Pay equity through strategic litigation:

The role and significance of strategic litigation (under the Equal Pay Act 1972) in the 2017 $2 billion historic pay equity settlement for aged care workers

A thesis submitted to Auckland University of Technology

In fulfilment of the requirements
for the degree of
Doctor of Philosophy (PhD)

Faculty of Culture and Society
2021

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Abstract

Aged care workers in Aotearoa New Zealand achieved an historic pay equity win with a $2 billion negotiated settlement in 2017. This win, secured by strategic litigation, was realised decades after the Equal Pay Act 1972 was enacted. There is a gap in knowledge regarding the unprecedented use of strategic litigation in Aotearoa and in understanding the influence and role of social movements in successful legal mobilization. Challenging direct discrimination does not address systemic inequality. Rather substantive equality seeks remedies to overcome unfairness of outcome and to remove the disadvantage manifest in pay inequity and the gender pay gap.

This qualitative socio-legal case study examined this strategic litigation phenomenon via theoretical discussion on legal and resource mobilization, legal opportunity structures (LOS), and social movement theory (SMT). A critical realist and feminist paradigm provided a theoretical lens to discuss gender undervaluation and care work. The case study methodology data included participant interviews and written legal documentation to understand this phenomenon well. The data were interpreted employing Reflexive Thematic Analysis.

This study's significance lies not only in its provision of a record of the event via the many voices of those involved but in the multiple theoretical approaches engaged to understand the case's success. A further significance of the study is its demonstration of the importance of this precedent for future pay equity claims and insight for future policy and legislative change. A confluence of factors enabled this litigation and a convergence of theoretical approaches assisted in demonstrating the significance of framing, timing, and the human resources (activists) involved. Additional findings illustrated the role and dominance of political will and the complexity of LOS. The mixed model of theoretical perspectives and legal and social factors resulting in this legal phenomenon are encapsulated in my original contribution to the body of knowledge, termed Socio-legal Convergence Theory (SCT).

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List of Abbreviations

BNZ	Business New Zealand
NZBORA	Bill of Rights Act 1990
CEDAW	Committee on the Elimination of Discrimination Against Women
CEVEP	Coalition for Equal Value Equal Pay
ECA	Employment Contracts Act 1991
EEA	Employment Equity Act 1990
EPA	Equal Pay Act 1972
EPAA	Equal Pay Amendment Act 2020
ERA	Employment Relations Act 2000
GSEP	Government Service Equal Pay Act 1960
HRA	Human Rights Act 1993
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
JWG	Joint Working Group
LM	Legal Mobilization
LOS	Legal Opportunity Structures
NZACA	New Zealand Aged Care Association
NZEI	New Zealand Educational Institute
NZNO	New Zealand Nurses Organisation
PEEU	Pay Equity and Employment Unit
PSA	Public Service Association
RJWG	Reconvened Joint Working Group
RMT	Resource Mobilization Theory
RTA	Reflexive Thematic Analysis
SCT	Socio-legal Convergence Theory
SFWU	Service and Food Workers Union
SM	Social Movements
SMT	Social Movement Theory

Glossary of terms

Aotearoa	New Zealand
E tū	Stand tall
Mana	Dignity, prestige, authority, status
Pākehā	European New Zealanders
Tāngata	People
Wāhine	Women
Whānau	Family

Attestation of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

Emily Griffin
10 October 2021

Acknowledgements

This thesis owes its existence to the brilliance of Professor Judy McGregor who firstly established a Master of Human Rights course at AUT which inspired me to return to university and then, upon completion of a master's degree, to embark upon further studies. I am further grateful to Professor Judy McGregor for assisting me to find such an absorbing and interesting thesis topic. I also acknowledge the wonderful support of Dr Jane Verbitsky whose enthusiasm and pastoral care is par excellence. Without such inspiring and dedicated supervisors this would not have been the enjoyable and rewarding experience it has been.

Importantly I acknowledge the invaluable contributions from all the participants whom without their provision of time, insight, and knowledge this thesis would not have been possible. I especially acknowledge Peter Cranney, John Ryall, and Kristine Bartlett for their unwavering dedication to the cause.

I also wish to acknowledge AUT's many workshop contributors who provided useful and helpful workshops at many of the crucial stages in the project. I especially wish to acknowledge Dr Lyn Lavery, Sue Knox, and Melanie Lovich from the AUT library.

I also wish to acknowledge Pam Nuttall who provided the impetus to co-write and present a paper at the International Labour Organisation in Geneva, an inspiring experience. Importantly I wish to acknowledge my fellow Beta group members who were there every step of the way. The advent of Covid-19 forced us to meet over zoom and then to write together over many hours, a definite silver lining to the pandemic. Thank you for the support and friendship Annalise, Coralie, and Helen, you contributed greatly to my enjoyment of this endeavour.

I also wish to acknowledge AUT for the VC scholarship which provided generous assistance to allow me to work on my thesis in a full-time capacity. I also thank my parents especially and my family for all their love and support.

Finally, I am forever grateful to Justin and our girls for all their support and love always.

Chapter One: Introduction, definitions, key concepts, research rationale, and historical context

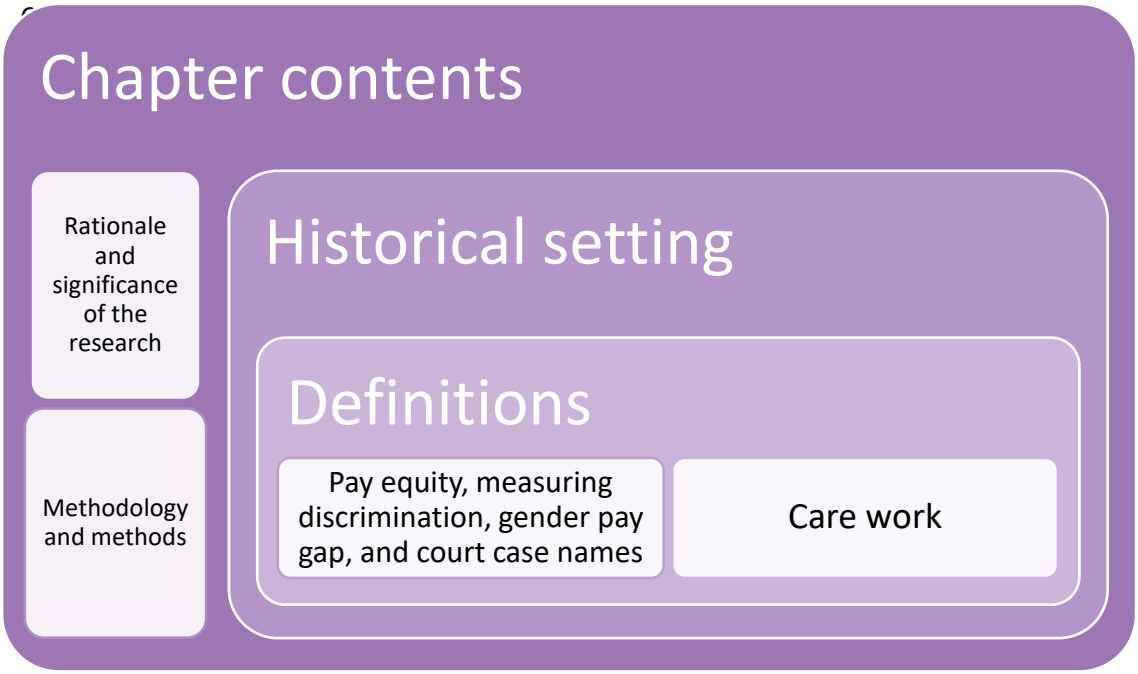
When New Zealand's Parliament enacted the Care and Support Workers (Pay Equity) Settlement Act 2017 (Settlement Act) providing for a $2 billion settlement for aged care workers, it was unprecedented both in the sizeable pay increase received by aged-care workers (Douglas & Ravenswood, 2019a) and for its recognition and embodiment of the principle of pay equity. For these reasons many viewed the settlement as a "significant feminist victory" (Millar, 2018, p. 142). It was simultaneously hailed a union triumph and a success for the recognition of the human rights of both the elderly and their carers. The historic settlement endorsed in legislation, and agreed to by Government, aged care providers and unions, was the culmination of a "confluence" of factors (McGregor, 2013, p. 11). One significant factor was the success of strategic litigation under the Equal Pay Act 1972 (EPA) decades after it had become part of New Zealand's body of legislation. The union's litigation strategy was especially remarkable given Aotearoa had "no previous history of equal pay mobilization" (McGregor & Graham Davies, 2019; Milner et al., 2019, p. 595). The legal action undertaken was unprecedented, and the judicial acceptance of pay equity arguments under the EPA was similarly unprecedented. The social movement campaigning for pay equality, another factor in the case, however, was not unprecedented. In various iterations, women (some men) and feminists, had been campaigning for pay equality in Aotearoa since the era of the suffragettes. Other relevant factors in this pay equity phenomenon included the presence of helpful Legal Opportunity Structures (LOS) (defined further below) and the significant coalition building within and across the 'two sides'. Additionally, there was agency achieved by women, acknowledgement of the rights of the elderly, and a growing awareness of human rights by both duty bearers and rights holders alike and, finally, there was the significant role of key actors in the phenomenon. Analysing and describing the factors which resulted in the Settlement Act 2017 and the Equal Pay Amendment Act 2020 forms the substance and content of this thesis which aims to facilitate understanding of how and why a pay equity legal case was won, and how social movements were influential, while also detailing a record of the event, and analysis of the legal and social precedents established by the case.

This introductory chapter sets out the research questions, the rationale and significance of the research, and the methodology. It also traverses various definitions of pay equity, the meaning and measuring of equality and discrimination, the gender pay gap, care work, and provides the

historical setting. The chapter will also outline the structural framework for the rest of the thesis.

Figure 1

Contents of Chapter One



Statutes and court cases

The successful legal case referred to throughout the thesis is the Service and Food Workers Union Nga Ringa Tota Inc (Plaintiff) and Kristine Robyn Bartlett (Plaintiff) v Terranova Homes and Care Limited (Defendant). The Service and Food Workers Union Nga Ringa Tota Inc was renamed E tū in 2015 (E tū, n.d) and will be referred to as SFWU/E tū together and singly throughout the thesis. The case was heard at the Employment Court and appealed to the Court of Appeal and the Supreme Court. The plaintiffs' claim initiated in 2012 culminated with the Care and Support Workers (Pay Equity) Settlement Act 2017. However, the thesis' parameters extend beyond the settlement to the select committee submissions and Hansard debates for the Equal Pay Amendment Act 2020 (a further legislative will product of the litigation). The legal case will be most often referred to as Terranova. However, when the decisions and submissions are analysed in Chapter Four more precise and specific nomenclature is employed.

Rationale and significance of the study

My research and investigation into the role and significance of strategic litigation (under the 1972 Act) and the resultant $2 billion historic pay equity settlement for aged care workers aims to answer three research questions.

1. Why, at this time, did women find agency, and why did a social movement influence union leadership to take a pay equity case under the Equal Pay Act 1972?
2. What caused the Union's strategic litigation to be successful in a pay equity case over 40 years after the enactment of the Equal Pay Act?
3. How were New Zealand's Legal Opportunity Structures (LOS) able to provide for this strategic litigation's success and will this provide a precedent for other sectors/employees/unions seeking pay equity?

The three questions address the legal and future-looking significance as well as the engagement of social movements, the significance of Legal Opportunity Structures, the importance of women's agency and specific actors in the phenomenon.

Pay equality, at the essence of this research, is a "fundamental tenet" (McGregor, 2013, p. 5) of, and inextricably linked to gender equality, which in turn is "a core value of modernity, and democracy" (Fuchs, 2013a, p. 191) and forms the basis "of all documents on international and domestic human rights" (Banakar, 2004, p. 165). State reports to the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) continually reference pay inequality and "equal pay and pay equity" as representing "significant, systemic and continuing barriers to gender equality" (McGregor, 2013, p. 10) in New Zealand. The gender and pay inequality concerns identified in CEDAW Committee reports are particularly evident in the care sector. Despite the skills required, aged care workers have been some of the lowest paid (Hill, 2013, p. 14; New Zealand Human Rights Commission, 2012) in Aotearoa, and include Māori and Pacifica women, migrants and older workers, who, as noted by the CEDAW Committee have comparatively "poorer outcomes relative to other groups" (2016, p. 2). The "socio-economic disadvantages associated with women's caring responsibilities have been significant" (Munro, 2017, p. 197) which made this aged care settlement so critical. The pay increase gained was substantial, adding dignity to these women's lives. As a care worker of 19 years' experience explained, "my wages increased from $16.75 to $23.50. For myself and my family this settlement was absolutely incredible" (Moore, 2018). Another caregiver detailed her financial struggles and the importance and benefits of the pay equity win for her family, describing her weekly budget before and following the pay equity win:

> "A bag of sausages $25 for 70 sausages, … a bag of rice $10, a bag of sugar $5, soap and toothpaste that cost 99 cents, some lollies, and cheap chips for my kids, and 2 box of chicken backs, the rest of my pay goes towards our bills. … I am so happy and so grateful of how winning equal pay has done for me and my family. My kids now can have cereals before they went to school, …, I can now afford to buy them new clothes and pair of shoes for their school,

> it's all because of equal pay. … my life and my family's life has finally changed because of my pay increase." (Faivalu, 2018)

The practical effects of pay inequality between men and women means women are less well recompensed for their work, have less disposable income, struggle to pay for essential items, have less opportunity for house ownership, smaller retirement savings, and less financial security, relative to men, over a lifetime.

While legislation has often failed to remove the gender pay gap and collective bargaining has not always been able to improve pay equality for women (Deakin et al., 2015, p. 402), litigation, in this instance, has been successful in forcing a process of negotiated settlement and a domino effect for successful pay equity claims in other sectors.

An investigation of this effective litigation action will assist in further combatting inequality because research evidence shows "litigation can be a potent mechanism for advancing social rights"(Deakin et al., 2015, p. 382; O'Reilly et al., 2015, p. 306). The success of strategic litigation under longstanding legislation, rather than the adoption of new legislative measures, exemplifies how legal mobilization can achieve a "goal" (Fuchs, 2013a, p. 190; Guillaume, 2015, p. 364).

Ultimately, understanding why this strategic litigation, and the social movement influencing the pursuit of pay equity, was successful (Vanhala, 2009, p. 741), may assist in learning how to achieve pay equity in other sectors, provide important insights into future strategic litigation for other equality goals and advance equality for women in Aotearoa. Equally, the case is also intrinsically noteworthy in and of itself because of its historic significance, financial benefits, and because it stimulated women's agency (McGregor & Graham Davies, 2019, p. 620).

There is an absence of literature concerning how this pay equity win was achieved through the theoretical perspective of Legal Opportunity Structure, Social Movement and Legal Mobilization and with an analysis of the precedents. This research aims to fill the gap in the literature by providing an explanation as to how and why these many factors converged in this successful outcome through the lens of a mixed theoretical model.

Methodology and methods

This is a qualitative case study of a unique pay equity 'triumph' situated within a socio-legal framework (Cownie & Bradney, 2013) and discipline. Theoretical discussion includes how legal mobilization theories around access and LOS, and social movement theory contributed to, and informed, a strategic litigation approach. The theoretical approach encompasses both a

feminist perspective and a critical realism framework. In adhering to the qualitative research paradigm, the researcher's personal philosophical position and the influence it has had on the research is made apparent. The methodology employed is the case study, a time bounded, in-depth acquisition of data from multiple sources with the researcher as the principal data collector. The qualitative research methods included 'in the field' interviews with many key figures involved in the decision to litigate and those with perspectives on the case which elicited rich data. Further data gathered included secondary documentation of the court decisions, legal submissions, submissions to the Bills, and Hansard debates which were analysed separately to the interview data. The interview data was coded and analysed applying Braun and Clarke's (2013) reflexive thematic analysis model.

Definition and importance of pay equity.

The interpretation and definition of pay equity was fundamental to the legal case and necessitates discussions of the interrelated but distinguishable concept of equal pay. Equal pay means those employed to do the same or similar work be paid the same, irrespective of their sex, and is a legal requirement set out in the Equal Pay Act. Pay equity expands the equal pay concept and is commonly accepted as meaning similar payment for work of similar value (Folbre et al., 2021; Hume, 1993, p. 471; Hyman, 2017). Pay equity is known as, 'comparable worth' in North America (Hyman, 1994; Hyman et al., 1987, p. 35), while in Britain pay equity is generally referred to as 'equal value' (Conley, 2014). Amongst civil society groups specifically engaged with advocating for pay equity in New Zealand the notion of pay equity is routinely referred to as 'equal pay for equal value' (Hill, 2013). Additionally, however, 'equal pay' is often the generic term denoting both equal pay and pay equity without distinction and this is especially the case in non-legal contexts. In this thesis the term pay equity (and pay equality) rather than equal value for equal work will be utilized. Further, a distinction is maintained between the definition of equal pay and pay equity, most relevantly because of the arguments made on this point in the Terranova litigation.

In international law the definitions of pay equity have gained universal acceptance. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 promotes pay equity by envisaging "equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men". CEDAW 1979 refers to "The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value" (Article 11 (d)). The International Labour Organisation (ILO) Equal Remuneration Convention, 1951 (No. 100) affirms "equal remuneration for men and women workers for work of equal value refers to rates of

remuneration established without discrimination based on sex" (Article 1 (b)(Goddard, 2012, p. 120; Junor et al., 2009, p. 197). Also, Equal Remuneration Recommendation, 1951 (No. 90) stipulates "Appropriate action … to ensure … the application of the principle of equal remuneration for men and women workers for work of equal value". These international obligations play a role in signalling to domestic lawmakers, and society, the importance of pay equity to achieve gender equality as well as providing a clear universal definition of the concept of pay equity (Smith et al., 2017, p. 218). Consequently, pay equity has become "a key measure of women's progress" in achieving gender equality (Charlesworth & Macdonald, 2015; McGregor & Graham Davies, 2019, p. 619) and a key marker of discrimination against women (Fredman & Goldblatt, 2015; Hyman, 2017; McGregor et al., 2016).

Even though there are cogent definitions of pay equity in numerous international instruments to which New Zealand is a party, New Zealand's domestic legislation has never explicitly defined pay equity in any statutory provision. The 1972 Act was generally understood (prior to Terranova) to define equal pay and preclude pay equity, describing pay discrimination as: "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees" (Goddard, 2012, p. 120). As will be discussed in the case analysis findings (Chapter Four), the lack of a specific definition for pay equity was one of the arguments made by the defendant in the Terranova case, who submitted that the EPA did not apply to, or envisage, pay equity. The paucity of pay equity litigation under the 1972 Act also suggests that many advocates for pay equity also believed that it was not intended to be, or was not specifically provided for, in the EPA. In the end, however, the Employment Court in the Terranova case accepted that the purpose and intention of the Equal Pay Act was to allow for pay equity (Hill, 2013; McGregor & Graham Davies, 2019, p. 625) and in justifying its decision referred to the long title of the 1972 Act being concerned with the elimination of discrimination.

Ultimately, the absence of a specific provision (other than the long title of the 1972 Act) in the New Zealand statute books, did not impede a pay equity claim succeeding under the Equal Pay Act (Robson, 2017, p. 15) although it probably contributed to the delay in this being realised. The result of the Terranova litigation has been a firm finding by the Court of Appeal specifically clarifying the concept by stating "Pay equity is about equal pay. It is equal pay for work of equal value" ("Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc," para 113) and, thus, putting to rest any confusion that the Equal Pay Act does not include or envisage pay equity.

The importance of a legal right to demand pay equity is evidenced by the continuing disparity in pay between the genders (occupations traditionally the preserve of women remain undervalued and under-remunerated) (Hume, 1993, p. 475). As Goldblatt states, “poverty is gendered” (2017, p. 266). Increasingly, international law is being relied upon when litigation is turned to in pursuit of pay equity claims. International mechanisms support pay equity claims taken under “equal pay legislation” or by means of “human or civil rights legislation” (Hume, 1993, p. 474) assisting women to challenge “oppression and disadvantage” (Goldblatt, 2017, p. 268) because human-rights mechanisms provide “entitlement to a higher and wider safety net of economic rights” (Junor et al., 2009, p. 197). New Zealand human rights legislation specifically allows for international conventions to be incorporated into domestic law. The long title to NZBORA explicitly commits New Zealand to the International Covenant on Civil and Political Rights (ICCPR) 1966 and the Human Rights Act in its long title and s20I and s22 also confirm commitment to international obligations (Goddard, 2012, p. 125). Ratification of optional protocols, for example to CEDAW (ratified by New Zealand in 2000) (Office of the High Commissioner of United Nations Human Rights, n.d), allows individuals to take discrimination complaints into the international realm. Ratification of international conventions, however, does not necessarily ensure the removal of discrimination. New Zealand pledged to end gender discrimination by signing CEDAW (McGregor et al., 2016), the ILO Convention 100-Equal Remuneration 1951, and ILO Convention 111-Discrimination (Employment & Occupation) 1958 (Jones & Torrie, 2004, p. 55) several decades ago, yet none of these ratifications have resolved pay inequality in Aotearoa.

The United Nations, in its Universal Periodic Review (the UPR) continually urges New Zealand to address the issue of pay inequality (McGregor et al., 2016) and to comply with “the human rights principle of equal pay for work of equal value (HRC submission to EPAA Bill, p. 5). The CEDAW Committee continues to reference equal pay issues, criticising successive New Zealand governments on the gender pay gap, pay differentials, and specific legislative actions: Such as repealing the Employment Equity Act, enacting the Employment Contracts Act, and disbanding the Pay Equity and Employment Unit (PEEU). The tenor of the observations is a clear expectation that the New Zealand government remains responsible and bears a distinct duty to rectify the discrimination against women and to realise substantive equality. The following table summarises the continual urgings by the international mechanism of CEDAW for New Zealand to improve its human rights record on gender equality.

Table 1

CEDAW Concluding observations for periodic reports on New Zealand

Year and report	CEDAW Committee's pay equity concerns (from concluding observations only)	CEDAW Committee's urgings (from concluding observations only)	Noted by Government
1988: First periodic report	Concluding Observation report unavailable.	Concluding Observation report unavailable.	Noted: women were currently concentrated in a narrow range of jobs: teaching, sales, typing, clerical, and manufacturing.
1994: Second periodic report	Concerned at women's inequality of income. Concerned at abolition of pay equity legislation. Concerned legislation weakened the trade union movement negatively affecting women.	More effort needed to alleviate the burden on women.	Noted: Steering Committee to investigate and eliminate wage differentials between women and men.
1998: Third and Fourth periodic report	Concerned at pay differentials between women and men for equal work. Concerned at repeal of the Employment Equity Act	Further effort through legislation and policies to reduce the gender pay gap.	
2003: Fifth periodic report	Concerned at persistent pay gap, occupational segregation, high number of women in part-time and temporary work, and low wages.	Urged to eliminate occupational segregation. Urged to increase efforts to apply the principle of equal pay for work of equal and comparable value,	
2007: Sixth periodic report	Concerned at lack of legal mechanisms to address discrimination against women in private sector employment (article 2 (e) of the Convention). Concerned at no comprehensive definition of discrimination against women (article 1 of the Convention).	Urged to eliminate occupational segregation. Urged to implement comprehensive laws guaranteeing substantive equality especially for equal pay and equal opportunity in employment.	
2012: Seventh periodic report	Concerned at lack of explicit and comprehensive prohibition against direct and indirect discrimination against women (article 1 of the Convention). Concerned at persistent high levels of occupational segregation. Concerned at the closure of the Pay and Employment Equity Unit	Urged to establish a legal definition of sex discrimination (article 1 of the Convention), and to extend state responsibility for acts of discrimination by both public and private actors (article 2 (e) of the Convention), with a view to achieving formal and substantive gender equality. Urged to implement the principle of "equal pay for work of equal value" (article 11 (d) of the Convention). Urged to enforce the principle of equal pay for work of equal value, through specific measures to redress pay inequality. Urged to evaluate the gendered impact of the reform of collective bargaining. Urged to establish an institution to monitor gender pay inequity.	
2018: Eighth periodic report	Concerned legislation on discrimination against women is not fully in line with articles 1 and 2 of the Convention. Concerned with persistent gender pay gap, which disproportionately affects women in low-income jobs, including Māori and Pasifika women and minority ethnic and cultural groups.	Urged to eliminate occupational segregation and adopt special measures to address it to achieve substantive gender equality. Urged to consider adopting a new law based on the recommendations of the reconvened Joint Working Group on Pay Equity Principles. Urged to enforce the principle of equal pay for work of equal value in employment legislation	

Unfortunately, successive New Zealand governments have avoided taking special measures to eliminate pay inequality (Committee on the Elimination of All Forms of Discrimination against Women, 2018) despite equality being a fundamental human rights issue affirmed in the foundation document for human rights such as the Universal Declaration of Human Rights (Caring Counts, p. 45). A fundamental legal cause of this inaction is the fact that the international obligations do not demand a corresponding consistency and are legally non-binding domestically (McGregor, 2013, p. 11). Similarly, the absence in New Zealand of a Parliamentary body with oversight on human rights issues severely curtails the implementation of international human rights recommendations and subdues both Parliamentary members' and the media's interest in the same (p.11, McGregor 2013).

Measuring discrimination and inequality

The concept of equal pay prohibits sex discrimination between men and women doing the same work, by targeting direct discrimination. Pay equity is more expansive than equal pay and seeks to alter the inequality of opportunity and outcome by targeting indirect discrimination. Pay equity addresses the gender segregation of occupations by requiring similar work of similar value to be paid equally (Hume, 1993, p. 471). The substantive equality approach of pay equity is focussed on the removal of "systemic inequalities" and "structural causes" of disadvantage (Takeuchi et al., 2018, p. 14) and places a "positive obligation" on government and institutions to resolve poverty and disadvantage (Goddard, 2012, p. 122) and realise social justice. The theoretical perspective and importance of substantive equality backgrounds this research on pay equity.

There are multiple means for defining how discrimination and inequality are both measured and challenged which at their essence are concerned with "unfairness of the outcome" (Hyman, 1994, p. 95). Sandra Fredman (2011) has devised an approach which provides for four main stages necessary for "policy or legal change" (Campbell et al., 2018, p. 5).

The four-dimensional conception of substantive equality (Fredman, 2011) delineates a framework to target disadvantage.

- Firstly, acknowledging distributive inequalities ("the redistributive dimension")(Campbell et al., 2018, p. 3);
- Secondly, the constraints of status imposed by power imbalances, "prejudice and violence (the recognition dimension)" (Campbell et al., 2018, p. 3).
- Thirdly, dignity, and accommodation of difference, enhancing voice "the participative dimension"(Campbell et al., 2018, p. 3);
- Fourthly, realising systemic change "the transformative dimension" (Campbell et al., 2018, p. 3) and, ultimately, the humanity of us all (Campbell et al., 2018).

Inherent in this approach to inequality and discrimination is the necessity of redressing disadvantage, prejudice and not accepting 'like' treatment (the shortcomings of a formative approach) (Fredman & Goldblatt, 2015; McGregor & Graham Davies, 2019, p. 260). This approach insists on "affirmative action, or special measures" (Campbell et al., 2018, p. 3) to achieve equality. The effect of substantive equality is ultimately to accept *difference* as part of equality (Campbell et al., 2018, p. 5; Whitehouse & Smith, 2020, p. 522) and in doing so bring about structural, transformative change (Campbell et al., 2018, p. 3; McGregor & Graham Davies, 2019). There is a striving for the facilitation of participation which is predicated upon

both individual agency *and* collective action. Substantive equality also envisages and requires meaningful, authentic representation and decision-making (Campbell et al., 2018, p. 5) and encompasses undervaluation, an aspect of the Terranova decision that was highly significant as the care workers (predominantly women) were recognised to be unpaid and undervalued due to their sex (Charlesworth & Heap, 2020; Pringle et al., 2017, p. 34).

In contrast, the formative approach, "Aristotelian" (Goddard, 2012, p. 122) in nature, requires the treatment of like as like, consistent fairness in treatment (Fredman, 2011, p. 8) which can result in the anomaly of even 'bad treatment' being justified. A formative approach looks to curtail direct discrimination in specific instances, but is not necessarily equal to the task of addressing indirect discrimination (Goddard, 2012, p. 122; Hume, 1993, p. 475) caused by "societal prejudice" (Fredman, 2011, p. 14) or in solving the historic injustices such as the "systematic and historic devaluation of "women's work"" (Hume, 1993, p. 471). Women workers in traditional female sectors are poorly paid (McGregor & Graham Davies, 2019) and the few men in the sector are similarly poorly paid rendering the imposition of formative equality ineffective in addressing the discrimination and in redressing the gender pay gap. The Equal Pay Act, as it has been interpreted previously, only countered direct discrimination by requiring men and women to be equally remunerated for the same job.

The progress, or lack thereof, of a country's pay equality measures can be assessed within a particular jurisdiction by a specific framework theory of typologies developed by Squires and further extrapolated in the work of Smith and Stewart and others (Parker & Donnelly, 2020). The framework theory that Squires proposes provides for a categorisation of equality into one of three typologies. The three typologies are Inclusion, Reversal and Displacement, although the categories are not "mutually exclusive", and there is a degree of difference as to how strongly a typology adheres to its categorisation (Griffin et al., Pay equity in the New Zealand jurisdiction in relation to the typology of Squires, para, 1). Inclusion is essentially equal pay for equal work and incorporates a framework by which direct discrimination is redressed (Whitehouse & Smith, 2020, p. 522). Generally, New Zealand's equal pay legislation has ensured that New Zealand is categorised within the Inclusion typology because the legislation only addressed direct discrimination, ensuring equal treatment for both sexes in the same situation (Fredman, 2008, p. 201). Although it could be argued the Terranova case and ensuing JWG principles demonstrate "a 'weaker' reversal approach" (Parker & Donnelly, 2020, p. 570). Reversal, the second typology, incorporates more of an equity focused means to achieve equality and its framework aligns with equal pay for work of similar value (pay equity). The Reversal typology requires a comparator model, measured against a universal comparator, and strives to address indirect systemic discrimination. The requirement in the Reversal typology

for a comparator, understood to be the 'universal man', however, is insufficient on its own to achieve true equality. Measuring and comparing against the 'universal man' creates anomalies, for example, in the circumstance of pregnancy where there can be no male comparator. Similarly it forces assimilation as in the circumstance of a Muslim teacher seeking accommodation at school for her daily praying (there being no relevant and appropriate comparison) (Fredman, 2011, p. 11). Displacement, the third typology is characterized as transformative because it seeks structural change (Whitehouse & Smith, 2020). Displacement, like the reversal approach, pursues the removal of "systemic inequalities" (Goddard, 2012, p. 122) and "barriers" by demanding a restructuring of the inequitable system and requiring a duty by the State to do so (Goddard, 2012, p. 122). Arguably, New Zealand fits within the Inclusion or Reversal typology. Although it has been asserted that a policy initiative by the 5th Labour government which saw the establishment of a unit to review and evaluate pay equity claims (the PEEU) in 2004 placed the New Zealand pay equality framework within the typology of Displacement/transformation by, "'making gender equity ordinary'" (Junor et al., 2009, p. 195). However, the disbanding of that Unit likely reversed New Zealand out of the Reversal typology. With the new EPAA 2020 in place, Parker and Donnelly suggest the new framework is representative of "a weak displacement approach" by allowing for male or "other comparators which the parties or the Authority or Court considers useful and relevant" (2020, p. 572). Further discussion on the significance of the EPAA is set out in Chapter Seven.

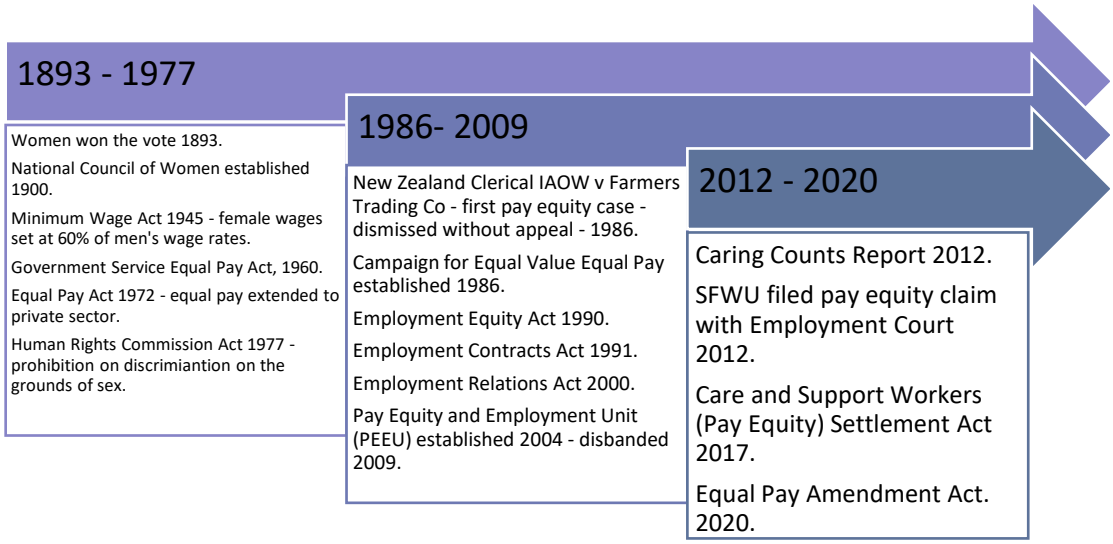
Aged care work

According to government figures on aged care (https://www.newzealandnow.govt.nz/resources/working-in-aged-care), approximately 33,000 carers are employed in the aged care sector in Aotearoa and this figure is set to rise due to increasing numbers of residents in aged care facilities. It is estimated that the demand for carers will increase by 50% to 75% by 2026 (Grant Thornton International Ltd, 2010, p. 5). Aged care work is being described as one of the fastest growing "occupational" (Harré, 2007, p. 62) groups and "industrial" sectors in the 'developed' world (Austen et al., 2016, p. 1040). In 2012, The Human Rights Commission published *Caring Counts, Tautiaki Tika: Report of the Inquiry into the Aged Care Workforce* which exposed the poor pay and conditions and systemic undervaluation of this occupational sector. The Report's findings were sobering and became the "catalyst" (and a significant resource) for the union's litigation and for ultimately "prompting change" (McGregor & Graham Davies, 2019, p. 621). The nature and undervaluation of care work is discussed in detail in the literature review (Chapter Two).

Historic overview of New Zealand's legislative and policy framework and litigation around pay equality and equity

Figure 2

Timeline of significant milestones for female equality



Contextualising and comprehending the significance of the 2017 pay equity win requires an acknowledgement of the history of the struggle for pay equality in Aotearoa. The Terranova litigation and negotiated settlement which recognised the principle of pay equity represented a long fought for objective of feminists which began well before the existence of the EPA. Pay inequality and discrimination had been identified more than a century ago by Kate Sheppard and other suffragists who recognised the lower rates of pay for women provided a cheaper source of labour for employers (Hyman, 1994, p. 81; Parker & Donnelly, 2020, p. 561) and were inherently unfair (Hyman, 1994, p. 80). It was an obvious goal for the National Council of Women, formed out of the New Zealand suffrage movement (Ministry for Culture and Heritage, 2020), to resolve in 1900 to strive for equal pay (Hyman, 1994, p. 80). Additionally, pay inequality has been a concept appreciated by government for some time: New Zealand was a party to the Treaty of Versailles (1919) which recognised equality between the sexes for "work of equal value", and there has been "labour law and human rights" legislation "since the 1950s" acknowledging the same (HRC submissions to EPAA Bill, p. 3). However, entrenched sexism played out in the law. In 1936 basic female rates were set by the Arbitration Court at "47% of the male rate" (Hyman, 2002) and the "Minimum Wage Act of 1945" required "women's wages" be at least "60 per cent of the male wage" (Brookes, 2016, p. 273). Furthermore, the almost entirely female aged care workers, often working for religious organisations, were not even included in the awards "which for nearly 100 years provided national minimum wage rates for private sector occupations" (Ryall, 2020).

In 1960 the first piece of legislation with the purpose of achieving pay equality, the Government Service Equal Pay Act, 1960 (GSEP) was introduced. It was not until 12 years after the GSEP that Parliament extended equal pay to the private sector with the EPA, the fulfilment of an objective of the National Advisory Council of the Employment of Women (NACEW)(Jones & Torrie, 2004, p. 53). The purpose of the EPA was to achieve equal pay in awards and agreements rates by 1977 which, unfortunately, and probably unsurprisingly was not realised. Hyman explains there were a variety of reasons for why equal pay was not achieved, not the least of which was poor attention to compliance and the deliberate classification of "discriminatory job titles" to circumvent the provisions of the Act (1994, p. 84). Despite the 1972 Act's failure to eradicate pay inequality, it nonetheless did make some gains in reducing the gender pay gap from "69.9 per cent to 78.8 per cent between 1972 and 1978" (Goddard, 2012, p. 128). However, despite the EPA there was still marked job segregation and the female dominated occupations were lower paid than the male occupations. A governmental Committee review in 1979 was concerned that "in some agreements the equal pay rate for work that had been traditionally performed by women was too low to attract males and was therefore still a female rate" ("Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc," para 27).

The third statute in New Zealand's legislative framework which specifically addressed pay inequality (Coleman, 1997) was the Human Rights Commission Act 1977 (HRCA) which prohibited discrimination in employment on the basis of sex.

Despite these three pieces of legislation (the GSEP, EPA and HRCA), whose goals were to eliminate pay discrimination, there had been very little testing of the statutes through the mechanism of litigation. The GSEP generated no case law (no claims were ever filed)(Goddard, 2012, p. 128) and the first legal action on pay equity (and only other) initiated under the 1972 Act was brought in 1986 by the Clerical Workers Union (New Zealand Clerical IAOW v Farmers Trading Co). The Clerical Workers' Union's claim cited unfairly low wages comparative to similar industries dominated by male workers. However, the pay equity argument made by the Clerical Workers' Union was dismissed in the court with Justice Finnigan determining that a claim seeking a remedy for pay inequity under the EPA was an "error of law" ("New Zealand Clerical Administrative etc IAOW v Farmers Trading Co Ltd," 1986). There was no jurisdiction because "the awards in question had been negotiated since the Act", the implication being equal pay had been achieved (Jones & Torrie, 2004, p. 56). The Clerical case was a clear judicial refusal to accept a pay equity argument under the EPA. Interestingly, the narrow interpretation of the EPA in the Clerical case was not universally held within the judiciary and subsequent decisions in the Employment Court and the High Court have criticized the Clerical

case decision for failing to consider indirect discrimination when other decisions by the High Court and the Employment Court had considered it (Goddard, 2012, p. 136). The Clerical case curtailed any further pay equity litigation under the EPA for decades, effectively halting litigation and rendering the 1972 Act "more or less inoperative" (Hyman et al., 1987, p. 46). The insufficiencies of the EPA to achieve pay equity appeared to be widely held (Doyle, 2016, p. 54), a belief reinforced by an Equal Pay Report commissioned by the Department of Labour in 1987 which asserted the EPA had been ineffective in resolving the gender pay gap and attaining pay equity (Hyman et al., 1987; Minett, 2016, p. 6). The lack of challenge to the Arbitration Court's narrow interpretation of the EPA (despite the seemingly broad interpretation implied in the legislation)(Hyman et al., 1987) caused many to conclude the EPA did not advance pay equity (Hyman et al., 1987, p. 4). Although some researchers believed the 1972 Act did foresee pay equity (Hyman et al., 1987, p. 7), others believed the absence of litigation was a manifestation of the ineffectiveness of the legislation. Further litigation was also possibly stymied by both the political climate and the Clerical Workers' Union's disestablishment. The Clerical Workers' Union had played a significant role in facilitating feminist action around equal pay and with its departure, and the 1990 National government's dismantling of the labour market and the welfare state, women's "ability to organize" (Millar, 2018, p. 140) was demonstrably reduced.

Although litigation had not proved successful, there continued to be agitation for pay equity and women pursued other policy and mechanisms, for example, job evaluations to improve pay rates for women (Burns, 2003, p. 2). Women in the union movement, feminist politicians and a specifically formed interest group, the Campaign for Equal Value, Equal Pay (CEVEP) amongst others, continued to pursue the pay equity cause campaigning for new legislation for pay equality (Hyman, 1994, p. 85; McGregor & Graham Davies, 2019). This ongoing commitment by women politicians and women's groups culminated in the Employment Equity Act 1990 (EEA), a statute which has been described as "the most impressive legislative attempt to provide for pay equity" (Goddard, 2012, p. 131) and which came to fruition in part due to "a robust campaign organisation" (Hyman, 1994, p. 86). However, the EEA had no influence on pay equity in Aotearoa because its legislative life span was truncated with its swift repeal a few months after its enactment, the "first act of vitriol of the incoming National Government" (Moroney, 2017). Not only did the immediate repeal of the EEA ensure the legislation had no opportunity to be tested, but the repeal was a manifestation of a fundamental ideological change in Aotearoa. The ideology of neoliberalism commenced by the 4th Labour Government and continued apace by the 4th National Government brought significant economic reform, radical new policy direction and substantial deregulation of the labour market in New Zealand

(Charlesworth & Heap, 2020; Douglas & Ravenswood, 2019b; Hume, 1993, p. 476). The labour market reform agenda saw the enactment of the Employment Contracts Act 1991 (ECA) with a stated purpose to "promote an efficient labour market" (Hume, 1993, p. 477). The ECA removed compulsory unionism, negatively affecting unions to both organize and bargain collectively (Charlesworth & Heap, 2020, p. 610; Douglas & Ravenswood, 2019b; Harré, 2007, p. 53), and the rates of unionisation dropped dramatically, “from 35.4% to 19.9%” from 1991 to 1996 (Parker & Donnelly, 2020, p. 567). The ECA was “a major disadvantage for women in the labour market” (Committee on the Elimination of All Forms of Discrimination against Women, 1998, p. 70) and especially for “lower-paid women” (Hyman, 2017, p. 46). The decreasing role of the unions ensured increased wage inequality (Hume, 1993, p. 478) as pay equity issues were surpassed by seemingly more pressing issues such as maintaining the status quo. Union activity became centred on “fighting a rear-guard action to retain hard-won conditions” (Torrie & Rendall, 2004, p. 13). In the wake of the Employment Contracts Act, the gap between male and female dominated wage rates for the lowest paid widened. Progress towards pay equity was further hindered by confidentiality clauses in employment contracts which prevented the ability to bring “comparative pay equity claims” (Hill, 2004a; Junor et al., 2009, p. 198). Privatisation was another feature of the new policy direction which Deakin et al suggest hampered the attainment of pay equality by removing the “comparator” or the “claim driver” (Deakin et al., 2015, p. 401). Eventually, following a change in government in 1999, the ECA was repealed and replaced with new employment legislation (the Employment Relations Act 2000 (ERA)) whose stated purpose was to be more supportive of unions. Collective bargaining was re-instated, and the ERA section 3 specifically acknowledged the “inherent inequality of power in employment relationships” ("Employment Relations Act 2000,"). However, the ERA did not herald radical change in terms of collective bargaining (May & Lonti, 2003, p. 10) and was criticised for doing little to boost union strength (Hyman, 2004b, p. 5). The Labour Party’s return to power in 1999 also saw a preference to address pay inequality via bureaucratic rather than legislative means. A Taskforce on Pay and Employment Equity was established in 2004 to carry out research on various aspects of the gender pay gap, including the reasons for it and how it might be overcome, as well as a cost benefit analysis of pay equity measures and implementation (Hyman, 2004a). The Taskforce recommended the establishment of a dedicated unit (which became the Pay Equity and Employment Unit, PEEU) to sit within the Department of Labour and address gender pay inequity (Goddard, 2012, p. 137; Hall, 2007, p. 37). The PEEU provided for the “reviewing of pay and employment opportunity and for remedies such as job evaluation” (Junor et al., 2009, p. 195), its existence justified by gender pay gaps as large as 30% in some areas of the public sector (Goddard, 2012, p. 138). The Unit had not commenced implementing pay reviews when it was disbanded by the

incoming National government in 2009. The dismantling of the Unit exemplified the dependence of pay equity measures on political will, a refrain that will be returned to in later chapters.

The next significant event in pay equity's history in Aotearoa was the claim brought in the Employment Court by Kristine Bartlett and the SFWU which is the focus of this thesis. As the above demonstrates the New Zealand pay equality litigation terrain has been one of relative inactivity with the EPA having stimulated the filing of only two pay equity claims in its over 40-year life. The historic lack of legal action under the 1972 Act underscores the importance and novelty of the pay equity win in 2017.

Brief overview of the New Zealand context: the Human Rights Commission and union density

Union density decreased significantly in the wake of the Employment Contracts Act 1991 (Centre for labour employment and work, 2017; Parker & Donnelly, 2019) and continues to slowly decrease in Aotearoa (Centre for labour employment and work, 2017). Table 2 below illustrates union membership from ninety-nine unions in 2017 and makes comparison with 2008 figures (Centre for labour employment and work, 2017). The Companies Office register records 133 unions in its union membership report of 2020 (2020).

Table 2

Union membership proportions (comparison between 2017 and 2008) for 99 unions

Year	Membership % of all employees	Public sector %	Female membership %	Union density
2017	17.7%	59.5%	59.7%	41.6%
2008	21%	62%	55%	49.3%

The amalgamation of the Service and Food Workers Union with the Engineering Printing and Manufacturing Union to form E tū has made it the largest private sector union in Aotearoa (New Zealand Companies Office, 2020).

The New Zealand Human Rigths Commission was established by Parliamentary enactment in 1977 and has its statutory mandate from the Human Rights Act 1993 (Esterling, 2015). The Commission is led by the Chief Commissioner. There are three other Commissioners, the Race Relations Commissioner, the Disability Rights Commissioner and the Equal Employment Opportunties Commissioner governing the Commission's work (Justice Committee, 2022). As an independent Crown entity the Commission is funded via Vote Justice a funding portfolio

within the Ministry of Justice (Justice Committee, 2022). The Human Rights Commission's role is to promote and protect human rights and relevantly to "lead, evaluate, monitor and advise on equal employment opportunities" (Human Rights Commission, 2022).

The gender pay gap in Aotearoa New Zealand

The gender pay gap exemplifies the complexities of discrimination and the consistent difficulty in reducing pay inequality. Measured as the differential between men's and women's median earnings, the gender pay gap has been a significant enduring negative reality for women across the globe and Aotearoa is no exception. Despite political acknowledgment of the existence of a gender pay gap, and legislation to redress gender pay inequality, including specific equal pay legislation, the gap remains (McGregor et al., 2016). As it currently tracks New Zealand's gender pay gap is unlikely to be resolved before 2062 (Griffin et al.; Logie, 2017d). Describing the pay discrimination experienced generally by female workers in numerical terms locates New Zealand women at an almost 10% negative differential in median pay compared to men, which over a lifetime accumulates and compounds significant disadvantages in terms of total earnings, savings, retirement funds, and financial well-being for women (Campbell et al., 2018, p. 11). Equally, the gender pay gap negatively effects other equality markers "across health, education, politics" (Henshall, 2018, February 11).

