Labour government's introduction of a pay and employment equity workstream across the public sector.

[35] At the same time, collective bargaining took place between the DHBs and the PSA for the mental health and public health nursing MECA, and with the NZNO for the nursing and midwifery MECA.

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[5] Clause 28 of the AR DHB's MECA, and cl 27 of the Rest of NZ MECA stated:

> "Pay and Employment Equity: the parties to this Agreement have a commitment to pay and employment equity. The pay and employment equity review in the public health services has now been completed and the parties agree to work together to address any issues that have been raised in the response plan."

Both of these MECAs were signed on 14 December 2018.

[36] TOSs for those workforces were signed on 26 August 2021. The text of each stated that, immediately on the signing of the document, the parties would sign a memorandum of understanding relating to pay equity in a form which was attached as Appendix 1.

[37] The text went on to refer to pay scale changes, which included $4,000 being paid as "an interim pay equity payment (being payable in accordance with the Memorandum of Understanding relating to Pay Equity attached as Appendix 1)".

[38] Appendix 1 was headed "Draft Memorandum of Understanding for Interim Pay Equity Payment" and set out in detail the terms and eligibility criteria of an intended interim pay equity payment, subject to certain conditions.

[39] On 17 September 2021, similar documentation was signed by the DHBs and NZNO.[6]

[40] On 21 October 2021, Mr Crawford wrote to the PSA collective bargaining negotiators, providing a further proposed TOS for the Allied MECAs. He specifically noted that there was no offer with regard to the claims which had been made by the PSA for "Pay Equity and Safe Staffing". He said these were matters that the DHBs remained happy to continue to work with the PSA and other stakeholders through the appropriate existing processes, and to jointly engage with other stakeholders such as the Ministry of Health. These would be outlined in a final covering letter.

[41] A reference to the pay equity claims was included in the proposed TOS itself, which stated that the parties were committed to progressing the Allied pay equity claim in a timely manner, recognising the complexities of the work given the range of profession/occupations under scope, and the multiple union parties involved. The draft stated that the issue of resourcing and timeframes for completion of this work, the implementation of any outcomes, and the issue of interim acknowledgment where gender-based undervaluation of an occupation or occupations were agreed, were

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6 Although not relevant for the purposes of this case, on 22 December 2021, a subsequent document was signed between the parties known to them as an Agreement in Principle.
All these documents are now the subject of a separate proceeding in this Court.

matters to be considered as part of the process of negotiating and settling the pay equity claim.

[42] On 28 October 2021, Ms McCullough emailed Mr Crawford in response to his proposal. She said she was keen to get a document finalised that could be taken out for ratification. Then she said that as there was no movement regarding the PSA pay equity claims, the union would be recommending that the DHB's offer be rejected.

[43] Mr Crawford responded the next day. He confirmed the DHBs were not able to agree to the undertaking sought by the PSA in respect of resourcing and timeliness of the Allied claim. He said the pay equity process was currently underway, and that was the forum within which to discuss these matters, noting that it was a multi-union process so other health unions would have a legitimate interest in these topics. He also said there was no support to include a commitment to what was now a significantly backdated implementation date.

[44] He went on to say that the proposed expiry date of the MECAs under the DHB offer was 31 January 2023. That meant the PSA could initiate bargaining for a new MECA from the beginning of December 2022, by which time the progress of the Allied pay equity claim would be clearer. Then he said, "This provides the appropriate forum to consider how any agreements reached in the Pay Equity process could be reflected in a subsequent collective agreement settlement".

[45] The text about pay equity matters in the proposed TOS remained as originally drafted for the DHBs.[7]

[46] On 4 November 2021, Ms McCullough confirmed that rejection of the DHB's offer would be recommended to PSA members. She said that without any guarantees as to pay equity completion and implementation, members would be significantly disadvantaged with the current pay offer. The majority of other workers in the DHBs were now on collectives that were above the living wage as a minimum. Merit steps for other low-paid workers were being changed to automatic steps. Career frameworks

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7 Above at [40]–[41].

could have alleviated some of these issues, but despite agreeing timeframes, these were not in place for a significant number of PSA members.

[47] On 13 December 2021, Ms McCullough advised Mr Crawford that members had rejected the DHB's offer. Urgent bargaining dates were requested.

[48] On 2 February 2022, the parties attended mediation facilitated by the Ministry of Business, Innovation and Employment. There, the PSA tabled a settlement proposal which referred to these outstanding issues:

a. A request for a salary increase of $5,800 to all pay scales from 1 October 2021. This matched the salary increase that had been provided to nurses/midwives who had received $4,000 of that increase as a "pay equity adjustment", under the nurses' and midwifery TOSs referred to earlier.

b. A lump sum amount being $1,600, plus a "$6,000 parity payment". This matched the sum provided to nurses and midwives as a "pay equity lump sum".

c. Appropriate resourcing of the pay equity claim to ensure completion in a timely manner.

d. An agreement that a pay equity settlement agreement would be concluded no later than 31 December 2022, and that a penalty of $1,000 would be paid by DHBs to each employee if the deadline was not met.

e. An agreement that the effective date of that pay equity settlement would be 1 January 2022.

f. A request for the establishing of an Allied Workload and Staffing Steering Committee.

[49] Mr Crawford said the DHBs did not see the parts of the claim that did not relate to pay equity as being stumbling blocks. He said the DHBs were also happy to confirm their commitment to properly resourcing the pay equity claim. They were unable, however, to agree to the remaining elements of the PSA's settlement proposal as they related to its pay equity claim.

Strike action

[50] On 3 February 2022, the PSA sent a communication to members summarising the position that had been reached in bargaining. Reference was made to the fact that the PSA's offer as to how the new MECAs should be settled had been rejected by its members by ballot. Throughout the ratification process, PSA members had strongly communicated that the offer did not do enough to address low incomes; was inequitable compared to other offers made to other health-sector workers which included provisions such as pay equity implementation dates and down payments on pay equity; and would, as a result, cause the pay rates within the Allied professions to fall behind other health-sector pay rates, further exacerbating pay equity issues.

[51] Mediation had broken down, so a vote was now being called for industrial action for two 24-hour withdrawals of labour, the first to commence at 6.00 am on 4 March until 6.00 am on 5 March 2022; and the second from 6.00 am on 18 March until 6.00 am on 19 March 2022.

[52] On 17 February 2022, the PSA issued notices of strike action to each DHB, giving notification of the 24-hour full withdrawal of labour on 4 – 5 March 2022.

[53] In a letter of 23 February 2022, Mr Crawford and a colleague, Ms Keriana Brooking, Chief Executive Co-Lead Allied Workforces, indicated that the proposed strike action could not legitimately relate to collective bargaining in the settlement of the current MECAs, because the key issues related to the Allied pay equity claim. The DHBs were unable to agree to the claims made relating to pay outcomes – quantum or effective dates – given there were other parties to the claim who were not party to the MECA bargaining. Any such agreements would pre-empt the pay equity settlement process.

[54] Accordingly, the DHBs were seeking urgent facilitation from the Employment Relations Authority to assist in resolving the MECA bargaining. The PSA was invited to support this approach.