Currently, New Zealand is ranked approximately seventh best in the world for its gender pay gap (Griffin et al.; World Economic Forum, 2018), although some suggest the comparatively small gap may reflect increasingly low wages for males, a consequence of a deregulated market (Hyman, 2004b, p. 29; O'Reilly et al., 2015). Furthermore, New Zealand's 9.5% (Ministry for Women, 2021) differential masks a further significant gap when disaggregated on the basis of ethnicity (Human Rights Commission, 2018, p. 2; McGregor & Graham Davies, 2019). In percentages, Māori women earn approximately 22.9% and Pacifica women 24.8% less than men compared to the generalised 9.5% for all women (Logie, 2017d). Ignoring the statistical ethnic disaggregation is to ignore the significant reality of inequality for many thousands of lowly paid women (including those in care work) and presents a 'skewed' view of the gender pay gap in Aotearoa. Additionally, the gender pay gap is not the preserve of the low paid because research suggests the gap is widening gap amongst the highest paid, too (O'Reilly et al., 2015).

The causes of and ways to reduce the gender pay gap (and pay inequality) have been the subject of much academic research (Becker, 1985; Hyman, 2017; Joshi et al., 2007; Morgan, 2020; Rubery & Grimshaw, 2015; Rubery & Johnson, 2019) and it has been variously attributed

to a difference in education levels, motivational differences, and preferences between the genders (Becker, 1985). “Women are characterised as choosing to perform different and 'less valuable' work” (Campbell et al., 2018, p. 11) and their lower wages are a result of “a lack of personal investment in education” (Hume, 1993, p. 473). However, much research discredits the difference being attributed to “productivity-related characteristics” (Smith et al., 2017, p. 211) or factors such as “education, experience or unionisation” (Coleman, 1997, p. 518). For example, women’s pay relative to men’s pay in the public sector in New Zealand failed to increase during the 1990s despite increasing levels of education amongst women (Hill, 2004b, p. 12). Similarly, overseas research demonstrates advances by women in terms of education and new career domains have not reduced the gap (O'Reilly et al., 2015; Rubery & Grimshaw, 2015). Rather, the data underscores pervasive job segregation (vertical and horizontal) of the genders as a cause for ongoing gender pay disparity (Jones & Torrie, 2004, p. 3; Junor et al., 2009, p. 195). Occupations dominated by women are paid less for the work they do (Hyman, 1994, p. 160) compared to professions and sectors dominated by men. An American report in the 1980s concluded “the more the occupation is dominated by women the less it pays" (Coleman, 1997, p. 518). The acceptance of the significance of job segregation was recorded in the Court of Appeal decision on Terranova which referred at paragraph [35] to the 1987 Phase One Report’s findings of the “strong statistical link between female dominance in an occupation and low pay rates” ("Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc," para 35). In Aotearoa approximately half of each gender remains in sectors which are 70% dominated by their own gender (Ministry for Women, 2018) and women remain “overrepresented in minimum wage jobs” as recorded in the Ministry of Business, Innovation and Employment’s Minimum Wage Reviews for 2014 (New Zealand Government, 2016, p. 28). This compares to overseas figures which show women are “concentrated in … female-dominated jobs or firms where wages tend to be lower” (Hugo et al., 2015, p. 577; O'Reilly et al., 2015, p. 304).

Other contributors to the gender pay gap are related to stereotyping, the “norms reinforcing women’s position as economic dependents” (O'Reilly et al., 2015, p. 301) and pervasive traditional beliefs in the “‘male breadwinner’” concept (higher male wages because ‘he’ supports the family)(Healy & Kidd, 2013, p. 762). The complexity of the gender pay gap extends “beyond the workplace” to other “gender inequalities and stereotypes and arrangements at individual, family and societal levels” (Macdonald & Charlesworth, 2018, p. 446). The “unequal division of unpaid labour” (Rubery & Grimshaw, 2015, p. 331) in the domestic realm, and especially the unequal cost of having children, the ‘motherhood penalty’ (England & Folbre, 1999; Pacheco et al., 2017), contribute to the gender pay gap. These

gendered factors continue to have a significant impact on “patterns of segregation”, women’s “working time schedules” and ultimately the opportunity for “promotion” (O'Reilly et al., 2015, p. 301) and “advancement” (Campbell et al., 2018, p. 11).

Alternative theories on the causes of the gender pay gap in New Zealand (Pacheco et al., 2017) and in other jurisdictions (O'Reilly et al., 2015) posit the most significant cause of the gap as being unexplainable factors (Manning & Swaffield, 2008; O'Reilly et al., 2015, p. 302; Rubery & Grimshaw, 2015, p. 325). Fredman, however, rejects the “unexplainable” factors narrative, insisting the causes are complex, historic, a result of legally permissible undervaluation and, ultimately, “deeply embedded in the institutions of our society” (2008, p. 195). The gender pay gap can be directly attributed to “systemic discrimination” (Smith & Stewart, 2017, para. 3) and inherent long-standing sexism (Healy & Kidd, 2013, p. 279) which sanction “unequal wage rates” (Campbell et al., 2018, p. 11). The plethora of causes are both overt and covert, residing in our “laws, … structures and cultural norms” which dictate a narrow range of work designated to women (Campbell et al., 2018, p. 1). The New Zealand Government concurs, describing the current pay gap to be a result of a “complex mix of factors”, including “patterns of employment and unconscious bias” (2016, p. 11). Ariane Hegewisch of the Institute for Women’s Policy Research categorises the unexplainable and unmeasurable as simply a “proxy for discrimination” (Collins, 2018, p. 37). The consequence of these underlying societal prejudices ensures pay equality remains an improbable attainment when “gender inequality and misogyny still pervade public and private life” (Rubery & Grimshaw, 2015, p. 339).

Nevertheless, orthodox economists refuse to accept discrimination is responsible for gender pay disparity, believing the market to be both objective and inevitable (Hyman, 1994, p. 95). Furthermore, redressing the pay gap by means of pay equity is criticised as too complicated. Pay equity cannot accurately measure (and therefore combat) inequality because there can be no comparison between apples and oranges (Hume, 1993, p. 473). The value of work cannot be objectively measured other than by the market and its demand and supply symbiosis, and interventions are necessarily “arbitrary and costly” (Hyman, 1994, p. 79). Implementing pay equity is implicit interference with the market (Hume, 1993, p. 472). Yet the market is criticised for being “inherently gender biased” (Smith & Stewart, 2017, International standards and treatments of comparability, para 3) and ineffective in redressing discrimination (Goddard, 2012, p. 125). In particular “market-oriented reforms” are ascribed culpability for contributing “to an increase in the gender pay gap in feminized public organisations” (Milner et al., 2019, p. 593; Thornley & Thoernqvist, 2009). This point is illustrated in the New Zealand context with the reduction of wages (Crossan, 2004, p. 37) in the aged care sector resulting from the “contracting out of direct employment in the state sector” (Crossan, 2004, p. 36). Globally, a

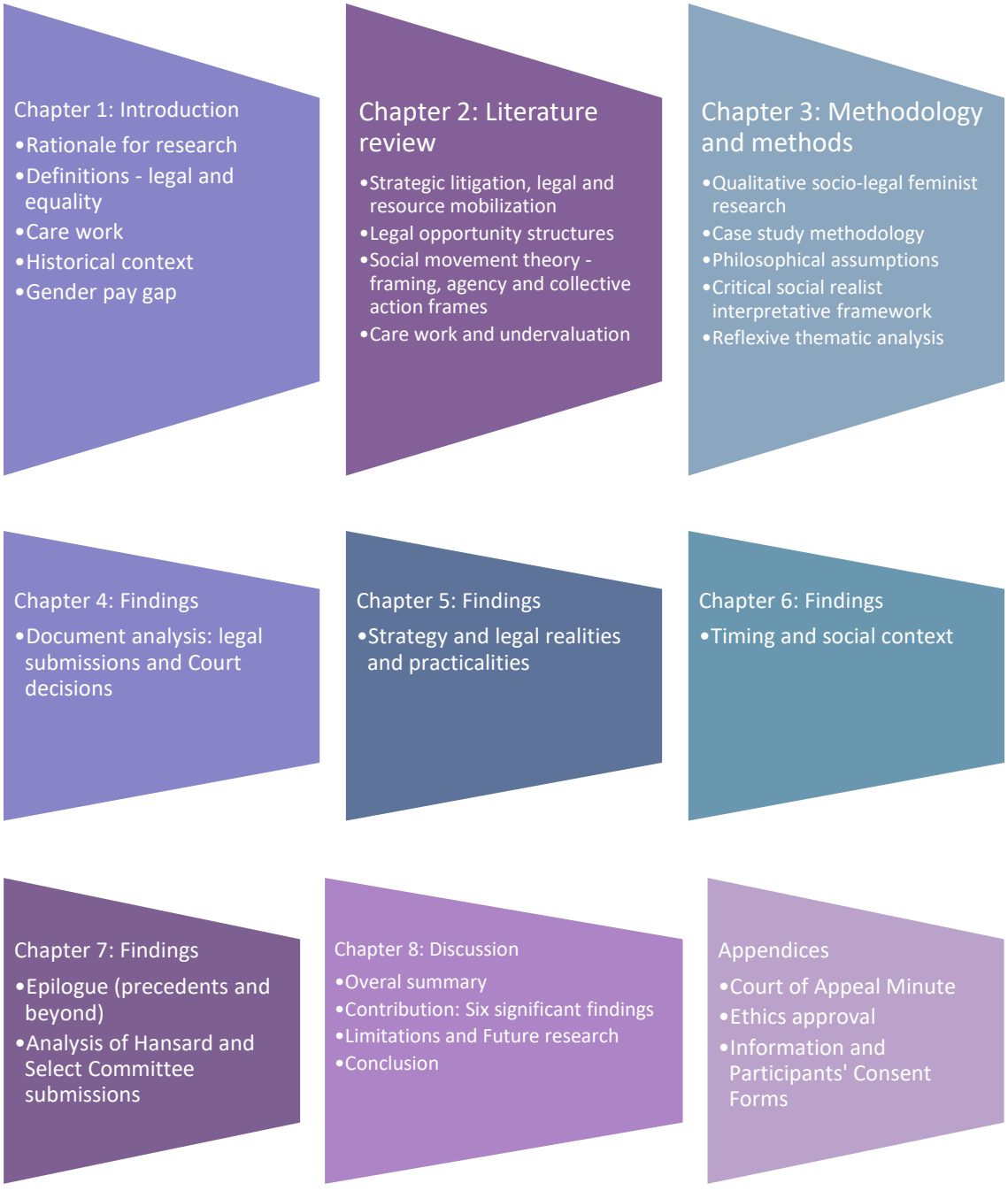
"neoliberal economic framework" has almost certainly contributed to the gender pay gap (Pollert, 2007)by elevating "economic 'rationality' above human need" resulting in the poor, and most often women, having to "bear the cost" (Goldblatt, 2017, p. 274).

Understanding the causes of the gender pay gap are crucial because "society as a whole pays the price for inequality" (Dannin, 2006, p. vii), both fiscally and in terms of well-being. Estimates of the value to economies if women achieved pay equality are enormous. The US "economy would gain five hundred and twelve billion dollars in additional wage and salary income" (Collins, 2018, p. 37) and the increased wages for women would equate to "fourteen more months of childcare and a year and a half's worth of food" (Collins, 2018, p. 37). New Zealand's GDP would be increased "by 10 percent" by "improving the workforce participation and the use of women's skills", according to a 2011 Goldman Sachs report entitled 'Closing the gender pay gap: Plenty of potential economic upside' (Ministry for Women, 2018). Similarly, worldwide, if women had "an identical role in labour markets to that of men" it would equate to approximately "$28 trillion to global annual GDP by 2025", according to McKinsey's research (Henshall, 2018, February 11). Not only are the world's economies not gaining extra revenue, but they are also losing revenue, "14 per cent of their wealth" due to "gender inequality" (Hodal, 2018; McGregor et al., 2018, p. 9). For women as a workforce, the difference in pay between the genders confirms women will continue to be less well recompensed for their work, affecting their income over a lifetime. Thus, achieving pay equity is posited as a route to closing the pay gap by explicit acknowledgement and resolution of historical discrimination (Hume, 1993, p. 474). Combatting the gender pay gap through legislative measures has support. The Working Group on Equal Employment Opportunities and Equal Pay Towards Employment Equity (1988) and the Human Rights Commission's report Tracking Equality at Work (2011) both concluded that solving the gender pay gap required "targeted legislation" rather than market forces (Goddard, 2012, p. 125). However, combatting the gender pay gap through legislative measures is always vulnerable to political will (Charlesworth & Macdonald, 2015; Whitehouse & Smith, 2020, p. 522). This has been clearly demonstrated in New Zealand on several occasions. It was demonstrated in 1990 when newly enacted pay equity legislation was repealed (discussed above). Similarly, it was demonstrated when a private member's pay equality bill in 2017, which sought to require statistical data gathering on pay transparency ("one of the factors known to be associated with a narrowing of the gender pay gap" (McGregor et al., 2016, p. 3; Whitehouse & Smith, 2020, p. 523), was defeated at its first reading. Both pieces of legislative action were defeated because of political hostility to remedying pay inequality via special legislative measures. Removing the gender pay gap and attaining pay equity remain elusive and uncertain (O'Reilly et al., 2015) and "will require

sustained and determined political will" (McGregor & Graham Davies, 2019, p. 630). As my results suggest, it also requires activist litigation and activists.

Figure 3

Structure of thesis

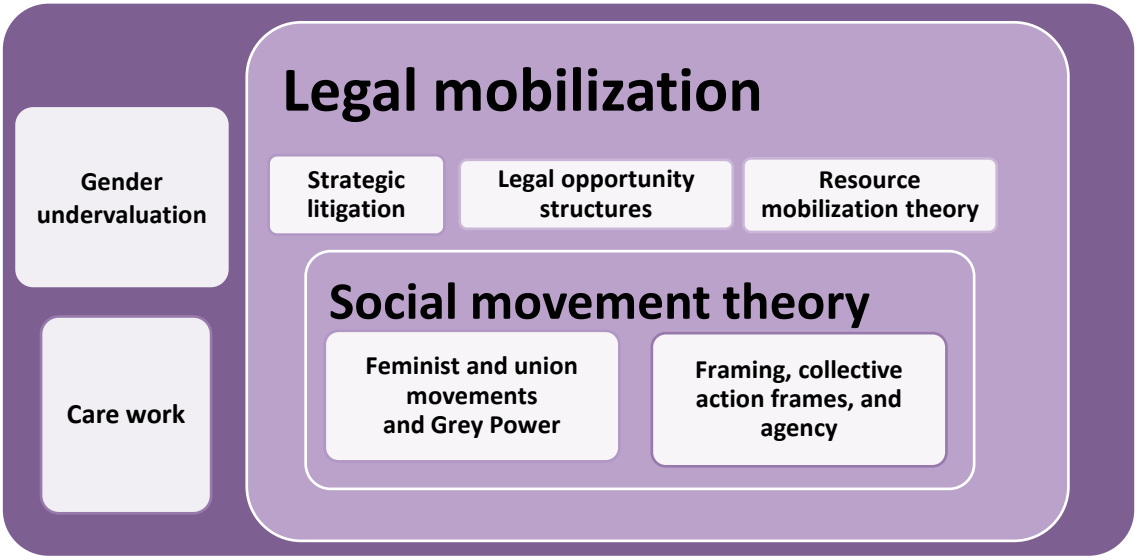


Chapter Two: Literature Review

My research is grounded in the premise that a confluence of factors (McGregor, 2013, p. 13) indicated litigation at this time may prove fruitful and this is supported by the growing acceptance in the socio-legal canon "that law can be effectively mobilized for social change" (Campbell et al., 2018, p. 6; Deakin et al., 2015, p. 402; Portillo, 2011, p. 949) and moreover "by the disadvantaged" (Portillo, 2011, p. 950). Legal mobilization (including recourse to strategic litigation), Legal Opportunity Structures (LOS), and social movement theories, in the context of pay equity claims, are traversed to explain, and understand the social movement activism and strategies employed in the Terranova v Bartlett case. The ability to have recourse to litigation is dependent on legal opportunities to access the courts (Hartlapp, 2018, p. 705; Hilson, 2002; Vanhala, 2011) and on political opportunities and resources (Vanhala, 2018, p. 382) articulated in resource mobilization theory. At a fundamental level, legal mobilization interconnects with social movement theory (SMT) (specifically unionism and feminism movements) and with the theoretical frameworks of both rights-consciousness and collective action frames (Vanhala, 2020). Additionally, the case's plaintiffs were an aged care worker and her union and, thus, the literature analysed addresses gender undervaluation and the position of aged care workers (a lowly paid female dominated sector affected by historic discrimination)(Charlesworth & Heap, 2020, p. 623).

Figure 4

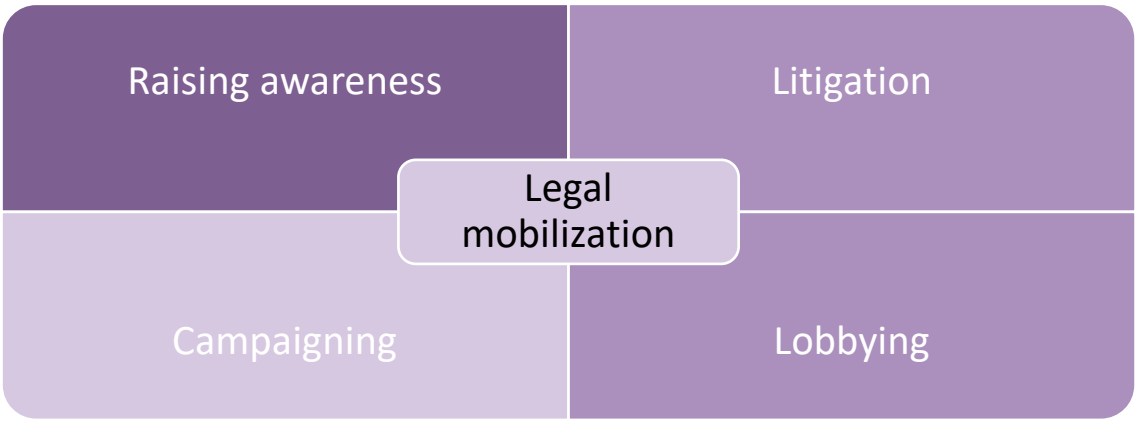
Literature review topics



This literature review only attempts to be a condensed review given the wealth of literature on these various theoretical approaches and subject areas delineated above. Given the inter-

relationship between the various areas of study, I have sought to focus on the essential material pertaining to the subject matter and to avoid the temptation to cover the entire breadth and scope of the academic canon on these topic areas.

Legal mobilization



Social movements turn to legal mobilization; using the law to bring about social and political change (Lemaitre & Sandvik, 2015, p. 8; McCammon et al., 2018, p. 57; Wilson & Rodríguez Cordero, 2006, p. 141), to develop rights (Fuchs, 2013b, p. 36; Vanhala, 2011, p. 6; 2012, p. 524), to "deliver tangible gains"(Cichowski, 2013, p. 210; Deakin et al., 2015, p. 402), and resolve injustices (Guillaume, 2015, p. 377) such as reversing deteriorating working conditions (Guillaume, 2018, p. 227). Legal mobilization is a "a tool for collective mobilization" (Lejeune, 2017, p. 241; Lemaitre & Sandvik, 2015, p. 8; Vanhala, 2009, p. 740) conceived of by some as a necessity when the State neglects "the interests of the people" (Lejeune, 2017, p. 252).

The possibilities for social reform through legal mobilization occur not only inside but "outside of the court" (Cummings, 2017, p. 240) via "soft law" methods (Anagnostou & Millns, 2013, p. 121) because the existence of black letter law in and of itself is not necessarily a determinant for legal mobilization (Vanhala, 2016, p. 117) or progress. This is exemplified in the UK where numerous statutes on "equal pay laws, maternity leave, social security laws, minimum pay [etc]" have not achieved "women's equality in the labour market" (Campbell et al., 2018, p. 2).

Alternative mobilization methods encompass a variety of social movement manoeuvres, "combining legal and non-legal forms of action" (Guillaume, 2018, p. 239) such as campaigning (Anagnostou & Millns, 2013, p. 121), lobbying (Bondy & Preminger, 2021, p. 3), and raising "political awareness and public attention" (Millns & Skeet, 2013, p. 188). A multi-pronged approach "combining hard and soft law strategies" (Wright & Conley, 2020, p. 991) to social movement action has the advantage to potentially facilitate more "leverage in extra-judicial negotiations" (Alter & Vargas, 2000, p. 462). The positive effects of collective action without

recourse to litigation were demonstrated in the successful campaigns run by the New Zealand Nurses Organisation (NZNO) and the New Zealand Educational Institute (NZEI) in the early 2000s (Harré, 2007, p. 54). Yet non-litigation strategies such as law reform can also be problematic for feminist activists, often delivering "little" despite the apparent potential (Cowan, 2016, p. 120).

The importance of legal mobilization lies not always in direct results but in its ability to influence "broader cultural changes" (Cummings, 2017, p. 241; Fuchs, 2013a, p. 206; 2013b, p. 35), for example, the "shift in systemic attention" in the wake of Brown v Board of Education of Topeka, a significant precedent decision on civil rights in the US in 1954 which "sparked intense national debates" about segregation (Epp, 2008, p. 604). The challenging of "existing norms" (La Barbera & Lombardo, 2019, p. 628; McCann, 1994; Milner et al., 2019, p. 593) and the "contesting or reinforcing existing gender inequalities" (La Barbera & Lombardo, 2019, p. 628) have gained attention through legal mobilization. For example, employing the law can be significant in "modifying cultural norms and oppressive structures" which dictate women's position in "the labour market", potentially leading to the empowerment of women (Campbell et al., 2018, p. 15). This was demonstrated in the Terranova litigation which has been described as having "a lasting effect in empowering low-paid, low-status women" (Milner et al., 2019, p. 595).

However, academics continually question whether there ought to be "strict" reliance on law for the "implementation of rights" (McNamara, 2013, p. 248) and for achieving social transformation given the courts' "limited enforcement powers" and "the limited resource capacities of disadvantaged groups" (Epp, 2008, p. 607; NeJaime, 2010, p. 954). Judicial decisions only mirror or follow already occurring social or cultural change (Cummings, 2017, p. 255; Cummings, 2018a, p. 106) and the courts are ineffective agents of social change (Cummings, 2017, p. 241; Deakin et al., 2015, p. 402; McCammon & McGrath, 2015, p. 131; NeJaime, 2010, p. 948; Wilson & Gianella-Malca, 2019, p. 140) never fully achieving "real benefits" for the "disadvantaged" (Stryker, 2007, p. 78). The courts' lack of institutional capacity to effect change (Alter & Vargas, 2000, p. 457; Stryker, 2007, p. 78), is borne out in international research indicating litigation's inability to eliminate the gender pay gap (Miles, 2015, p. 21). Equally, Scheingold (2004) pessimistically refers to the "myth of rights", the misplaced assumption that litigation can realize any sort of material social change given the reality of the distribution of power which ultimately determines the results of litigation seeking to progress change (Albiston, 2010-2011, p. 63; Cummings, 2017, p. 241; McKnight, 2015, p. 113; Stryker, 2007, p. 77). In a similarly negative vein others posit that litigation always privileges the powerful (Cummings, 2017, p. 242; Wilson & Gianella-Malca, 2019, p. 140) and

that those with “influential allies” and abundant financial and other “resources” (Epp, 2008, p. 608) can shore up their agenda via the courts (Vanhala, 2016, p. 105). Abrogating reform and the establishment of “new legal rights” to the will of the courts (Stryker, 2007, p. 77) does nothing to shift the balance of power (Stryker, 2007, p. 77). Brown exemplifies this phenomenon because “legal discrimination” was removed, but “social discrimination” against Afro-Americans survived intact (Alter & Vargas, 2000, p. 470). Despite court proclamations to de-segregate, it was a “decade” later before it was actually realised (NeJaime, 2010, p. 950) through the efforts of the civil rights movement.

Further disadvantages of litigation include the constraints of precedent (NeJaime, 2010, p. 949) and litigation can result in “harmful extra-judicial effects” (NeJaime, 2010, p. 948), for example, wins on controversial issues such as gay rights have been confronted by “a backlash of enormous proportions” (NeJaime, 2010, p. 951; Wilson & Gianella-Malca, 2019, p. 140). Backlash has contributed to the non-realisation of pay equality in the labour market (McGregor, 2013, p. 6) and in other political contexts (such as climate change litigation) (Setzer & Vanhala, 2019, p. 12).

Therefore, some conclude litigation is often only employed when lobbying is found to be ineffective (Hilson, 2002; Vanhala, 2009, p. 740) and is largely viewed as a last resort (Alter & Vargas, 2000, p. 457). Not only may it be a last resort, but change brought about by feminist litigation action (Vanhala, 2011, p. 63) is at “perpetual risk … of undoing” (Munro, 2017, p. 199). Feminist gains can be lost (Cowan, 2016, p. 117), “slippages” occur (Millns & Skeet, 2013, p. 186) and equal pay advances “hindered” (Rubery & Grimshaw, 2015, p. 339). Litigation ‘fails’ may cause the regression of policy and rights (Alter & Vargas, 2000, p. 457; Borland, 2019, p. 2) which propels many to advocate for law reform (Doyle, 2016, p. 4), legal education, and public outreach to achieve social change (Cowan, 2016, p. 117; Cummings, 2017, p. 255; Vanhala, 2011, p. 256). For many, ultimately, litigation is inherently adversarial, “a site of conflict”, rather than an arena for problem solving (Cowan, 2016, p. 117).

Nonetheless litigation remains an important aspect of legal mobilization and proponents view the litigation and legal mobilization process as a fundamentally rights focussed strategy (Deakin et al., 2015, p. 386). Litigation can advance (De Fazio, 2012, p. 5) and assert rights (by transforming wants into demands) (McCann, 2008, p. 523). Legal action (and the development of legally enforceable rights) can stimulate and raise rights consciousness (Anagnostou & Millns, 2013, p. 122; Guillaume, 2015; McGregor & Graham Davies, 2019, p. 624; NeJaime, 2010, p. 954; Vanhala, 2012, p. 526) and even cause a “rights revolution” (Wilson & Gianella-Malca, 2019, p. 141). Pay equity litigation in the US raised consciousness, by making pay

inequity an issue of discrimination that could be remedied (McCann, 1994, p. 76) and provided "a strategic resource" that could be used in future actions to advance "challenges to status quo power relations" (McCann, 1994, p. 281). Many scholars credit litigation for its comparative "efficacy" in attaining pay equity wins (Milner et al., 2019, p. 593). Notwithstanding Scheingold's negative 'myth of rights' proposition, he, too, hails what he terms the "politics of rights", the ability of judicial "pronouncements" to exert both "discursive and political power" (NeJaime, 2010, p. 954) thus assisting a movement's aspirations. Furthermore, litigation is viewed by many scholars as a tactic which remains relatively accessible to the less powerful (Vanhala, 2016, p. 105) in contrast to the often intractable nature of political hostility (p. 665, NeJaime, 2012). Positive impacts from litigation are also reflected in what Alter and Vargas term "follow through" when litigation leverages (2000, p. 476) a policy response from government (2000, p. 478).

Litigation also has tangible benefits other than the immediate legal action in court as it can become a catalyst for legal mobilization and for growing grassroots organisations, such as has been evidenced in the development of the "pay equity movement" in the US (McCann, 1994, p. 58). Other benefits of litigation include mobilizing "citizens" and the development of new groups (Stryker, 2007, p. 77). Spin-off effects from litigation can manifest in revolutionising how people perceive themselves, in gaining a sense of the possibilities of further action even while not effecting "social change directly" (Stryker, 2007, p. 80).

Nonetheless, assessing the ramifications of litigation may be complicated (Setzer & Vanhala, 2019, p. 12; Vanhala, 2011; Vanhala et al., 2018, p. 442) with positive effects attributed to occasions of both legal wins and legal losses (Vanhala, 2012, p. 526). A loss can galvanise movements, recruit members, draw public attention and "awareness" (Millns & Skeet, 2013, p. 178) to the issue, reframe the grievances (Arrington, 2019, p. 315) (NeJaime, 2011-2012, p. 668), and consolidate group identity (Albiston, 2010-2011, p. 67) and collective action (Albiston, 2005, p. 311). As Vanhala notes McCann's (1994) work showed, despite court losses "legal mobilization can provide important social movement and political payoffs" (2012, p. 544). Moreover, NeJaime emphasises how "vibrant mobilization" may arise from losses, whereas a win can manifest in "complacency" (Albiston, 2010-2011, p. 68). This is exemplified in activity following the Roe v Wade decision (the seminal abortion rights decision legalising abortion in the US in 1973) which resulted in decreased pro-abortion activism and correspondingly re-invigorated the anti-abortion movement (NeJaime, 2010, p. 984). A win may become a 'false' victory because the "short-term advantages" may be minimal because the actors are dictated to by "the larger structure of domination through legal ideology and

law" (Albiston, 2010-2011, p. 76), exemplifying the maxim of a battle won but a war lost without "transformative collective action" being achieved (Albiston, 2010-2011, p. 76).

Finally, legal mobilization often constitutes an active "political" engagement (Anagnostou & Millns, 2013, p. 117) where decisions, "strategies and tactics" (McCammon & McGrath, 2015, p. 130) of social movements are influenced by the "political environment" (Vanhala, 2009, p. 740). Political context can be conceived of as the Political Opportunity Structures (POS) (McCammon & McGrath, 2015, p. 131) which define the grievances (Zajak et al., 2018, p. 171) and provide an indication of whether "the system is open to being challenged" and, crucially whether progressive reform is possible (Lemaitre & Sandvik, 2015, p. 9). POS may signal whether the judiciary will rule favourably and if so, will it enable "the desired policy outcome (Kane & Elliott, 2014, p. 223). In New Zealand the "muted status" of the Bill of Rights Act ensures that it can only be effectively "mobilised" if there is political will for mobilization to occur (McNamara, 2013, p. 261). Securing pay equity gains has often relied upon or been realised by "political commitment" (McGregor & Graham Davies, 2019, p. 621; Rubery & Grimshaw, 2015) yet, conversely, an inhospitable political regime (unsympathetic to feminist and environmentalists' aspirations) in the UK has been a determinant for the "adoption" of litigation as a strategy (Alter & Vargas, 2000; Hilson, 2002, p. 239; Vanhala, 2009, p. 745). Women, animal activists, and gays in the UK often "lack" political opportunities and receptivity (traditionally the domain of professionals or the politically powerful), a factor which can "influence" the choice to turn to litigation strategies (Hilson, 2002) to achieve objectives. This is a point also exemplified in the US with the 1940s and early 1950s 'pre-civil rights movement' for black emancipation, which was forced to resort to litigation to create change having few political opportunities given the Southern Democrats support for segregation (McCammon et al., 2018, p. 131). Similarly, Iceland's experience of forcing political opportunity through the women's movement's "huge pressure" politically on "gender issues" (Henshall, 2018, February 11) is another case in point. However, it cannot be said that political disadvantage is the sole determiner of litigation activity given how often the politically powerful have recourse to litigation (Vanhala, 2016, p. 105). Evidently, and inevitably, "the greater environmental context" can influence decisions by actors to "mobilise the law" (Kane & Elliott, 2014, p. 220; McCann, 1994).

Strategic litigation

Strategic litigation is a form of legal mobilization (Vanhala, 2012, p. 526) positioned to achieve a targeted (and significant) outcome (Kirk, 2020, p. 538) in the judicial system (Anagnostou & Millns, 2013, p. 122; Miles, 2015; Talbot, 2013, p. 70; Vanhala, 2011, p. 7), and "change law"

(Fuchs, 2013b, p. 28) as distinct from litigation seeking a verdict (Miles, 2015, p. 17). Strategic litigation is often utilised for a point that will affect a large group, or on a point that has not been included in previous case law (Vanhala, 2011) with the intention of setting a 'positive' precedent (McCammon et al., 2018, p. 57). Test cases are the purview of strategic litigation, testing the law in the courts to ascertain its suitability, its viability (Alter & Vargas, 2000, p. 472) or whether it falls short, leaving a "gap" (Vanhala, 2009, p. 740). The prevalence or otherwise of legal action under a statute is generally indicative of a statute's utility and efficacy. It is, therefore, not without significance that pay equity litigation under both the GSEP, and the EPA has been virtually non-existent since their inception until SFWU, and Bartlett filed an equal pay claim in the Employment Court in 2012. Test cases are less common "in the British system" than in legal systems like the US where "judicial activism" is an accepted "feature of the political process" (Maiman, 2004, p. 103). Strategic litigation is often the preference choice for "empowering vulnerable" (Anagnostou & Millns, 2013, p. 122), "marginalized" (Wilson & Gianella-Malca, 2019, p. 153) or "politically disadvantaged" groups who are unable to exert "much influence in the legislative or executive arenas" (Maiman, 2004, p. 106; Wilson & Gianella-Malca, 2019, p. 153). Litigation is conceived of "as a channel to articulate interests" (Hartlapp, 2018, p. 704) and draw "media attention" (Vanhala, 2009, p. 740), a means to threaten when all else has failed (Alter & Vargas, 2000, p. 472). Women's groups have often successfully employed strategic litigation to achieve progress in equality, both in the expansion of rights (Cichowski, 2013, p. 226) and the creation of favourable policy (Alter & Vargas, 2000, p. 466).

Despite the potential benefits of strategic litigation, the union movement has less actively pursued it (Guillaume, 2015, p. 364) with the exception of specific female dominated occupation British unions with "narrow constituencies" (Alter & Vargas, 2000, p. 473). In New Zealand, female-dominated unions in the care sector have been historically reluctant to resort to industrial action because of their commitment to their patients (Hyman et al., 1987, p. 22).

Unions often reject litigation because it is "inherently individualistic" compared to communal approaches (Conley, 2014; Guillaume, 2015, p. 377; Vanhala, 2011, p. 12) (such as collective bargaining) (Guillaume, 2015, p. 363) and can be a "drain on resources" (Colling, 2006, p. 151). Litigation may undermine "collective" approaches through the distilling of action to an individual focus (Albiston, 2010-2011, p. 63; Guillaume, 2022, p. 40; NeJaime, 2011-2012, p. 665). Research has also indicated litigation is only employed by unions who are weak in an industrial sense (Chun, 2016, p. 176; Guillaume, 2018, p. 227; O'Sullivan et al., 2015, p. 241). When unions (and others) have litigated it is often chosen as a last resort (Chun, 2016, p. 176) because collective bargaining has failed, (Colling, 2006; Guillaume, 2015, p. 364), is ineffective

(Conley, 2014, p. 311; Guillaume, 2015, p. 364; O'Reilly et al., 2015) or the union is powerless to bargain collectively (Conley, 2014; Guillaume, 2018, p. 227; O'Reilly et al., 2015, p. 304), or when state support for bargaining dwindles (as in the case of Britain)(Deakin et al., 2015, p. 387). British unions have not viewed litigation as a means to obtain pay equality (Deakin et al., 2015, p. 396) and have been accused of not properly assisting "female dominated occupations" (Beirne et al., 2019, p. 42).

The disinclination to litigate (Guillaume, 2015, p. 366) is further compounded by concerns about both the financial and emotional cost of litigation, (O'Reilly et al., 2015, p. 305; Vanhala, 2012, p. 526) and the fear of division within the union (O'Reilly et al., 2015, p. 305). Litigation is naturally "legalistic and selective" (Guillaume, 2018, p. 227), reliant on lawyers (Guillaume, 2015, p. 364; McCann, 1994) and potentially a lengthy "process" (Vanhala, 2012, p. 526). The negative effects of litigation loss may "sap movement morale" (McCann, 1994; NeJaime, 2010, p. 963). Litigation remains a "risky" (Alter & Vargas, 2000, p. 472; Vanhala, 2012, p. 526), "high-stakes" (NeJaime, 2011-2012, p. 688) undertaking given the often "limited chances of success" (Guillaume, 2018, p. 228; 2022, p. 49).

Other non-union organisations seeking the protection of their members' rights have also viewed litigation negatively, seeing it as a process that can be both expensive (De Fazio, 2012, p. 6) and "diverting for the organisation" (Vanhala, 2011, p. 256), redirecting resources from potentially more positive strategies (NeJaime, 2010, p. 951) without certainty of "effective change" (Vanhala, 2011, p. 256). There are concerns strategic litigation may have outgrown its transformative usefulness (Conley, 2014; Deakin et al., 2015; Milner et al., 2019, p. 593), is ineffective in policy formation (Alter & Vargas, 2000, p. 472) and therefore is only useful in conjunction with other methods of engagement to force negotiation (Alter & Vargas, 2000; Anagnostou & Millns, 2013, p. 128). Finally, litigation is less readily undertaken when there is not a culture of it (Anagnostou & Millns, 2013, p. 123).

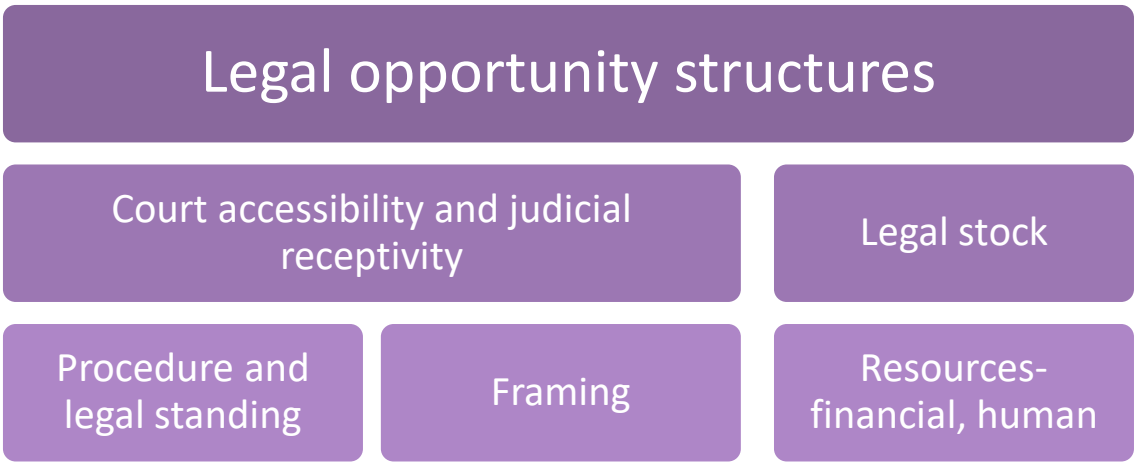
Notwithstanding these potential disadvantages and obstacles, "the legal route" (Guillaume, 2018, p. 238) is becoming part of the arsenal, a resource activated by unions (Guillaume, 2018, p. 229; 2022, p. 39; Heery, 2010) in limited instances (Guillaume, 2018, p. 238; O'Sullivan et al., 2015, p. 241). The threat of litigation has been a useful leveraging tool (McCann, 1994, p. 280; NeJaime, 2010, p. 959; 2011-2012, p. 668), a tactical (Cummings, 2017, p. 252; McCann, 1994) "weapon" (Alter & Vargas, 2000, p. 465), together "with other bargaining and lobbying strategies" (Cummings, 2018b, p. 380; McCann, 1994) for equality gains (Guillaume, 2015, p. 373; 2017, p. 65). For example, court wins in same-sex-marriage claims became the leverage that shepherded in legislative changes (Cummings, 2017, p. 253). The litigation 'threat' in

equity cases had leverage (in the US) with public sector employers especially, seeking to avoid negative publicity (Stryker, 2007, p. 88). Leverage is also gained when litigants seek negotiated resolutions to avoid the uncertainties (McCann, 1994; Vanhala, 2012, p. 537) presented by the length and cost of litigation (Colling, 2006, p. 160; McCann, 1994, p. 280).

Similarly, litigation can be important in gaining media attention and "publicity for a cause" (Cummings, 2017, p. 241; McCann, 1994, p. 58). The 'visibility' (Fuchs, 2013b, p. 35) of litigation can have the effect of increasing membership rates in unions (Guillaume, 2015, p. 373). The Terranova action saw a membership increase of "2000" for E tū (McGregor & Graham Davies, 2019).

Positive discourse in the media can have a significant effect for social movements, not only "provoking popular outrage" (Fuchs, 2013b, p. 35), but also forging "coalitions" (Fuchs, 2013b, p. 35) in an unsympathetic political or judicial climate. Litigation success can be aided by a plaintiff who is astute with the media and presents well in court (Guillaume, 2015; McCann, 1994, p. 81). A sympathetic litigant can "impact the public psyche" and render the "abstract principles" more comprehensible to the general audience (Maiman, 2004, p. 107). A "group's worthiness" becomes more likely to gain public support (Arrington, 2019, p. 315). According to 'signalling theory' a person who puts themselves in the media glare is often credited with being "more trustworthy", the reasoning being that anyone choosing to put up with the angst of media attention must be truthful (Arrington, 2019, p. 315). A credible spokesperson for a movement, by "sharing personal stories", can be a powerful means to garner support in light of the media's desire for personalised stories (Arrington, 2019, p. 311; Maiman, 2004, p. 107) but also to "shock bystanders" and "shame officials" (Arrington, 2019, p. 315) and add legitimacy to a movement (NeJaime, 2010, p. 944). Equally, when a movement ceases activism (as many say occurred with the women's movement in New Zealand late last century) the media loses interest, as do the politicians, resulting in an "erosion of the political base for interventions" (Grey & Sawer, 2008, p. 6). Despite the above factors, as Fuchs and McCann both insist, the decision to litigate strategically, for pay equity, is not merely based on legal factors, but is premised on the value society gives to gender equality (2013a, p. 191; 1994).

Legal opportunity structures



The practical framework for the how and why of possible litigation (Andersen, 2005; De Fazio, 2012, p. 4; Hilson, 2002, p. 240; McCarthy & Zald, 1977; Vanhala, 2011, p. 10; 2012) is explained by some theorists as the external structural opportunities (De Fazio, 2012, p. 4; Guillaume, 2018, p. 228; McCann, 1994) such as Legal Opportunity Structures (LOS). LOS may aid legal mobilization and signal the "accessibility of a legal system" or otherwise, to those with an agenda for change (Vanhala, 2012, p. 527). Equally, LOS can foster new policy, enable strategic litigation (Case & Givens, 2010, p. 223) and envisage both the "practical and strategic" (Vanhala, 2012, p. 527) context in which social movement actors take legal action. LOS are concerned with procedural aspects, with accessibility, "justiciable[1] rights and judicial receptivity" (De Fazio, 2012, p. 5), legal stock (precedents) and, contentiously, resources (Hilson, 2002; Vanhala, 2012, p. 527).

Procedural rules (Vanhala, 2009) and "variables" (Alter & Vargas, 2000; Andersen, 2005; Case & Givens, 2010; Hilson, 2002; Vanhala, 2012, p. 527; Wilson & Rodríguez Cordero, 2006) can dictate "legal opportunity" (Vanhala, 2012, p. 527) and include rules of no win no fee contingencies (the claimant does not pay unless they win) (Guillaume, 2015, p. 364; Pollert, 2007), the process of filing "complaints" (Alter & Vargas, 2000, p. 471), reduced legal fees (Wilson & Gianella-Malca, 2019, p. 141; Wilson & Rodríguez Cordero, 2006) or an affordable "legal process" (De Fazio, 2012, p. 6). Access to legal aid (Alter & Vargas, 2000, p. 471; Case & Givens, 2010, p. 225), and rules around "statutes of limitations on claims, caps on damages" (Alter & Vargas, 2000, p. 471; Arrington, 2019, p. 318) all present opportunities influencing the choice to litigate. Procedural matters particularly relevant for pay equity claims include where the legal "burden of proof" falls (Alter & Vargas, 2000, p. 471; Fuchs, 2013a, p. 195), the evidentiary burdens (Arrington, 2019, p. 318) and definitions within discrimination law (Case &

[1] The ability to have a legal remedy in the courts.

Givens, 2010, p. 223). Procedural factors also include issues about clarity of definition in the legislative wording, and the intelligibility of the judicial process (Fuchs, 2013a, p. 193). Definitions of legal standing (the right to bring a lawsuit) (Andersen, 2005; Arrington, 2019, p. 318; De Fazio, 2012, p. 6; Hilson, 2002; McCammon et al., 2018, p. 131; Wilson & Gianella-Malca, 2019) and "associational standing" rules (Case & Givens, 2010, p. 224; De Fazio, 2012, p. 6), whether individuals or interest groups or human rights institutions (Alter & Vargas, 2000, p. 470; Case & Givens, 2010, p. 225) are able to litigate are also part of LOS. Standing rules are a tangible example of an enabling LOS (Hartlapp, 2018, p. 705) and "liberalized" or loosened standing rules may better facilitate legal mobilization (Vanhala, 2016; Wilson & Gianella-Malca, 2019, p. 114), especially for "public interest" advocacy groups (Cichowski & Stone Sweet, 2003, p. 198). Apparent procedural advantages can, however, have a correspondingly negative effect such as with no win no fee contingencies in the UK which led employers to deny equal pay discrimination in order to reduce the chances of back pay claims (Joshi et al., 2007; Rubery & Grimshaw, 2015, p. 335). Also loosened standing rules cause fragmentation of political alliances and reduce effectiveness in the "coordination of litigation strategies" (Wilson & Gianella-Malca, 2019, p. 144). Equally, it is argued procedural changes sought by "legal and political interests" in the US have curtailed "access to legal remedies" (Arrington, 2019, p. 312).

Accessibility both "to lawyers" (Stryker, 2007, p. 76) and "to legal elites and institutions", including the "receptivity" of the judges and courts to the "claims being made"(Andersen, 2005; Hilson, 2002; McCammon & McGrath, 2015; Vanhala, 2009, p. 740; 2012, p. 527) are part of LOS. In equality cases more rights conscious judges (Wilson & Gianella-Malca, 2019, p. 141) may increase and improve accessibility and receptivity; conversely, a lack of receptivity as demonstrated in the narrow judicial interpretation of the EPA in 1986 rendered it "inoperative" for equity claims (Hyman et al., 1987, p. 46) and signalled clear judicial hostility. In the US, LOS may present themselves with the appointment or retirement of judges because judges of final appeal make decisions "according to their policy preferences", thus signalling the likely reception to various legal issues (Vanhala, 2011, p. 17). In New Zealand this is less relevant due to the "strong constitutional convention" which, as stated on the Courts of New Zealand website requires the Attorney-General acts "independently of party-political considerations" (https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments/). Therefore, the policy preferences of the appointed judges are less determinable or less subject to party politics in New Zealand. Maiman, however, challenges the view that the British and New Zealand systems are particularly objective, noting the "myths" endorsed by both a supposedly "apolitical legal system and absolute Parliament

sovereignty" (2004, p. 88). Vanhala, though, disputes the notion that increased judicial receptivity represents a LOS because litigants often apply to the courts even when knowing losing is inevitable, hoping to "highlight a legislative gap, gain media attention or mobilize an organisation's own (potential) constituency" (Vanhala, 2009, p. 740). NeJaime concurs, noting litigation (for example in the sphere of gay rights) has been attempted in seemingly disadvantageous circumstances by "one individual, with little money and no community support" with the goal of publicity (2011-2012, p. 688), whatever the legal outcome.

Another increasingly accepted key element of LOS is 'legal stock' (Vanhala, 2016, p. 113) which Andersen defines as both legal "precedents" and "statutory foundation"(Andersen, 2005; Case & Givens, 2010, p. 223; McCammon & McGrath, 2015, p. 132). Precedents are crucial because they assist both lawyers and judges "to formulate and carry through a legal challenge" (Andersen, 2005; Hartlapp, 2018, p. 705). Vanhala, though, is wary of the inclusion of legal stock in LOS formulations because the very nature of litigation is that it builds on case law and provides precedents which, in and of themselves, cannot be determinant of structure and opportunity (2011, p. 19). Furthermore, social movements seeking change via strategic litigation do not only rely on current legal stock (precedents) but seek to expand legal protections by extending definitions (for example, seeking to extend the definition of Sikh beyond religion to an ethnic grouping or gender discrimination to include sexual orientation)(Vanhala, 2011, p. 19). Andersen's development of LOS also includes cultural stock and, again, Vanhala is critical of this inclusion, stating virtually anything could be defined as cultural stock: "frames, symbols, rites, discourse" (Vanhala, 2011, p. 20). Other expansions of LOS include Cichowski's theory of "social space" (2013, p. 211), conceiving of the opportunity for interest groups to mobilize around issues, to pursue rights action. This reiterates Vanhala's point that activists do not merely respond to LOS but, in fact, create "their own legal opportunities" (Vanhala, 2012, p. 525) ensuring that social movements can bring about positive change (Vanhala, 2012, p. 528). The social space theory is exemplified in the impact international law has had on gender equality through the promotion of discussion on women's rights (Cichowski, 2013, p. 222), for example, through the CEDAW Committee process. Engagement with international law by women's groups is an example of how "opportunity structures can also guide and impact the development of these movements" (Cichowski, 2013, p. 210). Exemplified in the table in Chapter One representing the CEDAW Committee's concern with pay equity attainment.

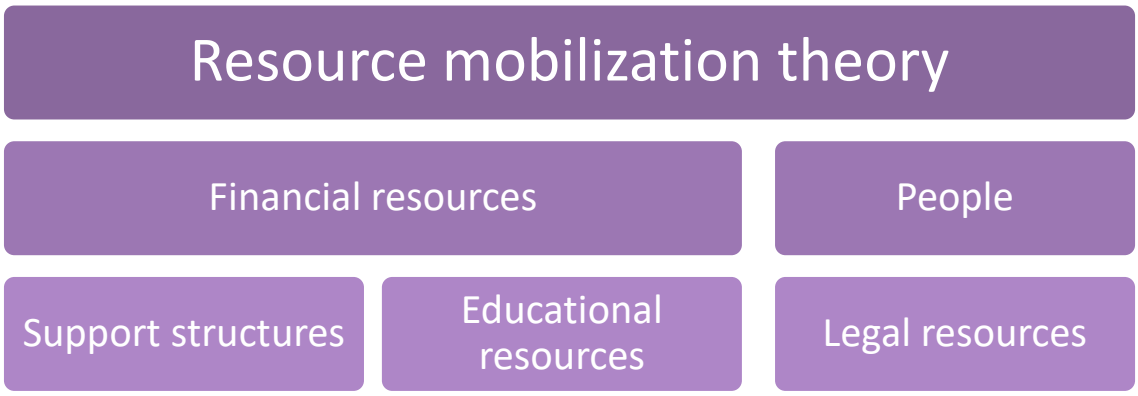
The presence of LOS and the opportunity to litigate can also result in unwanted complexities or results negating the value of mobilizing, as was the case in Rodriguez (an assisted 'suicide' of a young girl by her father) when public discussion in Canada became focussed around the utility

of the disabled. The eugenic overtones caused upset and there was a loss of control of the argument rather than the advancement of disability rights (Vanhala, 2011).

For many academics, whether the LOS theoretical framework facilitates strategic litigation is highly contestable and the choice to litigate is more complicated than simply the presence of LOS (Fuchs, 2013a; Guillaume, 2015, p. 365; Hilson, 2002, p. 241; Vanhala, 2009, p. 739; 2011, p. 260). Fuchs contends that LOS, while providing an important "framework" (2013a, p. 206), within which the social and the political gain "significance" (2013a, p. 206), are inadequate in explaining how the "norms and values" (2013a, p. 206) regarding gender equality develop and influence litigation (2013a, p. 206). Hilson agrees, noting the significance of "resources, identity, ideas and values" (2002, p. 251) when making decisions about strategy choice. Vanhala concurs noting factors such as 'framing' pre-empt decisions to mobilise legally because "the identity and meaning frames of organisations" are all important when a group is making strategic decisions (Vanhala, 2009, p. 752). Similarly, Hartlapp emphasises that "organisational structures do not create litigation", rather it is how movements utilise the structures that demonstrates "legal mobilization" (2018, p. 702). Additionally, other non-structural explanations for litigation, such as how "agent level characteristics" in the legal and or political context may determine litigation as an option might better explain action rather than LOS alone (Alter & Vargas, 2000; Vanhala, 2016, p. 104).

Finally, it is also posited that without LOS would-be claimants and social movements turn to more protest focused means, rather than litigation (De Fazio, 2012, p. 4), to achieve their aims, creating their "own opportunities", rather than relying on LOS (Vanhala, 2012, p. 525).

Components of resource mobilization theory



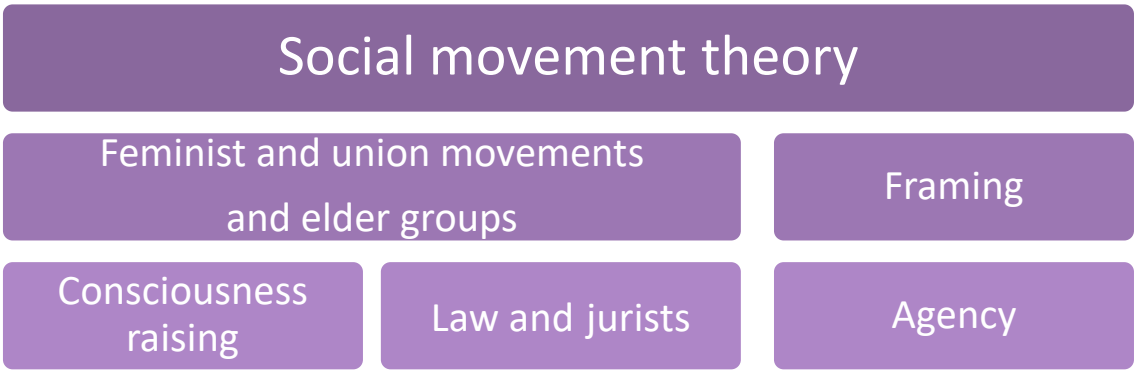
Resource mobilization theory sits within and across LOS, legal mobilization and social movement theory and conceives of litigation as being dependent on the financial resources of the litigants (McCarthy & Zald, 1977; Vanhala, 2009, p. 741; 2011, p. 22; 2012, p. 17). Put

simply, when groups have resources, they can litigate. Similarly, funding has potential to influence litigation wins (McCammon & McGrath, 2015, p. 133). According to Epp, the availability of "legal and financial resources" is a prerequisite for "a rights revolution" (2008; Guillaume, 2018, p. 228). However, there is divergence as to what resources encapsulate. Some scholars emphasise finances, technical resources and publicly funded resources (Vanhala, 2009, p. 741) are essential for litigation and "collective mobilization" (Stryker, 2007, p. 83). Others define resources as the "human and material assets" (Lemaitre & Sandvik, 2015, p. 9). McCammon and McGrath also include non-financial resources and subscribe to Epp's (1998) view that social movements are best able to engage in litigation when they have "support structures" (2015, p. 133) and resources (such as organisational and legal expertise) to do so (Case & Givens, 2010, p. 224; New Zealand Nurses Organisation, 2014, p. 6; Vanhala, 2012, p. 526), for example, "in-house lawyers" (McCann, 1994; Vanhala, 2012; 2016, p. 115). However, Vanhala opines that the presence and number of lawyers in an organisation does not necessarily dictate a propensity to frame a problem as a legal one (Vanhala, 2016, p. 123). Financial resources are not always a determinant for litigation (Vanhala, 2016, p. 122) and not all litigation demands expenditure, or at least large scale expenditure (Alter & Vargas, 2000, p. 466). Hilson argues that conceiving of resources as only financial ignores the importance of other resources, such as the "professional and educational background" of the individuals in an organisation (2002, p. 240). For example, strong and effective leaders are important in social movements (and the women's movement in particular), as is building alliances and having "allies" (Vanhala, 2012, p. 527) and liaising with lawyers. Effective leaders can reinterpret goals and strategies, assisting the "revitalization of even the most conservative and risk-averse unions" (Chun, 2016, p. 177).

The importance of organizational resources in assisting women's movements has been significant and has enabled women to identify the power structure of inequality (McCann, 1994, p. 287). Yet, as well as disputing how to define resources, some academics argue that the existence of resources does not determine whether an organisation will litigate because organisations do not need the resources if they are interveners in a case, or even the defendants (Vanhala, 2009, p. 741; 2011, p. 95). Vanhala maintains many of the large UK charities for the disabled, and for example, CNIB (formerly the Canadian National Institute for the Blind), despite having significant resources at their disposal, do not engage in strategic litigation, while others, despite the risk of financial collapse, doggedly pursue litigation (Vanhala, 2011, p. 259). This phenomenon is also echoed in the French environmental NGO sphere (Vanhala, 2016, p. 126). Similarly, Wilson and Rodriguez posit resources arguments become less relevant when the rules allowing for self-representation are relaxed and lower

filing fees facilitate greater access to the courts (2006). However, other organisations seek to increase resources through the collaboration with sympathetic or aligned organisations (Polanska & Piotrowski, 2015; Zajak et al., 2018, p. 172). For many scholars, resource theory is inadequate to properly explain legal mobilization and, like Pedriana and Vanhala, they prefer a theory model which does not exclusively rely upon either structural opportunities and/or resources (2006, p. 1720; 2011).

Social movement theory



Social movements (SMs) defy a simple categorization, being amorphous and "heterogenous", their complexity demonstrated by their lack of "formalization" in time or actions (Beckwith, 2001, p. 382; Diani, 2003, p. 1; Nynas & Lassander, 2015, p. 456). They can be "professionalised" or "grass roots" (Cummings, 2017, p. 261) building momentum from the bottom upwards (McGregor, 2013, p. 14), or "coalitions" (Maddison & Martin, 2010, p. 110) with "connectedness" through "time and space" (Maddison & Martin, 2010, p. 116) across the political spectrum (Cummings, 2017, p. 261). SMs have been described as "actors" (Cummings, 2017, p. 234) central to the "conflict" (Cummings, 2017, p. 262) with shared grievances (Cummings, 2017, p. 250 and 261; McGregor & Graham Davies, 2019, p. 626) defined (Benford & Snow, 2000, p. 612; Hilson, 2002, p. 241; Vanhala, 2011, p. 35) by a shared "collective identity" (Della Porta & Diani, 2006, p. 20). SMs are conceived as the "challengers" to power (Diani, 2003, p. 5) forming out of marginalised sectors (Cummings, 2017, p. 261) they are given "legitimacy" through the articulation of a subjective experience (Nynas & Lassander, 2015, p. 457). For Lemaitre and Sandvik, the theoretical explanations for social movement theory rests on "frames, resources, and political opportunities" (2015, p. 8). SMs are an important social phenomena (Maddison & Martin, 2010) with the potential to "create new norms" (Cummings, 2017, p. 241; Maddison & Martin, 2010, p. 103) and challenge "values ... and ideals for society" (Nynas & Lassander, 2015, p. 456). Not only can SMs "shift public opinion" (Cummings, 2018a, p. 475; Nynas & Lassander, 2015, p. 456), they also have the capacity to "reshape politics" (Cummings, 2017, p. 241; Maddison & Martin, 2010, p. 103).

According to some scholars, movements emerge from a place of "structural stability" that is from within established institutions. For example, the civil rights movement in the US came out of institutions within the black community; likewise the US Vietnam anti-war movement came from university students' campuses (McAdam, 2003, p. 283). This reasoning demonstrates the importance of existing relationships amongst members and the role "social settings" play in the genesis of a movement (Diani, 2003, p. 7). As McCann emphasizes, movements only become possible when resonating with those "well situated for political activation" (McCann, 1994, p. 135).

Other scholars, such as Pedriana, insist social movement theory requires reference to legal institutions and without which it is weak theory (2006, p. 1723). Law has 'master status' because the legal-rights frame influences and shapes the way grievances are dealt with (Pedriana, 2006, p. 1725). Furthermore, most social movements are defined, in part, by a legal objective (Pedriana, 2006, p. 1722), mobilizing and strategizing to take advantage of socio-legal structures (Lejeune, 2017, p. 238) which may come to be "shaped by those strategies" themselves (Andersen, 2005; Vanhala, 2012, p. 528). The role of lawyers and activists can be essential, (Lejeune, 2017, p. 238) because a "rights-oriented legal profession" (Maiman, 2004, p. 103) can raise awareness and "empower marginalized groups" (Lejeune, 2017, p. 238). Other scholars prefer to insist that the legal profession is better suited to a support role. However, this is entirely contingent on the engagement of a movement's members (Arrington, 2019, p. 317). Maybe cynically, Albiston identifies a subset of movement actors whose tenacity against the "odds" continues simply because they relish the fight (2010-2011, p. 71). Yet other aspects of SM theory on "cause lawyers" posits there is often a "preference" to litigate even though LOS present more obstacles than assistance to an organisation seeking reform (Vanhala, 2012, p. 544).

Feminist/women's movements

Women and/or feminist movements (employed interchangeably in this thesis), like other social movements, have long engaged in legal mobilization, using the law to bring about social change (McCammon et al., 2018, p. 57) and defining their "grievances and goals" both culturally and in legal terms (Beckwith, 2001, p. 383; Fuchs, 2013b, p. 28; NeJaime, 2010, p. 955). McCann, however, posits that legal tactics have only assisted movement building in the pay equity arena in limited circumstances (1994, p. 137). The success of feminist or women's movements has often been determined by "how cultural framing, collective identity" has been able to take advantage of political opportunity for feminist ambitions (Beckwith, 2001, p. 381). Beckwith differentiates between women's and feminist movements, noting the former are

characterized by a focus on “women’s gendered experiences, women’s issues, and women’s leadership and decision making” (2001, p. 372). Feminist movements, by contrast, are more especially concerned with an analysis and challenge to “power arrangements of domination and subordination on the basis of gender” (Beckwith, 2001, p. 372). Compellingly erudite, bell hooks defines feminist movements and feminism as simply the pursuit “to end sexism, sexist exploitation, and oppression” (2015, p. xii). Others define women’s movements broadly as any “organizing of women” for social change whether they have gendered goals or not, citing specifically peace and anti-racism movements as non-gender-focussed movements (Marx Ferree & McClurg Mueller, 2004, p. 577). Feminist/women’s movements and activists can also be described as being within and without of government, political parties, and interest groups existing as a “continuum of activists” unified across society (Beckwith, 2001, p. 383) with “complex” connections (Anagnostou & Millns, 2013, p. 128). These connections between ‘insider’ and ‘outsider’ feminists have been effective on occasion to realise progressive change (McCammon & Brockman, 2019, p. 8). The building of alliances is an important feature of social movements, particularly for “outsider” groups (Zajak et al., 2018, p. 171), although Vanhala’s research has also found that the “privilege” of being “insiders” assists with “collective action” (Vanhala, 2016). Feminist groups who have established links with the ‘inside’ have often achieved “feminist policy success” (Milner, 2019, p. 136) as was demonstrated in the UK in 2016 with the success of gender pay reporting regulations.

In researching a legal pay equity case, my analysis rests on the presumption that women’s movements examined in the pay equity sector are feminist given their aspiration to remove gender pay disparity, a blatantly feminist goal. Like social movement definitions discussed above, feminist movements (and feminist activists) are frequently “informal networks, co-operatives, communities and non-hierarchical organisational forms” (Maddison & Martin, 2010, p. 111). Nevertheless, some academics cite the necessity of “formal structures” to bring about successes (Beckwith, 2001, p. 379) and highlight the importance of being well organized (Rubery & Grimshaw, 2015, p. 339; Stryker, 2007, p. 78) and forming “strategic” partnerships to compensate for reduced “power” (Charlesworth & Heap, 2020, p. 613; Parker, 2011). Another effective strategy has been “venue-shifting” whereby institutional feminist activists in US pregnancy discrimination legislation ensured not only increased “structural opportunities”, but also increased support from decision-makers for policy changes through “venue-shifting”(McCammon & Brockman, 2019, p. 22). The political environment can provide either constraints and/or opportunities for social movements which may dramatically affect social movement development. In a hostile environment, the “abeyance literature” suggests that “movements will strip down to their core in order to survive” (Grey, 2008, p. 75) and remain

"hidden" (Maddison & Martin, 2010, p. 112) as "submerged networks" (Maddison & Martin, 2010, p. 111), turning inward in their focus, and this is especially so of women's movements. It is claimed, possibly controversially, that the feminist movement in Aotearoa moved from activism after the 1980s to "service provision" (Aimers, 2011, p. 311) for some years.

Union movement

Much early social movement theory (SMT) was premised on the labour movement which expanded in the 1960s to include dynamic movements emerging across the western world (referred to as New Social Movements (NSMs)(Edwards, 2009, p. 390). NSMs were not concerned uniquely with labour issues but with "system/lifeworld" terrain incorporating feminist and other progressive movements (Edwards, 2009, p. 390), and were intent on the "democratization" of life (Maddison & Martin, 2010, p. 109) and with critiquing "Marxist social movement theory and Resource Mobilization Theory"(Skinner, 2009, p. 1). Unions have a tradition of flexibility, engaging with issues and mobilising for social justice (Lopez, 2003, p. 1; Peterson et al., 2012, p. 622) which has allowed them to be adept at moving between "conventional … and unconventional collective actions" (Peterson et al., 2012, p. 622).

The literature refers to three different union movement models: the Business Union model which avoids engagement with other social movements; an Integrationist model which is concerned to "build alliances" as a means to "exert influence"; and the third model, a Class Conscious one which is more militant (Zajak et al., 2018, p. 176). The third model is also defined as "social movement unionism (SMU)" (Parker, 2011, p. 392) and is progressive, concerned with "sociocultural" issues and connection to "other civil society movements"(Peterson et al., 2012, p. 623). Yet another category is Community unionism which Heap et al consider describes the alliances in this pay equity case where there were "multiple, sometimes overlapping, interests" amongst unions and other bodies such as the Human Rights Commission (2020, p. 213).

Unions and feminist/women's movements have long shared pay equity aspirations and are inextricably linked which has presented advantages as well as disadvantages. The feminist/women's movement has both benefited from the work of individuals in the unions and has required the support of active and strong unions (Guillaume, 2015, p. 366; McCann, 1994, p. 115). However, union support for pay equity has not always been consistent (Kirton, 2021) or forthcoming with unions being "varied in their efforts to use the law " (Guillaume, 2015, p. 365) and less ready to promote the pay equality cause (Beirne et al., 2019, p. 43; Conley, 2014, p. 310).

Furthermore, women's subordinated social position has meant women have not always been successful at having their voices heard within the union movement (Guillaume, 2017, p. 68) because social movements inevitably fall prey to gendered hierarchy (Beckwith, 2001, p. 383). At times male dominated unions have even colluded with management (Guillaume, 2017, p. 65) to "minimise the effects of equal pay legislation" (Guillaume, 2015, p. 370), further reinforcing the fact that "litigation strategies are embedded in power relations" (O'Reilly et al., 2015, p. 305). Additionally, a disinclination for middle class women to engage with working class employment issues in the US has also affected progress (McCann, 1994, p. 121) as has an unwillingness of women to take industrial action and to appear too "reliant on union guidance" (Beirne et al., 2019, p. 49). Despite these factors, unions and women have worked together on pay equity (McCann, 1994, p. 115) as demonstrated in the Terranova action (McGregor & Graham Davies, 2019, p. 627). And research has demonstrated unions can help reduce the gender pay gap within an organisation and across (segregated) "organisations" (Rubery & Grimshaw, 2015, p. 332) by way of a "centralised wage bargaining system" (Hyman, 2004b, p. 5; May & Lonti, 2003, p. 2 and 7).

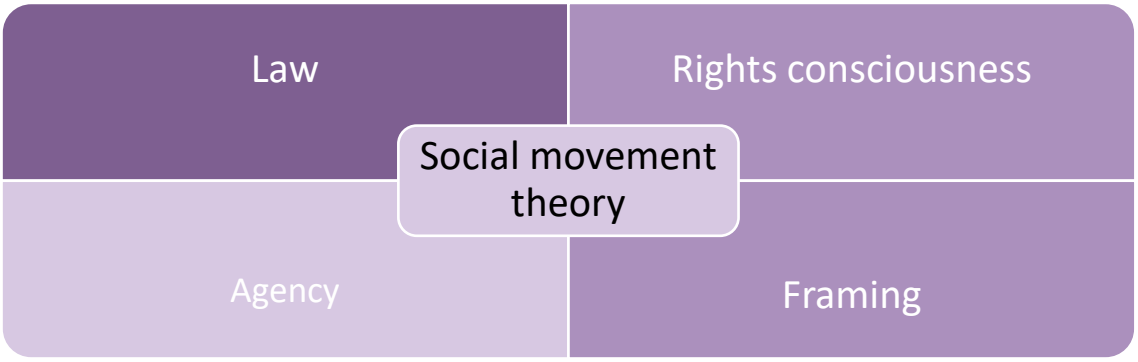
The unionization of women has been both "an essential precondition, as well as a result, of pay equity movement building" (McCann, 1994, p. 118). US unions have established a "strong movement culture connecting pay equity activists" (McCann, 1994, p. 115) and ultimately ensuring "legal mobilization around pay equity rights" (McCann, 1994, p. 120). In contrast, in Canada, Briskin refers to how feminists (not unionists) strategized to build alliances of women "from the unions, parties, and community-based groups" which, in coalition, were able to pressure the unions over issues such as pay equity (2014, p. 230). The presence of cross community engagement by women union members, keen to foster alliances with other organisations' and social movements' campaigns, has been a feature in the New Zealand context (Parker & Douglas, 2010), although there has been a perception by many that equality has been attained and women have been 'mainstreamed' (Parker & Douglas, 2010, p. 453). Low rates of leadership by women in the unions referred to in a Human Rights Commission report of 2008 may have also contributed to the low rate of pay equity litigation (Parker & Douglas, 2010). Furthermore, the symbiotic nature of unions and women's movements has also meant in Canada (and the US to a lesser extent) the failure of women's movements to achieve goals in a climate of weakened unions where women's groups lost their allies and struggled to "defend policy advances made during previous governments or administrations"(Beckwith, 2001, p. 378). Feminist movements became 'moderated' and vulnerable to "state attack" when left-aligned political parties and the union movement became weaker and when the state was re-structured (Beckwith, 2001, p. 377). This

phenomenon played out in New Zealand with the arrival of the neo-liberal economic and political model which, among other things, substantially undermined the labour movement (Parker, 2011, p. 392). Weakened unions and falling membership (Yates, 2010, p. 400) has ensured unions' collective bargaining power has declined (Hume, 1993, p. 477) and their influence on government is much diminished (Fudge, 2017, p. 386). Predictably, the "de-unionisation" of the workforce in New Zealand decreased bargaining capacity resulting in increasingly lower wages for low-paid women workers (Hume, 1993, p. 477). There were further effects on the feminist movement with some scholars and activists describing a period (in the 1990s and early 2000s) where feminist action seemed "no longer sustainable" (Millar, 2018, p. 140). Although belief in feminist ideals remained, the movement ceased to exist on a large scale (Grey, 2008, p. 72) and feminist "initiatives" such as "The United Women's Conventions" ended (Millar, 2018, p. 140). This was noted at the international level with succinct criticism of an ideological shift away from protecting and promoting women's rights described as both a "climate change and "backlash"", despite the ongoing need to strive for equality (Committee on the Elimination of All Forms of Discrimination against Women, 2007, p. 5).

Rights consciousness

Figure 5

Research design and methodology



Integral to social movement theory (and legal mobilization) is the raising of rights consciousness, the consolidation of rights awareness, not only as a function to spur social movement activity but also to gain further support and members. Academics theorise that movements only become possible when members see themselves as rights holders (Vanhala, 2009, p. 744). Recognizing their rights helps groups self-define, exemplified in pay equity movements in the US, where professional women self-identified with feminist campaigns due to having been previous recipients of "rights-orientated collective action" (McCann, 1994, p. 132). Rights shaping identity (Vanhala, 2011, p. 50) was apparent with disability activists in

Canada who reframed their disadvantage in terms of discrimination and inequality (a raising of rights consciousness and defining of collective identity)(Vanhala, 2011, p. 53). Not only do rights assist in the self-defining of groups but legal actions help develop legally enforceable rights (McCammon & McGrath, 2015, p. 129) through "judicial interpretation" (Maiman, 2004, p. 88). Social movements can identify "new rights" (McCann, 1994; Revillard, 2017, p. 450), for example, the use of international human rights law by "relatively powerless groups" to gain "moral strength and legitimacy" (Merry et al., 2010, p. 125). This is exemplified in the case of a Polish woman denied an abortion despite the pregnancy causing significant detriment to her health (Fuchs, 2013b, p. 31). With the support of NGOs and lawyers, the claimant won at the European Court of Human Rights, crystallizing and affirming her 'rights' as a citizen during the process of litigation (Fuchs, 2013b, p. 31). In the same way, the legal protections inherent in the establishment of the Charter of Rights and Freedoms in Canada increased rights consciousness (Vanhala, 2011, p. 255) for the disability movement (Vanhala, 2011, p. 106).

Framing

Alongside rights consciousness sits "meaning construction" (Benford & Snow, 2000, p. 614) or framing which explores and defines "the impact of culture and values" and elucidates 'meaning' (p. 613, Snow, 2000). The transformation of a cultural frame into a recognized legal right is one of the "central objectives of social movements" (Pedriana, 2006, p. 1729) allowing "demands" to be articulated, a "rationale" for action (Benford & Snow, 2000, p. 617) and a group identity established (NeJaime, 2010, p. 955). When unions frame issues as injustices collective identity is solidified (Ainsworth et al., 2014, p. 2512; Guillaume, 2022, p. 39) and "collective efficacy" is achieved when organisations realise the potential to effect change through "collective" action (Ainsworth et al., 2014, p. 2512). Equally, when issues are viewed through a "legal lens" legal solutions are most likely to be sought (Vanhala, 2016, p. 115) such as in the UK and Europe when the "framing processes" demanding "anti-discrimination legislation" paved the way for "strategic litigation" (Vanhala, 2009, p. 748). Activism that draws on frames identifying specific problems (Cummings, 2017, p. 250) which reinforce "beliefs already widely held" (Andersen, 2005; McCammon & McGrath, 2015, p. 134) have more success in achieving aims. This transformation often occurs through litigation by allowing "aggrieved groups to turn a symbolic frame into a legal claim" (Pedriana, 2006, p. 1729) allowing injustices to become evident (Benford & Snow, 2000; Lemaitre & Sandvik, 2015, p. 9) and cementing cooperation between groups (Zajak et al., 2018, p. 175). Legal symbols and categories also influence interpretation which can both assist and prevent movements against both opponents and/or the state (Pedriana, 2006, p. 1723). Although there is divergence amongst scholars on the success of framing, some believe the "inclusion of the concerns of

opponents" in framing is more likely to successfully achieve goals (McCammon & McGrath, 2015, p. 134) and others that litigation opponents' framing may variously "enable, constrain, and (sometimes) transform social movements" (Pedriana, 2006, p. 1724).

Framing is important (as is the discourse) in shaping structural political opportunity (Beckwith, 2001, p. 381) because changing the frames can transform the narrative. This was demonstrated in Australian union campaigns to convert 'choice' discourse to "rights talk", a deliberate strategy to "disrupt" (Ainsworth et al., 2014, p. 2522) and challenge the Howard Government's neo-liberal labour reforms (Ainsworth et al., 2014, p. 2521). Vanhala prefers sociological–institutionalist theory (2011, p. 49) to explain the disability right activism movement which challenged the status quo by reinterpreting disability as a social construction, rather than a medical condition (2011, p. 57), and in doing so articulated rights which enabled legal mobilization to effect change (2011, p. 63). Similarly, McCann attributes the equity movement with having appropriated legal conventions to fit their purposes and of reinterpreting "particular concepts of antidiscrimination law" for their own benefit (McCann, 1994, p. 284).

Agency

Finally, another important dynamic in social movements is agency, a concept represented in Benford and Snow's three part framing process (2000, p. 614). Agency and voice are similarly essential to the third dimension of substantive equality as outlined by Campbell, Fredman, Fudge and Olney et al who describe the importance of "agency" in providing meaningful "participation in decision-making" (2018, p. 5). The value of decision-makers hearing women's voices saw practical demonstration in the Bartlett Terranova pay equity case where the raising of women's voice (McGregor, 2013, p. 13) was integral to "pay equity mobilization" (Fredman & Goldblatt, 2015; McGregor & Graham Davies, 2019, p. 627) and the eventual outcome. The previously un-heard or "rarely heard" aged care workers' voice gained media attention (Milner et al., 2019, p. 595) as the generally invisible and "powerless" women gained "power" (McGregor, 2013), raised awareness, and ultimately forged a new narrative about and calls for "new policy on pay equity" (McGregor & Graham Davies, 2019, p. 620). Empowering women's agency is an essential element of realising equity for women (Fredman & Goldblatt, 2015; McGregor & Graham Davies, 2019, p. 627) and framing the proponents as rights holders and the grievance as a human rights issue speaks to the fundamentals of SMT.

Gender undervaluation and care work

Care work is described as both gendered (McGregor, 2013, p. 13; New Zealand Human Rights Commission, 2012, p. 50) and stigmatised (Twigg, 2008, p. 234). Like much of women's work, caring work is "misrecognized" and historically and universally "undervalued" (Austen et al., 2016, p. 1041; Campbell et al., 2018; Douglas & Ravenswood, 2019b; Hayes, 2017, p. 7; Hill, 2013; O'Reilly et al., 2015, p. 303). Equally, care work is poorly paid (McGregor & Graham Davies, 2019, p. 619; New Zealand Human Rights Commission, 2012; Pringle et al., 2017, p. 42) because it "is undervalued" (McGregor & Graham Davies, 2019, p. 620) and associated "with women" (England et al., 2002; Macdonald & Charlesworth, 2021, p. 481). It is viewed as less valuable than other work because it has traditionally been the preserve of the home (McGregor & Graham Davies, 2019). The justification for the undervaluation and corresponding low pay of women's work is reflected in the Breadwinner concept, an economic model in which men work outside the home and women within the home, "responsible for care and domestic work" (La Barbera & Lombardo, 2019, p. 628). Both statutory recognition and societal endorsement of this concept ensured men be paid commensurate with the understanding that their wages supported their dependent wives and children, thus cementing their identities as the providers (Brookes, 2016, p. 166). Women were carers in the domestic sphere, not the providers, but even when caring became a paid occupation the Breadwinner concept endured, contributing to the universal undervaluing and underpayment of caring work in the labour market (Campbell et al., 2018; McGregor & Graham Davies, 2019; Phillips & Martin-Matthews, 2008). The Breadwinner concept demonstrates how the evaluation of skills is "socially determined", and a "social construct" (Hyman, 2004b, p. 6 and 29).

The skills of women have often been deemed unequal to the skills of men, with the male norm being the universal measure (Campbell et al., 2018, p. 4). Hence "physical strength" is "more highly" valued than "manual dexterity" (such as found in secretarial work) and "responsibility for machinery" more important than "responsibility for people" (Hyman et al., 1987, p. 37). All too often care workers, such as aged care workers, are regarded as "unskilled" (Hyman et al., 1987, p. 37) and the skills and responsibilities involved are ignored or dismissed. Or the skills required in care work are commonly "mis-named 'soft skills'" (Junor et al., 2009, p. 196) perceived to be inherently female, "natural" to women (England et al., 2002; Hyman et al., 1987, p. 37), and/or are perceived as ubiquitous skills not worthy of remuneration (Junor et al., 2009, p. 196; Macdonald & Charlesworth, 2021, p. 481).

Yet aged care work is complicated "emotional labour" (Pringle et al., 2017, p. 40), demanding physical and psychological effort (McGregor, 2013, p. 13; New Zealand Human Rights

Commission, 2012, p. 46) as well as time management skills (New Zealand Human Rights Commission, 2012, p. 45). The body to body nature (McGregor & Graham Davies, 2019, p. 619; Phillips & Martin-Matthews, 2008, p. 247) and the "emotional labor" (Watson & Mears, 2008, p. 159) of care work ensures it is demanding and hard (New Zealand Human Rights Commission, 2012, p. 45). The multiplicity of challenges presented by care work include its "unbounded" nature, its emulation of family bonds (Watson & Mears, 2008, p. 160) its unpredictability, and its disruption of notions of efficiency. Care work involves 'states', not products, and can be "undone, [and] nullified" with order being unexpectedly "overthrown" constantly (Twigg, 2008, p. 234).

Additionally, individual carers' years of experience is not perceived to result in the accumulation and progressive development of skills (Junor et al., 2009, p. 196). This invisibility as to skills, the lack of recognition of "the complexities of the job" (Hyman, 2004b, p. 48) and the rigorous nature of the occupation fits Adam Smith's Recognition principle found in *The Theory of Moral Sentiments* (Austen et al., 2016, p. 1038). Smith describes the absence of being both acknowledged and appreciated as "cruel and painful" because it "contravenes our human expectations" (Austen et al., 2016, p. 1038).

The above characterisations of caring leads to skills being 'disguised', or invisible (Kirk, 2020, p. 533) and contributes to the undervaluation (New Zealand Human Rights Commission, 2012, p. 51) which results in a "narrative of unfairness and discrimination" (McGregor & Graham Davies, 2019, p. 623). Australian courts have concurred with this narrative of discrimination finding that gender contributes to low and undervalued wages (New Zealand Human Rights Commission, 2012, p. 51). Similarly the undervaluation of women's work has been described as being both caused by 'discrimination' and part of the 'processes of occupational segregation' (Grimshaw & Rubery, 2007). The institutionalisation of "gender-based" remuneration and "job segregation based on gender" has resulted in unequal pay for "comparable work" and the "confinement" of women to lowly paid sectors (Campbell et al., 2018, p. 11). Women have traditionally been and continue today to be channelled into certain occupations as a result of stereotyping (Campbell et al., 2018, p. 4). The segregation of work dictated by "explicit laws, invisible structures and cultural norms" (Campbell et al., 2018, p. 1) renders job segregation both "pervasive and persistent" (Rubery & Fagan, 1995, p. 233).

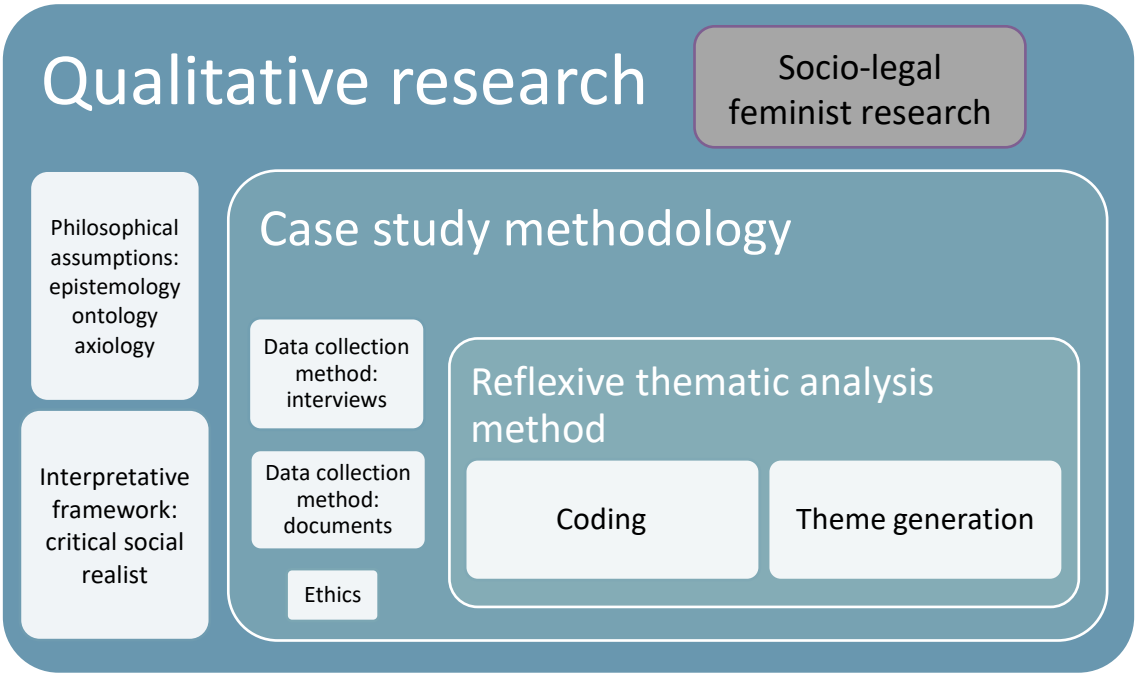
Thus the underpayment of workers in a demanding occupation which is indispensable for a society to function is exploitative and tantamount to "modern-day slavery"(New Zealand Human Rights Commission, 2012, p. 48). The inequity represented by the underpayment of care workers is both "'systemic and entrenched" and fundamentally "a breach of human

rights" (McGregor & Graham Davies, 2019, p. 623; Ryall, 2017, April 18). Essentially, low paid workers are subsidising the cost of care, and the underpayment of wages contributes to profit in the private sector or positive finances in the public sector (Douglas & Ravenswood, 2019b; Fredman, 2008, p. 194). The seemingly dispensable nature of care workers and the undervaluation of care work has created a norm of disregard for care work's importance and, consequently, care workers have "less to bargain with and very little which they can afford to lose"(Hume, 1993, p. 477). The means by which this can be addressed and wages increased is to have "stronger protection for collective action" (Campbell et al., 2018, p. 10) and as we have seen recourse to legal mobilization.

Chapter Three: Research design and methodology

Figure 6

Framework, methodologies, and methods



Socio-legal discipline and qualitative feminist research

How and why did a pay equity case for low paid aged care workers activate a forty-year-old piece of legislation and consequently force a favourable negotiated settlement worth $2 billion. This qualitative research project "aims at understanding" this "one thing well" (Merriam & Tisdell, 2016, p. 38; Stake, 2010, p. 27). The scope of the research is located not only within the legal sphere (given that the mechanism of strategic litigation is emphatically a legal instrument), but also within the territory of social movements. To coherently marry these two disciplines (sociology and law), the research is delineated by the over-arching discipline of socio-legal studies: incorporating both the social movement theory and the legal framework. Furthermore, the socio-legal framework mirrors my own personal perspectives and experience being the combination of law and sociology (discussed in more detail within the reflexivity and axiology section below).

Setting this research within a socio-legal context is to situate it by reference to both the literature and the "disciplinary orientation" of socio-legal studies (Merriam & Tisdell, 2016, p. 86). Socio-legal studies include such approaches as Layard adopted in her study of a shopping centre which questioned how the transformation of the space was "legally facilitated" and analysed the legal aspects using "other disciplines" to produce original work which

incorporated the law (Cownie & Bradney, 2013, p. 48). Hayes has undertaken socio-legal research combining politics, legal regulation and carers' experiences to analyse and understand the experiences of home carers (2017, p. 3). Fudge has incorporated a socio-legal "approach" to better understand how the UK government has reframed "illegal work" by migrants as a crime (2018) and Conaghan has extensively explored the "relationship between law and gender" in her work of the same name (2013). In the context of pay equality, socio-legal case studies have been undertaken looking at those involved in important legal decisions and interviewing the main protagonists (Deakin et al., 2015, p. 382). McCann's research on a dozen pay equity litigation cases in the United States of America looked at the role of social movements in the process of asserting work rights (Blum, 1995). McCann included discussion of "social movement reliance on legal norms" and the complicated nature of "legal consciousness" among less powerful groups in society (Blum, 1995). The application of a law in context approach is thus well suited to this study (Wheeler & Thomas, 2000, p. 273) and is one which has not previously been undertaken to such a degree with this particular subject matter.

The debate over how to categorise socio-legal studies in terms of its discipline is due in part to its "interdisciplinarity" which includes input from law, the humanities, and the social sciences (Shaw, 2013, p. 116) and which distinguishes it from doctrinal legal studies (research into law and legal concepts)(Wheeler & Thomas, 2000, p. 269). Notwithstanding the debate, the term socio-legal has gained momentum and embraces many different theoretical perspectives and methods (Cownie & Bradney, 2013). The Socio-Legal Studies Association (SLSA)(UK) refers to socio-legal studies as research on how the social is affected by, and in turn affects, the law (Feenan, 2013, p. 4). Wheeler and Thomas describe socio-legal studies as an "interface with a context within which law exists" (Cownie & Bradney, 2013, p. 42) because law cannot be separated from the social world (Wheeler & Thomas, 2000, p. 269). Banakar and Travers suggest, however, that the social sciences only provide the tools to collect the data and do not assist in the substantive analysis (2005, p. xi). Moreover, socio-legal studies are not included as part of the substantive legal education curriculum and technically do not qualify as part of the discipline of law (Wheeler & Thomas, 2000, p. 269). Accordingly, there is contention about whether socio-legal studies are a discipline, (Wheeler & Thomas, 2000, p. 271) a movement because of its marginal status in law schools (Wheeler & Thomas, 2000, p. 273), a paradigm because it allows for values and ultimately for development, (Wheeler & Thomas, 2000, p. 273) or a methodology (Banakar & Travers, 2005, p. xi). I subscribe to the view that socio-legal studies are an interdisciplinary category of the academy rather than a theoretical perspective or methodology. Socio-legal conveys an overarching concept of research that seeks to understand "social phenomena within the larger discipline of law" (McKnight, 2015, p. 116)

and, therefore, I situate my research within this socio-legal tradition. Adding further weight to this project's entitlement to classification within the domain of socio-legal studies is the obvious fact that the research combines a legal case (and particularly the decision to employ strategic litigation) with an investigation into how social movements influenced the legal decision to litigate, and the ultimate victory, incorporating a social science approach to this politically charged phenomenon of pay equity success. Strategic litigation and the decision to employ it will be examined with reference to LOS and social movement, legal mobilization theories and feminism thus following a long tradition of "socio-legal scholars" being "interested in the mobilization of social movements and interest groups" (Halliday & Schmidt, 2004, p. 22). However, the philosophical positioning and theoretical perspectives or frameworks are not concentrated on a uniquely socio-legal (or law in context) approach (Cownie & Bradney, 2013) but incorporate critical, SMT, and feminist approaches. This research can also be characterised as feminist research, being both conducted by a feminist and being concerned with a fundamentally feminist aspiration, pay equity. Although the theoretical framework for this research (discussed below) is critical realism, the subject matter (pay equity and litigation under equal pay legislation) defines this project as feminist research given its exposition of "gender inequalities" (McHugh, 2014, p. 137) and its engagement with gender empowerment and the "material reality of women's lives" (McHugh, 2014, p. 137). It is intended that this research project will add to "knowledge" concerning "the many varieties of gender injustice" (McHugh, 2014, p. 138).

Adjacent to this research's socio-legal disciplinary and umbrella feminist classification is the project's location within the qualitative research practice which determines a framework for the research design, and dictates both the methodology and the methods to be employed in obtaining and analysing the data (Denzin & Lincoln, 2018). A qualitative research framework encourages the researcher to make apparent their philosophical assumptions underpinning the theoretical framework (Braun & Clarke, 2006, p. 79) and their personal philosophical positioning (reflexivity) and values (axiological assumptions)(Creswell, 2013). Being at the heart of this process (Denzin & Lincoln, 2005, p. 10) means that the researcher's perspectives influence every aspect of the research (Leavy, 2014, p. 3), including the data gathering and data analysis (Merriam & Tisdell, 2016, p. 15). Qualitative methods include face-to-face interviews and evaluating documents with the aim of obtaining multiple perspectives (Creswell, 2013, pp. 45-47) to deeply understand phenomena (Denzin & Lincoln, 2005, p. 5; Sandelowski, 2004, p. 894). In binary opposition to quantitative research the qualitative philosophical paradigm insists on there being no objective truth but rather accepts subjectivity (Curtis & Curtis, 2011, p. 5; Madill, 2015). The qualitative framework endeavours to produce

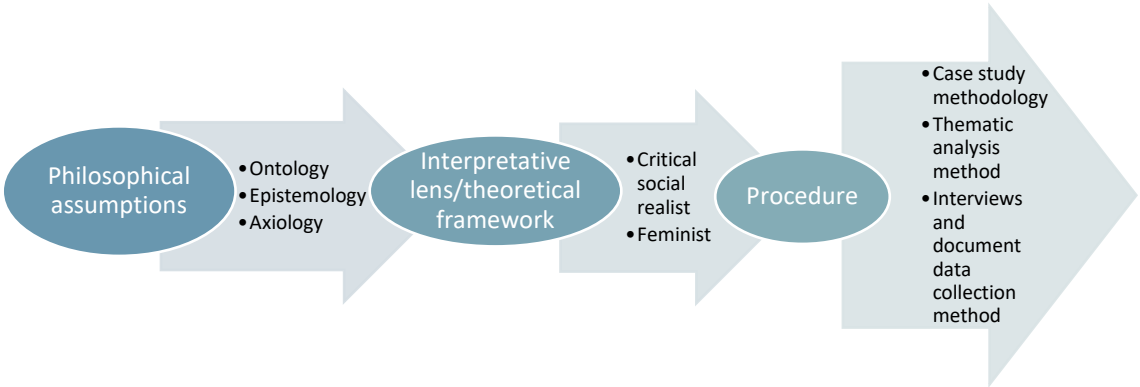
knowledge (Braun & Clarke, 2013, p. 33), acknowledges "the socially constructed nature of reality" (Denzin & Lincoln, 2005, p. 10; Webley, 2010, p. 936), and intends that the research will "reveal unexpected issues" (Aaltio & Heilmann, 2010). The analysis in a qualitative project is "inductive" (Creswell, 2013, p. 22) whereby theory is built from the facts and produces "themes" (Madill, 2015; Merriam & Tisdell, 2016, p. 17) as opposed to a deductive analytical process whereby the data are used to test the theories (Merriam & Tisdell, 2016, p. 17). The inductive process of analysis embraces "emergent design" (Creswell, 2013, p. 45) where the strategies and questions evolve during the data collection and coding.

A tenet of qualitative research is its richly in-depth descriptive nature and its engagement and inclusion of "quotes and excerpts" (Merriam & Tisdell, 2016, p. 18) which enhance its "detailed descriptions and particularized interpretations" (Sandelowski, 2004, p. 894). Words are the means to portray the thoughts and feelings of participants, creating the "richness" through "word choices, metaphors, and even slang" (Firmin, 2008, p. 2). The data collection methods are often "non-random, purposeful, and small" (Merriam & Tisdell, 2016, p. 18). Sample selections with "purposive sampling" are a common qualitative practice (Palys, 2008).