[55] On 28 February 2022, Ms McCullough replied indicating the PSA did not agree with the DHBs' assertion that the upcoming strikes did not relate to collective bargaining of the relevant collective agreements. She said the PSA agreed that collective bargaining of the MECAs should be referred to facilitation, which she acknowledged had, by the date of the email, occurred.

[56] The proposed strike for 4 March 2022 did not proceed in light of the interim injunction issued by the Court restraining the notified strike action. The Court also issued a quia timet injunction restraining the anticipated strike of 18 – 19 March 2022.[8]

[57] Facilitation proceeded on 7 and 8 March 2022. Settlement of the Allied MECAs was achieved in May 2022, based largely on the recommendations of the facilitator.

Overview of parties' cases

[58] Mr Cranney, counsel for the PSA, submitted in summary:

(a) The parties were lawfully entitled to include terms in the collective agreement which dealt with pay equity wage increases by way of down payments on a future pay equity settlement.

(b) Section 13ZM of the EP Act is fundamental to understanding both s 13ZN and the entire Act, as well as the issue of whether it is unlawful to bargain and strike about pay equity matters during collective bargaining.

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8 *Capital and Coast District Health Board,* above n 1. Reasons were given in *Capital and Coast District Health Board,* above n 2.

(c) The structure of s 13ZM is based on a presumption that ordinary bargaining continues, and that the results of that bargaining may lead to rates which are either more or less than pay equity claim settlement rates.

(d) The terms sought were based on the nurses' arrangements, which had not been contained in a pay equity claim settlement within the meaning of s 13ZH(2).

(e) Neither were the terms connected in any way with ss 13ZZD or 13ZZE, which permit the Authority to order payment for past work following a fixing application. At best, they might be "factors" that the Authority or Court could take into account within the meaning of s 13ZZD(2)(d)

(f) As such, the terms sought were purely contractual in the ER Act sense. They were proffered under the ER Act for the purpose of settling a collective agreement; they were "proposals" under s 32(1)(c) of the ER Act. They were not terms and conditions under s 13ZH(2) of the EP Act.

(g) The strikes were lawful because they related to collective bargaining. The purpose of the strikes was to advance the bargaining by compelling the DHBs to offer what had already been offered to others (back pay, two lump sums and an increase labelled "pay equity adjustment") and to advance several other matters.

[59] Mx Hornsby-Geluk, counsel for Te Whatu Ora, submitted in summary:

(a) The purpose of a pay equity claim is to identify and correct undervaluation in female dominated workforces. The framework established in the EP Act for resolving claims is based on a step-by-step process that the parties are required to work through in good faith in order to reach reasoned and logical conclusions. These processes take time as they involve careful assessment of potential comparators and the comparison of terms and conditions of work of equal/similar value to determine whether there is undervaluation, and, if so, the extent of it.

(b) The purpose of such a claim differs fundamentally from wage negotiations which occur for the purposes of collective bargaining. Conflating these two things risks undermining the purpose of pay equity by confusing negotiated pay adjustments which are aimed at maintaining wage currency, with the correction of rates aimed at removing discrimination.

(c) Pay equity bargaining and collective bargaining processes must remain separate in order to preserve the integrity of both. It is for this reason that pay equity-related claims cannot be pursued through collective bargaining. The structured pay equity process provided for in the EP Act should be followed to completion and not undermined by the pre-empting of its outcomes.

(d) To the extent that collective bargaining and pay equity processes may occur in parallel, the trains must nonetheless stay on their own tracks. It follows that any interim agreements reached in either context must also be clearly identified as part of that process and settlement, rather than crossing over.

(e) Consistent with the different purposes of the two processes there is a statutory right to strike in support of bargaining for a collective agreement, but not in relation to the resolution of a pay equity claim. Strike action in support of pay equity-related claims could never be lawful under s 83 of the ER Act. That is because such action could not relate to bargaining for a collective agreement. Rather, it would relate to a pay equity claim process for which there is no statutory right to strike.

Our approach to analysis

[60] To resolve the pleaded issues we identified earlier, in light of the evidence and submissions, there are a number of sub-topics we must address.

[61] First it is necessary to analyse the legal framework of the pay equity settlement process under the EP Act, having regard to the statutory language used.

[62] Then we will consider whether the PSA advanced a pay equity claim during bargaining for the collective agreements.

[63] Next, we will discuss the interface between the EP Act pay equity regime and the ER Act bargaining regime, in order to determine whether these processes should be regarded as separate.

[64] Finally, we will discuss each of the limbs of s 83 of the ER Act, first as to whether the pay equity points that were raised could be said to relate to bargaining for a collective agreement, and second, whether the intended strike action could be said to be not unlawful.

Legal framework

[65] In analysing the legislative framework interpretation issues arise.

[66] The Legislation Act 2019, s 10(1) requires the Court to ascertain the meaning of legislation from its text and in light of its purpose and context. The Supreme Court, referring to the former, similarly worded, provision, wrote:[9]

> The meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and general legislative context. Of relevance too maybe the social, commercial, or other objective of the enactment.

Pay equity provisions under the EP Act

[67] For the purposes of this proceeding, it is necessary to spell out in some detail the relevant provisions of this statute, noting that this is the first opportunity the Court has had to analyse in any depth the important provisions that were introduced in 2020.

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9 *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

[68] The EP Act describes three categories of claim – that is, an unlawful discrimination claim,[10] an equal pay claim,[11] and a pay equity claim.[12] The present case concerns claims which have been brought under the third category.

[69] A pay equity claim means a claim that an employer has breached s 2AAC(b), which provides:

> **2AAC Differentiation in rates of remuneration prohibited**
>
> An employer must ensure that–
>
> (a) ...
>
> (b) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who–
>
> (i) have the same, or substantially similar, skills responsibility and experience; and
>
> (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.

[70] Plainly, the section proceeds on the basis that men and women performing work of equal value should be paid the same.

[71] Part 4 relates to pay equity claims. Its purpose is defined in these terms:

> **13A Purpose**
>
> The purpose of this Part is to facilitate resolution of pay equity claims, by—
>
> (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and
>
> (b) providing a simple and accessible process to progress a pay equity claim.

[72] Then, the EP Act describes a step-by-step process which is to be followed, from claim through to settlement.

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10 Equal Pay Act 1972, s 2A.
11 Sections 2 and 2AAC(a) and pt 3.
12 Sections 2, 2AC(b) and pt 4.

[73] The first step involves raising a claim, either by a union, or two or more unions, or an individual employee.[13] Such a claimant must consider that the claim is "arguable". That is, that it relates to work that is, or was, predominantly performed by female employees; and it is arguable that the work is currently undervalued or has historically been undervalued. In determining whether these thresholds are met, the work must be currently, or historically, performed by a workforce of which 60 per cent or more members are female. In determining whether it is arguable that the work is currently undervalued or has historically been undervalued, any relevant factor may be taken into account, including those falling within a non-exhaustive list of factors.[14]

[74] Employers who receive a pay equity claim must acknowledge the claim within five working days,[15] and provide relevant notifications to affected employees[16] and other affected unions.[17] Consolidation issues may arise.[18]

[75] Opt-out options exist for employees in respect of a pay equity claim raised by a union.[19] Thus, an employee can reserve her rights to raise her own pay equity claim in future, or raise a discrimination claim under the ER Act or the Human Rights Act 1993.