Finally, qualitative research has the ability to influence and frame policy and contribute to our greater understanding of the world (Olesen, 2005, p. 237), providing an "impetus for social change" (Leavy, 2014, p. 6) and seeking an understanding of "social phenomena" by means of both the individual and the context (Clark, 2008, p. 4). As Beckwith notes, qualitative research is especially important in studies of women's movements so as to understand the "activism" and the "movements themselves" (2001, p. 373) which have a "social justice" (Leavy, 2014, p. 2) focus. The features of qualitative research play out in the theoretical frameworks, the methodological procedures adopted, and the methods of data collection and analysis employed, as depicted below:

Figure 7

Philosophical aspects



Philosophical assumptions (epistemology, ontology, axiology, and methodology)

Philosophical positioning is fundamental to qualitative research (Merriam & Tisdell, 2016, p. 8) because it establishes "the basic set of beliefs that guide actions (Creswell, 2013, p. 18) which are essential to a subjective search for meaning and knowledge. The values and beliefs of researchers towards the participants, and the world (Leavy, 2014, p. 3; Spencer et al., 2014, p. 82) inform the interpretative or theoretical framework ("theoretical orientations") (Creswell & Poth, 2018, p. 16) of the research (Crotty, 1998, p. 18; Gareth et al., 2017, p. 27; Leavy, 2014, p. 4). The philosophical paradigm (Creswell & Poth, 2018, p. 16; Denzin & Lincoln, 2005, p. 22) encompasses the researcher's position about the nature of reality (ontology), how we know what we know (epistemology) (Curtis & Curtis, 2011, p. 26), the values with which it is laden (axiology), and the methodology (the procedures used to acquire knowledge)(Ponterotto, 2005, p. 127).

Figure 8

Philosophical assumptions

Ontology, fundamental to philosophical positioning, is concerned with the nature of reality or existence (Bakker, 2010, p. 630; Barron, 2006, p. 300; Webley, 2010, p. 936) and seeks to understand "what can be known" about it (Leavy, 2014, p. 3). Is there one reality or several? Do we construct our own reality? (Webley, 2010, p. 936). The way research is conducted is "intimately connected" (Barron, 2006, p. 301) to how we view reality and is determined by our "knowledge perspective" (Barron, 2006, p. 301). Qualitative research focuses on understanding reality and phenomena and is premised upon there being multiple realities

(Creswell & Poth, 2018, p. 20). The ability to be informed by multiple realities is achieved through the inclusion of many different research sites and via many different voices, the incorporation of "multiple forms of evidence and themes … presenting different perspectives" (Creswell, 2013, p. 20).

Closely connected to ontology, epistemology is centred around understanding the nature of "knowledge" and how, and what, we know (Stone, 2008, p. 265). Epistemology is an understanding that knowledge is generated subjectively, that we can know what we know by understanding people's own experiences through their personal perspective (Creswell, 2013, p. 20). Understanding others' perspectives requires researchers to engage directly with the subject of research and to "try to get as close as possible to the participants being studied'' (Creswell & Poth, 2018, p. 21). Transparency about the "philosophical grounding" (Crotty, 1998, p. 8) requires the epistemology of the researcher to be apparent, which establishes the adequacy and legitimacy of the research, as well as the knowledge gained.

The third essential aspect to the philosophical underpinnings of the inquiry (Guba & Lincoln, 2005, p. 200) is the researcher's acknowledgement of their axiological position within the research (Creswell & Poth, 2018, p. 21), reporting biases and admitting "the value-laden nature" (Creswell, 2013, p. 20) of the particular research/er. The "emotions and expectations" of the researcher are an influence on the research inquiry (Spencer et al., 2014, p. 83) and determine the fundamentals of the inquiry process, including the theoretical perspective and the methods (Guba & Lincoln, 2005, p. 197).

My research is underpinned by my values and prior knowledge and experience. An emphasis on social justice is a prerequisite for my research and dictates my value system and work history to date. As well as having studied for a master's in human rights, I worked in the 'field' as a human rights lawyer for fourteen years. The latter factor situates me as both previously a student of law, of human rights, and a lawyer, and therefore suited to the socio-legal aspect of this research endeavour. My perspectives and beliefs connect to a sense of justice, feminism, and the significance and import of the law. My way of thinking has been influenced by the legal discipline and by my human rights practice. Experience as a lawyer and as a student of sociology are two background experiences which converge in a socio-legal case study examining legal, sociological, feminist, and human rights issues. In acknowledging the importance of reflexivity and my own position and perspectives which influence the research, I share my work history, academic background, ethics, politics, biases, and conceptions of self. I describe myself as a feminist and live by a feminist ethic and political perspective on the world. Finally, and significantly to describe my perspective, I am Pakeha (white European), middle

class, and a parent of daughters. I have been affected by low pay rates in sectors dominated by women or where women are traditionally less well recompensed, including as a casual university contract lecturer. Additionally, in my career in private law firms, there was a noticeable absence of pay transparency.

The fourth philosophical underpinning is methodology which is the procedures or the process by which research is carried out (Creswell, 2013) and strongly influences the methods of data collection. My research methodology, the case study (set out in detail below), sits comfortably with my epistemological position by incorporating many different participants' perspectives on the phenomenon under study, including written documentation related to the phenomenon, and explicitly realising a multi-reality ontological position.

Theoretical framework– critical realism and feminism

Theoretical frameworks "enact" the philosophical assumptions with ontological and epistemological beliefs (Creswell & Poth, 2018, p. 15) which are "folded into interpretive frameworks" (Creswell, 2013, p. 23). The main paradigms, although often described differently in the literature, can be said to conform to three broad strands: (Post)-positivism (reality is objective and known), constructivism (Crotty, 1998, p. 3) (meaning is constructed by many) (Crotty, 1998, p. 8), and, thirdly, subjectivism/social realism (Curtis & Curtis, 2011)/interpretivism (where meanings are imposed on reality (Crotty, 1998, p. 48) or imposed on the object by the subject imported from elsewhere (Crotty, 1998, p. 9), such as power structures and inequality).

Critical realism sits within the third criteria, subjectivism, with some claiming critical realism finds a perfect middle way between positivism and constructionism (Clark, 2008, p. 2), being able to accept the objective reality of the nature of "fixed structures" (Birks, 2014, p. 20) within society while also accepting how we construct our own interpretations through "social interaction" (Birks, 2014, p. 20). Essentially, critical realism accepts that objective truth is constructed through subjective interpretation (Clark, 2008, p. 5). Curtis and Curtis concur with this description of subjectivism frameworks; reality is subjective, it is subject to "our perceptions of it" (2011, p. 11) yet, nonetheless, there are objective elements and realism can encompass a reality which is "external and measurable" (2011, p. 11). Put similarly, critical realism can envisage "things that are both real and constructed" (Schwandt & Gates, 2018, p. 342). There is an "objective existence" which is "mediated" through dependence on theory (Danermark et al., 2019, p. 19) and that facts themselves are "theory laden" (Danermark et al., 2019, p. 21). Critical perspectives envisage multiple realities and critical realism has an

ontological comprehension which is "complex" (Clark, 2008, p. 2). Epistemologically, and implicit in the nomenclature, critical research is concerned with challenging "injustice" (Kincheloe & McLaren, 2005; Merriam & Tisdell, 2016, p. 10) , with transforming, empowering (Fine & Weis, 2005, p. 57; Grant & Giddings, 2002, p. 18; Guba & Lincoln, 2005, p. 201; Merriam & Tisdell, 2016, p. 10 and 60), critiquing (Kincheloe & McLaren, 2005, p. 304) and emphasising issues of power and inequality (Staller, 2013, p. 410). The exposing of the marginalisation and oppression of people who are rendered powerless by "hegemonic social structures", such as women and those of less powerful social classes is one such example. Critical realism complements a feminist epistemology which comprehends women's position as marginalised, exploited (Travers, 2011, p. 133), and subordinated and this "enhances the production of knowledge" (Taylor, 1998, p. 368). Feminist researchers have perspectives of being both "insider and outsider" (Taylor, 1998, p. 368), understanding subordination while also appreciating the "dominant worldview" (Taylor, 1998, p. 368). Feminist research, without seeking to limit or define feminist thought, "problematizes women's diverse situations as well as the gendered institutions and material and historical structures that frame those" (Olesen, 2005, p. 236). Critical realism also commits to social justice (Creswell, 2013, p. 23), "human rights" (Muncie, 2006, p. 88), advocacy and activism (Guba & Lincoln, 2004, p. 30), and ensures "social, political, cultural, economic, ethnic and gender" factors (Guba & Lincoln, 2004, p. 32) are made visible. Critical realism also assists in providing understanding of behaviour helpful to "governments and organisations" in seeking resolution to problems (Clark, 2008, p. 5).

Critical realism is eminently applicable to my research which is designed to understand the pay equity 'win' and poses "questions that seek to explain outcomes" (Clark, 2008, p. 3) and understand "causality" (Clark, 2008, p. 2). My interpretive position is nested within an ontological concept of reality "based on power and … privilege" (Creswell & Poth, 2018, p. 36). Although we have agency, this is limited, and affected by "wider structural factors" (Clark, 2008, p. 2). Reality is "known through the study of social structures, freedom and oppression, power, and control" (Creswell & Poth, 2018, p. 36; Kincheloe & McLaren, 2005, p. 304; Muncie, 2006) and, crucially, research has the potential, to change the current reality (Creswell & Poth, 2018, p. 36). This formulation by Creswell and Poth (2018) is congruent with my ontological and epistemological perspective; the assumption of power imbalances and discrimination against women and the working classes, and a belief in the importance and role of law for bettering the world, enacting change, and assisting activism. The transformative nature of both law and activism can be used as instruments to improve life. From a feminist perspective, an exploration into pay equity provides a lens to evaluate the importance a society gives to gender equality (Fuchs, 2013a, p. 191). Equally, a feminist perspective on the law is often

predicated on the belief that legal choices and decisions are “politically motivated” as a means to maintain the status quo of (gendered) power relations (Munro, 2017, p. 198). While research which challenges “gender inequality” is viewed by some as a feminist methodology (Taylor, 1998, p. 358), I situate my feminist approach as forming part of my theoretical and philosophical perspective. Like Taylor, my focus is on “gender inequality” (1998, p. 262). However, the methodology I will employ to engage with my theoretical perspectives and feminist epistemological, axiological viewpoint is the case study.

Case study methodology

Theoretically, case study methodology lends itself to a number of different philosophical positions because “it is not assigned to a fixed ontological, epistemological” perspective (Harrison et al., 2017, p. 7). This “flexibility” (Forrest-Lawrence, 2019, p. 319) can be both an advantage and a disadvantage, making the process of determining a “theoretical perspective more challenging” (Baxter & Jack, 2008, p. 545) for case study researchers. Notwithstanding the ‘theoretical flexibility’, the case study has been specifically identified as a methodology well suited for critical realism by Ragin, given its often complex nature and its objective and subjective realities “real and constructed” (Schwandt & Gates, 2018, p. 342). There is debate about whether case study qualifies as a methodology. Many academics, including Creswell (2013) and Leavy (2014, p. 4), accept case study as a qualitative methodology being the subjective “lens through which the researcher views and makes decisions about the study” (Harrison et al., 2017, p. 6). Nonetheless, many others question whether case studies are a legitimate methodology and whether single case studies are justifiable. Stake, a key proponent of case study research, voices dissent over the methodological categorisation, preferring to term case study as simply the subject (the case) that is to be studied (2005, p. 443), not a theoretical process or the method of obtaining the data (2005, p. 443). Despite Stake’s misgivings, I subscribe to the view that a case study is very much a methodology given its characteristics, described below. Another criticism of case study is its inherent lack of generalisability (Street & Ward, 2010, p. 825), a viewpoint centred in positivism which is a philosophical position I eschew. Many argue case studies can be generalizable through “the strength available in the description of the content” (Forrest-Lawrence, 2019, p. 324) and through the ability to “realize in-depth understanding and context in different circumstances and situations” (Simons, 2014, p. 469) as exemplified in the Cuban Missile Crisis study by Allison (Yin, 2014, p. 7). Generalisability or otherwise, it remains a moot point in a critical realist theoretical perspective where generalisability is neither the purpose nor goal of the research.

As well, there are detractors of the single case study who criticise the endeavour for its inability to compare “across a wide range” (Flyvbjerg, 2010, p. 224). Yet, as has been eloquently argued by Forrest-Lawrence, Galileo disproved Aristotle’s “law of gravity” by means of a “a single experiment … a case study” rather than by many “observations” (Flyvbjerg, 2010, p. 225). As is contended, the credibility inherent in a single case study has been well established through its ability to provide a “richer understanding” of the subject (Forrest-Lawrence, 2019, p. 318).

Methodologically, there are a number of fundamental factors that make the case study the choice of many qualitative researchers, not the least of which is the “in-depth” (Creswell, 2013, p. 97; Merriam & Tisdell, 2016, p. 40) acquisition of data which can be gleaned from “multiple sources of information (e.g., observations, interviews, audio-visual material, and documents and reports)” (Baxter & Jack, 2008, p. 554; Creswell, 2013, p. 97; Merriam & Tisdell, 2016, p. 40). It also facilitates inductive analysis (Aaltio & Heilmann, 2010, p. 70; Merriam & Tisdell, 2016, p. 37). Within case study methodology there are different research designs that can be utilized including *intrinsic case design*, which is not conducted for its representative (generalisable) aspects (Baxter & Jack, 2008, p. 548), but rather because the case is of “interest in and of itself” and requires detailed description (Creswell, 2013, p. 98). An intrinsic case study can assist in ensuring the understanding of one thing very well (Merriam & Tisdell, 2016, p. 38; Stake, 2010, p. 27) by providing “thick description of the case” (Grandy, 2010, p. 500; Mabry, 2008, p. 219). Another common case study design relevant to this case study is *descriptive case design* which can “illustrate or explain key features of a phenomenon within its context” (Baxter & Jack, 2008, p. 548; Hancock & Algozzine, 2017, p. 39). A third design, also appropriate for this research, is the *sociological design* which is useful for its ability to investigate important societal issues “social institutions, and social relationships” (Hancock & Algozzine, 2017, p. 39) and can facilitate the understanding of complex social phenomena (Merriam & Tisdell, 2016, p. 37; Yin, 2014, p. 5). Of final relevance is the *retrospective case design* which differs from an historical case study because, although the event has occurred (Street & Ward, 2010, p. 824), data can still be gained from first-hand accounts of the actors engaged in the process, as well as from archival data (Yin, 2014, p. 12). Advantageously, data collection in retrospective designs is time “efficient” (Street & Ward, 2010, p. 825) because the event under study has occurred. This case study has incorporated intrinsic, descriptive, sociological, and retrospective case study design in its methodology.

The notion of a case study being a conceptually, spatially, or temporally bounded unit (Creswell & Poth, 2018, p. 97; Curtis & Curtis, 2011, p. 22; Hancock & Algozzine, 2017, p. 9; Merriam & Tisdell, 2016, p. 233; Stake, 2005, p. 444; Yin, 2014) is an important element of the

methodology. Time boundness (Baxter & Jack, 2008, p. 546; Merriam & Tisdell, 2016, p. 38) provides a delimited criteria which can be described and analysed in a concentrated and penetrative manner (Merriam & Tisdell, 2016, p. 37). Another defining characteristic of case study is its flexibility to incorporate varied (Yin, 2014, p. 12) and "multiple sources" (Creswell & Poth, 2018, p. 97) of data. Multiple data sources permit the research question to be explored through a variety of different means, facilitating "multiple facets of the phenomenon to be revealed" (Baxter & Jack, 2008, p. 544) and ensuring the convergence of many and different strands to deliver a keener "understanding of the case" (Baxter & Jack, 2008, p. 554). The in-depth nature of case study research, is its drawing on "deep and varied sources of information" (Hancock & Algozzine, 2017, p. 16) which results in "richly descriptive" research (Hancock & Algozzine, 2017, p. 16; Merriam & Tisdell, 2016, p. 37). The richness of the data are also drawn from the varied perspectives of participants, "the many-sided, complex, and sometimes conflicting stories" (Forrest-Lawrence, 2019, p. 237). The methodology can facilitate an "understanding of social realities as they are subjectively perceived, experienced, and created by participants" (Mabry, 2008, p. 218). True to the qualitative tradition, the case study establishes the researcher as the principal means of data collection (Merriam & Tisdell, 2016, p. 37) with researchers often being "outsiders" and "observers" in essence "to the cases they study" (Mabry, 2008, p. 220). Case study methodology can also prescribe engagement not only with participants, but with the "contextual conditions" (Baxter & Jack, 2008, p. 545) within which the case unfolds (Forrest-Lawrence, 2019, p. 323) in order to appreciate the phenomenon (Baxter & Jack, 2008, p. 545) more fully.

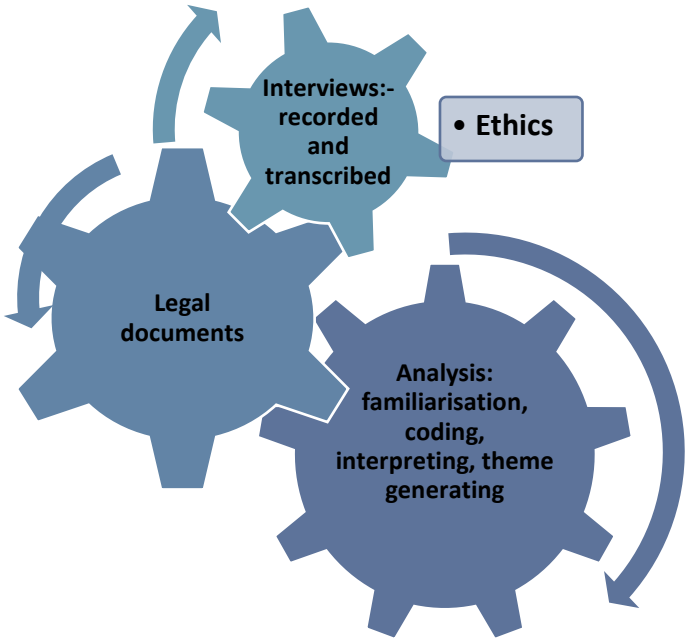
The applicability and suitability of case study methodology and its specific research designs to this project are manifold. Firstly, as many in the academy concur, case study methodology is appropriate for subject matter within the discipline of law (Harrison et al., 2017), studies of social sciences, and also socio-legal studies (Forrest-Lawrence, 2019, p. 318) which is especially pertinent to my research topic. Secondly, the case study is theoretically sound because it can "embrace varied epistemological orientations" (Forrest-Lawrence, 2019, p. 318). Thirdly, the utter uniqueness of this socio-legal case, the revitalisation of pay equity under a seemingly defunct EPA, fits the intrinsic (Stake, 2005, p. 445) design criteria; knowledge of the case phenomena is valuable in and of itself and the event was in recent history, demonstrative of a retrospective case study (Merriam & Tisdell, 2016, p. 108). Fourthly, the use of multi-data sources, interviewing many of those involved or with a perspective on the case as well as recourse to legal documents and decisions, provides depth and clarity. The case was temporally bounded, having a distinct perimeter from legislation enactment to litigation decision, to negotiated settlement date, to final legislation amendment, delineated as one

union's quest for pay equity. There is a clear commencement date and an end date. Finally, case study methodology is eminently suited to the subject matter of my research which is quite literally an inquiry into the "complexity" (Harrison et al., 2017, p. 6; Mabry, 2008, p. 214) of strategic litigation which was unique, legally significant, and important for the union movement, for low paid women workers, and for a growing human rights awareness. The rather literal interpretation of a case study of a legal case permitted deeper inquiry into the analysis of a successful strategy of litigation and engagement with other theories, including LOS, resource and mobilization theories, rights consciousness, feminism, and SMT to more completely understand why this pay equity claim was successful. The 'how' and 'why' focus of my research (Stewart, 2014, p. 145; Yin, 2014, p. 14) fits very much within the definition of a qualitative case study which is a "search for meaning and understanding" (Hancock & Algozzine, 2017, p. 10; Merriam & Tisdell, 2016, p. 37).

Ethics – Research methods: Data collection and reflexive thematic analysis

Figure 9

Research methods, ethics, and data collection



The theoretical framework of case study methodology determined the research methods employed to carry out data collection (Denzin & Lincoln, 2005, p. 22; Merriam & Tisdell, 2016, p. 8), the coding, theme generation and analysis to interpret the data. Equally, the method for analysis, Braun and Clarke's Thematic Analysis (2013), is theoretically congruent with case study methodology. Thematic Analysis is a common approach for research involving interviews (Roulston, 2014, p. 305) and is proclaimed as "a foundational method for qualitative analysis"

(Braun & Clarke, 2006, p. 78). Initially sceptical of case study methodology, Braun and Clarke accept it can be used in case studies (Braun et al., 2019). The case study suits an analysis where the researcher seeks to be "storyteller" (Braun et al., 2019, p. 848), and describes the phenomenon of a particular case. Furthermore, Thematic Analysis suits many different "critical frameworks" (Braun & Clarke, 2013, p. 12; Clarke & Braun, 2017, p. 297) including critical social realism as it facilitates understanding of "social meaning around a topic" (Clarke & Braun, 2017, p. 297), can incorporate "the two poles of essentialism and constructionism" (Braun & Clarke, 2006, p. 81), and is characterized by the ontological commitment of there being "no single truth" (Gareth et al., 2017, p. 20).

Braun and Clarke classify the Thematic Analysis method into three branches, of which Reflexive Thematic Analysis (RTA) is most closely aligned to my research approach, philosophical assumptions, and how I engage with my research. Essential to RTA is the creation of codes and themes generated from the data set (Roulston, 2014, p. 305), illustrative of the inductive nature of the process (Gareth et al., 2017) and suitable to case studies (Hammersley, 2004, p. 92).

In RTA the themes evolve and are shaped by the researcher applying their "analytic skills and experiences, and personal and conceptual standpoints" (Gareth et al., 2017, p. 20). RTA seeks to achieve "a coherent and compelling interpretation of the data" (Braun et al., 2019, p. 848) where the "subjectivity of the researcher is seen as integral to the process of analysis" (Gareth et al., 2017). Furthermore, RTA allows a researcher to analyse and interpret the data set through "their theoretical assumptions and ideological commitments, as well as their scholarly knowledge" (Braun et al., 2019, p. 848).

Ethics and data collection

Fundamental to, and prior to the data collection, the ethical practice of interviewing participants for qualitative research must be scoped out, formally applied for via an academic ethics board, and then it must remain a constant throughout the research process. My ethical application to interview participants was approved by AUTEC in April 2019 and the data collection commenced shortly after. A further application for an amendment to the ethics application (approved in June 2020) was made to interview participants via email, an amendment made necessary because of the restrictions enforced by the Covid-19 coronavirus pandemic.

Included in the ethics of data collection were issues of the anonymity of participants. In litigation the names of the key figures (the lawyers, plaintiffs, defendants, and judges) are a

matter of public record and, therefore, cannot be anonymized. Nonetheless, the consent form provided to participants included consent to be specifically acknowledged for their quotes in the thesis write-up. If participants did not wish to be acknowledged, then confidentiality around the owner of the quote was maintained as far as is possible given the public nature of the case. Interview participants were also provided with the opportunity to amend the transcript of their interviews. Some chose to do so in detail, others made no changes or comments.

The data collection methods for this project included 16 face-to-face interviews, two telephone interviews and one via email, 19 in total (an appropriate sample size for qualitative research which includes other forms of data)(Gareth et al., 2017, p. 22) and other forms of data including 18 legal submissions and documents and three court judgments and over 600 submissions to select committees. Data collection undertaken via interviews is a truly qualitative method, one of "the most powerful" as interviewee Merriam describes (Roulston, 2014, p. 297) and Freeman expounds on its provision of "a rich understanding of human nature and human experience" (Roulston, 2014, p. 297). The literature supports the use of interviews in methodological approaches and theoretical perspectives similar to my own, in social movement research on pay equity (Fuchs, 2013b, p. 34), for understanding the impact of gender discrimination (Fuchs, 2013a, p. 207), to explore "legal practice and consciousness" (McCann, 1994, p. 286) and to determine how legal mobilization comes about via strategy and "consciousness" (Vanhala, 2012, p. 532). Theoretically and practically, interviews facilitate the researcher's access to a person's "subjective experiences and attitudes" (Perakyla, 2005, p. 869) and therein lies their importance and effectiveness.

There were several theoretical considerations in deciding who to approach for interviews. Firstly, the participant selection was purposeful; the nature of the legal case and the focus of understanding how and why it had occurred determined specific participants. There was no 'random' selection of interviewees. Interviewees were targeted specifically and 'sourced' through personal networks and by utilising the snowball technique (Blewden et al., 2010). Participants included those closely and directly engaged in the strategic litigation and those more broadly involved in the pay equity movement. In subscribing to the RTA approach, the boundaries of my data collection were not governed by the concept of 'saturation'. Rather there were specific people, key to the legal case and the pay equity movement, whom I sought to interview. Additionally, there were "contextual and pragmatic" (Braun et al., 2019, p. 851) factors which determined the sample size, including the willingness or not of potential participants to be interviewed. I specifically do not include the details of who did not want to participate or who did not respond, as such detail would breach the ethical guidelines and

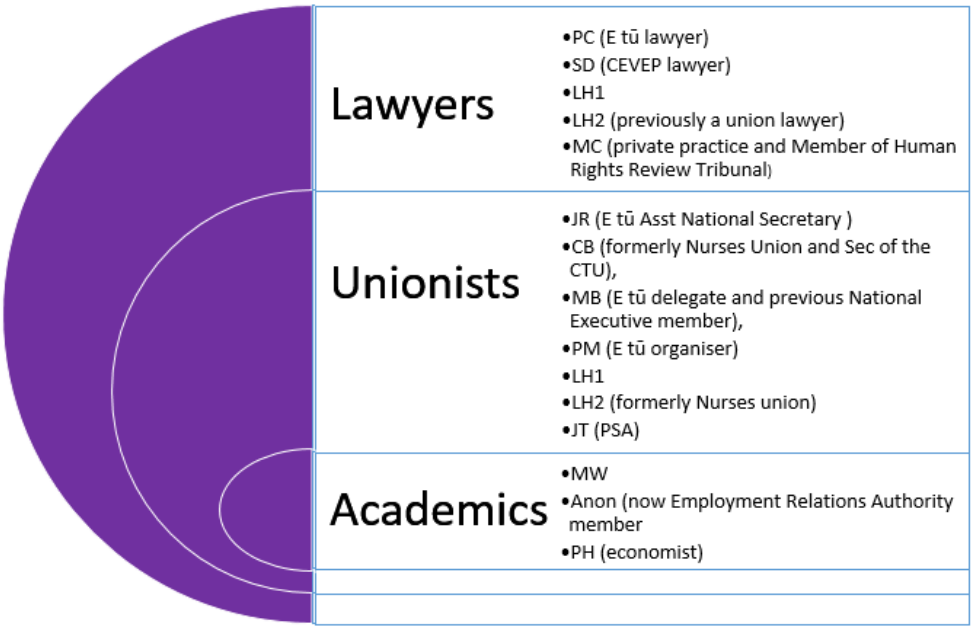
contradict the instructions in the consent forms and information sheet sent to potential participants. However, it is relevant to note that some potential participants declined to be interviewed or did not respond.

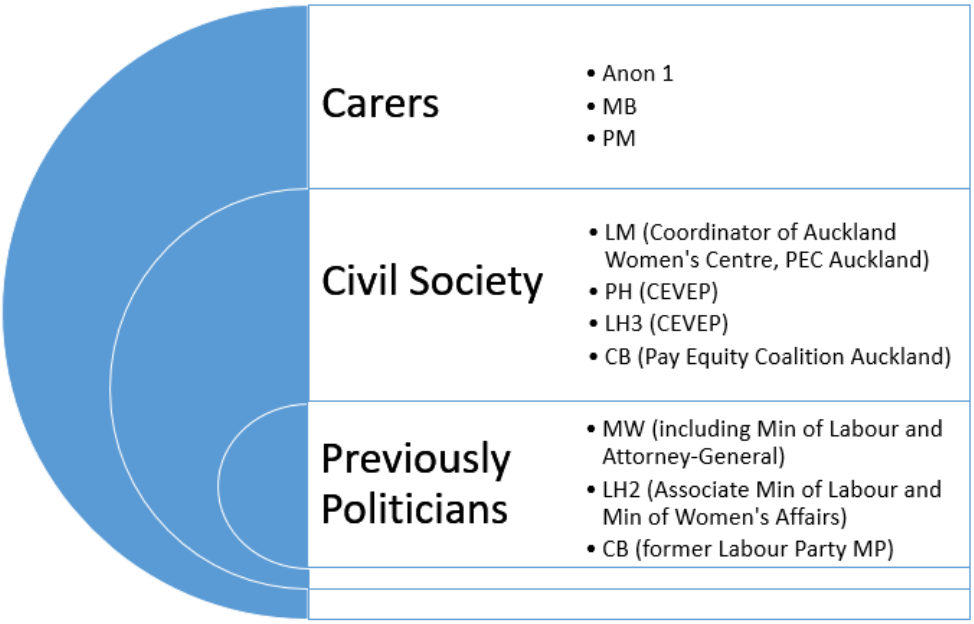
Below is a table setting out the perspectives and backgrounds of the participants. Many participants fit within more than one category being for example a carer and a union delegate/organiser.

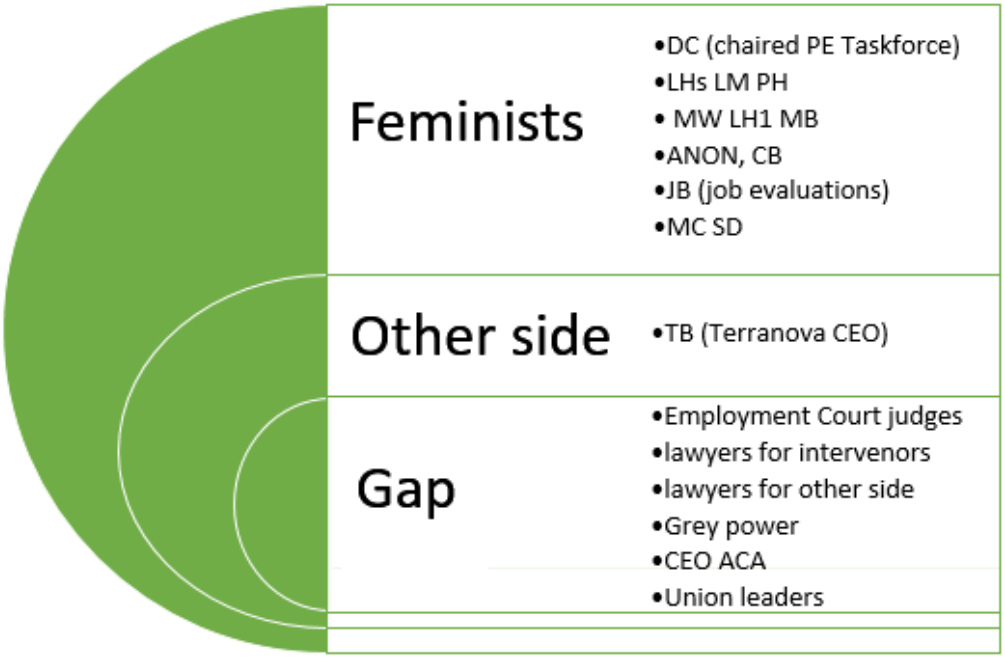
Despite the diversity and independence of voice there was also commonality. To emphasise this aspect, I used similar quotes from more than one participant to create on occasion a 'wall of sound'. This theoretical approach dictated numerous but often short quotes.

Figure 10

Table of Participants



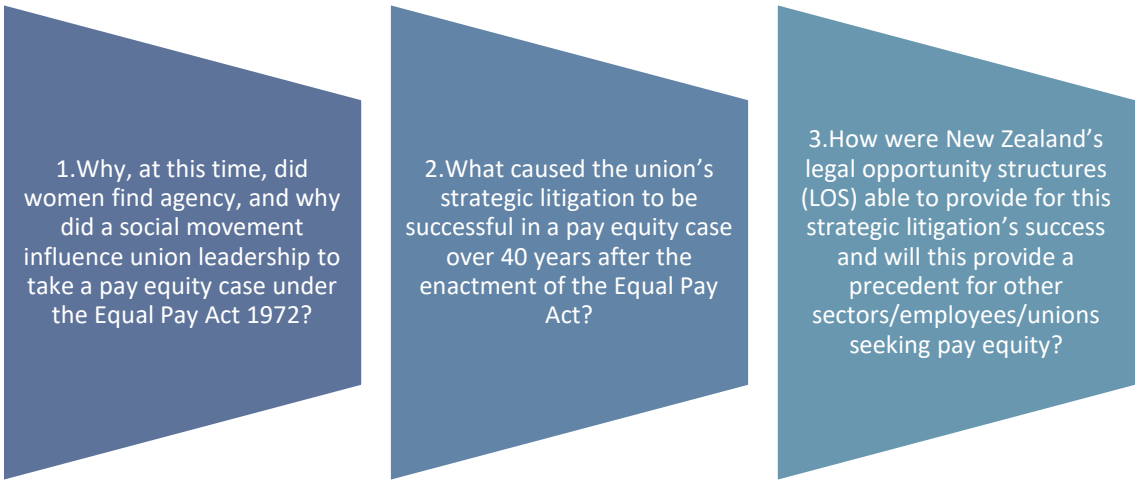




Another theoretical aspect to the data collection was the semi-structured interview approach which allowed for a mix of pre-determined questions and 'on-the-spot' spontaneous questions which evolved during the interview. This less structured approach ensured I did not impose predetermined categories, nor was I constrained by "exact wording" (Merriam & Tisdell, 2016, p. 110) which might have limited the research (Fontana & Frey, 2005, p. 706) and data obtained. The questions I asked the participants were influenced by my three over-arching research questions posed by the project and, as I began the coding process while I was still interviewing, also informed the interview process. The three research questions repeated in the diagrams below helped me to identify more accurately the appropriate questions in a process of refining and adjustment.

Figure 11

Research questions



To explain how the codes were developed based on the three research questions, I will describe each question and its relevance to the codes formed. The codes for the first question included women and feminist action, discrimination and human rights, a changing industry, ideology, inequality, and motivation to improve the lot of these care workers. The codes for the second question were more numerous and included the effectiveness of negotiation, union solidarity, previous organising and litigation, public support, historical, legal, labour market and societal factors, the front people, timing, litigation, the Caring Counts report and bargaining strategies, people knowing their value, a multi-pronged approach, Australian precedents, and the legal and leadership team. While my second question addresses the issue of why the strategic litigation was successful, an unsaid but essential aspect of this question concerns the history up to the pay equity success and the reasons for why strategic litigation had not been embarked upon or been successful previously. Consequently, many of the codes regarding the second question relate to historical factors, union preferences, previous litigation, the employment, economic and labour market context, and political beliefs. The first part of the third question is focussed on how LOS were able to provide for the success of the litigation and so was more readily addressed by the participant lawyers and those with legal training. Hence, I did not, for example, seek responses, or at least not detailed responses, from union members or carers about the relevance of LOS to the success of the litigation. The codes for the first part of the third question included courts and judges, legislation (EPA), legislative wording, filing opportunities, and interpreting the law. The issue of LOS was one which caused participants to commonly focus their answers on the role of the Employment Court and its judges more so than focusing on other issues connected to LOS, such as clarity of wording or legal standing or where the burden of proof lies. The second part of the third question relates to whether the Bartlett litigation will or has become a precedent for other pay equity litigation.

Participants provided varying responses related to their own experience and perspective on employment law and human rights law. The codes for the second part of the third question were criticisms and praise, precedent, principles, and looked beyond the settlement to the future for pay equity.

A final theoretical aspect inherent in interviewing for qualitative research is researcher reflexivity, the provision of an explanation of "biases, dispositions, and assumptions regarding the research to be undertaken" (Merriam & Tisdell, 2016, p. 249) and self-awareness which assists in interpreting and understanding the "data" (Rossman & Rallis, 2017, p. 26). Thus, it is relevant to note that my experience as a legal practitioner, an interviewer during my legal practice, and my participation in a pay equity civil society group assisted both my understanding of the phenomenon being investigated and my ability to ask relevant and useful questions. The key interview participants were grouped into several different classifications as indicated in the diagram below:

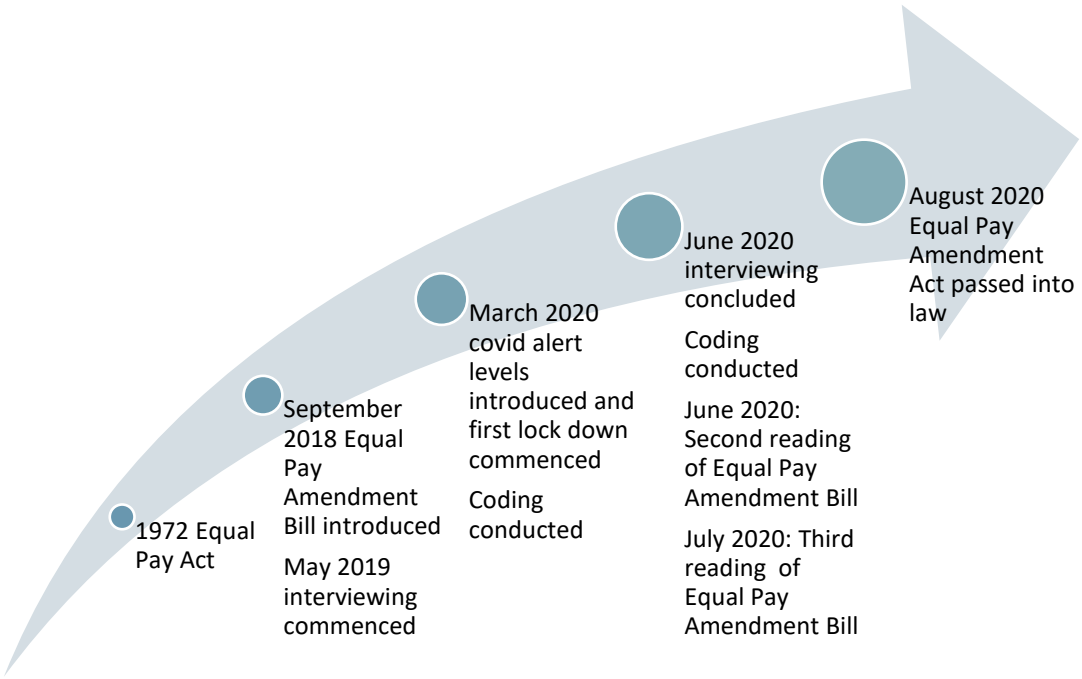
Figure 12

Classification of participants

The period of data collection was undertaken from May 2019 through to June 2020 in Wellington, Hamilton, and Auckland. The slightly elongated interview timeframe was partly a result of the impact of Covid-19 and partly the inability to conduct a final interview face-to-face (an amended ethics application was made to conduct the final interview via email) and was also protracted because of the nature of purposeful data selection. I wanted to interview some key people and it took time and some delays to schedule certain interviews.

Figure 13

Timeline of legislation, interviewing and Covid-19 lockdowns



During the period of interviewing I commenced coding which meant that the data collection and early stages of the analysis were carried out simultaneously, allowing the coding to assist with the framing of the questions and being faithful to the "emergent" nature of "qualitative design" (Merriam & Tisdell, 2016, p. 195). The span of years since the legal case first commenced had obvious effects on the memories of those involved in the case. The time elapse meant that people were speaking of past events in accordance with a retrospective case study design. As is the nature of any human account, participants contradicted one another or had entirely different perspectives on the significance or otherwise of events, all of which I have sought to include in the analysis. These differing perspectives and the incorporation of contrasting opinions is consistent with my theoretical critical realism approach of complexity and multiple realities.

Transcription and familiarisation

The interviews were audio recorded and then transcribed (except for the 'email correspondence' interview). Transcription, like other aspects of the process, is a "theoretical" (Mann, 2016, p. 200) "practice" (Braun & Clarke, 2013, p. 161) and is the "beginning" of the interpretative and analytical "process" (Mann, 2016, p. 205) because choices are made about how and what is interpreted. I employed an orthographic transcription method and recorded what was said in a "thorough" manner to be a "representation" of the interview rather than being an "accurate" record or mere "facsimile" (Braun & Clarke, 2013, p. 162) of the interview.

With that in mind, I ignored the “ums” and “ahs” and filler phrases like “you know” because, on the written page, without the tone of voice to aid comprehension, these utterances added little to the meaning. As well these ‘fillers’ detracted from the content and interfered with the clarity of the content and sometimes portrayed the speaker as less articulate than they were. As Braun and Clarke opine, the “non-semantic sounds” etcetera are “less important” (2013, p. 168) in the overall interview.

Familiarisation with the data set is a crucial element in RTA process establishing “depth” (Gareth et al., 2017, p. 20) through repeated and ongoing familiarisation and immersion in the data. A comprehensive and lengthy transcribing process aided familiarisation. I undertook the transcribing myself, which amounted to approximately 400 pages of text, with transcription of each audio-recording taking numerous hours to complete. By not outsourcing the transcription task, the process ensured I was interacting directly with the material and the engagement was complete “immersion in the data set” (Gareth et al., 2017, p. 23). The lengthy immersion in the interviews, having recorded them and then having listened to them on numerous further occasions, before the transcribing process was completed, created an intimacy and a very solid knowledge of the data. As has been stated, “one cannot fully understand data unless one has been in on it from the beginning’” (Kowal & O’Connell, 2014, p. 68). In the familiarisation process observations were made of striking elements, of perspectives and emotional responses in the way different participants responded to questions. I noted those involved directly in the litigation appeared far more enthusiastic about the result and the positive ramifications of the litigation and the significance of the litigation, both in its historical context and in terms of its positive outcome for carers and low paid women workers. Those not directly involved in the litigation were more circumspect about the success of the litigation, were more critical and more ready to highlight negative consequences or potential negative consequences. Some union members, although acknowledging the success, were also concerned to highlight ongoing problems regarding guaranteed hours and conditions of work. It was interesting to note how much participants referred to their own specific role and understanding of the case without often referring to the bigger picture. The contradictions and oppositional viewpoints were also significant aspects of my initial observations. The specific political perspectives were clearly apparent, as well as the occupations and positions of those interviewed; also evident were the backgrounds of participants being from a legal, union, political or worker perspective. Another observation of note was the personal aspect of many of the participants and the importance for them of the actions taken by the people they knew. Obviously, those from a union background spoke more readily of the union engagement and those from a legal background spoke more of the legal arguments. Many of the lawyers also

had a union background and so spoke from a position of understanding the nature of union activity and organising and collective bargaining as well as appreciating the role of the law.

Finally, apparent early on was a remarkable and distinct tension between those that decried the absence of back pay in the final settlement and those who saw the issue of back pay (and its avoidance) as being critical to the settlement being achieved. Those who accepted the lack of back pay saw the issue as having been a potentially major obstacle to the negotiations being successful. The dissatisfaction with the outcome (the lack of back pay) was often voiced by those not closest to the action, outliers, and those with a single focus perspective. Familiarity with the data gained through transcription also assisted with my ability to reflect upon the theoretical framework (Mann, 2016, p. 200) of critical realism. A critical realist lens appreciates that "peoples' words provide access to their particular version of reality; research produces interpretations of this reality" (Gareth et al., 2017, p. 21). In the current project this was captured through an intensive transcription and familiarisation of the data which, in turn, led to analysis and the construction of themes and meaning.

Coding, theme construction, and analysis

In pursuing a RTA method, familiarisation with the data set is followed by coding which is a "generating of labels" (Mann, 2016, p. 212), assigning a term that succinctly encapsulates the meaning of the material in the specific piece of data so the information within the data may be readily accessed (Merriam & Tisdell, 2016, p. 139 and 199). Coding is also a means by which evidence is found to generate the themes (Gareth et al., 2017, p. 26). Philosophically "there is no single truth" and so therefore coding cannot be described as "accurate" (Braun & Clarke, 2013; Gareth et al., 2017, p. 6). Rather, it is "an organic and flexible process" (Gareth et al., 2017, p. 6). Initially, I considered coding using CADQAS (computer assisted qualitative data analysis software) but rejected it because I felt both constrained and lacking in control over the data without a view of the 'big picture'. For that reason, I coded my data 'by hand' with the coded labels informed in part by the issues identified in the three main research questions of my thesis. I sought to loosely depict the codes and their connections visually by attributing a colour to specific subject areas which followed Braun and Clarke's description of coding as providing "a foundation for conceptualising possibly significant patterns (for research questions)" (2016, p. 742). Often parts of the data were labelled with several codes, or a code appeared across more than one research question and topic. The compilation of codes was a collation of all the participants' codes, and in the process of collating the codes they were re-assessed and adjusted. I found that the process of describing each code served to re-enforce either the saliency of the code or led to its deletion or the addition of new codes.

Once the coding was completed, the codes were collated into a list and I determined how and which codes ought to be grouped together with similar pieces of data or, as Gareth et al elucidate, I conducted a process of "combining, clustering or collapsing codes together into bigger or more meaningful patterns" (2017, p. 28). I developed a diagram of visual colour shapes in which I placed similar or associated codes to make connected codes more readily identifiable. These similar codes were then constructed into several main categorising themes, ordered around "a central organising concept" (Braun & Clarke, 2013, p. 224). In order for a theme to form there had to be enough codes "smaller meaning units" to establish patterns (Braun et al., 2019, p. 845). The themes must reflect summaries of meaning and can represent either or both "abstract" (Braun et al., 2019, p. 845) and more distinct or observable aspects in the data. Within theme generation, Braun and Clarke further define the process by identifying what they call the domain summary process which involves "summaries" of the participants' input, thus allowing for the recording of a diversity of opinion and multiple perspectives and "contradictory meaning-content" (2019, p. 845). I constructed (Braun & Clarke, 2016, p. 742) four themes from the data coded: Strategy, Philosophical/ideological/political/human rights (which was renamed Timing and Social Context), Legal realities/practicalities, and Impact/outcomes. This construction followed the completion of the coding and aligns with the third stage of Braun and Clarke's Thematic Analysis six phase steps (Gareth et al., 2017, p. 23) and was "inherently subjective" and "reflexive" (Braun & Clarke, 2016, p. 741) reflecting my "interpretative choices" (Braun & Clarke, 2016, p. 740). The first theme, Strategy, contained 21 codes, but surprisingly was not the largest theme in terms of the number of codes it comprised. I had assumed the Strategy theme would contain the largest number of codes given the term strategy reflects an aspect of one of the three research questions. However, the largest theme, containing 26 codes, was Timing and Social Context. The smallest number of codes (five) were categorised within the Impact/outcomes theme was unexpected because the precedent aspect of the case for future litigation and union action was also reflected in one of the three research questions. The fourth theme created was Legal realities/practicalities and contained 12 codes. The central organising concept for the organising of the codes was two-fold: a pragmatic or practical collection of codes which captured the tangible concrete ideas, together with a more nebulous philosophical collection of codes which captured notions that were less tangible and more concerned with opinions and political, ideological, and philosophical perspectives. There was a clear "organising concept" (Braun & Clark, 2019, p. 180; Braun & Clarke, 2013) related to the formation of the practical theme and this became the Legal Realities/Practicalities theme which partially addressed my second question regarding how the strategic litigation was successful. This central organising division of pragmatism versus philosophical, political, and ideological ideas helped develop two other

themes: The Strategy theme and the Timing and Social Context theme. The Strategy theme grouped together those codes relating to the very deliberative steps taken by the union to force a result under the Equal Pay Act and included legal and campaigning strategies and addressed my second question regarding the reasons for the success of the litigation and my third question relating to the LOS which were so successfully capitalised upon. The Timing and Social Context theme was developed out of the codes that were related to data which were less tangible and more concerned with ideas and beliefs, but which sat alongside the pragmatic theme of Strategy. The Timing and Social Context theme spoke to the first question of how social movements influenced the union and how women's agency was achieved. The final theme developed was named Impact/Outcome and was a combination of both practical and philosophical concepts because it incorporated the tangible results of the strategic litigation and the less tangible and more philosophical views of the ideological impact on society of the pay equity win. The fourth theme also addressed the third question of my research relating to the precedent the litigation provided and simultaneously spoke to issues of the LOS present. The process of theme generation and the manipulation and development of the codes within the themes felt very much as Braun and Clarke describe as being a "'tussling with' the data to develop an analysis that "best fits" the "research question" (2016, p. 741).

In the process of writing, the doubling up of codes in several themes was resolved when it became evident that a particular code fitted one theme more successfully than another. Equally, some codes seemed to be standalone codes, but when the written analysis began, they merged into other codes, sometimes disappearing completely, other times not totally subsumed, but fitting within the same section. Many of the codes remained the same but some were modified slightly, and many were removed as they became irrelevant. Five codes were repeated and were thus reduced to one when written up. A further 21 codes were removed or subsumed by other codes as I refined my analysis in the writing up.

As well as coding the data and constructing the themes, I also created a list of what I termed 'choice quotes' which were a compilation of pieces of the data that were rich, descriptive and meaningful and assisted with theme generation and the writing up. In writing up my findings I sought to be faithful to the richness of the perspectives and chose to include expletives in the quotes where they provide an indication of the importance of the point being made and the emotion of the participant towards the thing being expressed. Finally, I chose to include punctuation in the quotes to improve comprehensibility, and additionally because it was an aspect of my legal training, I was unable to dispense with.

Documentary evidence from secondary sources

Consistent with Braun and Clarke's recommendations for qualitative thematic analysis, the research ought to contain between 12 and 20 interviews (2013) if it is complemented with the analysis of other material. My data include the interviews of 19 participants together with my secondary source data which include court decisions, court minutes, legal submissions, select committee submissions, and government statistics to obtain a perspective from as many sources as possible. These other sites of data ensured that there were multiple sources of information and perspectives to provide rich qualitative data (Yin, 1994). Further, the legal submissions provided evidence of the legal frames, the arguments, and how the lawyers were pursuing their objectives (McCammon et al., 2018, p. 58). In a critical realism approach, there is an element of the objective, and this ontological objective reality combines with the subjective perspectives on that objective reality to create knowledge and meaning. A factual account of the phenomenon (the black letter law decisions and submissions) is interpreted to aid understanding and provide further verification on the subject (Roulston, 2014, p. 298). As Braun et al articulate, the objective is to interpret the data in a "coherent and compelling" fashion through the lens of one's own "cultural", "social", "theoretical" and "ideological" (2019, p. 848) and ultimately subjective position.

Analysis of the secondary or written data is covered in Chapter Four. The audio-recording from the Court of Appeal hearing was requested and provided by the Registrar via a court Minute (a copy of which is included in the appendices) after both parties to the litigation consented to my application for an audio-recording of the hearing. Following approval from the parties, the Registrar provided me with a USB stick containing the audio recording of the hearing which I then transcribed. The ability to hear the lawyers speaking to their submissions and the questioning by the judges brought the court hearing alive. Listening to the audio-recording and transcribing over 27,000 words was an interesting exercise and provided an additional perspective on the court process. However, given the arguments made reiterated the written submissions it was decided that analysing the transcript and incorporating it within the body of the thesis would be repetitious. Additionally, there was only a recording of the Court of Appeal (and not the Employment Court) which I decided, would provide an unbalanced record of the legal process.

Unexpected issues and acknowledgment of strengths and weaknesses.

It was unexpected that many participants did not perceive the action to be influenced by feminist belief, action, or theory but rather that feminist activism sat alongside the action.

There was a perception that feminists supported and participated in the action only once it was underway but did not exert direct influence over the decision to run the case. Nonetheless, many did acknowledge the huge influence feminism and feminists have maintained in the sphere of pay equity, providing a general environment within which the launching of a pay equity claim had an impetus and a ready support base. These differing opinions are acknowledged. It is equally possible that both 'subjective' versions of the truth are accurate. My analysis of these findings is set out in Chapters Five, Six and Seven and my eventual conclusions are presented in Chapter Eight.

Similarly, it was surprising to me that not all participants saw the action in litigating as a strategic deployment of the law despite the knowledge of the campaigning, organising, and educating that contributed to the case. There was a perception by some that the action was just 'obvious' and was not a tactic but a natural consequence or occurrence. This was in direct contradiction to many who viewed the action as a deliberate strategic move, a result of specific manoeuvring and a long time in the planning.

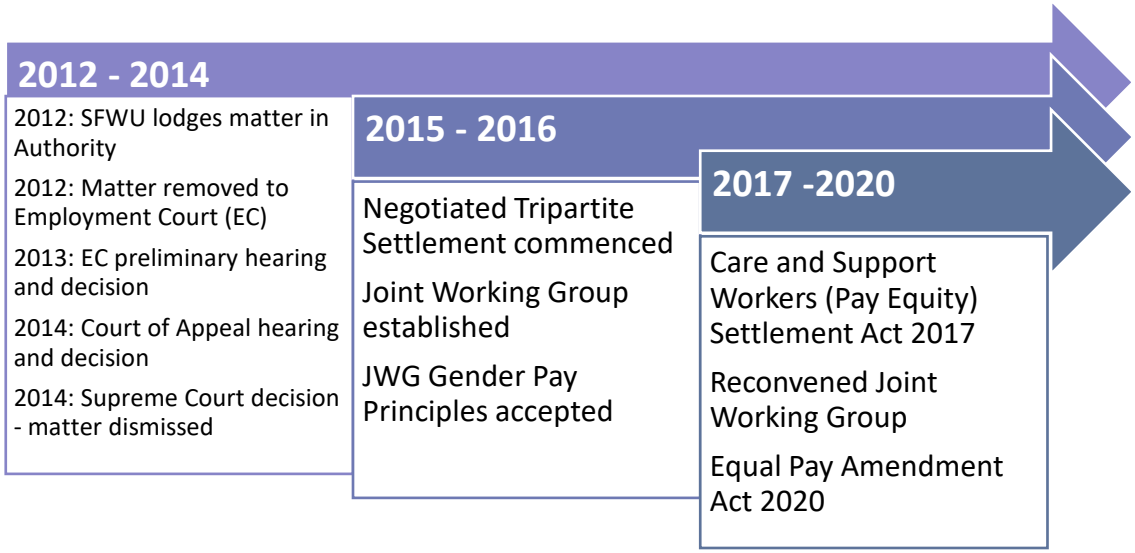
An evident weakness in the research was the fact that I was not able to recruit everyone involved in the litigation to participate in the research. However, the fact I was able to recruit so many of the main actors in the litigation and campaign is a strength. The issue of strengths and weaknesses is discussed in more depth in the "Limitations" section in Chapter Eight.

Chapter Four: Findings, case law analysis and document analysis

True to the socio-legal and multiple-source dimension of this research (congruent with case studies, critical realism, and thematic analysis) I provide a legal case analysis of the Terranova/Bartlett litigation. The analysis includes the submissions to and the decisions from the Employment Court, and the subsequent appeals to the Court of Appeal and the Supreme Court. Relevant legal documents concerning the litigation are analysed and particular attention is paid to the legal arguments at the centre of the litigation and the contentions for the necessity for pay equity. A timeline of proceedings is set out below showing the period covered in this case study:

Figure 14

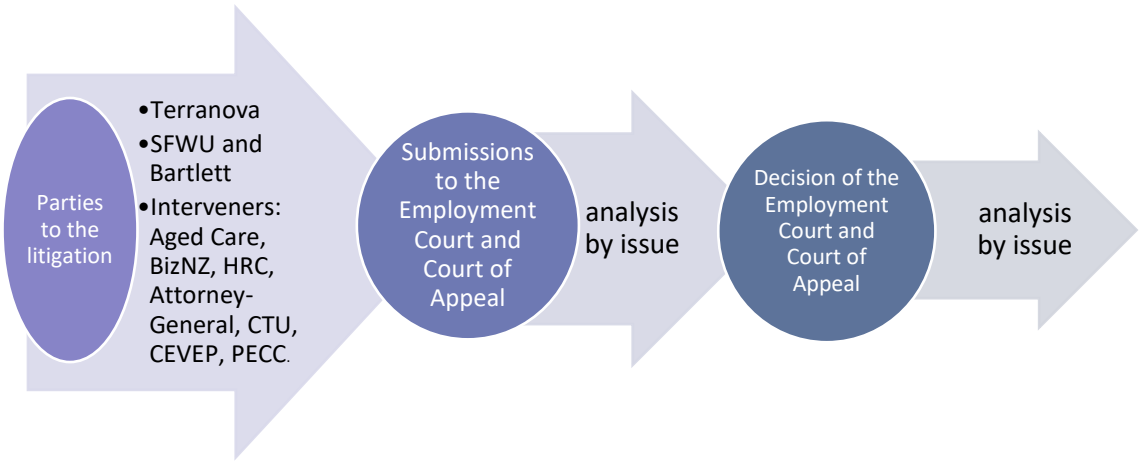
Timeline of court cases and legislation enactment



The order of the chapter will be, firstly, a description of the parties to the litigation; analysis of the legal submissions to the Employment Court, categorized by the issues argued, analysis of the Employment Court decision, followed by analysis of submissions to the Court of Appeal; analysis of the decision and then that of the Supreme Court. What followed the Supreme Court's refusal to hear that matter is the subject of Chapter Seven and includes the negotiated Settlement and subsequent enactment of legislation. The chapter direction follows the simplified diagram below with submissions analysed by issue followed by the Court decision at each level:

Figure 15

Parties, submissions, and decisions in the court cases



Brief outline of the parties to, and the order of, the litigation

The matter commenced in September 2012 when the plaintiffs (Kristine Bartlett and the Service and Food Workers Union (SFWU)) lodged two causes of action with the Employment Relations Authority. The first cause of action related to section 3 and section 9 of the Equal Pay Act 1972 (1972 Act), and the second cause of action pertained to schedule 1B of the Employment Relations Act 2000 (ERA 2000). The latter cause of action was discontinued before the matter proceeded beyond the initial filings and will not be discussed further in this analysis.

The former cause of action relating to the 1972 Act (sections 3 and 9) was the subject of the preliminary hearing and the ensuing litigation and eventual settlement. The defendant (Terranova Homes and Care Ltd) sought the plaintiffs' application (the pay equity claim) be struck out, due to it being "frivolous and vexatious" as provided in 12A of Schedule 2 of the Employment Relations Act 2000. The Authority thought otherwise, and the plaintiffs' application was removed from the Employment Relations Authority's jurisdiction to the Employment Court). Removal to the Employment Court is procedurally provided for in the Employment Relations Act 2000 (s178).

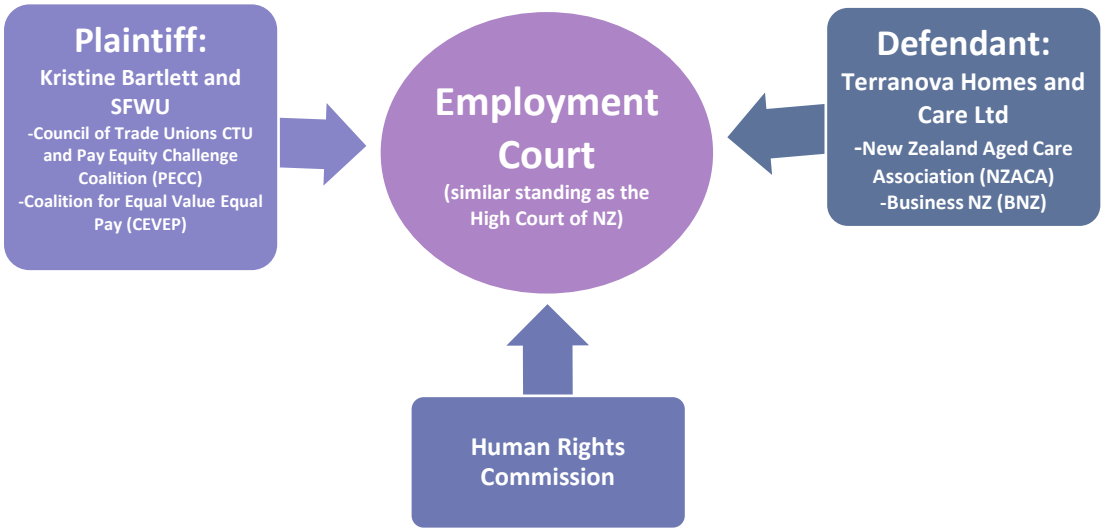
Once the filing of the causes of action had occurred, the Employment Court responded by delivering an interlocutory judgment on the plaintiffs' application. Essentially, the interlocutory judgment was a determination on procedure, setting out how the matter would proceed, with an outline of the issues to be dealt with, in the preliminary hearing. It is to be noted that no substantive hearing on the facts of the claim ever occurred because, as will be discussed

below, the matter was removed from the Courts' jurisdiction by the 5th National Government led by John Key.

The preliminary hearing was heard at the Employment Court with several interveners, who were either requested to partake in proceedings by the Court or sought the leave of the Court to appear. Interveners sympathetic and supportive of the plaintiffs' position were the Coalition of Equal Value Equal Pay (CEVEP), the New Zealand Council of Trade Unions (NZCTU) and Pay Equity Campaign Coalition (PECC). The Human Rights Commission (HRC) presented as a 'neutral' party, but fundamentally endorsed the plaintiffs' position. The Human Rights Act 1993 specifically allows for the HRC to enter court proceedings as an intervener pursuant to Functions of Commission S5(2)(j). Part of the HRC's functions is to "advocate for human rights and to promote and protect … observance of human rights" s5(2)(a) HRA 1993. The New Zealand Aged Care Association (NZACA) and BusinessNZ (BNZ) appeared as interveners for the defendant (Terranova). The following presents a diagram of the parties:

Figure 16

Employment Court parties

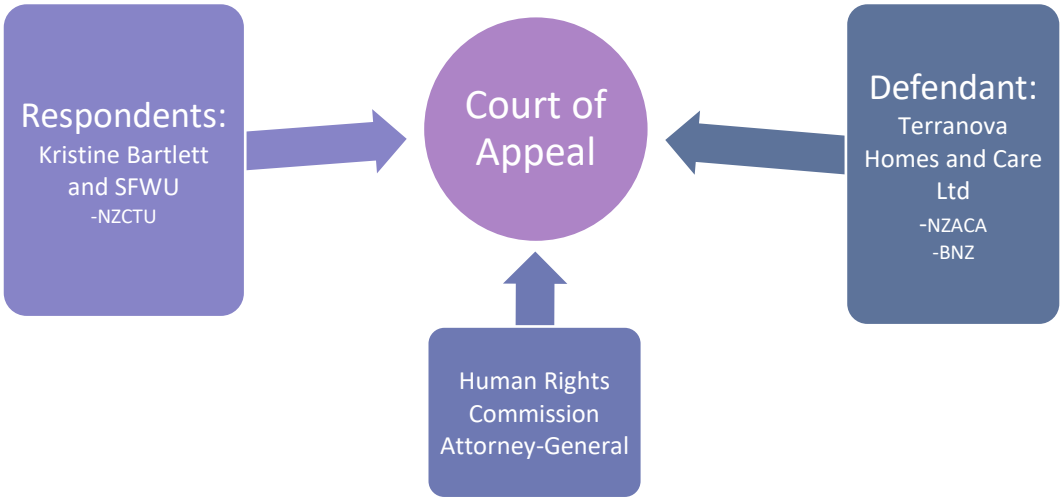


Prior to the preliminary hearing commencing, the parties and interveners made written submissions to the Court outlining their arguments. The plaintiffs' submissions were extremely comprehensive at 74 pages (and included a history of amendments to the EPA and of prior litigation arguing discrimination under the Act). A summary of the relevant international instruments pertaining to pay equity (Universal Declaration of Human Rights 1948, ICESCR 1966, CEDAW 1979, ILO Conventions, ILO 100 and 111), and a canvassing of relevant case law from other common law jurisdictions). The other parties' submissions were also lengthy; CEVEP's were 14 pages, HRC's submissions ran to 20 pages, NZCTU submitted 17 pages of

submissions, and NZACA wrote 6 pages of submissions. The defendant (Terranova Homes and Care Ltd) filed 46 pages of submissions and a separate Memorandum of Counsel relating to several statements attached to the NZCTU's submissions. The statements included in the NZCTU's submissions were from the New Zealand Nurses Organisation (NZNO), NZCTU, and PECC. The NZNO statement provided reasons for why litigation had not been brought previously, including changes in the industrial relations framework and an historical context, for pay equity initiatives in Aotearoa. The statement discussed the differences between equal pay for work of equal value, and equal pay, and situated it within the international context noting the undervaluation of aged care work. The defendant argued the NZNO's, and other statements were 'prejudicial' and ought not to be included. However, the statements were not a subject included in the Employment Court's decision and thus the 'prejudicial' argument will not be discussed further.

At the Court of Appeal, the plaintiffs (now termed the respondents for the purposes of the appeal) and the defendants (now termed the appellants for the purposes of the appeal) were again joined by the NZCTU as an intervener (supportive of the respondents), BNZ and NZACA as interveners (supportive of the appellants), and the Human Rights Commission (HRC). The HRC's has intervened in a number of significant cases of strong public interest including Attorney-General v Taylor [2017] NZCA 215, regarding a prisoner's right to vote and two important cases regarding payment to carers of "disabled family members Ministry of Health v Atkinson [2012] NZCA 184, [2012] 3 NZLR 456, 9 HRNZ 572; Spencer v Ministry of Health [2016] NZHC 1650, [2016] 3 NZLR 513" (Anderson-Bidois, 2017). In the Terranova litigation the HRC intervened as a neutral party (but reinforced the plaintiffs' position). The Attorney-General, like the HRC, also intervened in proceedings on behalf of the Government as it may do in matters which "affect the public interest" (Cullen, 2006) and was supportive of the appellant's position. Other interveners CEVEP and PECC, present at the Employment Court, did not appear as interveners in the Court of Appeal proceedings. The following diagram sets out the parties at the Court of Appeal proceedings:

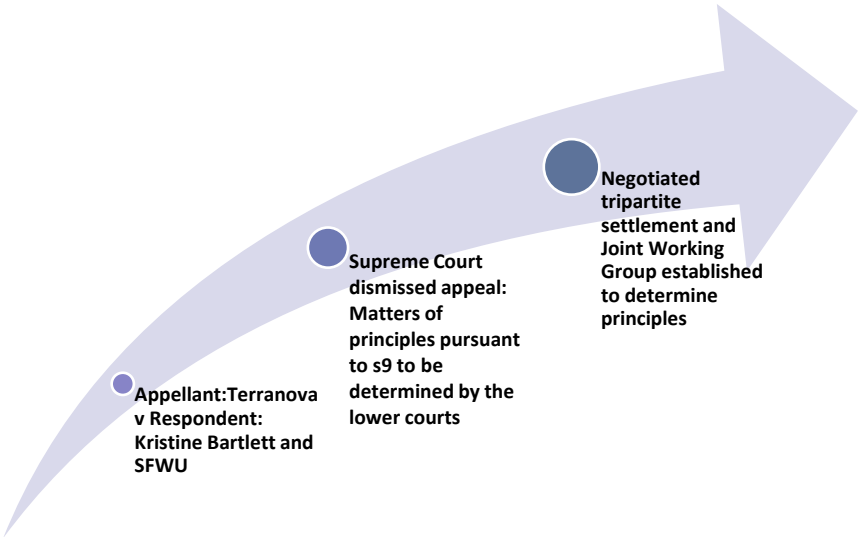
Figure 17 Court of Appeal parties



At the Supreme Court only the plaintiffs and the defendant filed submissions. The matter was disposed of with a short judgment which dismissed the appeal by Terranova. At this point, before the matter was to re-commence in the Employment Court to resolve the substantive issues, the matter was transferred out of judicial determination to negotiation. The negotiation resulted in a settlement for the sector worth $2 billion and the passing of the Care and Support Workers (Pay Equity) Settlement Act 2017.

Figure 18

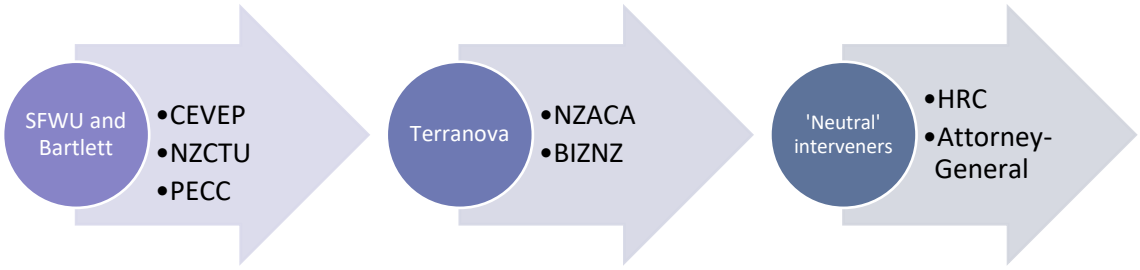
Timeline of litigation and negotiation



Description of the interveners

Figure 19

Diagram of interveners



Coalition for Equal Value Equal Pay (CEVEP) is a Wellington based civil society group, established in the 1980s, active in promoting equal pay for work of equal value (2013, section A, para 3). CEVEP's members have been involved in various activities including engagement with policy reviewing (1970s), implementing cases with the Labour Department Inspectorate, involvement in the Clerical Case, preparing claims for the Employment Equity Act 1990 (1990 Act), involvement in government policy papers (2002), researching for the Task Force (2003 - 2004), developing evaluation tools for the Pay and Employment Equity Unit (PEEU) (established in December 2004), and were active in halting the repeal of the Equal Pay Act 1972 (CEVEP submissions) in the early 2000s. CEVEP instructed Wellington employment lawyer Steph Dyhrberg to represent the organisation in the litigation.

The New Zealand Council of Trade Unions (NZCTU) represents over 340,000 members, has a history of supporting pay equity initiatives (2013a, para 1) and is critical of the glacial progress towards the realisation of pay equity. NZCTU's commitment to pay equity is exemplified in its campaigns for pay parity for primary school teachers, its improvement to early educator and nurses' wages and conditions, as well as its submissions to government and to international treaty committees. NZCTU supported PEEU and has made ongoing attempts to increase low wages through bargaining and negotiation. The Pay Equity Campaign Coalition (PECC), also represented by NZCTU's counsel, is a coalition of "community, employer, union and academic groups" and is committed to pay equity initiatives (New Zealand Council of Trade Unions, 2013a, para 2).

The New Zealand Aged Care Association (NZACA) is "the largest aged care industry organisation" (New Zealand Age Care Association, 2013a, para 3) and Business NZ (BNZ) is

"New Zealand's largest business advocacy body" (https://www.businessnz.org.nz/about-us/voice-of-business). Both supported the defendant's position.

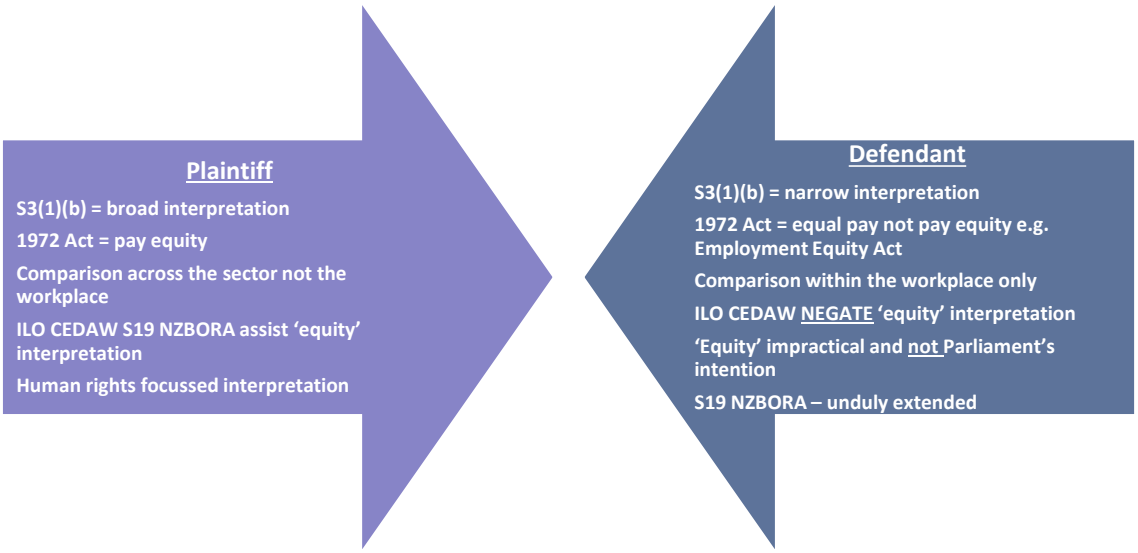
The Human Rights Commission (HRC) is New Zealand's national human rights institution (NHRI) and advocates and promotes fairness and justice, diversity and upholds the human rights of all (https://www.hrc.co.nz/our-work/). The Attorney-General, in fulfilling one of its roles, appeared on behalf of the government and provided legal advice to the Government (https://dpmc.govt.nz/cabinet/portfolios/attorney-general).

Analysis of submissions to the Employment Court

The following diagram sets out in a summarised version the arguments of the parties:

Figure 20

Legal arguments



Comparison Issue – narrow or broad interpretation?

The core pleading by the plaintiffs was that the rate of pay of the four males (compared to the 106 females) employed at the rest home (Terranova Homes and Care Ltd) was no defence against their equal pay claim (Service and Food Workers Union, 2013a, para 4). The fact that there were a small number of males working at the rest home was irrelevant because their rates of pay were essentially "infected by sex segregation of the labour market" (Service and Food Workers Union, 2013a, para 101). The correct assessment for female dominated workplaces/occupations ought to consider what male employees "would be paid" for similar work. This approach, it was argued, had Parliamentary recognition, as demonstrated in the wording of the legislation. How to interpret the rate that "would be paid" was the nub of the

legal issue (Service and Food Workers Union, 2013a, para 34). The "would be paid" assessment could only be properly comprehended when assessing male employees' pay in different sectors (Service and Food Workers Union, 2013a, para 37) and required a "counter-factual" exercise to determine the remuneration for a male if performing the "work" (Service and Food Workers Union, 2013a, paras 99 and 100). A narrow approach to comparison (that is, within a firm) for the purposes of s3(1)(b), essentially "preserves and ossifies discrimination" by doing nothing to eradicate it (Service and Food Workers Union, 2013a, para 128). A broad approach to s3(1)(b) allows for across industry comparison, with "predominantly male occupations". The HRC also endorsed a broad approach, insisting the comparators chosen **may** be male employees in an occupation with similar skills, responsibility and service performing similar work **if** the males' wages are unaffected by "structural gender discrimination". If not possible, then a comparator male, meeting the same criteria could, in principle, be used (Human Rights Commission, 2013a, para 3.8). Any comparison in pay rates ought to be determined beyond gender-determined undervalued sectors (Human Rights Commission, 2013a, para 1.2). The NZCTU similarly recommended a broad interpretation, apparent in the wording of the section: The terms "exclusively or predominantly" performed by women necessarily require a male comparator, and the reference to "class of work" implies a "broad comparison" consistent with s3(1)(b)(2013, para 8).

CEVEP noted that prior to 1991 the industrial relations system had contemplated across industry comparison (2013) because there was often no male worker existing in the occupation being assessed. The 1972 Act, however, is not explicit about occupational comparisons because the regulating of industrial relations was the preserve of the Industrial Relations Act which dealt with wage bargaining based on occupation, not enterprise. The notion of a single employer as a "unit of collective wage bargaining" was not contemplated prior to the Employment Contracts Act (ECA 1991) (Coalition Equal Value Equal Pay, 2013, section G, paras 31 and 32). Additionally, the 1972 Act's long title places no restriction on comparisons by referring to "employees" plural and specifically prescribing the purpose to be the "removal and prevention of discrimination based on the sex of the employees" (Coalition Equal Value Equal Pay, 2013).

The defendant countered by submitting s3(1)(b) dictates a narrow approach and the legislation **does not** provide for any comparison beyond the sector concerned (Terranova Homes & Care Ltd, 2013a, para 36). Evidence that the comparison test does not require 'beyond-worksite' assessments is contained in the wording, "the employees", and the reference to 'the employees' of the specific employer; a precise, not a broad interpretation (Terranova Homes & Care Ltd, 2013a). Comparisons ought to be conducted within the workplace with workers with

comparable skills and responsibilities. This was clearly the intention of Parliament and the 1971 Commission; equal pay is to be achieved "by reference only to its own workforce …" (Terranova Homes & Care Ltd, 2013a, para 53). Comparison does not include with other carers employed by other employers or with "predominantly male" roles in other "industries" (Terranova Homes & Care Ltd, 2013a, para 10 (b)(iii)). A broad interpretation of the section is wholly impractical, they argued, and not reflective of Parliament's intention (Terranova Homes & Care Ltd, 2013a, para 113) and would be unfair as it would involve comparison with male employees in other sectors not constrained by the funding model found in the aged care sector (New Zealand Age Care Association, 2013a). NZACA contended Parliament's language would have been clearer and would have provided mechanisms to carry out sector wide comparisons if this were its intention. The Employment Equity Act provided such mechanisms and the absence of express mechanisms in the 1972 Act is therefore resounding confirmation of a narrow approach to interpretation (New Zealand Age Care Association, 2013a). This is an argument which CEVEP contested, arguing the reason for a lack of mechanisms in the 1972 Act was because the 1971 Commission excluded a job evaluation scheme as being too difficult.

Equal pay v pay equity – narrow or broad interpretation?

A major ambit of the defendant's argument was refuting the contention that the 1972 Act pertained to pay equity or work of equal value. Neither concept was expressly provided for in the wording of the 1972 Act, thus reinforcing the 'narrow approach' the defendant advocated (Terranova Homes & Care Ltd, 2013a, paras 2 and 5). Terranova referred to *A Ministry of Women's Affairs document Next Steps Towards Pay Equity: The discussion document* (published in 2003 by the Ministry of Women's Affairs) which included varying definitions of equal pay and equal pay for work of equal value thus 'muddying the waters' of the definition (2013a, paras 90 and 91) and supporting its argument over terminology.

The interveners who supported the plaintiffs argued for a broad approach to interpreting "equal pay". CEVEP contended the 1972 Act provided for 'equal pay for work of equal value' a definition accommodated within the ERA 2000 framework (2013, section B, paras 4 and 5 and section D, para 8). The concept of 'equal pay for work of equal value' was well understood at the time when the 1972 Act was drafted, proving there is jurisdiction for the court to redress gender pay equity (Coalition Equal Value Equal Pay, 2013, Section D, para 11). The HRC acknowledged both the ambiguity of s 3(1)(b) and the actuality of the 1972 Act, which dealt with the specific circumstances at the time (suggesting a narrow interpretation). Nevertheless, despite these factors the HRC considered the principles adopted in the 1972 Act implicitly favour a wider interpretation; an interpretation the HRC preferred. The NZCTU submitted

section 2 defined equal pay broadly, describing the criteria as one with no "element of differentiation" and also by making reference to "skills responsibility and service and the same or similar work" which is consistent with the concept of 'equal pay for work of equal value' (2013a, para 8). The 1972 Act had always provided for equal pay for work of equal value (New Zealand Council of Trade Unions, 2013a). The NZCTU also asserted in its statement a need to resolve current perceived inequities and the "increasingly desperate situation" for aged care workers.

Removal and prevention of discrimination arguments

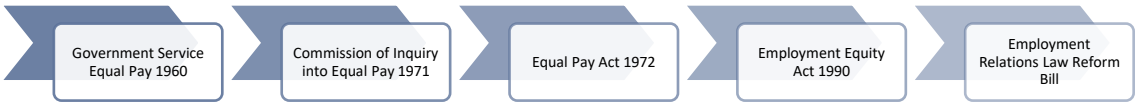
The plaintiffs relied upon the reference in the 1972 Act's long title concerning the "removal and prevention of discrimination" based on sex, and the definition of equal pay in section 2 being pay rates without any "element of differentiation" to advance its arguments. The function of the EPA was twofold: the **removal** of discrimination and the **prevention** of discrimination (Service and Food Workers Union, 2013a). The HRC also highlighted the long title of the 1972 Act, which specified the express purpose of removing and preventing sex-based discrimination in pay rates (2013a, paras 5.12 and 5.14). In the statutorily regulated implementation period from 1973 to 1977 all awards/instruments (or employment contracts, in modern parlance) were to remove mention of female remuneration rates. This was essentially a form of "judicially supervised removal of discrimination" because any transgression or disagreement was referred to the Arbitration Court for determination (Service and Food Workers Union, 2013a, para 76). The second ambit, the prevention of discrimination, enabled the Court to set the principles for implementing equal pay (pursuant to s9) and to both determine discrimination issues and apply penalties (Service and Food Workers Union, 2013a) . The HRC concurred; s3(1)(b) was concerned with preventing and removing gender discrimination and this discrimination was likely connected to low pay rates in a female dominated sector and reflected "historical and structural gender discrimination" (2013a, para 3.6). If gender discrimination has caused the low pay rates in this industry, then the 1972 Act must address it they argued (Human Rights Commission, 2013a, para 3.6).

However, NZACA contended that the discrimination that was present was essentially one of age and the responsibility for the low pay rate for aged care workers, and lack of funding, fell firmly at the feet of Government.

Legislative history

Figure 21

Legislation timeline



The plaintiffs' arguments emphasised the requirement for consistency and context in statutory interpretation and the importance of understanding legislative purpose to establish the meaning of an Act's provisions. Relevant "external context" such as Reports of Committees or Commissions regarding the initial legislation, Cabinet documents, Parliamentary Debates, international treaties, NZBORA, other statutes and empirical material which may demonstrate the "economic and social implications" of different approaches was drawn upon (Service and Food Workers Union, 2013a, para 6) . The plaintiffs, therefore, illustrated the legislative purpose (gleaned from Hansard) of the Government Service Equal Pay 1960 (which provided the template for the 1972 Act) to prevent discrimination. The HRC interpreted the 1960 Act's intention, to remove discrimination in pay rates, as a broadly framed one which included comparison with other occupations and an expectation of future extension into the private sector and consistency with the ILO's equal remuneration principle (equal pay for work of equal value) (2013a, paras 5.2, 5.3 and 5.4). Clearly, the 1960 Act envisaged equal pay for work of equal value (Human Rights Commission, 2013a, para 5.5) and the notion of female dominated industries being undervalued (Service and Food Workers Union, 2013a). The first major Government investigation into pay equality was the 1971 Royal Commission of Inquiry into Equal Pay which identified gender-based work segregation and the inherent problem of defining equal (Service and Food Workers Union, 2013a). The eventual definition adopted by the 1971 Commission appeared in the 1972 Act "a rate of remuneration in which rate there exists no element of differentiation between male and female employees based on the sex of the worker" (Service and Food Workers Union, 2013a, para 57). Significantly the 1971 Commission's recommendations included the proviso for implementing equal pay requiring employment contracts to refute "in wording, spirit, or effect for a rate of remuneration based on distinction between employees solely in terms of sex" (Service and Food Workers Union, 2013a, para 58). The HRC also relied upon the 1971 Commission of Inquiry in its submissions, noting references to societal inequality and the need to eliminate sex discrimination in pay rates (2013a, paras 5.71, 5.72, 5.73 and 5.74). The 1971 Commission recommended broad schema for determining "differentiation based on gender" (Human Rights Commission, 2013a, para 5.75) to remove any sex-based remuneration (Human Rights Commission, 2013a, paras

5.8 and 5.9) and, although not naming it specifically, the 1971 Commission contemplated systemic and indirect gender discrimination (Human Rights Commission, 2013a, para 5.10). The NZCTU noted the 1971 Commission referenced the ILO 100's provisions by emphasising the need to ensure consistency with ILO provisions and to strive for equal value for equal pay, recommendations all accepted by Parliament (2013a, para 8 (g)).

Subsequently, during the 1972 Equal Pay legislation's passage through the House, much emphasis was made on equal pay for work performed by women "including work in female intensive industries, where very few males are engaged" (Service and Food Workers Union, 2013a, para 63). The HRC's submissions equally relied upon the Hansard record of debates in the House for the 1972 Act, which specified the express purpose of removing and preventing sex-based discrimination in pay rates (2013a, paras 5.12 and 5.14).

The next piece of legislation in the chronology of equal pay was the Employment Equity Act 1990. CEVEP contended that the repealing of the 1990 Act (a more detailed instrument to implement pay equity) did not undermine Parliament's intention for the 1972 Act to address equal pay for work of equal value (2013, paras 52 and 53). Furthermore, the implementation period of the 1972 Act did not necessarily ensure compliance, and some union leaders and employers remained ambivalent to the concept of pay equity, thus ensuring equal pay was not achieved (Coalition Equal Value Equal Pay, 2013, section D, para 10). Parliament's continued amendments of the 1972 Act evidenced its ongoing relevance.

Terranova, rejecting CEVEP's submissions on the implementation period, claimed the rest home award was subject to the 1972 Act and, consequently, all pay differentials were resolved by the end of the implementation period or the 1977 Award (2013a, para 109). The defendant also insisted the existence of the 1990 Act demonstrated the 1972 Act did not provide for pay equity (2013a, para 7) because it detailed specific mechanisms for achieving pay equity (2013a, paras 61 and 112), including a commissioner to conduct assessments and implement research and education programs for pay equity (2013a, para 62). Equally, the Employment Relations Law Reform Bill, at the Select Committee stage, was clear that it would not continue its contemplation of pay equity, noting it was a concept not covered by the 1972 Act (Terranova Homes & Care Ltd, 2013a, paras 75 and 76). Clearly, both the 1990 Act and the Employment Relations Law Reform Bill 2003 demonstrate the 1972 Act did not provide for pay equity.

Undervaluation – human rights issue – aged care work

Rest home care work is traditionally "women's work" and, as such, the "skills, experience and responsibilities" are underpaid as compared to the skills, experience and responsibilities of

work undertaken in male dominated sectors (Coalition Equal Value Equal Pay, 2013, section B, paras 2 and 3). The submissions circumstantiate women's work as undervalued work because historically and traditionally caring, cooking, cleaning, and educating was unpaid work carried out in the home and was accordingly denoted as 'natural' attributes of women, not actual skills (Coalition Equal Value Equal Pay, 2013). It followed that this gendered work became occupationally segregated in the labour market and, together with the "historically low social value placed on women", contributed to the undervaluation and low pay for these skills. The low pay in these sectors is further exacerbated by low rates of unionisation and casualization of labour which often frustrates industrial action: equally, the reluctance to strike also results from a concern to not inconvenience and renege on responsibilities to patients (Coalition Equal Value Equal Pay, 2013, section C, paras 6 and 7; Folbre et al., 2021). The sector is underfunded, and the 'market' has not resolved the plight of the low paid.

The NZCTU framed the issue as one of human and employment rights for an exceptionally low paid sector whose work conditions are deteriorating and who are increasingly being required to carry out more complex tasks and take on additional responsibilities. Care work is undervalued, the workers are underpaid, there is a high turnover of employees and 92% of the workforce are female. This is a sector that suffers from occupational segregation which further contributes to the low pay rates. These points were endorsed in the New Zealand Nurses Organisation's statement which viewed the undervaluation of nurses as a human rights and social justice issue (New Zealand Council of Trade Unions, 2013a).

PECC noted ever increasing economic inequalities with low paid female workers suffering disproportionately. Clearly, they argued, the industry requires better pay, better training, and increased career development possibilities, especially given the projected increase in the aged population.

Caring Counts inquiry

The undervaluation of care work set out in the Caring Counts Report was referred to extensively by the HRC in its submissions. The HRC also referred to an Australian Equal Remuneration Case (Equal Remuneration case [2011] FWAFB 27), concluding that the low pay rates for care workers were "undoubtedly gendered" because the work had traditionally been, and continued to be, done almost exclusively by women (2013a, para 4.5). International research on the issue of low paid female dominated care sectors, traversed by the HRC, also supported the contention that female dominated work is undervalued and underpaid (2013a,

para 4.6). The NZCTU and PECC statements also referenced the Caring Counts Inquiry and its accurate articulation of the undervaluation and underpayment in the sector.

New Zealand Bill of Rights Act 1990 (NZBORA), the Human Rights Act 1993 (HRA) and case law precedents

The plaintiffs relied upon the NZBORA, HRA and case law in support of their position. Section 19 NZBORA, freedom from discrimination, and section 21(1) of HRA (prohibited grounds of discrimination including sex), both assist the interpretation of section 3(1)(b), the latter because it provides guidance as to approach, and the former as it requires consistency with the provision in question (New Zealand Council of Trade Unions, 2013a; Service and Food Workers Union, 2013a, para 8). The plaintiffs emphasized that s19 of NZBORA reflects a requirement for interpretations of sections such as s3(1)(b) to be human rights centred (Service and Food Workers Union, 2013a, para 204), a point echoed by the HRC which emphasized that section 19 protects everyone from discrimination and necessitates a broad interpretation of s3(1)(b)(2013a, para 7.2). In discussing discrimination pursuant to section 19 of NZBORA, relevant precedents were relied upon, including a Court of Appeal decision (Ministry of Health v Atkinson and Ors [2012] 3 NZLR 456 which dealt with a comparator group, finding the chosen group ought not to lead to the discrimination but also that prejudice need not be established (Service and Food Workers Union, 2013a). What was required was "proof" of "a real disadvantage", or "a material disadvantage of the person or group discriminated against"(Service and Food Workers Union, 2013a, para 115). The plaintiffs also relied upon the discrimination definition found in McAlister v Air New Zealand [2009] NZSC 78, Quilter, Ministry of Health v Atkinson and Orrs [2012] 3 NZLR 456 being a 'difference in treatment' (on identifiable grounds) in 'comparable circumstances' (Service and Food Workers Union, 2013a, para 126.1). The Supreme Court has also endorsed this approach in McAlister v Air New Zealand [2009] NZSC 78 requiring a comparator which suits the "statutory scheme in relation to the particular ground, which is at issue, taking full account of all facets of the scheme" (Service and Food Workers Union, 2013a, para 124). Another important issue regarding the definition of discrimination was that if the scheme implies comparison, then a comparator is necessary as per *McAlister* (Service and Food Workers Union, 2013a, para 126.3).

The HRC agreed NZBORA case law suggests the appropriate comparator is one "which best fits the statutory scheme" pertaining to the discrimination ground. In this case the statutory scheme is one designed to remove and prevent gender pay discrimination (Human Rights Commission, 2013a, paras 7.3 and 7.4).

Any interpretation of s3(1)(b) needed to be read consistently with section 6 of NZBORA and the rights and freedoms contained within (Human Rights Commission, 2013a; Service and Food Workers Union, 2013a). The plaintiffs relied upon a Supreme Court precedent, R v Hansen [2007] 3 NZLR, which follows the reasoning in Moonen v Film and Literature Board of Review [2000] 2 NZLR which determines that if only one meaning is available it must be adopted, but if there are two meanings the one with the "least possible limitation" must be adopted, the Court to ascertain whether the meaning 'limits' the relevant right and, if so, whether the limitation is "demonstrably justified" (Service and Food Workers Union, 2013a, para 13).

In contrast, the defendant argued that s19 of NZBORA could not "unduly" extend the meaning of s3(1)(b), which the plaintiffs sought to do, with the insertion of the concept of 'pay equity' (Terranova Homes & Care Ltd, 2013a, para 79) into the meaning of the provision.

International obligations

The plaintiffs maintained consistency with obligations set out in international law assisted to properly interpret New Zealand legislation, as determined in Governor of Pitcairn v Sutton [1995] 1 NZLR, a principle now "well settled" (Service and Food Workers Union, 2013a, para 139) in New Zealand. Similarly, other precedent cases, such as Atkinson, have also referred to international obligations, namely the ICCPR and the Human Rights Committee's description of discrimination (Service and Food Workers Union, 2013a, para 116). To that end the plaintiffs made comprehensive submissions regarding ILO 100 (Equal Remuneration Convention), ILO 111 (Discrimination (Occupation and Employment) Convention), CEDAW, ICESCR and the ICCPR which supported their contention that s3(1)(b) ought to be interpreted broadly.

The HRC concurred with the plaintiffs: There are firmly established precedents for interpreting New Zealand Statutes consistently with international obligations, (2013a, para 6.2) which include principles on the prohibition on discrimination. These anti-discrimination principles are found in the Universal Declaration of Human Rights (equal pay for equal work), in ILO 100 (equal pay for work of equal value), in numerous comments made by the ILO Committee of Experts, in the International Covenant on Civil and Political Rights (equality before and protection of the law), in the International Covenant on Economic, Social and Cultural Rights (equal pay for equal work) and in the Convention on The Elimination of all Forms of Discrimination against Women (equal treatment in respect of work of equal value) (2013a, para 6.4). The influence of international obligations fosters a broad interpretation (Human Rights Commission, 2013a, para 5.4), thus ensuring compliance with ILO 100, which was Parliament's intention when enacting the 1972 Act (Coalition Equal Value Equal Pay, 2013,

section C, paras 6 and 7). ILO 100 was ratified because New Zealand's statute book (our body of legislation) complied with it and because it complied with the UN Committee's insistence on a broad comparison to give full effect to the principle of equal value (Service and Food Workers Union, 2013a, para 179.3). There had been repeated concern, by the UN, at the dearth of complaints regarding equal pay (a gender gap of over 9% indicated a lack of pay equality and potentially ineffective legislation which ought therefore to give rise to complaints), which confirmed either the legislation, or the enforcement of it, was ineffective (Service and Food Workers Union, 2013a, para 179.4). ILO 111 has been ratified by New Zealand and is reflected in the HRA 1993, the ERA 2000 and the 1972 Act, thus confirming the State's commitment to the elimination of direct and indirect discrimination in "remuneration and employment generally" (Service and Food Workers Union, 2013a, para 184).

The NZCTU similarly argued the ratification of CEDAW implied acceptance of the principle of equal pay for work of equal value (para 8). The international obligations reflect a requirement for interpretations of sections such as s3(1)(b) to be 'human rights focused' (Service and Food Workers Union, 2013a, para 204). Hansard recordings of debates over the GSEP 1960 (which the 1972 Act essentially duplicated) underscored a legislative acknowledgement of ILO 100, the Universal Declaration of Human Rights and the concept of female dominated industries being undervalued (Service and Food Workers Union, 2013a, paras 40, 41 and 42). ILO 100 was also specifically outlined in the 1971 Commission of Inquiry which culminated in the adoption of the 1972 Act. Finally, the concept of equal pay for work of equal value is long established in international law because men and women are in segregated occupations, and this fact is reflected in CEDAW and ILO 100 provisions (Coalition Equal Value Equal Pay, 2013).