[76] An employer in respect of a multi-employer pay equity claim may also opt-out of the process relating to such a claim;[20] the claim may then be progressed separately.[21]

[77] Returning to the issue of whether a claim is arguable, an employer in receipt of a pay equity claim must as soon as is reasonably practicable, and not later than 45 working days after receiving it, reach their own view as to arguability. The EP Act makes it clear that there is a low threshold for raising a claim, and that the employer is to take a "light touch approach" when making that determination. Doing so does

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13 Section 13E.
14 Section 13F.
15 Section 13J.
16 Sections 13B, 13U and 13V.
17 Section 13J.
18 Sections 13M – 13P.
19 Section 13Y.
20 Section 13L.
21 Section 13L(2).

not mean the employer agrees there is a pay equity issue, or that there will be a pay equity claim settlement in due course.[22]

[78] Once the arguability threshold is cleared, the process of assessment begins. It is subject to the good faith obligations of s 4 of the ER Act, which requires the parties to at least comply with the specified obligations of s 13C. That section provides:

> **13C Good faith in pay equity claim process**
>
> (1) The duty of good faith in section 4 of the Employment Relations Act 2000 applies to the parties to a pay equity claim, as if references in that section to a collective agreement were references to a pay equity claim settlement.
>
> (2) The duty of good faith in section 4 of the Employment Relations Act 2000 requires the parties to, at least,—
>
> (a) follow the process set out in this Part to resolve the pay equity claim; and
>
> (b) in the case of multiple employer parties required by section 13K to enter into a multi-employer pay equity process agreement, use their best endeavours to enter into that agreement in an effective and efficient manner; and
>
> (c) in the case of multiple union parties required by section 13M to consolidate their claims, use their best endeavours to agree on how they will progress the consolidated claim; and
>
> (d) use their best endeavours to enter into an arrangement, as soon as possible after the start of pay equity bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and
>
> (e) use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner; and
>
> (f) recognise the role and authority of any person chosen by each of the parties to be that person's representative or advocate, and not (directly or indirectly) bargain about matters relating to the pay equity claim with the person for whom a representative or advocate acts (unless the parties agree otherwise); and
>
> (g) not undermine, or do anything that is likely to undermine, the bargaining or the authority of another party in the bargaining.
>
> (3) The duty of good faith in section 4 of the Employment Relations Act 2000, which applies to the relationship between a union and a member of the union, also applies to the relationship between a union and an employee who is not a member of the union if the employee is covered by the union-raised claim.

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[22] Section 13Q.

[79] Section 13C relevantly requires the parties to follow the process set out in the EP Act for resolving a pay equity claim, to use their best endeavours to enter into an arrangement for doing so in an effective and efficient manner and not to undermine, or do anything that is likely to undermine, the bargaining or the authority of another party in the bargaining. There is a statutory requirement for a bargaining process agreement, but only where there are multiple employer parties.[23] Then the parties are to use their best endeavours to settle the pay equity claim. This is to occur in an orderly, timely, and efficient manner. A penalty may be sought for certain failures to comply with requirements of the EP Act, including its specified good faith obligations.[24]

[80] The pay equity bargaining process commences once the employer decides or is deemed to have accepted the claim is arguable, or the Authority or Court determines that it is.[25] Three sections describe the process. First, there is a duty on all parties to provide information: s 13ZC. Second, the parties to the pay equity claim must determine whether the employee's work is undervalued by assessing a range of defined factors: s 13ZD. Third, a non-exclusive list of factors may be considered when identifying comparable work for the purposes of the assessment: s 13ZE.

[81] As the evidence in this case shows, the bargaining process involves the assessment of work, remuneration, and terms and conditions. This process must be undertaken before a settlement can be negotiated.

[82] The final step relates to settling the pay equity claim, which is required if the work that is the subject of the pay equity claim is undervalued. To do so the parties must agree on a rate of remuneration that ensures there is no differentiation on the basis of gender.[26] The parties also must agree a process for reviewing the employees' remuneration to ensure that pay equity is maintained, including the agreed frequency of reviews.[27]

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23 Section 13K.
24 Section 18. A penalty may also be sought for certain actions under s 4A of the ER Act, as we will explain later.
25 Section 13ZB.
26 Section 13ZH(1)(a)(i).
27 Section 13ZH(1).

[83] A pay equity claim may also include terms and conditions of employment other than remuneration, if that is agreed between the parties, but in doing so an employer may not reduce any terms and conditions of employment.[28]

[84] A union may not enter into a pay equity claim settlement unless a vote has been taken from proposed settlement employees, and a simple majority have voted to approve the proposed settlement.[29]

[85] The EP Act sets out a regime to deal with unfair bargaining for pay equity claim settlements.[30] It also requires offers of the benefit of pay equity claim settlements to be made to other employees.[31] And it provides that a pay equity claim settlement binds every employer who was a party to the claim, and every employee who was covered by the pay equity claim settlement.

[86] A pay equity claim settlement that contains a term or condition that excludes, restricts, or reduces an employee's entitlements under the employee's employment agreement has no effect to the extent that it does so. That said, nothing prevents employers and employees from agreeing to a term or condition of employment in an employment agreement that is more favourable to the employee than a term contained in the pay equity claim settlement.[32]

[87] Section 13ZN, on which there was a focus in the submissions of counsel, deals with the relationship between pay equity claims and collective bargaining. It states:

> **13ZN Relationship between pay equity claims and collective bargaining**
>
> (1) The entry into a collective agreement in accordance with the collective bargaining provisions of the Employment Relations Act 2000 by an employer and a union does not settle or extinguish an unsettled pay equity claim to which the employer is a party.
>
> (2) The existence of an unsettled pay equity claim between an employer and an employee, or of an uncompleted review of a pay equity claim settlement, is not a genuine reason for failing to conclude collective bargaining between that employer and a union representing the

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28 Section 13ZH(2).
29 Section 13ZF.
30 Sections 13ZI – 13ZJ.
31 Section 13ZL.
32 Section 13ZM(5).

> employer's employees for the purposes of section 33 of the Employment Relations Act 2000.

[88] It is appropriate to note that a number of specific mechanisms are referred to and are designed to assist the parties if difficulties arise during the foregoing processes. These include mediation;[33] facilitation;[34] and reference to the Authority.[35] With regard to the last of these processes, the Authority may determine whether the pay equity claim is arguable as to whether sufficient similarity of work exists; as to whether the work to which the claim relates is undervalued; and as to fixing remuneration that does not differentiate according to the provisions of the EP Act and which specifies a process to review the remuneration.[36]

[89] The statute specifically refers to backpay. It states that a determination fixing remuneration may provide for recovery of an amount that relates to remuneration for past work. In deciding whether to provide for recovery of an amount of remuneration for past work, and quantum, the Authority or Court must take into account several defined factors, and "any other factors the Authority or the Court considers appropriate".[37] There is, however, a limitation period for recovery of remuneration for past work.[38]

[90] Finally, a claimant employee may not be treated adversely in certain defined respects; a claim that such conduct has occurred is to be treated as a personal grievance. Certain failures of duty may give rise to a penalty action under s 18 of the EP Act, or under s 4A of the ER Act.