The defendant emphasised the numerous ILO demands for the New Zealand Government to implement pay equity legislation as evidence of the absence of any provision for pay equity in the 1972 Act. The ILO Experts' criticisms of the 1972 Act are clear evidence of the statute's failure to fulfil pay equity obligations (Terranova Homes & Care Ltd, 2013a, para 86). Similar concerns with the 1972 Act have been expressed by the CEDAW Committee, further confirmation that the 1972 Act does not provide for pay equity (Terranova Homes & Care Ltd, 2013a, para 89).

Workability Argument

The defendant maintained pay equity could not have been contemplated by Parliament given the impossibility for employers to obtain the information necessary to carry out a pay equity assessment, especially given only 40% of employees were covered by awards and agreements

in 1972 (Terranova Homes & Care Ltd, 2013a, paras 9 and 111). This was a claim CEVEP contested because "occupational wage documents covered 100% of employees" in the public sector at the time, not 40% (2013, section G, para 28). The inability to be able to obtain the necessary information, to remove pay differentials for the sexes under the same employment contract, and beyond that workplace, makes the requirement in the section unworkable (Terranova Homes & Care Ltd, 2013a). No employer or employee has ready access to information about another industry or workplace's pay rates (Terranova Homes & Care Ltd, 2013a, paras 9 and 111). NZACA also argued the impracticality and impossibility for rest home providers to comply with a broad interpretation of the 1972 Act because the nature of the individual or collective employment contracts makes industry-wide comparison impossible. The practical reality is that employers are unable to access this information from other employers (New Zealand Age Care Association, 2013a). However, CEVEP criticised the defendant's claim that job evaluations are impractical and impossible and cited instances where job sizing exercises have been used and referred to methodologies for making equal pay assessments (2013, paras 34 and 35). However, the HRC did note the difficulty in creating a universally applicable scheme for job evaluations (2013a, paras 5.71, 5.72, 5.73 and 5.74).

Terranova also submitted the current absence of awards rendered the circumstances for implementing equal pay quite different to the circumstances at the time when the legislation was enacted. NZACA argued the funding model created a difficulty if a broad interpretation of the 1972 Act was to be adopted because of the fixed nature of the funding provided. The funding is provided for in the Social Security Act 1964 and the exact funding amounts, set out in a Gazette Notice, stipulate a specific funding amount for each resident; effectively, the Government provides funding to predominantly private providers, making it difficult for funders to increase wages (New Zealand Age Care Association, 2013a).

Clerical Workers' Case

There was only passing reference to the Clerical case in submissions. CEVEP discussed the reason the case came about (because of frustration with the disparity between men and women's pay rates) and that the case had no practical effect because the Court determined it had no jurisdiction to hear the matter. The defendant noted the Clerical case provided a clear statement of the law; pay equity did not fall within the ambit of the 1972 Act (2013a, paras 93 to 98) and thus provided precedent support of their argument. The defendant also relied on case law and legislation in Australia (where a specific equity mechanism is in place) and the United Kingdom (where comparison is only within an enterprise) to support its argument that pay equity needs to be specifically provided for.

Principles

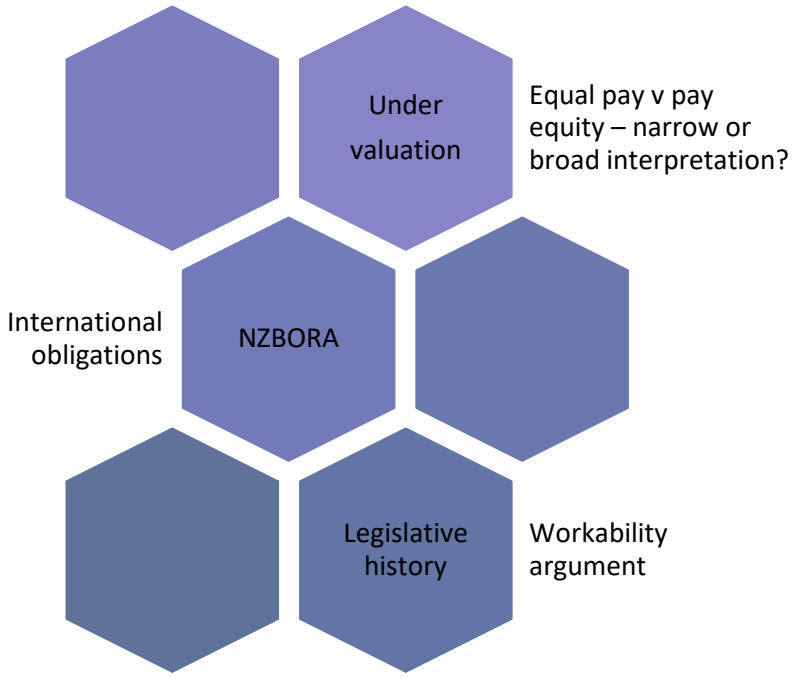
The HRC submitted s9 was confirmation that Parliament intended the Court to state “general principles for the guidance” of those interpreting the Act (2013a, para 2.3) without reference to a specific instrument such as a collective agreement or negotiation (2013a, para 2.5.3). The plaintiffs also proposed s9 was a general statement of principle to provide guidance for the parties; it was a broad approach, while s10 focused on specific guidance for parties regarding a particular negotiation or instrument (Service and Food Workers Union, 2013a, paras 79, 80 and 210). The plaintiffs sought support for their argument, that s9 was a statement to guide parties, from the Australian jurisdiction decisions which were relied upon during the passage through Parliament of the 1972 Act. Further, it was noted that a “statement of principles approach” was adopted by the European Court of Justice (Service and Food Workers Union, 2013a, paras 222 and 225.4). The plaintiffs submitted the Court’s ability to make statements was only limited by the 1972 Act (Service and Food Workers Union, 2013a, para 225.2), a union rather than an individual can initiate proceedings and the initiation of bargaining is no prerequisite to a s9 application (Service and Food Workers Union, 2013a, para 225.2).

Employment Court Decision

The Employment Court in Terranova ("Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd ") was tasked with first determining questions of law and principle before engaging with the substantive claim and the facts of the case (which in the end were not dealt with given the Government’s intervention and subsequent negotiated settlement). The following, therefore, is a decision on the questions of law, whether the claimants are undervalued because they work in a predominantly female sector and whether the Court has jurisdiction to state general principles for implementing equal pay. The issues contemplated by the Court are summarised in the following diagram:

Figure 22

Issues contemplated at Employment Court



Undervaluation

The Employment Court commenced with a brief survey of the residential care sector noting the "preponderance of female workers" [para 2] and that those employed by Terranova Homes and Care Ltd were being paid between "$13.75 to $15.00 per hour" which was equal to or just above "the minimum wage of $13.75 per hour" [para 3]. The Court summarized the plaintiffs' claim to be one of discrimination given female caregivers were paid a lower rate than if they were not part of a female dominated sector [para 4].

Equal pay v pay equity – narrow or broad interpretation?

The main issue to be addressed by the Court was "consideration of the scope of s 3 of the Equal Pay Act … and s 9". Sections 3 and 9 relate to the application of the criteria regarding the differentiation in the rates of remuneration based on the sex of the employees (s3) and the authority of the Court to set principles for implementing equal pay (s9). The 1972 Act sets out two subsections of s3; the first category is work not predominantly carried out by female employees and the second category is work that is predominantly carried out by female employees, and therefore requires consideration of what would be paid to male employees conducting similar work. The Employment Court chose the latter category and then considered whether to apply a narrow interpretation or a broad approach in determining the principles. The defendant, Terranova, argued for a narrow interpretation of the provisions and sought a declaration that the comparison for the female employee ought to be a male employee within

the same workplace (for example, the four male caregivers employed in the facility), and that the Court should only consider the actual workplace (or, at a stretch, the sector) [para 19]. Alternatively, Terranova argued if determining an "element of differentiation" [para 18], then the comparison ought to be made with the male gardeners also employed at the facility. Disagreeing, the plaintiffs submitted that a broad interpretation was the proper approach to take in determining the issues of law and principle.

In seeking a limited interpretation of the 1972 Act, the defendant also argued that equal pay and pay equity were mutually exclusive concepts and the 1972 Act only provided for equal pay, not pay equity. Despite the defendant's arguments, the Court determined that a relevant comparator occupation was not required at this stage of the case, although the decision-makers noted there was substantial evidence of "historical and structural gender discrimination" for female predominant sectors, citing both the Human Rights Commission's *Caring Counts* report and international literature on care work. The Court also quoted "Des Gorman, Professor of Medicine at the University of Auckland and executive chair of the Health Workforce" who referred to pay inequity in the health sector as the "baggage" of vocational and historical causes [para 22].

After adopting a broad approach, the Court applied the normal standards of statutory interpretation and looked to both the text of the legislation and its purpose. The purpose of the 1972 Act, as set out in the long title, was unequivocal in requiring both the removal and prevention of gender discrimination in women's remuneration [para 31]. Additionally, the Court found that the unlawful discrimination prohibition set out in s 2A accorded with that in the Human Rights Act 1993 and, thus, reiterated the requirement in s3 that there be no "element of differentiation based on sex" [para 32].

The Employment Court dismissed the defendant's argument that the 1972 Act only related to employment under the former awards system, chose the broader approach to interpret the provisions as sought by the plaintiffs, and determined that the comparison required by s3(1)(b) was one of "apples with oranges" [para 43]. The Employment Court determined s3(1)(b) "requires that equal pay for women for work predominantly or exclusively performed by women is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination" [para 44]. The Employment Court also referenced the Caring Counts report which had exposed the gardeners pay as being more than the care workers. The Court expressed surprise at the paradox of the situation, "it is unclear to us how a gardener can be

said to have the same or substantially similar skills, responsibility, and service as the plaintiff female employees … and somewhat ironically, it appears that gardeners (who tend to be male) are generally remunerated at a higher rate (around $16.56 per hour) than the plaintiff employees in this proceeding (around $13.75 to $15.00 per hour)" [para 20].

NZBORA

In making this determination the Employment Court relied upon NZBORA 1990, international obligations, and the legislative history of the Act [para 47]. The Employment Court referred to the domestic provision for freedom from discrimination found in s19(1) of NZBORA and its inclusion of s21(1)(a) HRA 1993 prohibiting discrimination based on sex.

International Obligations

Similarly the Employment Court referred to international laws including, among others, the Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value, 1951 (ILO 100), and its Article 2 on equal pay for work of equal value, the principles set out in the *Treaty of Versailles* (1919) on equal pay for work of equal value, the Universal Declaration of Human Rights on equality before the law, the ICESCR whose Article 7 asserts the right of equal remuneration for work of equal value, and finally Article 11 of CEDAW which requires "equal remuneration … equal treatment in respect of work of equal value". The Employment Court also found it was noteworthy that the New Zealand government ratified ILO 100 subsequent to the 1972 Act passing into law [para 67].

Legislative History

In evaluating the legislative history in New Zealand regarding pay discrimination, the Employment Court found support for a consistent Government intention to eliminate discrimination in the remuneration for women dating from the Government Service Equal Pay Act 1960 and including the Royal Commission of Inquiry 1971 into equal pay which ushered in the 1972 Act. The Employment Court made further points regarding the 'aliveness' of legislation, the relevance to statutory interpretation provided by subsequent legislative initiatives, and issues of practicality involved with the designation of comparators. While noting the virtual silence of the 1972 Act since its enactment, the Employment Court found that this did not preclude the Act engaging in 'conversation' now because "Statutes are always speaking" [para 95]. Further, the Employment Court found no indication of any intention to create conditions to discrimination [para 96], nor that any interpretation aid of the likely legislative intent was established by the enactment of the Employment Equity Act 1990.

Workability Argument

Finally, the Employment Court rejected the defendant's argument that comparators beyond the workplace were impractical, and while accepting it would be difficult to identify and assess comparators in a different sector [para 104], it was not insurmountable [para 105]. Similarly, the argument against implementing pay equity, due to the costs of such measures, was dismissed, not only because the funding was provided by the Government not the provider, but because of the societal cost of not redressing discrimination [para 109]. The following emphasises the point with rich eloquence:

> [110] History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which prove to be misplaced or have been acceptable as the short-term price of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.

Final Findings

The Employment Court then proceeded to set down the principles in regard to section 3 by addressing a series of questions that it answered in favour of the plaintiffs. Displeased with this judgment, Terranova Home and Care Ltd appealed to the Court of Appeal on the basis that the Employment Court's interpretation of s 3(1)(b) of the 1972 Act was wrong.

Analysis of submissions to the Court of Appeal

Grounds of appeal

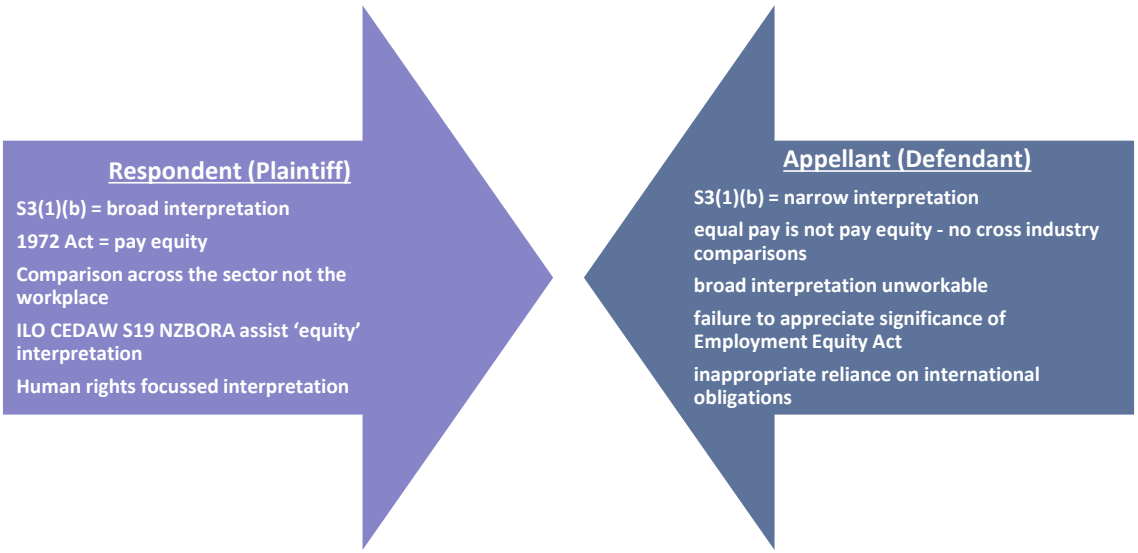
Terranova's appeal was based on several arguments. Firstly, the correct interpretation of s3(1)(b) required comparison between male and female employees performing the same work. Secondly, pay equity is an extension of equal pay, but not the same thing, and section 3(1)(b) does not allow for cross industry comparisons. Thirdly, the Court erred in law when determining that equal pay included comparing rates in different sectors and when it referenced wages being "affected by current or historical or structural gender discrimination" (Terranova Homes & Care Ltd, 2013b, para 3 (b)). Fourthly, the Employment Court's broad approach to interpreting equal pay was "impractical if not impossible" (Terranova Homes & Care Ltd, 2013b, para 5) and was wrong because Parliament's intention would not be an unworkable outcome which failed to consider various factors including funding and business profitability. Terranova's final points were that the Employment Court's approach also failed to properly consider the significance of the Employment Equity Act 1990, the consequences for

the functioning of the free labour market and was an inappropriate reliance on New Zealand's international obligations over and above properly interpreting the purpose of section 3(1)(b). NZACA agreed with Terranova's submissions: The Employment Court's interpretation of the EPA was untenable for employers (New Zealand Age Care Association, 2013b, para 2).

The respondent was in full agreement with the Employment Court's judgment but was, nonetheless, required to make submissions to the Court of Appeal. The HRC was also in full agreement with the judgment delivered by the Employment Court and its interpretation that the purpose of the 1972 Act was the removal and prevention of gender discrimination in the remuneration of women in the workforce across all industries, which was consistent not only with international obligations and NZBORA, but also the legislative history and text of the Act (2013b, para 1.3). The HRC criticized the appellant for making no new arguments on appeal. The NZCTU's submissions addressed the appellant's arguments, rejecting the claim that comparison was only to be within a single workplace" (2013b, para (7)(a)(iii)) and that the Employment Equity Act's repeal was statutorily relevant (2013b, para 7(b)). The NZCTU noted the EPA was enacted so that there was compliance with New Zealand's international obligations (2013b, para 7(c)) on prohibiting discrimination and it remained entirely applicable to contemporary industry factors (2013b, para 7(a)(v)).

Figure 23

Legal arguments at the Court of Appeal



Equal pay v pay equity – narrow or broad interpretation?

The fact that the Equal Pay Act provided for no mechanism or instrument to carry out comparison with another sector or employer, the fact that the statutory wording was unclear regarding inclusion of other sectors/employers and the fact it would be "absurd" for

employers to consider other employers' contracts, indicates that the Employment Court's broad interpretation was never Parliament's intention according to the NZACA (2013b, paras 28 to 32). At the time, the 1972 Act was enacted there was no intention to broadly interpret section 3(1)(b) especially, in light of the "financial implications" resulting from such an interpretation (New Zealand Age Care Association, 2013b, para 24). The fifth tranche in the NZACA's argument was that equal pay is not the same as pay equity and the legislation refers to equal pay only. BusinessNZ (BNZ) contended that the 1972 Act does not establish pay equity but only that there be pay parity between the genders for the same work in the same workplace (2013, paras 1.1 and 1.3) and there ought to be no recourse to other sectors or to enquiries into "current or historical or structural gender discrimination" (2013, para 1.2). BNZ urged the correct interpretation of section 3(1)(b) was to read the section as a whole, interpret discrimination only in relation to gender, and noted that "ability, experience, conditions and effort" may, however, be subject to differentials (2013, para 5.8).

The HRC dismissed the appellant's arguments concerning the terms 'equal pay' and 'pay equity', stating that these distinctions did not assist legal interpretation of the Act (2013b, paras 2.1 and 2.2). The respondent agreed with the HRC's submission.

Removal and prevention of discrimination arguments

Terranova contended the Employment Court's approach failed to address how other factors (not current or historical or structural gender discrimination) may influence differences in wage rates, it failed to provide or consider a mechanism to assess females' low wages, and it failed to address how the free labour market affects wages. The Attorney-General concurred and insisted the 1972 Act did not require consideration of what a man would be paid abstract from "historical, cultural and social value systems" (2013, para 31). Structural discrimination was irrelevant and not the purview of the 1972 Act (Attorney-General, 2013, para 5). Terranova claimed recourse to structural discrimination arguments was a departure from the plain words of the section and would also place an extremely onerous and unfair burden on any employer (2013b, paras 38 to 40). The Attorney-General referred to the 1971 Commission's recommendations which only dealt with direct discrimination, that became law, along with the proviso that a counterfactual would be required in female dominant sectors (2013, para 13). Case law establishes, it was argued, that there ought to some defence available for a discrimination allegation and in this context the defence ought to be the single source approach (Attorney-General, 2013, para 20). BNZ roundly rejected the notion of discrimination being a cause of different pay rates and proceeded on the basis that difference in pay rates was due to "merit or skill or experience of the employee and market conditions"

(Para 2.2). Equal pay and pay equity are not one and the same thing and pay equity proceeds on the basis that some work is "undervalued because of gender discrimination" a concept which is not provided for in the EPA (Business New Zealand, 2013, paras 3.2 and 3.3). However, BNZ argued the removal of discrimination based on gender has been achieved with the removal of awards among other things (2013, para 6.2) and the ERA 2000 and HRA 1993 also provide mechanisms for the eradication of discrimination (2013, para 7.1).

The respondent contended that comparison with a few males working in the aged care sector, and in this particular workplace, did not address the systemic discrimination but continued its perpetuation (Service and Food Workers Union, 2013b, para 71). The evidence for the underpayment and undervaluation of aged care workers, canvassed in the Caring Counts inquiry, is not only gendered, but "reflects historic systemic undervaluing of the role played by women" and this conclusion is supported in the Fair Work Australia's Equal Remuneration case and international literature (2013b, para 1.4).

Comparison issue

According to the respondent, the Employment Court's approach was erroneous in assuming there is a single rate of pay that "would be paid" to males and is wrong in assuming that s3(1)(b) applies to male rates in other sectors, especially given there is no mechanism in the legislation to make that comparison. The Attorney-General, they noted, agreed that the counterfactual can only be men in the same role with the same or different employer but not different roles in different sectors, that "goes too far" (2013, para 33). The NZACA agreed that interpreting 3(1)(b) as a comparison of the rates of remuneration of men in other sectors and employed by different employers was an irrelevant consideration. The Court erred in law because the words would have clearly expressed the ability to reference other sectors if that were intended (New Zealand Age Care Association, 2013b, para 11). Section 3(1)(b) only refers to the actual instrument or work in contention, the use of the singular therefore does not include comparison with other places of work or other employment contracts (New Zealand Age Care Association, 2013b, paras 12 to 19). The reference in the 1972 Act to a single site of employment is reflected by the nature of the employment agreements, being either individual contracts for each employee, or a collective agreement relating to an individual employer (New Zealand Age Care Association, 2013b, para 21). Additionally, comparison with other employers within the sector was not workable given that other employers were either entirely privately funded or entirely government funded (New Zealand Age Care Association, 2013b, paras 26 and 27), thus evidencing the practical problems of a broad interpretation. The Attorney-General supported Terranova's position; s3(1)(b) only envisaged comparison within

either the same workplace or the same role in another workplace and not a comparable predominantly male role in other industries (2013, para 4). Furthermore, the approach of comparison applied to the one employer, termed "single source" is the approach adopted in UK and European Union jurisdictions (Attorney-General, 2013, para 6.5). Comparison with others in different industries was not open to interpretation given the wording of the section (Business New Zealand, 2013, para 5.8).

International obligations

International law may assist interpretation, but only if Parliament intended legislative compliance with international obligations. The appellant argued the Employment Court's reliance on international law was erroneous in this respect. Firstly, the 1972 Act does not comply with ILO 100's "equal remuneration for work of equal value" principle (Terranova Homes & Care Ltd, 2013b, para 74), evident in the rebuke New Zealand has received from the ILO Committee of Experts (2003) for the absence of pay equity provisions in legislation. Various UN Committees have admonished New Zealand for a lack of legislative mechanisms regarding pay equity, all of which preclude the Employment Court's ability to interpret the 1972 Act as providing for pay equity. BNZ submitted the 1972 Act fulfilled "New Zealand's obligations under ILO 100" despite its submission that international conventions do not have "decision-making authority" (2013, Para 6.9). The Attorney-General contended the 1972 Act was only one means by which international obligations can be met (2013, para 6.4) and insisted that adherence to international law principles ought not to interfere overly with other parts of the industrial "regulatory system" (2013, para 25).

The HRC contested the appellant's submissions. The HRC argued, once ratified, Parliament's intention regarding international laws was irrelevant (2013b, para 4.3) and the Employment Court had rightly found New Zealand's international obligations required consistency with the concept of pay rates not being subject to gender discrimination (2013b, para 4.4). The use of international obligations to solidify the Court's approach was correct (2013b, para 4.2).

Legislative history

Terranova's submissions dealt extensively with statutory interpretation, the emphasis on the plain meaning of the words, the purpose of Parliament when enacting legislation and the overall context including factors such as "social, commercial or other objective" (2013b, para 20). In interpreting the text, regard ought to be given to the internal context, that is to say the words' meaning within the context of the section in which they appear, and external context, referring to factors relevant at the time of enactment, but only as an aid to interpretation. The

appellant argued the importance of considering subsequent legislation, namely the 1990 Act, when interpreting meaning because there ought to be consistency with the "statute book as a whole" (Terranova Homes & Care Ltd, 2013b, para 29). The 1972 Act and the 1990 Act were "laws on the same subject" (Terranova Homes & Care Ltd, 2013b, para 30) and, given Parliament had previously enacted pay equity legislation, it was obvious, therefore, that the 1972 Act did not cover pay equity. Essentially, the 1990 Act aids interpretation of s3(1)(b), and the fact that it provided mechanisms for achieving pay equity highlighted the absence of such mechanisms in the 1972 Act (Terranova Homes & Care Ltd, 2013b, paras 60(e) and 62). Recourse was made to Hansard debates where proponents of the 1990 Act argued the legislation would 'fill the gap' and achieve pay equity where the 1972 Act had failed to do so (Terranova Homes & Care Ltd, 2013b, para 64(e)). The NZACA also argued the passing into law of the 1990 Act was evidence that equal pay and pay equity are two different concepts with different legislative frameworks (New Zealand Age Care Association, 2013b, para 37). Furthermore, the existence of the 1990 Act and the amendments to the ERA in 2003 indicate Parliament never intended the 1972 Act to address systemic discrimination (Attorney-General, 2013, para 14).

The HRC disagreed with the appellant's argument that the 1990 Act ought to influence interpretation of the 1972 Act. Firstly, the parameters of the 1972 Act had never been fully canvassed and, secondly, a subsequent Parliament does not determine the meaning of previous legislation; that is the preserve of the Courts (Human Rights Commission, 2013b, para 5.2.2). The 1972 Act was intentionally enacted to establish the principles, not the mechanics of applying those principles (Human Rights Commission, 2013b, para 5.2.3) which was unchanged by the arrival and departure of the 1990 Act.

NZBORA

Terranova insisted its interpretation of s3(1)(b) aligned with section 19 of NZBORA and section 21(1) of the HRA 1993, as both seek (like s3(1)(b)) to remove and prevent sex discrimination in the workplace. NZBORA is not an affirmative action mechanism to rectify wrongs (Attorney-General, 2013, para 6.3), affirmative action is "an exception to the right to be free from discrimination" and nor is it a "rectification of prejudice" (Attorney-General, 2013, para 21.2). S19 provides no guidance for interpreting the "concept of discrimination" (Attorney-General, 2013, para 18) as set out in s3 of the 1972 Act. Furthermore, s6 of NZBORA does not allow the courts to determine and keep pace with current "community attitudes"; that is the role of Parliament (Attorney-General, 2013, para 15).

The respondents repeated their arguments in respect of s19 principles being "reasonably settled" in New Zealand case law, itemizing the same points as in the Employment Court and reiterating that section 19 confirms the right to freedom from "gender-based discrimination" (Service and Food Workers Union, 2013b, paras 64 and 135). Reinforcing the Employment Court's rejection of a narrow interpretation, an interpretation which would result in ongoing discrimination and inconsistency with section 19 rights, the respondent also criticized the appellant's contention any discrimination is justified within the meaning of section 5 of NZBORA. Further, Section 6 requires consistency with international human rights obligations (Service and Food Workers Union, 2013b, paras 73 -79). Finally, the respondent contended affirmative action was not at issue and had no relevance to the proceedings (Service and Food Workers Union, 2013b, para 67). The HRC also countered the appellant's interpretation of s 3(1)(b) as erroneous in claiming to be both consistent with s19 of NZBORA (because it would permit discrimination against women across industry) and a limit on discrimination (without providing any justification).

Workability argument

The thrust of the workability argument was that if there are several interpretations open to a court the most practical and sensible one ought to be chosen. Terranova relied upon a number of decisions where different courts had found that 'unworkable outcomes' were unlikely to have been the intention of Parliament. Terranova argued the unfeasibility of sharing sensitive wage rate information and for employers to survey wages across industry. Moreover, the ability to compare across industry is considerably more difficult currently without an award system, with few multi-employer collective agreements, with the problems inherent in disclosing personal information under the Privacy Act 1993, the fact most employees are not unionized and have an individual employment contract, the significant expense involved in finding and assessing a suitable comparator group and, finally, the reality of the funding model (the providers' reliance on the government for all funding increases) all make comparisons impractical. BNZ argued the purpose of the Act was not to compare across industries, a requirement both "onerous" and "unworkable" (2013, para 6.6), and, furthermore, the 1972 Act provides no mechanism to do so (2013, para 6.6). The radically changed industrial relations and labour market of the post-Employment Contracts Act era was a vastly different era to the context of awards under the 1972 Act and interpretation must accommodate such changes. The Interpretation Act 1999 specifically demands that legislation has application "to the circumstances as they arise" (Business New Zealand, 2013, para 6.7). This position is repeated by the Attorney-General's submissions arguing that legislation cannot be 'updated' if the extreme and extensive impacts were not "contemplated" (2013, para 6.2). The Attorney-

General also contended the onus on the individual employer to redress the undervaluation of women's work is onerous and impractical (2013, para 17). Rectifying the undervaluation of women's remuneration is not the role of employers, it is a policy matter best left to Parliament to resolve (Attorney-General, 2013, para 34). Finally, the NZACA submissions focused on the paucity of flexibility in terms of fund allocation to providers, which naturally dictates the wages paid (2013b, para 23).

In response the respondents argued that individual employers easily complied with the 1972 Act implementation period and equalised male and female rates without "calamitous consequences" (Service and Food Workers Union, 2013b, para 31). Equality has been achieved in other sectors such as with primary and secondary school teachers, and discrimination had been addressed in the aged care sector and "is neither alien nor extreme" but reflects accepted human rights principles (Service and Food Workers Union, 2013b, para 33). The respondent also submited that an employer having to rectify discrimination is but an inconvenience compared to "the human cost of continuing entrenched pockets of lifelong discrimination" (Service and Food Workers Union, 2013b, para 34). The HRC, with the respondents' concurrence, submitted funding issues have no relevance to the legal meaning of s3(1)(b) (2013b, para 3.2) and provides no defence to non-compliance (2013b, para 3.3.7). The respondent argued funding issues should be dealt with under s152 of the Social Security Act 1964, not the Employment Court (a position echoed in a Government response to an ILO Committee concern about the sector's low funding, where it noted that such claims would be dealt with in accordance with "normal collective bargaining processes" as set out in the ERA 2000). Additionally, the efficacy (or otherwise) for the employer in carrying out the comparison is not a legal issue (Human Rights Commission, 2013b, para 3.3.6). Finally, the claim of an inability to obtain information for the purpose of comparing across industries is erroneous (Human Rights Commission, 2013b, para 3.3) as this information is readily obtainable from, for example, StatsNZ. As well, assistance and guidance in regard to implementing equal pay can also be sought from the Employment Court or the Employment Relations Authority (Human Rights Commission, 2013b, para 3.3). The comparator mechanism exists to ensure equal pay is achieved.

Court of Appeal decision

The Court of Appeal was mindful of determining questions of law which would be setting the groundwork for the eventual, but as yet unheard, substantive hearing [paras 62 and 63]. The Court of Appeal did not accept the question formulated by the Employment Court and reformulated the questions of law to be determined as follows:

> [69] The question of law for determination is therefore:
>
> Were the answers given by the Employment Court to the 1st and 6th questions at [118] of its decision wrong in law?

The Employment Court's determination of the questions of law were that rates paid to males in other sectors could be compared with female rates and this was acceptable because comparison within the sector may also be affected by systemic undervaluation of female dominated sectors (questions 1 and 6).

Question One was formulated as:

> "In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:
>
> (a) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or (b) Identify the rate that her employer would pay a male employee if it employed one to perform the work?

Question Six was formulated as:

> In considering the s 3(1)(b) issue of "…the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service, performing the work under the same, or substantially similar, conditions and with the same or substantially similar, degrees of effort", is the Authority or Court entitled to have regard to what is paid to males in other industries?

The Court of Appeal ruled that the Employment Court had interpreted the 1972 Act correctly, an Act which had been "largely mute for the past 41 years" [para 95]. Interestingly, the Court roundly criticised the 1972 Act and the 1971 Commission report which preceded it for both being unclear in their wording and meaning, describing the Act as "very poorly worded" with "cumbersome" syntax and "elliptical" drafting [para 83]. The Court also concluded the 1972 Act by its wording and provision of categories, including one of a predominantly female workforce did not merely contemplate pay rates for men and women in the same work (equal pay), but was much broader [para 102].

Equal pay v pay equity – narrow or broad interpretation – under - valuation

The Court of Appeal confirmed that the 1972 Act included pay equity because the "statutory definition of equal pay is so broad" and, additionally, Parliament was aware of and concerned with the underpayment of those in female dominated industries [paras 114 and 115].

Workability argument

A further issue of contention on appeal was s 9 and whether it was workable. The Court of Appeal accepted that s9 did pose issues of "workability", but that these issues could be left with the Employment Court to deal with efficiently and fairly [172].

NZBORA

In terms of NZBORA, the Court of Appeal found that the Employment Court's interpretation was incorrect because the 1972 Act "does not itself infringe 19" [para 213] and NZBORA does not affect any reading of s3(1)(b) [para 210]. S6 is not relevant because there was no intention by Parliament during enactment to be inconsistent with any rights or freedoms [para 214].

International obligations

The Court of Appeal found that the ILO convention 100, regarding equal pay for work of equal value, was limited in its ability to aid in interpreting the 1972 Act, in direct contradiction to how the Employment Court applied Convention 100 [para 231].

Final findings

The Court of Appeal agreed with the Employment Court regarding the questions of law and also directed the Employment Court to determine the principles pursuant to s9, which would set out the framework for arguing the substantive claim.

Supreme Court and beyond

Terranova sought leave from the Supreme Court to appeal the Court of Appeal decision in respect of the interpretation of s3 and the setting of principles pursuant to s9. The Supreme Court dismissed the appeal as "premature" and determined it would not consider an appeal until the principles had been established by the Employment Court. There were no further matters determined by the Courts regarding the plaintiffs' claims under the 1972 Act because the Government intervened and the process of establishing the principles and a tripartite negotiated settlement were commenced.

The post court negotiation, setting of principles, agreed settlement and amendments to the EPA are addressed in Chapter Seven.

Chapter Five: Findings: Strategy and Legal Realities/practicalities

Participants provided a rich and comprehensive data set from which to explore the four themes established which are set out in this chapter and in Chapters Six and Seven. The four themes are depicted in the diagram below:

Figure 24

Themes and chapters

The first theme, **Strategy**, relates to the totality of the legal and campaign strategies undertaken by the Service Food Workers Union to achieve their aim, which was improvement to the working conditions and wages of low paid aged care workers. The second theme, **Legal Realities/Practicalities,** is distinct from the Strategy theme because it is less concerned with deliberate action undertaken to achieve an outcome, but rather it encompasses the reality and practicalities of how strategic litigation is possible within our legal system. It includes those factors in this case study which were not under the control of SFWU/E tū, but which are related to the Legal Opportunity Structures (LOS) resting in the legal procedure which permitted or assisted this litigation action. The third theme canvassed in Chapter Six is **Timing and Social Context**, which, while not as deliberative, sits alongside the Strategy theme, and comprises the factors which both facilitated the success of the strategic litigation and contributed to the influence on union leadership to take a pay equity case. The fourth theme concerns the **Impact and Outcomes** of the strategic litigation and how it provides a legal and campaigning precedent for future pay equity campaigns and includes an epilogue of analysis of

the two pieces of legislation triggered by the litigation (a necessary finale to this pay equity odyssey). Each of the four themes comprise a variety of sub-themes or codes which will be examined individually, together with exploration of their inter-relatedness.

The success of the strategic litigation undertaken by SFWU/E tū sits within the **Strategy Theme**. Strategic litigation is a legally focused approach, combined with other tactics, to test the law (to ascertain if the legislation is fit for purpose) and to effect a broad outcome or change. In this litigation, SFWU/E tū sought to test the Equal Pay Act (EPA) to gain a definitive answer as to whether the EPA covered pay equity and thus, hopefully, improve the working lives of an undervalued sector. The litigation was also strategic in that there were many tactics employed by SFWU/E tū outside of the actual legal arguments in court which contributed to the campaign. The background to this strategic litigation includes decades of action by feminists, unionists, and politicians to achieve pay equity and forms my second question. The influence of social movements on SFWU/E tū and how women found agency is the subject of my first research question and is addressed in the third theme, Timing and Social Context, which considers the philosophical, ideological, political, and the human rights perspective backdrop within which the litigation occurred. LOS forms the basis of the third question of my thesis and pertains to the legal procedures and processes within the New Zealand jurisdiction, which either enabled or impeded the strategic litigation. Consequently, whether these LOS will enable a precedent for future strategic litigation for pay equity is the final aspect of my third question. As well as being the third question, LOS is a thematic thread that runs through the Strategy, Legal Realities/Practicalities and Impact and Outcome theme categories as it influences and defines how the legal action succeeded and whether it will again.

Strategy theme

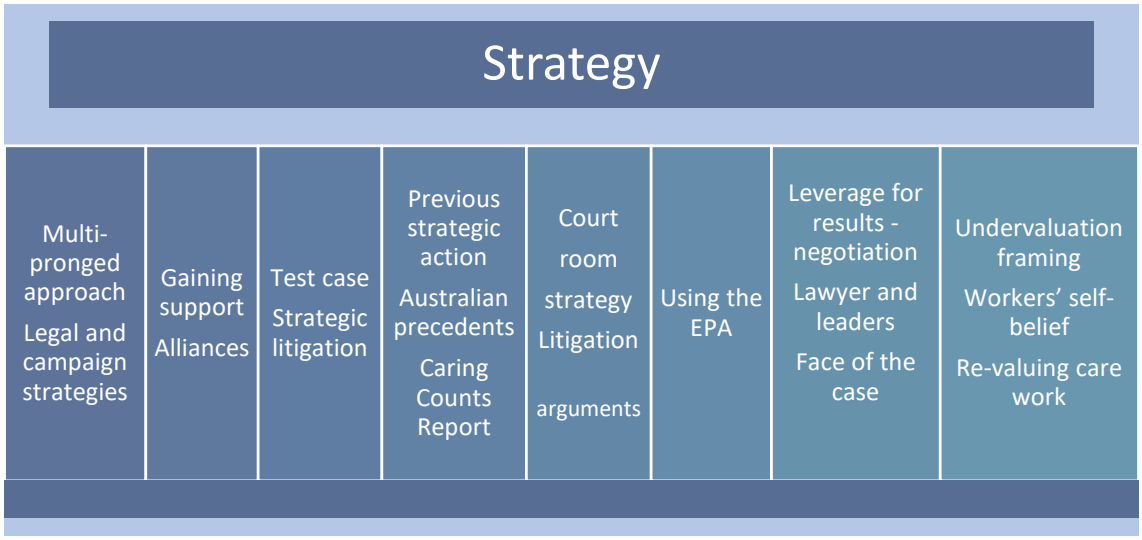
The Strategy Theme analyses the processes and tactics SFWU/E tū employed to achieve a successful outcome via strategic litigation and how the LOS enabled and assisted the strategic litigation. The lead SFWU/E tū lawyer succinctly described the litigation strategy and the employment of a variety of means to attain a positive result as a deliberate “modus operandi” (PC), honed through experience with other similar cases but also borne out of necessity, a last resort attempt. The success of the strategic litigation was a result of many factors, not only the legal strategy but also the campaigning, organizing, and educating of workers and raising awareness in the public domain. As an important aside, there is disagreement about whether the case was successful because it was not resolved in the courts, back pay was foregone, and the pay equity principles were not defined (discussed in Chapter Six, Impact and Outcomes). However, I subscribe to the view that the litigation was successful for several reasons. Many of

those involved in the action and those benefitting from it describe the litigation as a success. The aim of the litigation had been to improve the conditions and pay of the workers: The $2 billion settlement achieved significant pay increases, improved conditions, and drew attention to the importance of valuing the carers of our vulnerable elderly. It had a significant impact on political will, the Crown's hand was forced to avoid potential loss in the courts. Additionally, there was an end to the litigation; it did not continue for years without resolution. The win provided other sectors the opportunity to gain pay equity. Lastly, pay equity became an incontrovertible human right in Aotearoa.

The campaign was strategic, not opportunistic; it was not the situation that "suddenly … an opportunity popped up and they went for it" (LH2) (former union lawyer and politician). There had long been a desire to improve these workers' conditions. The strategic aspects are presented below, interwoven with the LOS.

Figure 25

Strategy theme



Strategy – Multi-pronged approach – Legal and campaign strategies

As the former SFWU/E tū Assistant National Secretary noted the union had deliberately sought to "take up the struggle" (JR) on many fronts for many years to try to alleviate the poor working conditions and rates of pay of aged care workers. These fronts of engagement included litigation in the Courts, activity in the human rights sphere, lobbying of Parliament and Ministers ("we sent a lot of aged care workers in to see all the MPs" (PC)) and the building of alliances and networks within the union movement and beyond. SFWU/E tū was cognizant that reliance on one approach, a single focused action, left little opportunity for positive results if that approach was unsuccessful. Over-reliance upon court action, to the neglect of

the campaigning, organizing, educating, and recruiting, could be detrimental, and similarly, initiating a campaign without considering the legal aspect, "was a serious error" (PC). Experience in previous union action had shown the utility of operating on more levels than just campaigning, hence the multi-pronged approach, running "a campaign alongside the legal argument" (JT)(unionist/feminist). The campaign agenda was multifaceted. There was an emphasis on the value of the work, the "quality of aged care" (LH2), on the "training, and the qualifications" (JT) rather than simply a demand for more money, and there was attention focused on the gendered aspect of the undervaluation and underpayment. Workers re-conceived their low pay as being because their "skills … are not valued properly" (CB)(unionist/feminist). They were lowly paid by virtue of their sex. The multi-pronged approach also included "education work" (CB), specifically developing "workplace leaders" (CB) to explain pay "equity concepts to others" (CB), to help workers, realize their worth and understand the legal arguments around pay equity. The valuation aspect was encapsulated in the PSA campaign slogan, "*time to care"*, which was run around the same period but slightly prior to the litigation commencing and had morphed from "*we are worth it"* (the PSA had aged care worker members and was particularly supportive of SFWU's campaign). The decades of campaigning to improve the lot of low paid women workers, combined with the instrument of litigation, became "a concerted campaign" (SD)(lawyer) and sought to link "the workers on the ground to this case" (CB). The campaign created "real momentum around the case" (CB) and equally, the campaign's result facilitated worker ownership; "this outcome was something that they could be part of" (CB).

Strategy – Gaining support – Alliances

The combination of organizing and litigating had the aim of gathering "broader support" (CB) not only within the union, the larger movement, but throughout the community generally. Raising awareness of the legal 'action' and gaining community support with, "whatever community, other groups, that are on your side" (CB) was important. Developing public cognizance of the issues, fostered public support, gaining "sympathy" (LH2) for low paid aged care workers and that "was its importance" (MW)(academic/politician/lawyer). An effective means to garner sympathy and raise awareness was the use of the "narrative of the workers" (SD) to articulate the issues, as realized in the HRC's Caring Counts Report's inquiry process and presented so ably by Kristine Bartlett (the plaintiff in the court case). The Report assisted the aged care workers "to build their confidence to articulate their rights" (LH2) and increased their voice and agency. Gaining support was further achieved by engaging with the community, building upon, and utilizing networks. As one unionist noted, networking "was always a plank of the campaign" (JT), and it was incorporated strategically, creating "allies"

with the public (CB). The garnering of support was not necessarily always deliberative and was sometimes more organic and evolving than other aspects of the strategic campaign. SFWU's network and support base was extended because the goals of pay equity and improving the lot for a lowly paid sector working in aged care was understood and supported across many areas of society. "Connecting with Grey Power and Aged Concern" (JR), who were naturally interested and invested in the aged care sector and supportive of the campaign was critical. There were "alliances and coalitions with women's organisations" (CB), "pay equity groups" (JR), several feminists' organisations, most particularly in Auckland and Wellington, other unions, and a Caring Coalition established by the HRC to specifically support the pay equity campaign. Feminists in Wellington (mostly connected to CEVEP) provided valuable assistance to the legal team and "did massive amounts of research" (PC).

The aged care workers' cause resonated with the general community, an "easily compelling case" (JB)(researcher). People could find "a point of contact" (JB) because "at some point in their lives everybody has somebody they know who is in care" (JB). Residents and their families were particularly supportive of the aged care workers, appreciating their hard work and wanting carers to be properly recompensed: "people could see more and more … what work was being done … and could see how hard a job it was and … what a difference people's work made to elderly people's lives" (CB). The community support, in turn, played a role in uplifting the workers, boosting their sense of being valued: "you so deserve it, you are so worthy of it" (Anon1) (carer) were frequent comments received in words of support to the workers over the course of the campaign.

Another significant ally of the campaign was the Human Rights Commission which had not only provided impetus for the claim with the publication of the Caring Counts Report (Douglas & Ravenswood, 2019a), but helped establish the Coalition Counts umbrella group and, importantly, became an intervener providing comprehensive and supportive legal arguments through the legal process. As one participant noted, the role of the Human Rights Commission "weighing in on the right side made a big difference" (SD). These deliberative actions to educate the public and gain support were part of the campaign and ensured "ordinary New Zealanders" (SD) understood "there was an issue" (SD) with aged care workers.

Strategy – Test case – Strategic litigation

Litigation was integral to SFWU/E tū's multi-pronged approach, an approach which truly fit the definition of strategic litigation of testing the law for a purpose and being employed alongside other non-litigation strategies. The Terranova Bartlett litigation was characteristic of strategic

litigation as “a test case for wider sector reform” (TB) (Terranova Executive). It was “happening at the same time that the organizing was going on” (CB) and was establishing a universally applicable precedent. The litigation the union embarked upon was “obviously” (SD) destined to be a test case, “a seminal case” (SD) which is why “they convened a full Employment Court bench (3 judges including the then Chief Judge)” (SD). Most participants agreed the litigation was a ‘text-book’ ‘test case’ to expose “whether the creaky Equal Pay Act” (PH) (academic) was operational before it could ever be “abandoned” (MC) (lawyer). This was a necessity ever since the Clerical Workers case in 1986 had failed to establish a right to pay equity under the law. Initially, the lead lawyer embarked on the litigation simply to test the law, to see “how far” (JR) they could go and to demonstrate the 1972 Act “doesn’t work” (PC). SFWU/E tū was “looking to select a counter-party to front” (TB), but it was never thinking the pay equity case “would ever win” (PC). Testing the law was risky because the concern was always “what sort of precedent” (JR) would a loss provide? The risk was mitigated somewhat by the choice of defendant. Terranova was a good choice, a “’Goldilocks’ defendant … neither too big to litigate against nor too small for the outcome to be irrelevant” (TB). Nonetheless, and despite the potential harm of the process, it was “a necessary thing to do” (Anon3) before it could be decided the EPA was “bloody hopeless” (JR) and other options could be taken up, such as lobbying for new legislation. As one unionist put it, in the “worst-case scenario” (CB) litigation would show the EPA “was dead in the water” (CB). Equally, some suggested, the test case scenario would be a ‘success’ either because there would finally be “a decision that you couldn’t use the legislation” (MC) or you could use it; the ‘test case’ delivering an answer to the longstanding question over the utility of the EPA. Was the EPA pertinent to claims of pay equity or was it limited to enforcing equal pay (the same pay for the same work by men and women)? Ultimately, most felt if the litigation established the EPA was not fit for purpose “then it will need to go” (JT).