Pay equity provisions under the ER Act

[91] There are two aspects of the ER Act to which reference should be made for present purposes. The first relates to amendments made to that Act when the Equal Pay Amendment Act 2000 (EP Amendment Act) was enacted. The second concerns pre-existing sections about collective bargaining, and strikes. We outline the

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33 Section 13ZO.
34 Section 13ZP.
35 Sections 13ZQ – 13ZX.
36 Sections 13ZY – 13ZZC.
37 Section 13ZZD.
38 Section 13ZZE.

amendments made in light of the pay equity reforms now and will return to consider collective bargaining/strike provisions later.

[92] The amendments made to the ER Act by the EP Amendment Act were necessary because of express cross-references to the ER Act which were introduced at the time.[39] Thus:

(a) With regard to the concept of good faith, consequential amendments were made to s 4(4) so as to confirm that the parties to a pay equity claim are subject to the generic good faith obligations of s 4: and as noted earlier, to s 4A, which provides that a penalty may be imposed if a party fails to comply with a s 4 duty of good faith with the intention of undermining the pay equity claim resolution process under the EP Act.

(b) The definition of "employment standards" in s 5 was expanded to include reference to ss 2AAC(a) and 2A of the EP Act, which means the obligations in those sections may fall for enforcement by a Labour Inspector under pt 9A of the ER Act.

(c) The definition in s 33 of the duty which requires parties concluding a collective agreement to do so unless there is a genuine reason not to, made it clear that a genuine reason would not include the existence of an unsettled pay equity claim, or the existence of a requirement to review a pay equity claim settlement. These provisions mirror the position described in s 13ZN of the EP Act.

(d) Section 50F was amended to provide that a statement made by a party for the purposes of facilitation was not admissible against the party in proceedings either under the ER Act or the EP Act.

(e) Section 137 was expanded so that the Authority can now make a compliance order where a person had not observed or complied with any terms of a pay equity claim settlement.

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[39] Section 15.

(f) Relevant amendments were also made to s 161, which enlarges the jurisdiction of the Authority to cover the various applications which may be made to the Authority as described in s 13ZY.

Legislative history of the pay equity reforms

[93] The Legislation Act 2019, and *Fonterra,* cited earlier, mandate a consideration of not only the immediate and general legislative context, but also the social, commercial, or other objectives of the enactment.[40]

[94] The reforms introduced by the ER Amendment Act have significant social and economic implications for women undertaking work which has historically been, and continues to be, undervalued due to systemic gender-based discrimination. That consequence is part of the interpretative context.

[95] The updating of the EP Act involved an unusual process. It followed the important 2014 judgment of the Court of Appeal in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, where the Court found the Equal Pay Act 1972 in its then form contained a pay equity regime.[41] It recommended that this Court establish principles to provide a workable framework for the resolution of a pay equity claim.[42]

[96] However, the executive government at the time decided to establish a Joint Working Group on Pay Equity Principles (JWG). The view was taken that it would be preferable for the principles to be decided by a broad-based group of workers, employers, and experts, rather than the Court.[43]

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40 Legislation Act 2019, s 10(1). *Fonterra*, above n 9.

41 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437, [2014] ERNZ 90.

42 At [239].

43 See Paula Bennett and Michael Woodhouse "Recommendations of the Joint Working Group on Pay Equity Principles" (24 May 2016) <mbie.govt.nz>. The Joint Working Group included Dame Patsy Reddy as Crown Facilitator, Richard Wagstaff of New Zealand Council of Trade Unions as Lead Union Representative, Phil O'Reilly of Business New Zealand as Business Lead Representative, Paul Stocks of Ministry of Business, Innovation and Employment as Co-Lead Government Representative and Lewis Holden of State Services Commission as Co-Lead Government Representative.

[97] Following deliberation, the JWG recommended a process for making a pay equity claim within the existing bargaining framework of the ER Act.[44] The process was to be underpinned by strong good faith obligations. As to dispute resolution it proposed an enhanced process compared to that contained in the ER Act, including mediation, greater access to facilitated bargaining, and a specific role for the Authority and the Court for resolving impasses which may involve setting pay equity roles.

[98] This resulted in the introduction of a Bill sponsored by the National government, the Employment (Pay Equity and Equal Pay) Bill 2017. Had the Bill been enacted, the pre-existing Equal Pay Act 1972 would have been repealed.[45]

[99] The Bill provided a discrete and relatively straightforward process for pay equity claims. Were an employee to raise a claim,[46] there was to be an assessment as to whether the claim had "merit", which included a requirement that there were reasonable grounds for believing the work had been historically undervalued and continued to be subject to systemic sex-based undervaluation.[47] After a notification process, the employer was to decide whether "merit" existed. If so, the parties could enter pay equity bargaining, which was to involve the assessment of the nature of the work to which the claim related, the nature of comparable work, and remuneration paid. Comparable work would be identified by reference to similar criteria. Then followed a pay equity settlement process. If bargaining reached an impasse, express reference was made to mediation,[48] facilitation,[49] and determination by the Authority.[50]

[100] The private member who spoke to the Bill at its first reading, Ms Denise Lee,[51] said that it reflected recommendations which had been made by the JWG. She also said:[52]

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44 (16 October 2018) 733 NZPD 7230 at 7231).
45 Employment (Pay Equity and Equal Pay) Bill 2017, cl 50(1).
46 Clause 14.
47 Clauses 14 and 15.
48 Clause 27.
49 Clauses 28 – 36.
50 Clauses 37 – 40.
51 It was drawn as a Members' Bill from the ballot after a change of government on 26 October 2017.
52 (21 March 2018) 728 NZPD 2526 at 2526.

> Another key characteristic of this system is its resemblance to the already-established bargaining procedures that are in the Employment Relations Act of 2000. As a result, all parties to the pay equity claim, whether it be the employees or the employer, are held to the same high standard of good faith bargaining. It also provides an option for any issues relating to the claim to be referred either to mediation or to the Employment Relations Authority.

[101] There was no express reference in the Bill to the possibility of industrial action in respect of a pay equity claim.

[102] The Bill was read for the first time in early 2018 after Labour had assumed the government benches in late 2017. The first reading was negatived because the motion that it be read a first time was not passed.[53]

[103] In fact, in late 2017, the Labour Government had reconvened the JWG on the basis that the group's original intentions had not been met by the provisions of the Employment (Pay Equity and Equal Pay) Bill 2017.[54]

[104] Further recommendations were made by the reconvened JWG.[55] It proposed lowering the threshold for a pay equity claim. It considered that further practical and specific guidance should be given on key areas such as how comparators should be selected and assessed. It also recommended that the principles be implemented by amending the existing EP Act, rather than repealing it, because of its symbolic importance.[56] As before, there was no express reference to the possibility of industrial action in respect of a pay equity claim.

[105] When introducing the Equal Pay Amendment Bill 2018, the Minister for Workplace Relations and Safety said that the Bill used the existing ER Act bargaining process as a framework for parties to address pay equity issues, provided employees with the right to raise a pay equity claim with their employers in the first instance, and

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53 (4 April 2018) 728 NZPD 2972.

54 See Iain Lees-Galloway and Julie Anne Genter "Recommendations of the Reconvened Joint Working Group on Pay Equity Principles" (27 February 2018) <beehive.govt.nz>.

55 Traci Houpapa replaced Dame Patsy Reddy as Crown Facilitator and Kirk Hope replaced Phil O'Reilly of Business New Zealand as Business Lead Representative. The other members of the Joint Working Group who were referred to earlier continued to be involved.

56 (16 October 2018) 733 NZPD 7230 at 7231; and Lees-Galloway and Genter, above n 54, at 2 and 39.

provided access to dispute resolution services such as mediation and facilitation if the parties could not agree at any stage of the process. However, he went on to say:[57]

> The Bill moves away from forcing parties directly to the courts and instead puts negotiation at the forefront of the pay equity regime.

[106] After outlining the pay equity bargaining process described in the Bill, the Minister made this statement which is relevant to one of the issues we must consider:[58]

> In bargaining, parties are free to discuss and reach agreement on back-pay as part of their pay equity bargaining. If back-pay is considered and parties are unable to agree, the dispute resolution process is available. At the end of the process, the Authority or the Court will be able to make a determination on backpay. Let me be clear about this point: this Bill does not create the right to claim back-pay. That right has existed ever since the courts determined that the Equal Pay Act applies to pay equity claims.

[107] After the Education Workforce Committee had considered the Bill, it was returned to the House for a second reading. At that stage, the Minister said that the legislation set out a fair and practical process, one which was aligned with the existing bargaining framework. The Bill would enable parties to negotiate in good faith for a pay equity settlement whilst still retaining the right of recourse to the Authority or Court through the dispute resolution process.[59]

[108] At the same time, he indicated that a Supplementary Order Paper (SOP) would be introduced to make some alterations. That came before the House a short time later.[60]

[109] In the course of debate on the SOP, a question was raised by a Member of the Select Committee which had considered the reforms, Ms Nicola Willis, about the clause that was to become s 13ZD.[61] Her question concerned the removal via the SOP of a provision that allowed for those involved in a pay equity claim to settle by following an alternative process. In response, the Minister for Women, who introduced the SOP, said she had sympathy for the view that an alternative process would have allowed more flexibility, but after discussion it had been considered there

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57 (16 October 2018) 733 NZPD 7230 at 7231.
58 At 7232.
59 (24 June 2020) 747 NZPD 19093 at 19094.
60 Supplementary Order Paper 2020 (548) Equal Pay Amendment Bill 2018.
61 (22 July 2020) 748 NZPD 19909 at 19911–19912.

was potential for that to undermine the process which was being laid out, and potentially provide an unscrupulous employer with the ability to approach a small group of employees and propose a different process that was not as robust as the one prescribed in the statute. Consequently, the possibility an alternative process being adopted was removed. This amendment was accepted by Parliament.

[110] The legislation was ultimately enacted with the support of all political parties.[62]

[111] The legislative history reflects a careful and deliberative approach to the passing of the amendments in 2020. Considerable care was taken in developing the pay equity resolution framework which was ultimately enacted after a comprehensive process of consultation. Particular attention was paid to the recommendations of the JWG.

[112] The process from start to finish was plainly designed to ensure that particular policy imperatives relating to pay equity were met. These centred on an elaborate and objective process for raising and settling a pay equity claim, bolstered by important good faith obligations.

[113] The framework adopted by Parliament, following what was an unusually collaborative process in respect of a very important and long-standing social issue, is significant for the interpretative exercise. The framework stands in contrast to the collective bargaining processes contained within the ER Act, and the mechanisms provided for within that Act, to which we now turn.

Relevant collective bargaining and strike/lockout provisions of the ER Act

[114] We have already referred to the consequential amendments made to the ER Act, following the enactment of the EP Amendment Act.

[115] Other provisions of the ER Act are relevant for present purposes, particularly with regard to the issue concerning strikes. These are well known, but for ease of reference we summarise them.

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62 (22 July 2020) 748 NZPD 19916–19920.

[116] Section 3 describes the objects of the ER Act, which includes the promotion of observing the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[117] Part 8 deals with strikes and lockouts. Section 80 describes the objects of the Part, which includes the fact that its provisions recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful, as defined in the Part.

[118] Section 83 is central to the plaintiff's case, and provides:

> **83 Lawful strikes and lockouts related to collective bargaining**
>
> Participation in a strike or lockout is lawful if the strike or lockout—
>
> (a) is not unlawful under section 86; and
>
> (b) relates to bargaining—
>
> (i) for a collective agreement that will bind each of the employees concerned; or
>
> (ii) with regard to an aspect of a collective agreement in respect of which the right to strike or lock out, as the case may be, is available under a declaration made by the court under section 192(2)(c).

[119] Other provisions will be referred to where relevant.

Issue one: did the PSA advance a pay equity claim?

[120] At the heart of the submissions presented for Te Whatu Ora is the proposition that strike action in support of pay equity-related claims could never be lawful under s 83 of the ER Act, since such action could not relate to "bargaining for a collective agreement".

[121] Mr Cranney raised a legal point concerning the claim made for back pay. He argued that the terms as sought by the PSA did not in any way relate to the provisions of the EP Act dealing with past work, which only arose for consideration after a fixing application was filed.[63]

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[63] Reliance was placed on s 13ZZD(1) of the Equal Pay Act 1972.

[122] He also submitted that the payments which were sought for Allied staff were simply a set of terms which had been agreed for nurses and midwives. In short, it was the case for the PSA that this would be a "parity payment" rather than a "pay equity payment".

[123] Mx Hornsby-Geluk submitted that at the time of the material events, the PSA acknowledged it was raising a pay equity claim.

[124] We deal first with Mr Cranney's point that the terms for which the PSA wish to bargain as to backpay could not be terms of the kind described in ss 13ZZD and 13ZZE.

[125] Bringing a fixing application under s 13ZZD is a necessary pre-requisite to the Authority having jurisdiction. The section clarifies that an aspect of fixing may relate to past work.

[126] That does not mean, however, that the parties cannot, as part of the pay equity settlement process, agree directly between themselves how backpay might be dealt with if they choose to do so. The statutory process places a strong emphasis on direct dialogue, as was emphasised by the Minister when the EP Amendment Bill was introduced.

[127] Section 13ZZE established a time limit for backpay entitlements. The time limits are not conditional on a fixing application being brought. Backpay is likely to be an inevitable issue where there has been *historic* undervaluation of female work. Again, the Minister clearly recognised this possibility in the speech he gave during the first reading.[64]

[128] Moreover, were such an agreement to be reached by the parties on an interim basis, its existence could be considered in a subsequent fixing application under s 13ZZD(2)(d).