Other participants argue the litigation was not a matter of choice but a pragmatic reality, a last resort, because there was a dearth of other options. Other mechanisms and tactics had failed to improve conditions for these low paid women. Legal mechanisms for bargaining had become more and more “discredited in union minds” (PC). Collective bargaining was becoming limited and ineffective because fewer and fewer people had collective agreements, “most people are on individual agreements” (PC). The lack of leverage for unions meant they could not “make the employer do anything” (PC). Equally, the legislative and labour market regime ensured it was increasingly difficult for unions “to organize workers” (PC), essentially rendering unions powerless. There had been years of trying to get some kind of “fairness for aged care workers” (LH1) (feminist/activist), but “endless attempts to negotiate different ways with the

employers and endless lobbying of government" (LH1) had been unsuccessful. Other attempts and strategies aimed at achieving pay equity had not been fruitful. Equity legislation had proved to be too difficult and vulnerable to political will and, similarly, the bureaucratic policy approach had also been vulnerable to political will. Job evaluations were viewed as too slow and, therefore, generally not favoured by unions. These factors highlighted that litigation was increasingly the only option and, therefore, "what have we got to lose" (Anon3) (feminist/activist/civil society) if we attempt to get a result that way. Some considered employing strategic litigation had been "staring us in the face" (LH1) and for that reason it was not so much strategic, but obvious. To describe the litigation as happenchance, however, denies the carefully chosen aspect of strategic litigation. It was deliberately chosen as "another forum, another front … another space to occupy" (PC), another platform, a means to apply "pressure" (CB) and, crucially, a "strategic opportunity to advance something for a large group of people" (MC). The lead lawyer, Peter Cranney, was always alive to ascertaining what "we can refer to or rely on" (PC) and saw the possibilities with the 1972 Act "to establish legal rights" (PC). The aim was always to achieve "legally enforceable rights" (PC).

Strategy – Previous strategic litigation – Australian precedents – Caring counts report

There were several significant factors that contributed to SFWU's strategy and decision to embark on strategic litigation: the success of previous strategic action, the influence of Australian precedents, and the Caring Counts Report. These previous strategic litigation cases (discussed below) saw litigants testing the law (hoping for a successful outcome) and employing specific techniques to achieve a win. Techniques included bringing the workers to the court to provide 'real' testimony on the issues of low pay facing the workers, something which transformed "the thinking of the judges a bit" (PC), educating them on the issue. Another technique was putting pressure on the funder (often the Government) to enter negotiations with the unions. It became a "pattern" (PC) of raising and winning "the legal point" (PC) before negotiating and settling with the Government. These notable cases include the LSG Sky case in which the union used litigation as a leverage to force the funder "into the room, to get the funder's attention" (JR). The 'sleepover' case (Idea Services Ltd v Dickson [2011] NZCA 14 - 16 February 2011) in the residential disability sector was a means to focus "attention on the plight of the low paid support workers in the disability sector, 75% of whom are women" (JR). The sleepover case concerned members not being paid for sleeping over while caring for their disabled clients. The workers were ultimately successful, although it went to the Supreme Court (JR). There was also a home support worker travel time case

(commenced by SFWU and the PSA and continued by the PSA). These cases were all run by Peter Cranney and their success was a motivation for and a contributing factor that compelled SFWU/E tū to use the equal pay argument to the same effect. The sleepover arguments were used again with the hope the argument might finally realize "this dream" (JR) of a win for low paid workers.

SFWU/E tū's decision to embark upon strategic litigation, was given heft and some impetus from precedent Australian cases on remuneration (Fair Work Commission), where similar low paid sectors had successfully improved working conditions and pay through litigation, based on equity and undervaluation arguments. The lead lawyer recognized the influence the Australian cases had on him was "significant" (PC) and he insightfully recognized the "potential" (LH2), seizing on the possibility of applying them in the New Zealand context. The Australian lawyer and unionist involved in these Australian cases emphatically viewed the Australian precedents as an "impetus" (LH2) for the New Zealand action. The Australian cases demonstrated the significance of the "framing" (LH2) of the problem being partly one of "historical" "gender undervaluation" (LH2) of the work, as well as providing a precedent for the formulation of "legal strategy" (LH2). Additionally, the Australian successes fuelled confidence among unions here: "if they can do it, we can do it." (JT). These precedent cases, both in New Zealand and Australia, embody LOS because they are legal stock and exemplify how analogous cases present legal opportunities which can be seized upon and utilized.

The third factor providing SFWU with an imperative to initiate action was the 2012 Human Rights Commission's report into the aged care sector in New Zealand which became "a wee bit of a trigger" (PC). The Caring Counts Report ("Report") was conducted by the Equal Employment Opportunities Commissioner, Professor Judy McGregor, who personally carried out an exposé of the industry with input from unions and other key stakeholders in the sector. The Report fulfilled a statutory requirement of the HRC to examine and investigate discrimination in New Zealand and as a "statutory document" (JR) it carried significant weight. The Report indicated that timely action was required and further signalled to SFWU/E tū's leadership it could be "a powerful launchpad" for SFWU/E tū "to do something pretty serious in this area" (JR). There became a sense of "urgency" to "file something and just see where it went" (JR) quickly before the Report's impact was lost. Although some suggest the case was not necessarily "predicated" (CB) on the Report, it was nonetheless "very important and very useful" (CB). The Report crucially assisted in raising "awareness of the role of aged care" (LH1). It generated "negative public opinion" (TB) and demonstrated the sector needed "some resolution" (LH2) to its problems which included "failures of care (often linked to inadequate wages)" (TB). Finally, the Report was an invaluable resource for the legal arguments being

made by the plaintiffs (and their supporting interveners) and “it gave credibility to the claim” (PC) by the plaintiffs. Whereas the use of precedent cases showed LOS at work, the Caring Counts Report led by a feminist activist from an institution concerned with human rights was a direct application and example of a social movement influence on SFWU/E tū leadership.

Strategy – Court room strategy – Litigation arguments

Once the strategic litigation, coupled with the campaign, had ensured the equal pay for equal work claim was brought to the courts, the next deliberative element became the strategy used within the court room. These strategic legal aspects explicated not only how and why the litigation succeeded, but also how there were integral LOS elements which assisted the litigation action. A crucial aspect of the legal arguments’ success was the decision by the plaintiffs to “sever the legal question off” (PC) and essentially separate the evidence, the fact-based case, from the questions of law. The court accepted the plaintiffs’ proposal and, thus, the preliminary hearing concerned the “applicability” (JR) and meaning of section 3(1)(b) (what is the definition of ‘equal’ pay) without any evidence being heard, and without the substantive issues being decided. The efficacy of such an approach meant that the Court was given “a pretty narrow parameter they could handle” (JR). The setting of the parameters in such a way was going to be important for “all future pay equity claims” (JR). Another significant decision taken by SFWU leadership was to expedite and simplify the process by removing back pay from the equation because they felt “the whole shebang, … including back pay … would have been too much” (JR) to deal with concurrently. This was a much more “focused approach” of arguing the principles and interpretation “before we got into Kristine’s details” (JR). The ability for the plaintiffs to ‘set the scene’ in this way demonstrated a procedural system which was flexible, exemplifying the existence of real and applicable LOS.

During the court proceedings, the issue of comparators became a particularly important concept, augmented by discussion concerning the pay the gardeners at the defendant’s facility received relative to the pay of the care workers. Although the issue of comparators, and which occupation would ultimately be used for comparison was not to be decided in the preliminary hearing, the relevancy of this counterfactual, of how much the gardening staff were paid, became extremely significant. Gardening, clearly, Counsel for an intervener argued, “is not the same sort of work” (SD) and the fact that gardeners “get paid significantly more” (SD) clearly highlights inequities. The gardener counterfactual drew the Court’s attention to the fact that “the people who are trimming the grass and pruning the roses get paid more than the people who are looking after the people” (SD). This argument resonated in the Court room and when the plaintiffs’ Counsel rhetorically asked, “that can’t be right?” (SD) the refrain was

paradoxically echoed by Counsel for the defendant. And with that the case and the inherent inequality crystallized:

> *"Everyone just went oh hang on a minute well that's clearly wrong isn't it? The only explanation for that is that men's labour is valued more than women's labour. It's historical it's systemic, it's the patriarchy, and it's just not right. That was it … a defining moment."* (Participant SD)

The effect and impact of using "tangible examples" (SD) such as the gardeners reverberated with the Court and was explicitly captured in the Employment Court judgment.

Another aspect of the court proceedings were arguments which relied on international law which had gained legitimacy due to New Zealand's ratification of key conventions related to gender discrimination in work, "reports from CEDAW, country reports" (CB) had ensured "a lot of attention on this issue in New Zealand" (CB). The legal opportunity enabled by ratification allowed the plaintiffs to make human rights focused arguments drawing upon international law, in particular CEDAW and the ILO conventions: "we did actually sort of push those international human rights things in the Employment Court and the Employment Court picked them up" (JR). Opportunities to litigate based on international conventions had not been accepted practice in New Zealand "in general we don't look for opportunities to litigate based on international conventions" (LH1), and this had certainly been apparent when the Clerical Workers took the pay equity claim. However, this time around, "the courts are more … willing to pick up that international human rights jurisdiction now than they were sort of 20 or 30 years ago" (JR). Undervaluation and gendered exploitation arguments gained credibility: "a fundamental human right. It is in CEDAW. It's in our international conventions that we have signed up to; this is a fundamental individual human right for women" (SD) able to be presented and accepted by the Court. Although one participant minimised the influence of international law, it must be noted that without the force of international law the Human Rights Commission would have been unlikely to have undertaken a statutory inquiry into the aged care sector. Similarly, the requirements and influence of CEDAW on the Ministry of Labour (and its subsequent iterations) in having to make reports against ILO 100 requirements are not unimportant. Furthermore, the political will which resulted in agreement to settle is likely to have been influenced in some measure by New Zealand's international commitments.

Strategy – Using the EPA

Despite the "orthodox" (MC) belief that the Equal Pay Act had nothing to do with pay equity SFWU/E tū leadership had persisted for some time with the idea of potentially using the Equal Pay Act "as a mechanism" (JR) to achieve "justice for workers" (JR). This was recognized by the

defendant who viewed the litigation under the 1972 Act as a deliberate means to test pay equity with themselves and the plaintiff used as "the exemplars (or strawmen) to allow the parties to run the pay equity arguments in Court to the point where the Government of the day would override the process and mandate or negotiate a funded settlement" (TB).

The real momentum for the idea then gathered pace with the Caring Counts Report (published in May 2012 with the active participation of SFWU/ E tū) into the aged care sector, described as the "genesis" (SD) of the plan which truly "alerted" (JR) SFWU/E tū to the idea the 1972 Act might be the means to a favourable end. Those outside the immediate union strategy and legal team credit Peter Cranney with having conceived of "the idea of the court case about the Equal Pay Act" because of his knowledge and experience of the "Employment Court judges or the courts in general" (Anon2) (academic), knowing they would be receptive to ideas about equal treatment. However, Peter Cranney had initial misgivings, shared by many, about section 3(1)(b) of the Act: "it was actually quite hard to comprehend" (PC) and virtually "nobody knew what it meant" (PC). The legal obstacle, the apparent absence of LOS, was not only the section's lack of (or perceived lack of) clarity, but also the simple fact that it had been ignored: "it was just put to one side" (PC) and had lain dormant for decades. No one had "examined" (LH1) the 1972 Act sufficiently and its sections were unfamiliar territory to most legal practitioners. However, this view soon gave way to "an absolute belief that the law could be applied" (LH1), that the section was 'workable' and a once unhelpful Act was becoming relevant. Peter Cranney, although not convinced of the EPA's applicability, filed the application anyway and wondered where it would go: "we weren't quite sure if it would get enough legs but at least file something away and something might just come up" (JR). Others were more confident. Steph Dyhrberg thought the application, the "pleadings and submissions" (SD) were completely "compelling, sensible and logical" (SD) and she became completely convinced of success: "I was trying to imagine losing and I couldn't" (SD). The legal wording of the statute, its perceived clarity or obfuscation, is an obvious manifestation of LOS.

The Legal Opportunity Structures for pay equity redress were, however, encapsulated in the 1972 Act's capacity to still be functional in 2012. This was an Act which had been preserved in both subsequent pieces of employment legislation: The Employment Contracts Act 1991 and the Employment Relations Act 2000. The 1972 Act had stayed the course, was legally applicable and relevant because it had remained consistent with the current employment legislation; very helpfully there was parliamentary preservation of section 3(1)(b). The preservation of the 1972 Act and the ability for it to be interpreted in a completely different industrial relations context speaks directly to the presence of enabling LOS. The different industrial relations context of the EPA enactment era included collective bargaining, the

arbitration and conciliation model, and the award system based on occupational "relativities" (Anon2) which before 1972 meant separate male and female pay scales with women paid at the lesser award rate. Although, the 1972 Act was now operating within an entirely different employment relations context, it had kept intact "a very important tool for bargaining" (JR) which became the newly discovered usefulness of the EPA.

> *"This arbitration aspect … missing from the NZ employment relations system for nearly 30 years, … still exists in the Equal Pay Act … and can lead to good outcomes for groups of women workers who generally have very little bargaining power."* Participant (JR)

The 1972 Act was able to circumvent a system that was no longer compatible with collective-bargaining, and the ensuing negotiated settlement was like a reinstatement of arbitration. While the 1972 Act was set up in the award era, it essentially "ran contrary to the award system" (PC) and, thus, in a post-award context it "actually applied better later with Bartlett than it would have done at the time" (PC). The LOS advantages were apparent, a simplification of legal process due to the concrete criteria for making comparisons "you don't have to compare with any enterprise" (MC), the simplicity because it accommodated relativities and, a simplification of the process due to a paucity of operationalizing provided in the statute. As the decision has shown, "there may be procedural problems with establishing a lack of pay" (MC) but, nonetheless, it is an "extraordinary piece of legislation in terms of its capacity to deliver" (MC). Like the international conventions, such as ILO 100, it could conflate equal pay with pay equity and thus a legal opportunity embodied in the statute's wording and its endurance was realised. The orthodox view of the EPA being unworkable was debunked through a re-interpretation of its wording, exemplifying a LOS that had always existed, and was able to be exploited. Nonetheless, contractors note the win under the 1972 Act would not have been possible with a "literal or conservative interpretation" (TB) of the statute's provisions which is a reference to the Court's role, discussed further below, and another example of a LOS advantage that was realised.

Strategy – Leverage for results - Negotiation

The leverage achieved by litigation is termed "organizing in the air" which sits alongside, traditional "organizing on the ground" (CB). Not only is leveraging "smart organizing" but it is using "every opportunity" (CB) open to unions. Leveraging to manoeuvre into a position of negotiating an outcome can greatly expedite the litigation process, which otherwise can go on "for years and years" (PC). The purpose and function of negotiation is to reach a settlement which "all parties can take some sort of win out of" (JR). The unions' goal is always for the

employer to "appear to not have spent as much as they have" and, conversely, the employer seeks to make "the union think they are spending far too much" (JR). There are many ways to achieve leverage and in this legal case a number were utilized, including following prior litigation methods, strategic legislation choices, leveraging off reports into the sector, and obtaining an across sector mandate. SFWU/E tū emulated previous successes where, with an initial court win, the union could often obtain "incredible leverage to force bargaining" (JR) and negotiation, not only with the employer, but with Government (the sector funder), and so used the same method "the same pattern as the sleepover negotiations, raised it, won the legal point, entered into discussion with the Crown, settled with the unanimous sitting of Parliament" (PC). The leverage obtained through the Terranova litigation was a perfect example of having "enough leverage over them" (JR) to ensure a 'willingness' to achieve a favourable settlement. As one of the lawyers involved in the litigation stated: "you don't get more strategic leveraged litigation than that" (SD). Initially, however, when SFWU/E tū had proposed negotiation after the Employment Court decision the Government declined, despite the potential risk to it if SFWU/E tū won further in the courts.

> *"We had a meeting involving NZCTU President Helen Kelly and the Solicitor-General over a prospective settlement. However, the Government at that point was not ready to negotiate and the employer, Terranova, was problematic as it was their case, not the Government's case (even though the Government would have been left carrying the can if the sector collapsed)".* Participant, JR

For many participants, an important leverage to forge the settlement was the "threat of the Employment Court determining it" (SD) and that is what "drove" (SD) the Government back "to the table" (SD), although this is something disputed by SFWU/E tū leadership as being a determining factor for the Government. From the outset, SFWU/E tū had searched for legislation that would facilitate "getting the District Health Boards, as funders, in a tripartite negotiation with the unions and aged residential care employers" (JR). The plaintiffs' calculated strategy paid off, given the negotiation resulted in a final settlement which was "sufficiently substantial" (PC). As well as utilizing helpful legislation, SFWU/E tū also utilized the leverage gained from the moral and legal potency of the HRC, from which they could get "leverage to move aged care residential wage rates" (JR). The mandated process was also a strategic move by SFWU/E tū and was a deliberate use of LOS because SFWU/E tū knew if any settlement was going to be enacted into law there needed to be consent from the members and non-members: "we knew a government couldn't legislate, impose something on people without some process of consultation and agreement" (JR). Therefore, SFWU/E tū required there be a mandated process to gain consent from all workers concerned which was

"universal, … every worker across the sector was covered" (JR). The mandated universal across-sector consent was significant for enabling the "negotiated settlement process" to succeed (JR).

Strategy – The lawyers and leaders

The main lawyer representing SFWU/E tū, Peter Cranney, enjoys enormous respect and admiration. Participants spoke extremely highly of him and credited him with having "enormous influence from a legal perspective" (MC). Peter Cranney's strengths include "a very good instinct" (JR) for presenting issues in a way the court could manage and would not find "too radical" (JR), and an ability to continually remind the court of "the nature of what happens in our employment relations system, and what rights people haven't got, and why they need to come to the court" (JR). Central to the litigation occurring were leaders with the vision to see "the possibility of legal remedy" (MW) and realizing (and believing in) the potential of the Equal Pay Act to be a mechanism for addressing inequity. Launching the litigation also required an "audacity" to push the legislation's "boundaries" (SD) and a boldness to think "fuck it, let's just try it, maybe it'll work now" (SD). This was matched by a belief that the pay equity argument under the EPA was "self-evident and sensible and rational" (SD) and could not be interpreted "any other way" (SD). Peter Cranney's legal mental agility meant he was a "strategic" (JT) lawyer, but also "an activist who is able to use the law to achieve … progressive social outcomes" (LH2). Coming from a union background, having been a 'worker', an organizer, a lawyer with Sandra Moran (respected Wellington lawyer known for her strong advocacy and union representation), and now a partner in the firm, Oakley Moran, Peter Cranney has been dedicated to the "fight for the rights of disempowered people who have been discriminated against" (SD). A union background has enabled Peter Cranney to understand the "dynamics of trying to organize larger groups" (JR) and to utilize his "capacity in the law" (LH2), to assist the movement and, by his own admission, remains "still sort of in the movement" (PC). Equally, strategy and policy lead for the union, John Ryall, was fundamental to the success of the strategic litigation. Heralded as a "visionary" (SD) John Ryall is "politically … committed to improving things for low paid women workers" (CB) in the sector, he has "supported women forever" (LM)(feminist/activist) and is "passionate about … workers getting their rights" (MB)(carer). Both Peter Cranney and John Ryall acknowledge the importance of focusing on the worker in strategic campaigns: "we don't promote the lawyer, the lawyer keeps well out of it, never goes in the media, we always put the worker up first" (PC). The skills, commitment and tenacity of both Peter Cranney and John Ryall are integral to why this strategic litigation was successful in the pay equity claim under the Equal Pay Act.

Their philosophical and political motivations and make up were also crucial and the decision to have Kristine Bartlett front the litigation was inspired.

Strategy – Face of the case

Kristine Bartlett was a "titular" (SD) plaintiff. She had the title and honours of a role without the responsibilities (Merriam-Webster). Bartlett fulfilled a legal role of being the claimant (and could do so procedurally because she had an individual employment contract) but was also a claimant who became "the face of the case" (JT). This "presidential style campaign" (JT) was criticized by some for detracting from it being a union action, when it ought to have been the union who was more at the forefront of the campaign. Despite the detractors, most viewed the choice of Kristine Bartlett as perfect: she was "such a brilliant front person" (MC and LH2), very "relatable" (SD), "people could see themselves in Kristine" (JT). The likeability and "authenticity" (JR) of the front person served the campaign well and won public support. She had "a quality that was pretty disarming" (JR), she was "photogenic, engaging, … warm, passionate, … like everyone's favourite spunky grandmother" (SD). Early on, an interview of Kristine Bartlett on Campbell Live (a popular primetime news and advocacy journalism show (NZ on screen, n.d) gave the campaign a boost of publicity, and earned support by shedding light on the reality of the poor conditions and pay for aged care workers. The use of a front person who was "a very experienced caregiver" (JR) was strategic and brought the focus back on the workers, reinforcing the 'reality' of the work; "the ground floor worker promoting what we do" (MB). Kristine Bartlett's clear articulation of the issues and her ability to "speak from the heart" (MB) not only assisted the campaign in the media but assisted with recruiting members and educating workers about the campaign. Strategically, it was a successful and smart move to employ the "narrative of the workers" (SD) to articulate the issues and gain public support and it was very deliberative "we wanted … an applicant who reflected the sector and was able to … engender the sort of support in the organization amongst all aged care workers" (JR). The decision to have a worker essentially present the case to the public was not only strategic for the legal case but was made possible procedurally through the employment contract (exemplifying the relevance of LOS). The publicity Bartlett created has ensured the issue became "part of our national conversation" (SD).

Strategy – Undervaluation framing - Workers' self-belief – Re-valuing care work

The Bartlett team's litigation strategy utilized compelling arguments around valuing care to support both the campaign and the legal arguments in court. Although the union leaders might not describe themselves, or be described, as feminists their approach was feminist in framing the legal questions around the low pay of women in female dominated sectors as an historical

and systemic problem of gender-based undervaluation. The campaign's framing of gender undervaluation and the revaluing of care work came about through a growing awareness of "the gendered basis of the low wages" (JR) and the need to address pay equity for the sector (JR). Firstly, there were the legal arguments framing care work as historically undervalued and a factor in sex discrimination against women workers. The low pay and poor conditions showed that care workers were "being exploited" (PC) and this exploitation was in part due to "gender-based undervaluation" (LH2). Historically, because care work was women's work and, because care facilities were often run by church organizations, there was a sense that "women working as care workers were working there as a sort of charity" (JR). The issue of low paid care workers was addressed "very deliberately" (CB) in the campaign because care work had been historically "invisible" (JR). The campaign needed to educate workers because some carers did not necessarily view their low wages as gender undervaluation:

> *"A lot of caregivers didn't really understand unless you said to them it was because it was considered women's dominated work that we got such crap wages and that we're fighting for it to be recognized in an equal role to a male role."* Participant (MB)

As one participant noted, however, was there anyone "who thought that the care workers were paid appropriately" (JB), it was not really a "dispute about undervaluation generally" (JB). Rather, it was a financial concern about "where is the money going to come from" (JB). Equally there was an appreciation by both sides in the case "without exception," (TB) of the importance and recognition of "the role of a competent caregiver" (TB). The families of residents (of aged care facilities) and the residents themselves understood "the importance of the role and the difficulty of the work" (CB) and appreciated the "wonderful" carers (PH). This was the second focus of the campaign, to raise awareness not only of the low pay in the sector but also of the importance of care work. By increasing wages, the issue of "the quality of care" (LH2) was directly addressed. Carers were leaving the sector because of the poor remuneration, "there is an absolute case to argue that higher pay was/is required to attract appropriately competent caregivers" (TB) and, fundamentally, the work's value was "demeaned by the loss of skilled workers" (LH2).

Carers, despite their sense that "we do good work..., our job isn't easy" (MB) were not always cognizant or self-valuing: "I never used to realize how much we do in a day" (Anon1). With a growing "environment of awareness around the unfairness facing people doing care work" (LH1) and an increasing awareness of the unfair conditions, the argument was distilled clearly; these care workers were doing "a really important role" (CB) but were being paid "rubbish wages" (CB) for an ever-expanding job: "it's getting hard because RNs are doing so much

bookwork and a lot of the stuff is put on us now" (Anon1)(RNs are Registered Nurses). Care work was not "recognized" (Anon1), they were "taking our compassion for granted" (Anon1) and there was a growing sense by carers that "they were undervalued, and … they needed to be valued more for the contribution they made" (MB). The campaign to raise awareness was assisted by a growing societal understanding and "empathy" (JB) and the union "did a good job of presenting it" (JB) and showing that the workers were "deserving" (PC).

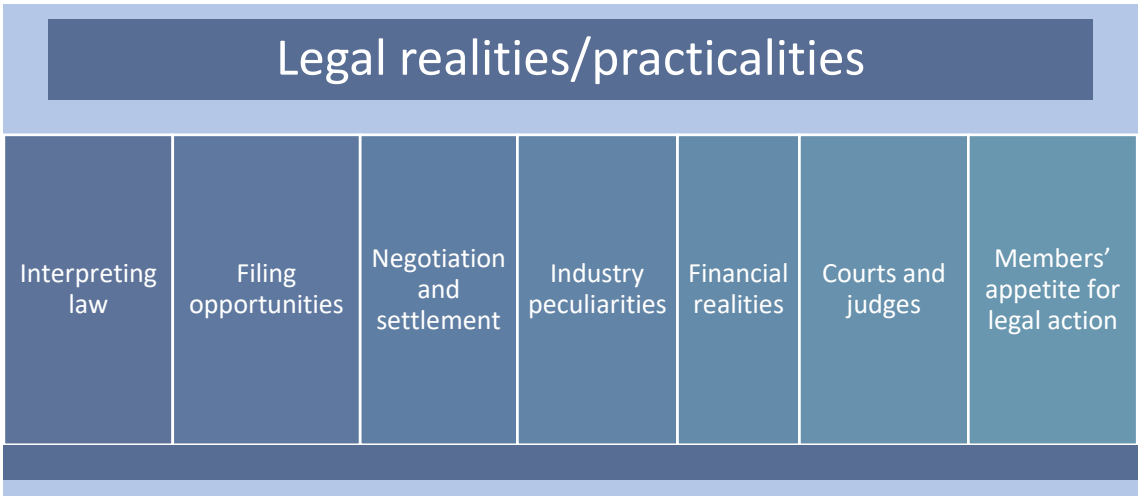
Thirdly, the campaign focused on the importance of valuing those who do the care work which, in turn, implicitly values the vulnerable in our society, such as the elderly and the disabled who are cared for by these carers. This was an idea that gained traction and resonance; to not value the carers was to not value the people being cared for. SFWU/E tū tapped into the idea that people want good quality care, valued, trained and "happy" (JT) staff looking after their loved ones and potentially (eventually) themselves. Nobody wanted their carer to be untrained and "on minimum wage" (JT).

Despite entrenched views about men being "hard-working" (PC) and women's skills not being recognized or valued, this "overwhelming prevailing ideology" (PC) began to be challenged. The "result" (PC) of the campaigning on the undervaluation of care work and of women's skills not only raised awareness of the issue but resulted in "an ideological shift" (PC) in the thinking of many. People were shifted in their thinking and became aware of the history and current reality of care work. Prior to the campaign people "didn't even know the history of the work, it didn't really exist" (PC). The litigation focus was the undervaluation of predominantly female workers, targeting "the effective exploitation of female workers" (JR) or "gender-based poverty" (JR). The re-framing of women's wages as undervaluation due to inherent sexism was a significant and successful plank to the strategic litigation.

Legal realities/practicalities theme

Figure 26

Components of Legal realities/practicalities theme



The legal realities of whether a legal case may succeed, or even be brought, is not based on how justified the plaintiffs are or how clear the injustices. A cause may be entirely deserving, the plaintiffs completely justified and the injustices clear, but those circumstances do not necessarily determine the ability to litigate (access the courts) nor the success of any potential litigation. The legal realities and practicalities of litigation are entirely different to the value of the action and LOS often dictate whether litigation can be brought and whether it will be heard. LOS include, among other factors, court procedures, access to the court, the wording and clarity of the specific legislation, and are evident in the role the judiciary play, and their receptivity to a case. Essential to this litigation, and the LOS available, was the legislation, barely tested, and considered inadequate. The clarity of its wording became an essential element in the case. Other legal realities and LOS features included the peculiarities of the industry, the 'last resort' aspect of the claim and the significance of the conclusion of the litigation through the intervention of the Government, negotiation, and resultant legislated settlement.

Legal realities/practicalities – Interpreting law

When a legal case is presented in court, both sides, in making their arguments, rely upon the interpretation of the legal provisions, seeking validation from the court that their interpretation is the correct one. As discussed in Chapter Four, the interpretation of the significant sections of the Equal Pay Act dominated the arguments submitted and the reasoning applied by the judges in the decision. The plaintiffs were seeking a 'broad' interpretation of section 3(1)(b) such that the comparison of female workers in the aged care

facility would not be limited to the male workers in their workplace but would be more broadly interpreted to include workers in comparable occupations. The defendant sought a 'narrow' interpretation of the section submitting only those within the same workplace ought to be compared. In the end the Employment Court and the Court of Appeal interpreted the Equal Pay Act broadly and "the 3(1)(b) reading that they accepted was very radical" (PC), although they could have taken a "restrictive interpretation" (SD). The decision by the Employment Court was heralded as "quite dramatic" (PC) because it interpreted the legislation, in particular the section (s3(1)(b)) regarding what would be paid to a male in the same position, acknowledged the discrimination, and gave it a more rights-based interpretation. The Employment Court decision, in accepting a broad interpretation, not only made the EPA workable in the current employment environment, but it facilitated "this wonderful new right you could achieve through bargaining … or arguably by going to court" (PC). The LOS present was demonstrated in the fact that "Parliament deliberately preserved this particular right" (PC) of equal value for equal work. To support their arguments about the interpretation of the section s3(1)(b), (rates of pay that "would be paid") the plaintiffs looked at "the origins of the Equal Pay Act here in New Zealand including differences with the Equal Pay Act in Australia and the UK at that time" (Anon2) helping to establish pay equity could be argued under the 1972 Act. The use of the Equal Pay Act in a pay equity claim was a "discovery" (Anon3), but one which had always existed in the ILO convention which "conflates pay equity and equal pay" (LH1). The legal opportunity the plaintiffs seized upon was using a seemingly redundant statute which, although it had been an "advance at the time" (MW), had ceased to be useful, "given the IC & A system … disappeared in the 90s" (MW) and re-activated it. The practicality and usefulness of the EPA had been diminished because of its lack of provisions, "operationalizing claims" (Anon2), its lack of "enforcement measures" (SD), and the lack of a proper "mechanism" (SD) to implement pay equity claims (having been enacted at a time when "everything was negotiated through unions" (Anon2). Being a creature of its time, one of collective bargaining and union negotiation, appeared to relegate the 1972 Act to historical irrelevance. However, in a remarkable 'comeback' the effective use of the 1972 Act has demonstrated how LOS factors such as the effectiveness of legal wording have been able to stand the test of time or, at the very least, amenable to a new lens of interpretation. The 1972 Act was brought back to life, it was re-interpreted from "a bygone era of arbitration and conciliation" (PC) and its dramatic return saw "New Zealand's history arising from the dead" (PC).

Legal realities/practicalities – Courts and judges

The receptivity of the judiciary to the arguments made by the plaintiffs was a specific and significant example of a LOS which the plaintiffs benefitted from. The receptivity of the Employment Court Bench to the importance of the case was exemplified in their early recognition a full bench was required. The importance and potentially wide ramifications of the litigation were understood. Chief Justice "Colgan got a hold of it and he straightaway read it, saw it, and knew it was an issue" (PC). The Courts' engagement with, and understanding of, the issues at the heart of the claim have been crucial and signal a 'sea change' in the openness of the judiciary to human rights issues. The Employment Court's decision to convene a full bench signalled not only the test case nature of the claim but also ensured that the Court sought interveners in the case to assist. "Interested parties" (SD) such as CEVEP who "had a long interest in this issue" (SD) were invited to participate in the proceedings. The interveners were able to assist the Court's understanding of the historical background of gender undervaluation, the legislative purpose of the EPA, as well as the concept of comparators and assessing and evaluating pay equity claims by means of a male comparator.

The plaintiffs understood that the judges were likely to be receptive to their claim and knew that the involvement of respected lawyers and institutions such as the HRC and the "Employers Federation" (PC) gave the case "a bit of gravitas" (PC). Counsel who has the respect of the Court ensure that the Court is inclined to hear their arguments with greater openness, for example submissions made by the HRC "carried a lot of weight because it was the Human Rights Commission, and it was (now Justice) Matthew Palmer" (SD). The receptivity or potential sympathy that the case might receive was contemplated by SFWU/ E tū and the lawyer: "There were some prospects that the Employment Court would indeed be sympathetic to the case" (JR), that they were in the "right frame" (SD). Previous sympathy by the judiciary towards and recognition of gender discrimination, the social justice aspect of low paid work, and human rights-based arguments in similar litigation "was extremely helpful" (Anon3) to knowing the Court's receptivity. Peter Cranney was cognizant it was essentially "a pro-pay equity pro-employee union bench, not in a biased way but that their minds were completely receptive to this" (SD). The defendant also acknowledged the receptivity of the judiciary to a "liberal (activist?) interpretation of the Statutes" (TB). The make-up of the bench was significant, more women members than ever before and "Christina Inglis who wrote the Employment Court judgment is a feminist and a very smart enlightened thinker. She's been very progressive as the new Chief Judge: she's a reforming, access to justice kind of judge" (SD).

The changed makeup of the bench ensured "indirect discrimination was understood better" (PH). Generally, the bench was becoming less conservative, more progressive or liberal, and there was a "more enlightened superior Courts … more women on the bench …" (SD) and the increase of women on the bench and as litigators had "wised them up a bit" (SD). The bench had changed since the Clerical Workers era but, equally, "the world's changed" too (SD), something the plaintiffs capitalized upon. Despite their apparent progressiveness, judges still want to follow precedent and need assistance from counsel to logically interpret statutes, so the judges do not feel, "they are way out there in the space … give them something which isn't drifting too far from sort of legal principles …" (JR). An important part of the litigation for the plaintiffs was to frame the issues in ways that were readily understood by the bench, allowing them to appreciate, "the nature of what happens in our employment relations system and what rights people haven't got and why they need to come to the Court" (JR). The Employment Court accepted "human rights arguments and rights-based interpretation" (MC) although the Court of Appeal did not "want a rights-based approach" because they found they could just use "literal interpretation" (SD) to establish a right to pay equity. The new "rights focused approach" (MC) had come about, in part, through the existence of the Bill of Rights Act 1990 which brought about "a quite fundamental change" (MC). Similarly, the Human Rights Act 1993 had also assisted in making the courts more prepared to adopt a human rights-based interpretation having "extended" (MW) the grounds of prohibited discrimination (MW). The plaintiffs took advantage of the LOS presented to them, a growing judicial acceptance of human rights-based arguments, a growing awareness of discrimination and the poor working conditions in the sector, and an acknowledgement of the importance of the case, all of which ensured a receptivity and interpretation favourable to the plaintiffs.

Legal realities/practicalities – Filing opportunities

The fact that the Equal Pay Act has endured through various significant legislation additions (namely the ECA 1991 and the ERA 2000) demonstrated a constancy provided in the 1972 Act. The opportunity to file under the EPA had always existed, "I think it always could have been" (PH) an option but had just not been an opportunity taken. The opportunity to file under the Equal Pay Act was possible due to several factors. Firstly, the employment agreement for Kristine Bartlett was an individual employment agreement, rather than a collective one, which made it conducive to litigation,

> *"There were possible defenses for employers who had a current collective agreement, whereas the same defence was not necessarily there if the care workers were on individual agreements. Most of the people who were*

> *involved through the union had collective agreements, but Kristine's place didn't."* (Participant JR)

Secondly this specific sector, residential aged care, had a universal contract for services which providers signed with the relevant District Health Boards, and which detailed all the requirements of the role, set out in the contract, which provided an opportunity for filing under the Equal Pay Act:

> *"Specific skills, roles, and duties … what was expected to be carried out by care workers. The same thing didn't exist in the home support sector so that was a much sort of stronger foundation for claiming that these … qualifications, skills, and qualifications … and attributes were … not just things that we thought that people … needed to have, but they were actually a requirement of the contract."* (Participant JR)

The fact that the District Health Boards' contract for services specifically set out what was required for the sector meant that the residential aged care workers were in a good position, had a "good set of facts" (JR), and a "stronger foundation for claiming" (JR) under the EPA, as opposed to other occupations, for example home support workers, where the job requirements were not specified. Thirdly, to file an application such as this (one likely to be a large test case) there must be lawyers prepared to file test cases and lawyers prepared to do this kind of work, of which a lot is done pro bono (work done without asking for payment)(Cambridge Dictionary, n.d). The lawyers involved had to be committed to their clients, to the cause, and able to sustain not being paid for some or all their work.

> *"Many hours that went into it that weren't paid … but … we were completely committed to it … our willingness to do that (a lot of it pro bono), well not a lot of people would have been prepared to do that".* (Participant SD)

Many of those involved had strong values, were "very noble people" (PC), and did "a lot of work for nothing" (PC). Despite this test case being run successfully, New Zealand does not generally have a lot of public interest litigation or a lot of class action cases such as exist in countries like America or Australia, in part because the Accident Compensation Corporation model precludes tortious remedies
(a civil wrong, or wrongful act from which injury occurs to another) (https://legal-dictionary.thefreedictionary.com/tort). Additionally, mechanisms to claim for pay discrimination via the Human Rights Act are not provided for. There is also a legal question about whether "employment is a public law power or function and so … whether it's judicially reviewable" (MC), which is "definitely a limit" (MC) on the prospect to file pay equity claims in

New Zealand. The opportunities, therefore, to run test cases and public interest litigation such as we have seen are rare and only probably possible "through unions" (MC).

Legal realities/practicalities – Financial realities

A significant aspect of litigation is the potential for considerable financial outlay. It is generally expensive to employ lawyers to represent claims in court and, furthermore, if the plaintive (the initiator of the court action) loses the case, the court may award costs to the defendant, thus incurring even more expense for the plaintiff. This specific issue is a concern in all union action, the risk of exposure to paying costs.

> *we're not so much worried about incurring legal costs we're worried about losing and then incurring legal costs because if you lose you get the other side's costs and that can break a union so it's quite risky … it can be an absolute calamity.* (Participant PC)

With Terranova SFWU/E tū was aware of the sympathy from the bench and took a gamble, expecting that, even if they lost, they would not be "stung for the costs, with that particular court, we thought that they'd say it was a test case" (PC). Another means for the union to potentially avoid expensive costs is to "find somebody who would qualify for legal aid as a way of protecting them against costs" (MC). In this instance it was not onerously expensive for the union, and they did not "have to spend a bloody fortune on it" (JR) because in an issue such as this, an important test case, "you are much more likely to find activist type lawyers who are willing to being part of making it happen" (CB). Despite this, SFWU/E tū knew that long-term litigation is not sustainable for unions because generally corporates and large companies have more money than unions to take cases: "We haven't got the resources that the employers have got" (JT) and "big corporate interests they're trying to keep unions out" (PC). Therefore, it is better to get a result with a positive settlement "fuck going to court for years and years on it, let's just get in there and get a settlement" (PC). Litigation is an uncertain process and if it becomes lengthy and drawn out the costs will inevitably increase. Peter Cranney noted that the union had to be very pragmatic, "just grab it you know and get out of it and then we'll go have another dispute about something else and that's the way we work in unions we're a high turnover" (PC). Financial costs are not always prohibitive, and litigation can be extremely positive. However, financial costs may not be the only expense in litigation. Personal and emotional costs in litigating can be draining, but this is potentially mitigated if litigation is seen within a larger context, "the emotional costs don't need to be as high" (MW). Another aspect of 'litigation reality' is the fact that there are few employment lawyers and few experienced ones as "there's not a lot of money to pay really good lawyers to litigate because the union

movement is small" (MC). Financial realities play a significant role in how LOS are available or not and can be utilized or not.

Legal realities/practicalities – Member's appetite for legal action

SFWU/E tū's members and non-member aged care workers became very supportive and committed to the legal action. SFWU leadership was aware of "an appetite there of aged care workers getting behind us" (JR), having a sense on the ground that there was a lot of dissatisfaction with conditions. During the campaign, the plaintiff, Kristine Bartlett spoke at many union meetings, articulating to many the importance of the litigation and of the aged care workers signing onto it. Part of the settlement process required members (and non-members) to sign an authority to be included in the litigation settlement deal and this was "greeted enthusiastically" (JR) as "thousands of members filled out authorization forms" (JR). Although litigation can be frustrating and very slow, people were still prepared to be "part of the case every step of the way" (JR) because, as one lawyer noted, "the members had nothing to lose, they had everything to gain" (MC). The ability to gain support and enthusiasm from the members and to recruit other workers was the strength of the litigation, it was symbiotic: The support fed the litigation and the litigation in turn gained more support.

Legal realities/practicalities – Industry peculiarities

There are number of factors that made for some unique peculiarities to the aged care industry that were relevant to the litigation. The industry had ceased to be under the public hospital system some decades ago and was outsourced to private providers. These private providers of aged care facilities continued to be funded by the government under District Health Board contracts. This meant the funding model was rigid and the providers were reliant upon the government as funders; any pay negotiation and increase were limited to increases passed on from the funder. This situation was frustrating for the defendant as it meant the preclusion of wage increases without the funding being similarly increased: "Sector funding mechanisms were not addressing the 'obviously' inadequate wage structure in the sector" (TB). Another peculiarity was that the aged care union members were split between SFWU/E tū and NZNO which each had around "3000 workers" (JR) who were predominantly older and almost all ("92%") (JR) female. Another peculiarity was the fact that both the defendants and the plaintiffs wanted better conditions and more training which would assist the defendants to reduce employee turnover and increase worker retention and, for the plaintiffs, it meant better working conditions, "a very useful strategic alignment between what the business needed" (JB) and what workers required. Historically, industrial action was difficult, firstly because there were so many different employers which made it "impossible to figure out how

to get a breakthrough and how to actually, even if you had … trying to actually then get that accepted more widely" (CB). The possibility of industrial action to achieve sector wide reform was "pretty hard to envisage" (CB) because there were a number of other factors that made it difficult "the industrial setting (namely the difficulty in bargaining collectively, … the turnover of staff (a rate of 26% p.a.) …, the funding model and the workers' reluctance to … take industrial action) before the residents' needs" (JR) and this was why, therefore, the litigation was so necessary.

Legal realities/practicalities – Negotiation and settlement

With the refusal by the Supreme Court to hear the defendant's (Terranova) appeal, the next step in the process was to have the matter returned to the Employment Court for a substantive hearing on the facts and to have the principles of the Equal Pay Act established,

> *the court was two things to do, one was to set the principles, and then you see those principles could be appealed, and then once we had finished with the appeals about the principles, we would have to go back to Kristine and say now that we have got the principles established, now we can hear your case.* (Participant JR)

Essentially, the Court was going to be stepping in, defining the section, and then setting the remuneration terms. The Government, being the funder of the sector, did not want the Court setting the terms and SFWU/E tū was also less inclined for the Employment Court to set the rate of remuneration. Essentially, it was mutually beneficial, "a win-win" (JR), for both sides to negotiate a resolution to the matter with the legal case having forced the settlement to occur. SFWU/E tū knew the Government of the day was keen to negotiate a settlement, "we knew fundamentally that there was political support" (JR) and without being "under duress" (PC) because the government wanted "to deal with a sector that needed attention" (PC). Peter Cranney was adamant that there was no compulsion, they were not "dragged kicking and screaming" (PC). Rather, the "National Government entered into negotiation because it wanted to resolve this issue … and in fact it could have drawn out the litigation" (PC). The negotiations worked well and in good faith, "they didn't muck us around" (PC), and the negotiation process led to a settlement which was embodied in a statute that was passed unanimously in Parliament. The achievement of the settlement was a combination of several factors: a mutual desire by the Government and the unions to reach agreement, the imperative for problems (and future ones) within the sector to be resolved, and the desire by both parties to avoid further court action. Growing problems in the industry, including high turnover of staff, recruitment problems and the obvious looming ageing population bulge, had the Government's attention. It was acutely aware of needing to future proof the sector, "doing

something about the future of a sector which is going to grow" (JR). The Government wanted to avoid the matter being determined by the courts, realizing the result may not be in their favour: "It frightened the hell out of them" (JB). Continuing litigation had the potential to leave the Government in a worse position, a fear shared by the unions,

> *"There is a risk for the funder and for the provider that it will go much further and if they allow the courts to set the terms of the settlement it may be worse and more restrictive for their business than they would get with a negotiated settlement. This is the same risk for the union and its members as well."* (Participant JR)

The threat of court action and the Court determining the result mobilised the Government who "was scared stiff of what the courts might do" (PC) and forced the negotiation, because "having the threat of the Employment Court determining it hanging over them is absolutely what drove them back drove them to the table, there is no way it wasn't" (SD). It was not solely the Government who saw negotiation as a favourable option. The unions were, "quite happy to bypass the courts ... and end up with a negotiated settlement" (PC).

The reality and significance of the settlement has meant collective bargaining was legislated for, the settlement was captured in a statute, the settlement was time bound, back pay was sacrificed, and pay equity was recognized. Reaching a universal agreement on pay rates across an industry and providing for that in legislation was hugely significant and "very radical because here we've got a national … collective agreement legislated, and by a unanimous Parliament, setting a minimum wage for an entire industry over and above the national minimum wage" (PC). A key driver for the union was to obtain a universal settlement which would "cover the whole of the aged care residential industry," (JR) and so the union agreed to represent members and non-members: "It was very clear to everybody that if this won there were like thousands of other workers effectively signed on for this case, indicating that they wanted the same issues dealt with" (CB). The universality of the settlement was important because it allowed for a hoped-for minimum wage which had to be across the industry and not just for union members. It needed to be legally applicable, "you couldn't actually establish a minimum right to a certain minimum wage if, in fact, it was just dependent on the fact that you belonged to a union" (JR). Secondly, if it were going to be legislated for, there needed to be consent and agreement by workers, "a government couldn't legislate … impose something … without some process of consultation and agreement" (JR), so the union "agreed to represent everyone whether they were union members or not" (JR) to ensure that the settlement was across industry and able to be put into law.

The sacrificing of back pay in the negotiation and eventual settlement was an exercise in expedience and pragmatism: “If you’ve got … 90,000 past workers entitled to back pay for six years then you’re not going get any settlement, you know you’re just going end up in a big court case” (PC). This was an aspect of the settlement process criticized by some who were not engaged in the negotiations: “The unions just then settled … without authority from the individual women to settle” (MC) but SFWU/ E tū believed the sacrifice of no back pay “was worth it” (PC). This issue will be further discussed below in criticisms of the case (Chapter Seven).