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64 Above at [106].

[129] Turning to the correct characterisation of the claims made by the PSA with regard to the disputed claim, we are satisfied that the contemporaneous evidence clearly establishes the union was raising a pay claim for past work in the context of the unsettled pay equity process.

[130] On 24 June 2021, the PSA's newsletter which sought the support of members was said to ensure that they "receive equitable backdating from their pay equity process in line with the nurses and midwives pay equity claims".

[131] Ms McCullough's email of 28 October 2021 stated explicitly "as there is no movement regarding our pay equity claims we will be going out with a recommendation to reject".

[132] In her further email of 4 November 2021, Ms McCullough stated, "Without any guarantees around pay equity completion and implementation our members will be significantly disadvantaged with the current pay offer".

[133] In a communication sent by the PSA to its members on 3 February 2022, it was recorded that PSA members throughout the ratification process had strongly communicated that the offer made by the DHBs was "inequitable compared to other offers made to other health sector workers, which included provisions such as pay equity implementation dates and down payments on pay equity".

[134] In his evidence, Mr Ashok Shankar of the PSA, National Sector Lead for the Health Sector, said that had the requested payments been made to the Allied workforce, this would not have resulted in them being "over-compensated". He said he was confident that the undervaluation of the Allied workforce would be similar to, or greater than, that of the nursing workforce. This view confirms that he considered the claims being made in collective bargaining related to the Allied pay equity claim and were in reality down-payments in advance of the settlement of that claim. If the intention was simply to achieve "parity" with the nurses, with no consideration of what that would mean for the Allied pay equity claim, over-compensation would not have been a relevant consideration.

[135] In her evidence, Ms Downes said pay parity is quite different from pay equity. She said the former involves seeking the same pay for different groups of workers, without consideration of the "value" of that work. A pay equity claim involves an assessment of the value of the work performed by women on the one hand, and men on the other. It necessarily disrupts relativities that exist within the market, whereas parity maintains relativities. We accept the validity of these views.[65]

[136] We infer that what the PSA was seeking was something akin to a down payment on its pay equity claims.

Issue two: interface between the regimes of each Act

[137] It was common ground that pay equity settlement processes and collective bargaining processes are separate processes. As Mr Cranney put it, the EP Act contains a scheme which is entirely different to the ER Act. Mx Hornsby-Geluk also submitted this was the case. We outline our reasons for accepting these submissions.

[138] Parliament could have provided for pay equity claims to be advanced within collective bargaining. Significantly, it did not do so. The first indication that a separate regime was intended flows from a comparison of the stated objects for each process. Included in s 13A of the EP Act is the statement that the purpose of pt 4 of that Act is to facilitate resolution of pay equity claims by setting a low threshold to raise a claim, to provide a simple and accessible process to progress and resolve it, and to deal with any issues arising during the course of the settlement process.

[139] That is to be contrasted with the objects of collective bargaining as defined in s 31 of the ER Act. That section relevantly states that pt 5 is to provide the core requirements of the duty of good faith, which includes the obligation that parties bargaining for a collective agreement have a duty to conclude this unless there is a genuine reason based on reasonable grounds not to, and to promote orderly collective bargaining.

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65 Equal Pay Act 1972, ss 2 and 2AAC.

[140] As noted, each regime has an important provision which refers to the duty of good faith. The way in which the core duty as described in s 4 of the ER Act is to be met differs in each instance. Section 13C of the EP Act includes a requirement to follow the process set out in pt 4 of that Act so as to resolve the pay equity claim, and for the parties to use their best endeavours to settle it in an orderly, timely, and efficient manner. Under s 32 of the ER Act, good faith includes an obligation to meet from time to time for the purposes of bargaining, to consider and respond to proposals made, and even when they may come to a standstill, or reach a deadlock, continue to bargain to conclude a collective agreement unless there is a genuine reason based on reasonable grounds not to.

[141] From the detailed process relating to pay equity bargaining which Parliament enacted, it is apparent it was intended pay equity claims would resolve a particular form of discrimination. Such claims would be dealt with transparently using objective assessment tools and a rigorous process which would be reviewed from time to time; where there is a dispute over any particular issue, the parties would have assistance via mediation, facilitation, or by applying for a determination on a range of topics including the fixing of remuneration for pay equity purposes.

[142] By contrast, the ER Act makes it plain that bargaining for a collective agreement is a negotiation process undertaken periodically to settle terms and conditions of a collective employment agreement. Dispute resolution is available via mediation and facilitation; fixing is available but only when there is a serious and sustained breach of good faith which undermines bargaining.

[143] Section 13ZN is important for present purposes. First, it emphasises that the existence of an unsettled pay equity claim, or an uncompleted review of pay equity claim settlement, is not a genuine reason for failing to conclude collective bargaining. The statement reinforces the discrete nature of the two processes.

[144] This provision, in our view, also serves to emphasise, for the avoidance of doubt, the importance of the integrity of the pay equity settlement process. It is a process that should have the ability to continue outside the confines of collective bargaining.

[145] It is important to note the modification made via the SOP introduced when the EP Amendment Bill was before the House, which removed the ability of the parties to set up an alternative process. This too reinforces the importance that Parliament attributed to the particular, and distinct, process described in the amended EP Act.

[146] That all said, the possibility of pay equity topics being referred to in collective bargaining was not ruled out. There is no statement to that effect, for example, in s 13ZM, which deals with the effect of a pay equity claim settlement on employment agreements, or in s 13ZN, which deals with the relationship between pay equity claims and collective bargaining.

[147] We refer specifically to s 13ZM(5) which allows for the possibility of the parties agreeing in an employment agreement the terms and conditions that are more favourable than those contained in a pay equity claim settlement: the subsection does not preclude pay equity issues being discussed in collective bargaining.

[148] Similarly, s 13ZN, by its confirmation that the existence of an unsettled pay equity claim is not a genuine reason for failing to conclude collective bargaining, does not expressly rule out discussion of pay equity topics during collective bargaining.

[149] The reality, however, is that discussion of such topics may well be confined, so as not to compromise the good faith obligations that both parties must comply with in the pay equity settlement process which is different from and separate to the collective bargaining process; and not to undermine either process.

[150] Where willing parties agree to discuss procedural matters, for example, such as when they may subsequently meet for pay equity settlement purposes, or what resources may be devoted to that process, then it may be the case that a breach of the underlying good faith obligations for pay equity settlement processes would not arise.

[151] But if there is not agreement between parties engaged in collective bargaining to discuss pay equity matters, there is nothing in the reforms enacted in either the EP Act or the ER Act which would require parties to "bargain" about pay equity issues in the context of a collective bargaining process.

[152] In summary, Parliament has not ruled out the ability of the parties to engage in pay equity discussions during collective bargaining if they choose to do so, but equally there is nothing in either statute that would allow one party or the other to insist on this occurring. Forcing the issue would be contrary to the carefully prescribed process of obtaining and assessing information relating to historic undervaluation of female work, by reference to a set of principles that will in due course allow the parties to reach a conclusion themselves; but if this does not prove possible, then with the assistance of the prescribed dispute resolution provisions.

[153] In reaching this conclusion we do not overlook s 13ZH(3)(ix), which states that the frequency of a review must be "aligned with any collective bargaining rounds", or if none applies at least every three years. Given the overall context, we consider this provision is simply a reference to timing.

[154] In this particular case, there was consensus between the parties to a pay equity issue being addressed in bargaining, namely, the resourcing for the PSA's pay equity claims. The parties were, however, at odds on back pay entitlements. The DHBs took the view that the separate processes of the EP Act should be followed given the work that had yet to be undertaken to advance the pay equity claims. We consider that as a matter of law, the DHBs were permitted to decline to engage in discussions about possible back pay as encroaching on the equal pay process.

Issue three: s 83(b) of the ER Act

[155] We turn next to the existing provisions of the ER Act relating to industrial action, and in particular, s 83(b) on which Te Whatu Ora based its case.

[156] The question Te Whatu Ora raised is whether the union's intended participation in a strike could be said to relate to bargaining for a collective agreement.

[157] We have already found that the pay equity settlement process is a separate process from that of collective bargaining.

[158] We have also concluded that it was not agreed between the parties that the controversial pay equity topics which the PSA wished to raise would be advanced in

collective bargaining. As noted, in the absence of agreement to do so, the DHBs could not be forced to deal with these topics when bargaining for a new MECA. To do so would have potentially undermined the integrity of the prescribed process, for instance because not all parties to the relevant pay equity claims were parties to the collective bargaining: APEX was not involved in that process.

[159] It is also necessary to consider the issue of the motive or connection between the intended strike and the bargaining for the collective agreement. We refer to several cases on this topic. In *Southern Local Government Officers Union v Christchurch City Council*, a full Court said this:[66]

> [51] The relevant parts of s 83 of the 2000 Act provide the participation in a lockout is lawful if it is not unlawful under s 86 and relates to bargaining for a collective agreement which will bind each of the employees concerned. Under the provisions of s 86 material to the present case, participation in a lockout is unlawful if it relates to a dispute. Section 5 of the Act defines dispute as "a dispute about the interpretation, application or operation of an employment agreement". *The leading case in determining whether a strike related to negotiation of a collective agreement contract rather than a dispute is NZ Labourers etc IUOW v Fletcher Challenge Ltd ... and the test is one of dominant motive or dominant connection*: see *Dickson's Service Centre Ltd v Noel* ... . We can see no reason why the same test should not apply to lockouts as the relevant wording in the sections is identical.

[160] This statement was approved by the Court of Appeal in *Spotless Services (NZ) Ltd v Food Workers Union Nga Ringa Tota Inc*.[67]

[161] In *SCA Hygiene Australia Ltd v Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc*, Judge Shaw expressed a view that the dominant purpose test had added a gloss to the meaning of the words of ss 83 and 86, which went beyond the plain meaning of the text of those sections and did not serve the purpose of the enactment.[68] She preferred an approach that, where there are two matters to which the action may relate, the question is whether there is a real causal connection between the action and the bargaining.[69] Subsequently, in *Unite*

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66 *Southern Local Government Officers Union Inc v Christchurch City Council* [2007] ERNZ 739 (EmpC) (footnotes omitted, emphasis added).

67 *Spotless Services (NZ) Ltd v Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 (CA) at [51].

68 *SCA Hygiene Australia Ltd v Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc* [2008] ERNZ 301 (EmpC) at [37].

69 At [41].

Union Inc v SkyCity Auckland Ltd, Judge Travis concluded that although these views had force, the Court of Appeal's interpretation of the sections in *Spotless* was binding;[70] it had affirmed the full Court's approach in *Southern*.[71] We agree.

[162] Turning to the facts, we are satisfied that the dominant motive, or real reason for the intended strike action, clearly related to the PSA's unresolved pay equity claim.

[163] Even adopting the approach referred to by Judge Shaw, it could not be said that there was an insufficient causal relationship between the intended action and the collective bargaining.

[164] In summary, we are not satisfied that participation in the proposed strike would have related to bargaining for a collective agreement for the purposes of s 83(b) of the ER Act.

[165] It is convenient to deal with a point raised by Mr Cranney that were it to be determined that it is unlawful to discuss, or seek to discuss, pay equity-related terms in collective negotiations, there would be significant consequences. He said it would lead to a reluctance on the part of a union to refer expressly to such a topic in collective bargaining in case it led to a claim that a subsequent strike was illegal.

[166] There are several responses to this submission.

[167] We emphasise that Parliament clearly intended that pay equity claims should be dealt with transparently, using objective assessment tools and a rigorous process that would be reviewed from time to time. Where there is a dispute over the issue, specialist assistance is available, including the use of third parties. The process is also meant to be efficient and effective.

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70 *Unite Union Inc v SkyCity Auckland Ltd* [2011] NZEmpC 12, [2011] ERNZ 1 at [47].
71 *Southern,* above n 66.

[168] Unless the parties *agree* to discuss what is in reality a pay equity claim when bargaining for a collective agreement, the underlying objectives of the legislative process may not be achieved, and indeed, may be undermined. The pay equity settlement process requires a single issue to be considered, analysed, quantified, and resolved – without being infected, for example, by any of the other competing interests that typically arise in collective bargaining, or the unique dynamics of that process.

[169] Moreover, we think it is unlikely a party would disguise a pay equity claim when bargaining, as Mr Cranney suggested might happen, because to do so would have implications for good faith, as defined in the provision relating to good faith in the pay equity claim process,[72] and for the purposes of the good faith obligations relating to collective bargaining.[73]

[170] But even if the disguising of a claim occurred, the Court is well able to assess the realities, as it does regularly for any type of employment relationship problem. Form does not usually trump substance. The assessment of dominant motive, or dominant connection, is a factual assessment the Court is well placed to consider when considering the realities of intended strike action.

Issue four: s 83(a)

[171] In this section we consider the question of lawfulness of the PSA's notified strike action.

[172] Before doing so, we make the obvious point that s 83 has two conjunctive requirements. Both must be established before participation in a strike – or lockout – is lawful. Because we have concluded that the second limb under s 83(b) is not satisfied, it follows that the intended strike could not satisfy the statutory test of lawfulness.

[173] In deference, however, to the submissions made by the parties, we briefly address the points raised as to a right to strike in circumstances such as the present.

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72 EP Act, s 13C.
73 ER Act, s 32.

[174] Section 83(a) provides that a strike must not be unlawful under s 86. Section 86 reads as follows:

> **86 Unlawful strikes or lockouts**
>
> (1) Participation in a strike or lockout is unlawful if the strike or lockout—
>
> (aa) in the case of a strike, takes place in contravention of section 82A; or
>
> (a) occurs while a collective agreement binding the employees participating in the strike or affected by the lockout is in force, unless subsection (2) applies; or
>
> (b) occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike or affected by the lockout, unless—
>
> (i) at least 40 days have passed since the bargaining was initiated; and
>
> (ii) if on the date bargaining was initiated the employees were bound by the same collective agreement, that collective agreement has expired; and
>
> (iii) if on that date the employees were bound by different collective agreements, at least 1 of those collective agreements has expired; or
>
> (ba) occurs in a situation where,—
>
> (i) in the case of a strike, the employee has failed to comply with the notice requirements in section 86A or 93, as the case may be:
>
> (ii) in the case of a lockout, the employer has failed to comply with the notice requirements in section 86B or 94, as the case may be; or
>
> (c) relates to a personal grievance; or
>
> (d) relates to a dispute; or
>
> (da) relates to a bargaining fee clause or proposed bargaining fee clause under Part 6B; or
>
> (e) relates to any matter dealt with in Part 3; or
>
> (ea) relates to a proposed agreement, a proposed variation, or a fair pay agreement under the Fair Pay Agreements Act 2022; or
>
> (f) is in an essential service and the requirements as to notice that are contained in section 90 or section 91, as the case may be, have not been complied with; or

(g) takes place in contravention of an order of the court.

(2) Subsection (1)(a) does not apply—

(a) to an aspect of a collective agreement in respect of which the right to strike or lock out, as the case may be, is available under a declaration made by the court under section 192(2)(c); or

(b) to a collective agreement that is still in force after the first of the collective agreements referred to in subsection (1)(b)(iii) has expired, for so long as that bargaining continues.

(3) For the purposes of this section, in determining whether a collective agreement is in force or has expired section 53 is not to be taken into account.

[175] We did not understand either of the parties to contend that matters relating to the EP Act fall into any of the prohibited grounds of strike listed in s 86(1). Nevertheless, it may be the case that the strike is unlawful under s 86, as the list is non-exclusive.[74]

[176] We accept Mr Cranney's submission, which we did not understand Mx Hornsby-Geluk to disagree with, as to the fundamental nature of the right to strike. That is a point that is well established and reflected in many judgments of this Court and the Court of Appeal.[75] It is also recognised in Article 8 of the International Covenant on Economic, Social and Cultural Rights, which endorses the right to strike. However, the right as expressed in Article 8 is subject to the proviso that it is to be exercised in conformity with the laws of the particular country.[76] Moreover, while New Zealand ratified that treaty on 28 December 1978, it reserved the right not to apply Article 8 to its full extent.[77] The result is, we must focus on the laws of New Zealand which define when the right to strike may be exercised.

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74 *Spotless,* above n 67, at [38].

75 *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC) at 500-502; *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] ERNZ 460 (CA) at [40]; *New Zealand Dairy Workers' Union v Open Country Cheese Company Ltd* [2011] NZCA 56, [2011] 2 NZLR 350, [2011] ERNZ 78 at [24]; *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [35]; *Collins v Independent Fisheries Ltd* [1993] 2 NZLR 290 (CA).

76 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (16 December 1966), art 8. The right to strike is not referred to expressly in either of the Conventions referred to in s 3 of the ER Act.

77 Ministry of Justice "International Covenant on Economic, Social and Cultural Rights" (19 August 2020) <justice.govt.nz>.

[177] Earlier, we noted there was no reference to the possibility of industrial action being taken or not taken in the EP Amendment Bill, which introduced amendments to both the EP Act and the ER Act. There is no provision confirming that a party to a pay equity claim could, or could not, strike or lock out.

[178] Nor is there a relevant statement in any of the extrinsic materials which confirmed parties could engage in such action. As we have explained, the emphasis in the enacted reforms was on direct constructive engagement between the parties, with any impasse being resolved not by industrial action but by recourse to mediation, facilitation, or an application being made for permitted reasons to the Authority. The single coercive step addressed in the EP Act related to the possible imposition of a penalty.

[179] As already noted, the genesis of the reforms was collaborative and comprehensive. It is significant that no recommendation as to industrial action was made by the JWG or the reconvened JWG.[78] Nor was such a possibility referred to in the explanatory note of either Bill, or in the Hansard debates relating to them.[79] Finally, the EP Amendment Act itself was silent on the issue, both in respect of the amendments it made to the EP Act, or to the ER Act.

[180] For completeness, we note that ministers of each government stated that, under the ER Act, industrial action could occur in relation to bargaining for collective agreements. Then it was recorded in each case that no new ability for industrial action was proposed.[80]

[181] We acknowledge that in *A Labour Inspector v Southern Taxis Ltd*, the Court of Appeal said it was difficult to envisage circumstances in which it would be appropriate to refer to a Cabinet paper to support an interpretation "that would not otherwise be

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78 Bennett and Woodhouse, above n 43; Lees-Galloway and Genter, above n 54.

79 Equal Pay Amendment Bill 2018 (103-1) (explanatory note); Employment (Pay Equity and Equal Pay) Bill 2017 (284-1) (explanatory note); (21 March 2018) 728 NZPD 2525; (4 April 2018) 728 NZPD 2960; (16 October 2018) 733 NZPD 7230; (24 June 2020) 474 NZPD 19093; (22 July 2020) 748 NZPD 19909; (22 July 2020) 748 NZPD 19916.

80 Paula Bennett and Michael Woodhouse "Response to Proposals of the Joint Working Group on Pay Equity" (24 November 2016) at [48]–[50]; Ian Lees-Galloway and Julie Anne Genter "Equal Pay Act: Improvements to Pay Equity Legislation" (17 May 2018) at [43]–[45].

adopted by reference to the legislation itself, and to other (admissible) extrinsic materials".[81]

[182] Given the comprehensive and transparent extrinsic history we have reviewed, we consider it is permissible to refer to this documentation, but we place little weight on it, because the primary conclusions are available from other admissible documents. And in any event, the statement, considered in isolation, is somewhat ambiguous – did the authors mean "a new ability for industrial action" would not be introduced because such an option already existed which pay equity parties could utilise, or did they mean the parties would not be able to engage in industrial action to support pay equity bargaining?

[183] Finally, we consider the inter-relationship between two important statutes is not straightforward. The wording of the EP Act has, as the parties' submissions reflect, caused a degree of confusion and difficulty.[82] It is, of course, up to Parliament to consider whether any amendments might be desirable in light of the issues thrown up by this case.

Result

[184] We declare that the PSA and its members intended to participate strike action which was unlawful because it related to a pay equity settlement claim, and not to bargaining for a collective agreement.

[185] We dismiss the PSA's application for a declaration that the proposed strikes were not unlawful. We also dismiss the PSA's application for a declaration that the 20 DHBs were not entitled to refuse to bargain on the pay equity matters which were in contention.

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81 *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, [2021] ERNZ 1345 at [51]. We also note that the two Cabinet papers were published soon after their presentation to the respective cabinets – 24 November 2016 and 17 May 2018. The first reading of the Bill that was ultimately enacted took place on 16 October 2018.

82 Compare, for example, the clearer regime contained in Fair Pay Agreements Act 2002, ss 24 and 285; Employment Relations Act 2000, s 86(1)(ea).

[186] We reserve costs. The case is a significant one, and it may be that no order for costs should be made given the test case status of the proceeding. However, if that is not common ground, an application for costs may be made within 21 days, with a response given within 21 days thereafter.

B A Corkill
for the full Court

Judgment signed at 4.20 pm on 5 April 2023