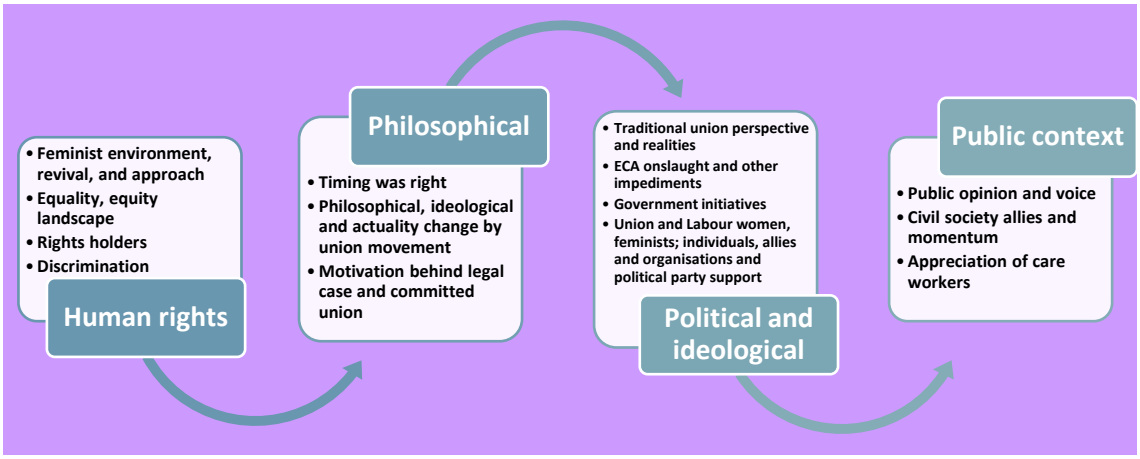
Essential to the settlement was that the concept of pay equity remained central: “This needs to be treated as a … settlement of historical gender discrimination” (JR). John Ryall believed a pay equity settlement was not only good for the members, but it was something acknowledged and appreciated by the Government: “Negotiating an historical pay equity settlement was going to largely mean that we arrived at something which was satisfying to our members as well as satisfying to the government” (JR). However, it is noted that this was not a definitive settlement for all time. It was social justice progress, but it was not the ultimate resolution of the problem (JR).

The settlement was a very strategic and useful alignment of business and unions both needing redress in the sector to combat constant turnover and the difficulty in recruiting caused by the low pay and poor conditions in the sector. It aligned with public opinion, too, because the settlement addressed public expectations of how a government should respond to the aged care issue. The settlement signalled a win all-round. The Government included home support and disability support, although not mental health as proposed by the unions. Despite the positive view by many of the Government’s actions in settling this claim, the Government had intervened at the Court of Appeal in support of the defendant and supported a “restrictive interpretation” (SD) against the pay equity claimants, which was decried as “political, clearly political” (SD) and “absolutely disgraceful … “absolutely unconscionable” (SD).

Chapter Six: Findings: Timing and Social Context

Figure 27

Timing and Social Context theme



SFWU's deliberative employment of strategic litigation melded a 'focused union-organizing-support-building' campaign with the legal strategy, and this strategy sat within a broader context. The greater context which made the strategic litigation possible included many different 'environmental' factors over many decades. These factors are the philosophical, ideological, political perspectives and beliefs, the public context, and a growing human rights awareness which influenced the litigation and the campaign, but also included factors that impeded a pay equity 'win' earlier. If the litigation and campaign strategy can be described as a confluence of factors which converged at an opportune time, then the philosophical, political, ideological, public context, and human rights environmental factors were the ideal conditions which facilitated the strategic features coming together to create the pay equity success.

Human Rights – Feminist environment, revival and, approach – Equality, equity landscape – Philosophical – Timing was right

In discussing the broader context in which the strategic litigation occurred it is important to consider the equality and equity landscape from which this strategic campaign emerged. Describing the equality landscape sets the background, establishes the context, and provides a further understanding of why this strategic campaign came about and how social movements influenced the case.

At the time of its enactment there was a belief that the Equal Pay Act would solve inequality. Following recommendations of the Equal pay in New Zealand: Report of the Commission of Enquiry (1971), the Act established a transition period "from 72 to 77" (PH), within which

equal pay would be attained. With the enactment “everybody breathed a sigh of relief and said, ‘we’ve got the Act, everything is alright’” (PH). In the decades following, however, pay equity became a less popular concept and the focus shifted away from pay equity to equal opportunity. There was little consideration of the significance of the segregated labour market and of female dominated sectors being less well paid. The strong feminist movement of the 1970s had become less visible and there was a general retraction of progressive social movements from the 1980s and a “backlash against feminism … a backlash from male groups” (PH). Many participants agreed there was a common perception that “calling yourself a feminist was branding yourself as something unmentionable” (SD) and there was a strong theme (promulgated in the media as well) that equality had been achieved so “don’t be a dinosaur it’s all sorted, let it go, move on” (LM). A participant active in feminist organizations described a sense of isolation being a feminist during this period. Neoliberalism, as will be discussed below, took hold in the 1980s, and inequality was perceived as something the market would solve, and legislation such as the Equal Pay Act was an unnecessary intervention in the labour market. There was little government interest in gender and equity issues which were also not prioritized by the unions, “political will wasn’t there, in and out of the union movement” (SD). The gender pay gap continued to be large with the true disparity, when disaggregated on ethnicity, being quite profound. There was a definite need for policy and legislation changes to progress pay equality, yet collective bargaining remained the only option and a weak lever at that. The decision in the Clerical case appeared to signal the ineffectiveness of the Equal Pay Act, and “the government’s view was the Act was dead” (MC). With the seeming finality of the Clerical case, proponents of pay equity turned to the Government to legislate for better legislation on pay equity: “We need a Pay Equity Act” and, thus, “the pressure was on for Labour to actually … address, and deliver on legislation” (CB), because we finally had this “political opportunity” (Anon2). The union movement, however, was not necessarily a pay equity ally and the CTU had been slow to provide its support to the new legislation: “It was only at the very last minute that, when it became clear that the Labour Government were going to introduce legislation, that the CTU got in behind it” (MC). In 1990, the Labour Government, with Helen Clark as the Minister of Labour, and at the behest of many feminists and Labour and union women, introduced the Employment Equity Bill (which became the 1990 Act). This new statute was going to be “a better way forward” (Anon2) and it would ensure the needed domestic compliance with “ILO 111 on equal employment opportunity as well as ILO 100 on equal remuneration, including equal pay for work of equal value” (Anon2). This specific pay equity legislation illustrated there were “better political opportunities than going back to court” (Anon2) and this legislation would provide clarity, “mechanisms for making the claims” (Anon2) with a designated decision-making body, a

commission, and “EEO requirements for private sector employers” (Anon2). There were criticisms of the 1990 Act. It perhaps “wasn’t the most wonderful piece of legislation in the world” (Anon2). Nonetheless, it briefly became law only to be repealed by the incoming National Government in one of its first legislative actions as the Executive. The National Government viewed the EEA as “quite a threatening sort of thing, that it was going to open the floodgates” (CB). In the subsequent nine years under a National Government, women active in the Labour Party continued to promote pay equality: “It was a big issue, and it was being pushed really hard and a lot” (CB). Similarly, other political parties such as the Alliance Party and the Green Party had included pay equity in their policy and on their election platforms, which meant the issue, “as a policy, … it was around” (Anon2). In 1999 the Labour Party was returned to government and adopted a policy approach, rather than a legislative one, to achieve pay equity, burnt by how tenuous enacting legislation had proven to be: “Margaret Wilson who was Minister of Labour … didn’t want to do legislation again because it could be repealed” (Anon2). The Alliance Party, as coalition partner, helped “resuscitate” pay equity policy (LH1) and Minister of Women’s Affairs, Alliance leader Laila Harré, “initiated a discussion paper … about pay equity to sort of kick off the policy process again and the public debate” (LH1). Approaching pay equity as a “policy parameter … rather than a legal one” (LH2) reflected a “bureaucratic feminist approach … to gender equality type matters” (LH2) and reflected a belief “that the Equal Pay Act was not fit for purpose for pay equity” (LH1). The establishment of the Pay and Employment Equity Unit (PEEU) in 2004 within the Department of Labour was “an alternative to black letter law” (CB). Its establishment occurred at the same time as a proposal to repeal the Equal Pay Act (with the Labour Relations Reform Bill) because it was deemed insufficient to resolve pay inequity. “The fact that Margaret Wilson was prepared to repeal it in 2004 is a real indication of just how anachronistic and un-useful it appeared to be to women in New Zealand at that time” (Anon3). If the proposed Labour Relations Reform Bill had been passed it would have repealed the Equal Pay Act, moving the “equal pay section into the Labour Relations” legislation and “then there would be no possibility of … pay equity claims” (Anon2). However, pay equity proponents fought to keep the repeal from happening, believing “the Equal Pay Act was better than nothing, … and that we should not abandon it until there had been a case to test it” (MC). Thus, the Equal Pay Act was saved, and the Unit went on to carry out many reviews and evaluations for pay equity assessments. However, the PEEU never realized any pay increases for female dominated sectors and was criticized for the absence of an inbuilt time frame for action. The PEEU, nonetheless, did valuable work: “The foundations that we’re utilizing now … is … coming back and the tools that were created at that time are being you know re-looked at and definitely some of the work that they did” (LH2) is useful. However, policy, like legislation, was not

immune to being “overturned” (Anon2) either and in 2009 after approximately four years of operation the National Government disbanded the PEEU, demonstrably absolving themselves of political responsibility for the gender pay gap. Once again, pay equity was subject to political will; a “political football” (Anon2) between the two major parties.

The end of the Unit ushered in a period of inactivity. As a CEVEP member noted, there were no “political opportunities” (Anon2) and CEVEP became relatively quiet: “I think a little bit died inside some people then, because that was such a positive thing and, it would have been so useful to people” (SD). Although these initiatives, both legislative and policy-based, did not result in the realization of pay equity, they did ensure that the concept remained within the political discourse, providing awareness, and, it can be argued, a conducive environment for strategic litigation on pay equity to succeed when it later, eventually, did.

Alongside these setbacks the union movement, much reduced under enterprise-only bargaining, was becoming (relatively) more female dominated, and Helen Kelly, head of the CTU, and previously “not interested in pay equity” (Anon2) became more “receptive to pay equity” (Anon2). Additionally, a feminist activist credits several broader issues with re-igniting a feminist voice and the movement in general in the ‘teen 2000s’, including general shock and outrage at the Roast Busters case (teenage boys boasting on social media about their sexual activity with underage and drunk girls) (Leask, 2019) which rose to notoriety in 2013 and the growing awareness of #metoo (social activist Tarana Burke’s campaign against sexual harassment of women of colour) (Maryville University, n.d). Movements such as #metoo became a rallying point and encouraged a feminist revival, but also there was a growing “momentum” due to having “more women … in more influential positions, … a weight of numbers thing” (Anon3) in society generally.

Equally, there was a rejuvenation of a framework for “a feminist approach to policy in the community” (MW). This was coupled with “the general clamour that was being created around pay equity” (CB). For example, the PSA was specifically engaging in educating around equal pay, and the PSA’s commitment to the issue saw the appointment of a dedicated equal pay officer to raise “the awareness of equal pay” (JT) amongst members. The SFWU lead lawyer acknowledged a growing awareness of gendered undervaluation and discrimination: “I think we have increasingly become … if you like, feminist, in terms of how we approach the industrial questions … we have increasingly seen the exploitation of workers as having a distinctly gender aspect” (PC). Attitudes had changed and arguments common in the preceding decades, that women chose these ‘low paid’ occupations, had lost “traction” (MC).

It was from within this context that the Terranova litigation emerged. A forward and backward stepping process for achieving pay equality had seen legislation and policy proven ineffective. However, now there was a growing female dominated union movement, and attitudes were changing. Timing was viewed as a crucial element of the success of this litigation. This case simply could not have occurred at any other time: "If that case had been brought 10 years earlier" (MC) it may not have "succeeded" (MC), however, "it's time had come" (JB). There was a sense among many that certain crucial factors came together at this time, to ensure its success: "The unions were able to negotiate the community support for what was happening" (MW), a sense of the growing inequality, "household incomes are lower than they should be, a person's income is lower than it should be" (CB), and a perception the time was ripe. But not only was it necessary that the "stars had to be aligned" (SD), it was also "smart" (SD), and "well resourced" (SD) and there was a readiness and receptivity of the Courts to consider systemic discrimination and gender undervaluation.

Political and ideological – Traditional union perspective and realities

There are aspects to traditional union perspectives, the practice of unions in both the litigation sphere and in terms of advocacy for women workers, the understanding and acceptance of pay equity, and feminist approaches to union action, as well as resource practicalities, all of which have influenced why a union pay equity case had not been attempted successfully until this time.

Traditional union perspectives had at times impeded the ability of a pay equity case to succeed, for a variety of reasons, including a preference not to litigate, a mentality which has been criticized as unsupportive of women, the accepting of stereotypical roles, and an issue of resources.

Oftentimes litigation had been viewed in the union movement as both unhelpful, but also an anathema, to unions seeking to bargain collectively, negotiate, and resolve issues outside of court. Strategic litigation was simply not "part of the raison d'être of unions" (MC), unions have preferred "collective bargaining which is their stock and trade" (PH). Notably, unions have eschewed job evaluation assessments as a mechanism to improve wages being, "pretty scared about job evaluation … and detailed evaluation comparators" (PH). Practical resource factors and financial issues have also impeded the use of litigation for unions. "Unions are not what they were, they haven't got any money you know" (JB), and as one lawyer noted, "lawyers that have worked for unions have tended to be inexperienced" (MC), there is never the money to "pay really good lawyers to litigate" (MC).

In the union movement in New Zealand there was a preference “to settle things industrially” (MC) coupled sometimes with a suspicion of lawyers and “legal processes” (MC), and unions were “a bit suspicious about courts and even about Parliament” (PC). The courts were not seen as being “useful” (PC) and were perceived to be “a nuisance” (PC) and “anti-worker” (PC). Militant unionists had traditionally viewed the “fight” (JR) as being in the workplace or the “streets” (JR) and the only legitimate means to ‘win’ because the judiciary were “all rich people” (JR) and politicians were “sell-outs” (JR) which closed off court and lobbying as legitimate avenues. There was always a risk that litigation might not be fruitful and “union leaders don’t want to stick their necks out with things that are going to be unsuccessful” (PH). This prevailing view, though, is countered by the belief of some participants that litigation had been accepted as part of the movement’s “tool kit” (LH1) and lawyers have been “esteemed” (LH1) for their contribution. The claim that unions have been “frightened” to litigate or that court action was “unclean” (LH1) cannot be an explanation for the ‘delay’ in this pay equity litigation (LH1). Nevertheless, many participants expressed surprise that the unions “took so long” to move to litigating, “that they didn’t use the law” (MW) earlier was remarkable.

A perception shared by many participants was that unions had traditionally not supported women and in fact “male dominated unions” (SD) had been “wilfully unhelpful to the cause” (SD), did not act “in the best interests” (PH) of women, preferring to be “there for the brothers” (SD) rather than their female counterparts. The implicit and explicit “sexism” (LH1) and “male environment” (LM) within the union movement played out in the celebration “of militancy of drivers and store men” (LH1). Traditional views about the role of men and women permeated unions as much as any other aspect of society. There was a strong belief (and it was established within the relativities framework) that men were the ‘breadwinners’ while women were in the ‘home’. This very gendered stereotyping existed in society and was reflected by the labour market regulations, legislation, and supported by the male dominated union movement. “Women weren’t expected and weren’t entitled to be paid that sort of money because they were not the ones who provided for the family, it was a such a deeply entrenched idea” (Anon3). Thus, pay equity was relegated to a “peripheral” (LH2), “a nice add on” to other more ‘important’ rights such as increasing wages and improving conditions for ‘breadwinners’.

Political and ideological – ECA onslaught and other impediments

While the political and ideological landscape in 2012 (when the case commenced) contributed to the case’s victory, political and ideological factors had also impeded previous prospects of successful strategic litigation on pay equity. The New Zealand political and ideological

landscape had for some decades prior to 2012 impeded the progress of workers' rights and feminist human rights objectives. A major barrier to the realisation of improved working conditions, and the incorporation of human rights and feminist perspectives to employment law generally, was the advent of the Employment Contracts Act 1991 which drastically changed the labour market and the political ideological backdrop with significant effect. Other obstacles to attaining pay equity included the Clerical Workers Case in 1986, and an almost universal dismissal of the EPA as irrelevant and useless.

The ECA "really significantly transformed the country" (PC) and "changed everything forever" (SD). With the enactment of the Employment Contracts Act 1991, union power, and the ability to bargain collectively, was effectively removed as was "the premise of arbitration and conciliation" (JR) and "compulsory unionism" (Anon2) which had "worked for women" (Anon2). Union membership numbers dropped substantially, "we were basically crushed" (PC), the movement was "decimated" (JT), quite simply unions "were struggling for their lives" (LM). This survival mode ensured unions were only capable of "holding on [for] grim death" (Anon3), "protecting what they had" (LH2), and "trying to maintain collectivism in the face of a massive onslaught" (CB). Any plans to advance new avenues, such as testing the Equal Pay Act, were thwarted because "the unions were up to their necks in it" (MW). The collective nature of organizing within the labour movement was seriously challenged with the new ideology of a "heavily individualized" (SD) workforce which "changed the grundnorm of collective" (SD). The ability to bargain collectively was negated, became "next to useless" (JR) because the union was forced to bargain "employer by employer" (JR) around the 'funding' and whether it got "passed on" (JR) or not.

While collective bargaining was seriously compromised so, too, was unions' ability to recruit and represent members. The Employment Contracts Act "wiped out everybody's ability to organize" (Anon2) and "recruit members" (JR). Unions had lost their power and were no longer "on the ascendancy in any area, in any issue" (PC). The changed labour relations framework dramatically undermined "bargaining power" and had a particularly negative effect for caregivers with the complete "destruction of employment rights for rest home workers" (JR). Advancement for women was also curtailed because, with the demolishing of the award system by the Employment Contracts Act, the Equal Pay Act appeared to be "unworkable" (JT) and there were certainly no union resources available for "women's officers anymore" (Anon3).

The other notable impediment to the realization of a pay equity claim was the Clerical Workers Case in 1986 which was the only other pay equity litigation ever pursued under the Equal Pay

Act 1972. Procedurally, the Clerical Workers' case was an anomaly legally because the witnesses essentially became the advocates and the advocate, not a lawyer, presented evidence. The Arbitration Court delivered a short judgment denying jurisdiction because the implementation period from 1973 until 1977 had ended and thus equal pay was no longer an 'issue' to be resolved. The refusal to hear the claim was extremely "final" (Anon3) and "pretty kind of damning" (Anon3). As a result, most believed the Equal Pay Act was redundant and the case consequently became "an enormous obstacle" (Anon3) to pursuing pay equity. As one academic rhetorically asked, "that doesn't really encourage one to go on, does it?" (Anon3). The ruling and the subsequent interpretation within the union movement meant that the Equal Pay Act was viewed as a "dead letter" (SD). Many felt that it was pointless, an exercise in futility, "unions didn't have the courage" (PH) and accepted that there was "no jurisdiction" (SD) for the court to hear pay equity claims, and so "people got on with other things" (SD). It was certainly a missed opportunity by the union, and it probably ought to have been appealed and "some proper legal advice" sought (MW). The reasons for the case not being appealed, for not pursuing "a legal remedy" (MW) were a combination of historical reasons: "a hangover … of the IC & A system" (MW) and a 'cultural' reluctance to litigate and political hope for new legislation. The obstacle the Clerical Workers' case embodied made sure it was a long time before the orthodox view (that pay equity was not possible under the Equal Pay Act) was challenged. It took a union to have the will to make pay equity a priority and "unions that were prepared to take a risk" (MW).

The significance of the failure of the Clerical Workers' case cannot be underestimated in terms of its prolonged and negative effect on both the psyche and the action of proponents of pay equity. It spelled the start and end of any litigation on pay equity for a long time, ensuring the 1972 Act was effectively dormant for a quarter of a century, and it brought disillusionment with the 1972 Act: "the Equal Pay Act was not fit for purpose for pay equity" (LH1). Its irrelevance for pay equity claims was extended to equal pay claims,

> *"Nobody could ever prove that there was disparity; there was secrecy about pay. Employers would always come up with some good justification for why a woman was paid less than a man and so we basically didn't use the Equal Pay Act."* (Participant SD)

The Act was seen as an ineffective piece of legislation, by many "across pay equity circles" (LH1) and unhelpful as a mechanism to achieve pay equity, "that road is not worth travelling really, it was tested, it was not deemed possible" (CB) and lawyers were equally dismissive, "we grew up just ignoring it pretty much" (SD). The Equal Pay Act was considered to have "nothing to do with pay equity" (Anon3) because "the court shut the door on us" (SD).

Similarly, unionists had "written off" (JR) the EPA, seeing it as something "clunky" (JR) and irrelevant which pertained to the "old award system" (JR) and, consequently, "did not deliver equal pay for work of equal value" (JR). The belief that the EPA could not achieve pay equity was strongly held and became the "conventional wisdom" (LH1), "a mantra everybody just believed" (Anon3). Bewilderment and genuine embarrassment were expressed that this "myth" (LH1) had been so widely accepted: "it still baffles me why we adopted this belief that the Equal Pay Act couldn't be an effective tool for pay equity" (LH1) because really it was a "failure of the litigation" (LH1) not the law.

In pay equity circles there continues to be divergence about whether the EPA legislation is good or bad. Some claim the Equal Pay Act and regime are "very substandard" (LH2), yet others extol its virtues: "Ironically it is probably the best legislation that exists throughout the world" (MC) because it was not the legislation at fault: "it was the mindset of the unions and the court particularly the Arbitration Court" (SD) which terminated its relevancy and, although not "beautiful" (SD), there is nothing inherently "wrong" (SD) with the 1972 Act. The consequence of the EPA being dismissed as a mechanism for achieving pay equity meant that it languished on the Statute Book, and few turned their minds to the "possibility" (LH1) of using it. SFWU's lawyer, Peter Cranney, was initially reluctant to attempt to explore using the Equal Pay Act, but then, when studying it in more detail, realized that the possibilities of the 1972 Act had not been examined adequately: "no one ever really read it properly" although "no one likes to admit that, but that's the truth, no one read the section properly" (PC). There was LOS in existence implicit and explicit in the EPA just waiting to be activated.

Political and ideological – Philosophical, ideological and actuality change by union movement

The changed political and labour market environment of the 1990s forced the unions to rethink not only their approaches, but also their whole philosophy towards collective bargaining, a previous "preference to organize and take collective action over litigation" (LH1). Unions re-thought their philosophy "about using the courts" (PC) because "there was nothing else, we could do" (PC) and, within the new political and legislative landscape, sought "alternative means to improve the wages and conditions of aged care workers" (JR). The unions realized that using the courts had to be "part of a larger strategy and within a larger context" (MW). This philosophical ideological shift was also dictated by the "unreceptive political climate" where "the legislature was controlled by a very right- wing National Government" (PC) which had on occasion legislated "against Court decisions favouring improvements to worker conditions" (JR). The Sleepover Wages (Settlement) Act 2011 was

enacted in direct response to union litigation in Idea Services Ltd v Dickson [2011] NZCA 14 which won increased wages and improved conditions for disability care workers.

The changed labour relations context brought in by the Employment Contracts Act heralded a significant ideological turning point, not only for the labour market but also for the economy. The ideology and ethos of neoliberalism came to dominate (and many argue still does) economic theory, policy, and politics. Employment was transformed from a "collective" (MW) to an "individual issue … a contractual approach" (MW) and there was a focus on market "flexibility" (MW) and "wage fixing" (MW) in a move away from the "rigidity" (MW) of "relativities" (MW). Politically and economically through the 1990s the National government "pursued a low wage economy approach" (MW) dictated by neoliberal ideology which had been ushered in by the Labour Government of 1984 and 1987 and its neoliberal economic approach coined 'Rogernomics' after the Finance Minister Sir Roger Douglas. Labour had traditionally been a "pro-union party" (PH), but by "dismantling the labour market protection" they ensured "they weren't while Rogernomics was underway" (PH). Neoliberal ideology includes concepts revolving around the individual, individual responsibility, and choice as the way to organize and engage in the labour market and in society in general, and it is fundamentally "against the free market to have organized labour" (PC). The arrival of neoliberalism meant there was a shift from the importance of pay equality to a perception that Equal Employment Opportunities were all important, which involved "looking at quotas or targets or trying to get more senior women in boards … thinking that would solve some of the problem" (DC) (Chaired PE Taskforce), although it did little in "changing anything" (MW). Pay equality was a cost to employers which the country could not afford, "but women apparently" (Anon2) could.

Human rights – Rights holders – Discrimination

A pay equity claim is fundamentally an issue of human rights and essential to the human rights analysis is whether those taking the 'action' perceive themselves to be right holders whose rights need to be upheld or not. The framing of the situation for aged care workers as a human rights "consideration" (LH2) had been unequivocally established by Professor Judy McGregor in the Caring Counts Report. The Report was important in framing the care workers as "right holders" (LH2) which allowed women to see the value of their work, but it also "created a sense of anger and recognition that they were being unjustly treated" (CB). The framing of the issue as gender undervaluation was readily understood. "It didn't take much to convince" (PC) women workers that their discriminatory treatment "was gender related" (PC) because "they lived the fact, … they knew that the work they were doing was really hard work and really

important work. But that they were getting terrible wages" (CB). The framing and the process undertaken in the Report further assisted women workers "to build their confidence to articulate their rights" (LH2). As one care worker succinctly articulated, "you have got to fight for your rights. You have got to stand tall and be strong" (Anon1).

The relevance of the international conventions became apparent in the Employment Court hearing where both the legal submissions and the judgment dealt with discrimination against women as provided for at international law. CEVEP had always understood the low pay of a whole sector to be a fundamental human rights issue. The organisation's very existence was to promote and advocate for "the human right of women to be paid equitably for their labour" (SD), the very rights enshrined in CEDAW and other "international conventions we have signed up to" (SD). The National Council of Women had brought up pay equity with the CEDAW Committee and it became an issue in all subsequent reports: "the CEDAW Committee kept asking on a regular basis for reports and updates from the government about what they were doing to fix the problem with the Act" (LH2). A politician active in the pay equity sphere notes that CEDAW became relevant "when we got to the 2000s" (MW). However, others dispute the importance of CEDAW, noting that "most people have never heard of it" (JB), and litigation using international conventions was not accepted practice in New Zealand, "we don't look for opportunities to litigate based on international conventions" (LH1). Yet, the rhetoric regarding inequality, "growing levels of income and wealth inequality" (JR), and the "popularization of the living wage movement" (JR) assisted in elevating human rights issues of discrimination into public consciousness. A parallel was also drawn with the Treaty of Waitangi settlement process and the identification of systemic historical discrimination of Māori being comparable to that of long discriminated against groups of women: "this is another settlement about discrimination" (JR). The role of the Human Rights Commission and its function to promote the protection of human rights also played a role in the influence of growing awareness of human rights, aside from the Caring Counts Report. The acceptance of inequality and historical discrimination suffered by sectors of the population was being understood, generally: "the courts realize it, Parliament realizes" and there is an understanding across political lines that these things "need to be rectified" (JR), demonstrated when the Care and Support Workers Pay Equity Settlement Act "was passed by everyone in Parliament" (JR). Once indirect discrimination is recognized, and laws are created, then the process of addressing unfairness is possible: "you strengthen the arm of people believing that unfair things should be looked at" (PH). This general environment of increased societal consciousness of human rights inspired by the Waitangi Treaty process, the Human Rights Commission, engagement with international conventions, and growing rights-based interpretation by the courts 'set the scene' for

receptivity for a human rights-based pay equity claim. There were LOS in place that could be relied upon to assist the legal arguments and process.

Philosophical – Committed union – Motivation behind legal case

In the wake of neoliberalist ideology, a political environment hostile to unions, a legislative framework which stymied collective bargaining and the protection of workers' rights, the financial hardship suffered by aged care workers had been ever increasing. The pursuit of a low-wage economy and the weakness of unions ensured that aged care workers had remained poorly paid with poor working conditions for decades. This situation provided the motivation for the litigation and the campaign. SFWU wanted to provide some relief and improve the lot of these "low paid women workers" (CB) by doing "something substantive about the rights of care and support workers" (JR). This long commitment to trying to improve the lot of its members was borne out in the strategic litigation campaign: "they all had the stick-ability and we put the resources into fighting it" (MB). SFWU/E tū's commitment was appreciated by members and delegates alike who saw a union which "kept fighting and kept getting to the next level" (MB). Indeed, John Ryall's "devotion" (LH2) to the cause was "unswerving" (LH2) and Peter Cranney was driven to ameliorate the lives of aged care workers and redress the injustice,

> *there is a particular aspect to female exploitation of workers, … which is particularly cruel. Look at this example of the aged care people, these people lived lives of, lived and died for generations, in lives of total bloody poverty without any light being shone on it.* Participant PC

SFWU's motivation to help aged care workers was one of social justice, "an equity thing … it was a social justice, social right" (JB), it was about "repairing a blatant injustice" (LH1). The union leader and lawyer were politically motivated as "old comrades" (PC) to "obtain justice for workers" (JR), but John Ryall was adamant that they were not "driven by … a feminist agenda" (JR). The use of the Equal Pay Act was a "mechanism", rather than ideological, to "address pay equity for the sector" (JR). The motivation to litigate was not due to any "great legal analysis of the Act" (PC). Rather it presented an opportunity to draw attention to a group of workers in need of some positive change. This was the view of the defendant, too. The 1972 Act "would become the vehicle to address the underlying issue (that all parties – i.e., providers and unions - had raised with successive governments) which was a paucity of funding to the sector" (TB). Although Peter Cranney and John Ryall have been described as "feminist allies" (LH2), the motivation to act was predominantly "an equity thing … a social justice" cause (JB) with strong "links to feminism" (JB), but it was not specifically a feminist campaign. It was a

fight for the rights of “disempowered” (SD) people and it was also an opportunity “to highlight the issue” (PC) which could be “done by litigation” (Anon3). Additionally, the idea of a feminist agenda behind the case was refuted by those who contend there had been a lot of “good feminist leadership” (LH1) in the past which had not made a pay equity case happen. The decision to take a pay equity case was a litigation decision, not something “the union had campaigned on, really campaigned on” (MC) and, thus, the perspective that the social movement was neither “significant” (LH1), nor “influential” (Anon3), in deciding to run the case was reasonably strong amongst participants. Nonetheless, many insist, even though feminists were not responsible for having “brought” (SD) this specific legal case, the work that had been done by feminists prior was “hugely influential” (SD) and “helped pave the way” (SD) for the pay equity case to succeed. Feminist proponents claim the case would not have succeeded “had it not been for all of that earlier work” (CB). As well, the significance of the union’s growing awareness of “the gendered basis of the low wages” (JR) cannot be dismissed.

Political and ideological – Government initiatives – Union and Labour women, feminists; individuals, allies, and organisations – Political party support

Despite dispute about whether there was a feminist motivation behind the decision to take the case there was agreement amongst participants that there had been women campaigning and working for greater pay equality in the unions, within political parties and within civil society, for “over what? three decades or four” (CB). Although the numbers of women advocating for pay equity were never large, there “was always a few people in a few key places” (PH).

In the political sphere some participants believe feminists’ hard work and dedication contributed to the success of the pay equity case which might never have happened without those “prepared to involve themselves politically” (MW). Women, in the Labour Women’s Council, in particular, “were pushing” (CB) not only to “develop the policy” (MW), but also to persuade others. The “policy drive” (Anon3) for pay equity “amongst Labour women” (Anon3) was evident in the Labour Party’s “union roots” (LM). The significant political events surrounding pay equity are described in the section above on the equality and equity landscape.

In union circles the concept of pay equality had been around since the 1970s. “Feminism hit the union movement the same as it hit everything else” (JB) and then, in the 1980s, “there was a cohort of feminist women who went into the union movement in … relatively big numbers

[and] were pushing the boat out on the issues of … women workers and pay equity" (CB). Feminist unionists and "influential" (JB) feminist leaders within unions kept "pushing" (Anon2) for pay equity to keep the issue "visible" (CB) and kept the "pressure" (CB) on union leaders, and on some of those chaps" (JB) who often did not see its relevance or worth. Furthermore, there had been other pay equity campaigns, for example the successful nurses' action, which was "very much a pay equity case" (LH1) in the early 2000s and people, such as Alistair Duncan in the Service and Food Workers Union, "didn't let it die" (MC). Women in the unions had also been "trying to address" (CB) the issue of pay equity "through collective bargaining" (CB). Despite pay equity campaigning by many feminists, it was only SFWU, a supporter of "women's causes" (LM) that "got brave enough to take the case" (PH). Perhaps it needed "a whole new generation of people and probably a women centred union" for the claim to be taken (MW). The union movement gender demographics had remained reasonably static from 2011 to 2017 in research which recorded women making up 59.7% of union numbers in 2017, mostly concentrated in the three large unions, PSA, NZNO and NZEI (Ryall & Blumenfeld, n.d). In the arena of civil society groups CEVEP was one of the lead groups consistently campaigning for women's employment rights. CEVEP remained committed to the pay equity cause and Peter Cranney acknowledges the assistance and support given by CEVEP during the case, emphasizing they were "totally committed to the whole thing very, very, supportive, … gave us all sorts of historic documents and perspectives" (PC). The National Council of Women was also vocal in its promotion and support of pay equity, not the only "general feminist group that was raising the issue" (CB). The Auckland Women's Centre "did a lot of … straight forward work of explaining to people what pay equity was, the difference between pay equity and equal pay" (LM) and other women's groups who "have tirelessly worked behind the closed doors" (Anon1). Feminist organisations, such as the above, are credited with not only understanding "gender-based undervaluation" (LH2) but have maintained an "active presence over decades" (LH2), ensuring that this issue has not been forgotten. The feminist movement, generally, has drawn attention to these issues "when other people didn't stand up for it" (SD), although some wonder whether this presence and campaigning, although insistent, was not always in the "public domain enough" (CB). As part of these organisations and/or separate to them, there have been many significant women and "radical feminists" (MW) engaged in the movement who sought to continually promote pay equity and "pursue the women specific agenda" (MW). One person continually attributed with tenacity in holding on to the mantle of pay equity was Elizabeth Orr who "never ever wavered from the position" (MC) that the EPA was workable for pay equity and was convinced that had also been the view of the "proponents at the time" (PH) when the EPA was made law. Steph Dyhrberg has been described as an "ardent campaigner" (Anon3) and Judy McGregor as being extremely

"influential" (Anon3). As one participant involved in politics for decades noted, the campaign was bigger than any one person, "not one person could have done it by themselves and that is the whole point" (MW). The length of time it took certainly attests to the 'movement' for pay equity being a long one that was continually being built upon to gain "a momentum" (Anon3) around the role of women and their value and "women's work … just not to be totally overlooked anymore" (Anon3). Finally, however, the influence of feminism was made apparent in the collective astonishment in court that gardeners were paid more than carers. Previous arguments about "women's choice" (MC) (rather than arguments about discrimination against women) no longer had purchase when they had held such force in previous decades. Social movement influence ensured questions of women's equality and arguments about discrimination against women were now readily both accepted and fully comprehended.

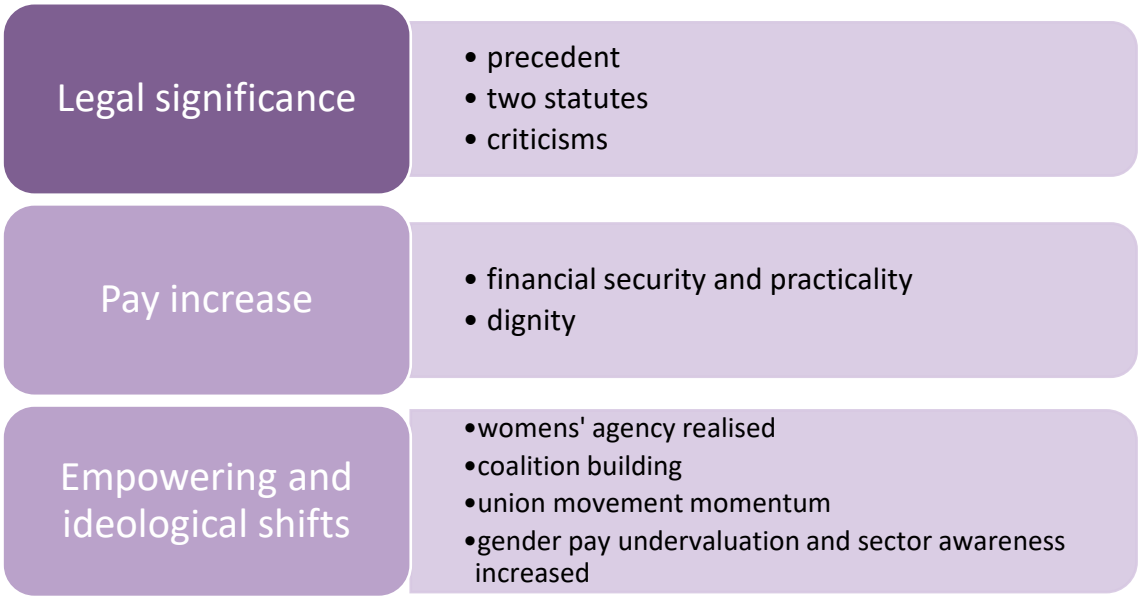
Public context – Civil society allies – Public opinion and voice – Collective guilt and profile of carers

Finally, the significance of non-feminist civil society groups such as Grey Power and Aged Concern is noted, together with a public voice and opinion which exerted influence in its support for care workers. Grey Power and Aged Concern, although not mentioned in depth by participants, were important allies in the campaign, exerting pressure on politicians for improvement in wages and conditions and engaging and collaborating with the Caring Counts Report. These two groups were allies in the campaign and contributed to the momentum of the case and in the raising of awareness of issues of undervaluation and poor working conditions in the sector. These organisations assisted in the gathering of research data for Caring Counts, in organizing large public rallies, and supported Sue Kedgley and Winnie Laban with their report published in 2010 prior to Caring Counts entitled, 'A Report into Aged Care: What does the future hold for older New Zealanders?'. As well, these organisations were very supportive publicly of Kristine Bartlett's claim for better working conditions. A narrative endorsed by these civil society groups and certainly supported by some in the media (for example, journalist John Campbell's sympathetic portrayal) was the concept of 'caring heroines', a mantle bestowed upon the carers' representative Kristine Bartlett and readily accepted by the public at large. These worthy carers were undervalued and needed to be more valued which would, in part, assuage guilt by those who outsourced care of their elderly to aged care facilities. The public reception to Kristine Bartlett's claim gained a resonance and comprehension in the public domain, in part due to the support and endorsement by Aged Care and Grey Power. Significantly, Aged Care and Grey Power also maintained an influence politically and, in part, shaped the political response on this issue.

Chapter Seven: Outcomes, criticisms, precedents, and epilogue

Figure 28

Outcomes



A positive outcome of the litigation and settlement was the notion of aged care workers no longer being overlooked. Other positive outcomes included the practical effect of improved conditions and better wages, the legal result (a legal precedent to achieve pay equity under the EPA), the positive impetus for the union movement, an ideological shift in respect of gender undervaluation, greater public awareness of the sector, empowerment and agency for low paid women and equal pay campaigners, and a shift in the balance of power of the influential Wellington based aged care lobby with its ready access to parliamentarians. Additionally, the coalition and consensus building that occurred between the union movement and other community organisations (such as Grey Power and Aged Care) and employers became a mechanism for dialogue, a monitoring of the sector and a template for future settlements.

The success of the strategic litigation campaign was greatly facilitated by LOS. Lawyers were able to present and argue their interpretation of the legislation, the courts were receptive, and the union gained sufficient leverage to negotiate a favourable settlement. The significance of the litigation and the aftermath of it, including two pieces of legislation, select committee submissions and the Parliamentary debates for each are analysed below. There were criticisms as well as praise for what the litigation achieved (or did not) and for its transformative value which is conveyed in both participant interviews and submissions, and the Hansard debates (official report of debate in the House of Representatives)(New Zealand Parliament, 2016).

Positive outcomes – Increased wages and dignity

The massive pay increase was a practical injection of "much-needed money into the pockets of caregivers" (TB) and saw "40% pay increases" (JR), often for those who had worked their whole lives in the sector (the lowest paid moved from $15.75 to $19 per hour (Martin et al., 2018). Aged care workers were in disbelief: "Never in my lifetime did I think that we would get this much money'" (JT). As well as dramatic wage increases, the volume of workers who benefited was substantial, "tens of thousands of women" (PC), and significantly "turnover of staff has decreased" (TB) which may be a combination of the increased wages, but also the difficulty of earning the same wages in a new workplace.

Positive outcomes – Legal significance

From a legal perspective the case was significant on several counts. Firstly, the case demonstrated how successful strategic litigation could be, and for thousands of people: "You seldom get litigation that benefits this many people on this scale" (SD). Secondly, the litigation saw the 're-birth' of the Equal Pay Act as an effective mechanism for pay equity, "nobody had thought this Act had anything to do with pay equity and then it suddenly did" (Anon3). It unequivocally showed pay equity "still exists" (PH). Thirdly, it exemplified the benefit to the legal profession of being bold and seizing opportunities: "Having that vision … that's emboldened me to think, why wouldn't you have a crack at other things?" (SD). It has been able to inspire "a generation of people" (SD) to question an orthodox legal view and challenge it. As a legal precedent it showed how to get "leverage … for future cases" (JT). The Terranova Bartlett litigation saw the Employment Court ruling (affirmed by the Court of Appeal) confirming the EPA provides for pay equity, and acceptance it applies to "equal pay" as well as "equal pay for work of equal value" (JR). Nevertheless, it is important to note that there was never a substantive hearing on the pay equity claim, the pay equity principles were not determined by the court and the resolution via negotiated settlement provides no 'legal' precedent. However, the decisions affirmed and "strengthened" (JR) bargaining and arbitration for unions. Up until the new legislation (the Equal Pay Amendment Act 2020), Terranova was the last word on pay equity and "absent Terranova there is no litigation" (Anon3). Prior to the passing of the legislation there remained opportunities for further litigation, "the world is your oyster really until there is a decision" (MC). Now there is new legislation, yet no litigation, it is impossible to know if these comments from the participants remain pertinent. Nonetheless, the Equal Pay Act had been reactivated as a piece of legislation applicable as a human rights instrument. And "a whole architecture … created to progress equal pay" (LH2), a new right was achieved, historically situated, establishing that the

undervaluation of aged care workers is a systemic historical wrong. The influence of Terranova saw several other occupations within the public sector seeking pay equity: “the knock-on effect it’s had working through the system … independent midwives going to the High Court getting their mediated settlement … the mental health caregivers” (SD) was significant. There are a number of other occupations within the public sector “benefiting from the Terranova precedent” (JT) and the application of the JWG principles having their pay equity claims resolved, such as the education support workers, childcare workers, 4000 mental health and addictions support workers and 3000 social workers at Oranga Tamariki (New Zealand Council of Trade Unions, 2018; New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018), nurses and midwives and clerical and admin workers in the District Health Boards. As well, the PSA and E tū jointly secured an “extension of the equal pay settlement to support workers working in mental health and addiction services” (Martin et al., 2018, p. 4). The aged care workers received the benefits of this litigation, but there are also positive ramifications for “everyone beyond those workers directly covered” (LH2) because gender pay principles have been accepted by the government and there is now a framework “to progress” (LH2) pay equity, there is “leverage … for future cases” (JT) and, generally, “a whole dialogue” (LH2) surrounding pay equity. Equally, feminists are being consulted, included, and have made submissions on the new legislation, which is significant because “those women spent decades wanting to be at the table” (SD).

Positive outcomes – Empowering for union movement

Another positive flow on effect from the case was its value to the union movement. The case helped foster “good alliances … between unions and community organisations” (CB) and it was heralded as a positive directional change for unions because strategic litigation had not been utilized in “these ways before” (LH2). Also, the influential effects of the Terranova litigation are being seen in Australia: “They’re borrowing straight from the stuff that’s been developed here” (LH2) which contributes to an ongoing “momentum” (LH2) for the union movement. The union movement was validated: “The years of union activity around higher wages and minimum qualifications” (JR) came to “fruition” (JR). Another positive consequence was an increase in membership, the showcasing of “the power of the union” (SD) because the court decision had become “a rallying point” (PC). The leverage and power attained had not been something SFWU/E tū had predicted, “not even the union foresaw how big it would be” (SD). The case also demonstrated to others that to be the plaintiff was a positive thing, “it’s not such a bad thing to be at the heart of a major union litigation” (LH1) and that although there was risk there was also “public recognition and opportunity” (LH1), exemplified by Kristine Bartlett becoming New Zealander of the year.

Positive outcomes – Increased awareness and ideological shift

The strategic litigation and the campaign have had an important effect on the "public psyche" (SD). It has had the rare opportunity to "impress … on the public mind" (SD) to highlight the problems in the sector, "this is real people, personified in Kristine … and a real issue" (SD) and it has made gender undervaluation recognized and understood. The publicity gained in the community ensured many were happy for the carers' pay increase: "'I'm glad you got a pay rise, it's really good that you got a pay rise'" (MB). There was a societal shift, an ideological change. Gendered pay undervaluation was understood by women, that their work was "not valued properly" (CB) because they were women. The framing of the problem as the 'work' and the 'skills' not being valued, due to gender became "a political question that was won" (CB). The strategic litigation was empowering because low paid women were given value and validation: "A group of low paid women workers saw that they won, and they won a significant case, that was very empowering" (CB). The women were directly involved in the case: "The worker saying what the worker does and how the worker felt rather than just the union … talking about it" (MB) which was enabling. The articulate and emotion-filled discourse of the plaintiff, Kristine Bartlett, was "empowering" (MB) because it "pulled at people's heart strings" (MB). There was a commonality of the struggle that was also empowering, "their stories were my stories, the girls' stories, that gave me … the power to stand up then" (Anon1). In realizing their value and the value of their work they gained validation, something they had not had before: "I never used to realize how much we do in a day" (Anon1). While the litigation wins, and affirmation of the importance of the work aged carers do, was empowering for the workers, the win was also empowering for those who had continually fought for equal value for equal work because "this kind of litigation … actually shifts power" (LH1). The case also represented a greater awareness, via the campaign for the carers, of the situation, and recognition of the elderly, and their vulnerability. These were a "worthy" group of workers "looking after our vulnerable members of the community" (JT) which everyone can "relate to" because everyone wants their elderly cared for "with dignity" (LH2). The "worthiness of the cause" created an "impact" (LH2), and it highlighted the issue, of "not valuing those people" (MB) (the elderly) if we are "not valuing the people that care for them" (MB). Equally, the community being served by the carers supported their claim, they "had allies from older people and their families" (CB) who could see "what work was going on and what a difference people's work made to elderly people's lives" (CB).

Positive outcomes – Transformative

The legal-rights-frame can influence and shape the way grievances are dealt with and can establish new norms. Equal pay law had been shown to be influential, transformative, and had effected real change during the transitional period of the Equal Pay Act, from 1972 to 1978. The Act's transitional period required the removal of male and female pay rates and the equalizing of the rates paid to men and women performing the same job. This was a "great social step forward" (PC) and "massively important" (PC). The 1972 Act was "transformative" (PC) because it acknowledged the inequality between men and women, and it sought to transform society to a more equitable state. However, the 1986 Clerical Workers' decision which excluded pay equity under the Equal Pay Act demonstrated that the Court could essentially through its interpretation put a "full stop on the law and make it ineffective" (LH2). The transformative function of the law, in this example, had been halted, severely halted, for decades. However, the re-activating of the 1972 Act through this pay equity litigation once again saw the law having a transformative function. It "forced society and the court to confront the actual historical inequality between men and women in a way which is very fundamental" (PC). The Terranova litigation caused an interpretation of the law which had a transformative social impact, a practical impact, a legal rights impact and "it transformed a lot of people, not just giving them more money, it transformed their whole dignity" (PC). The Court had been influenced by societal change and this transformation saw the same piece of legislation reinterpreted differently 26 years later, highlighting the effect of "social transformation impacts" (LH2). The implementation of specific rights legislation (the HRA 1993 and NZBORA 1990) and "more rights focused" (MC) decisions from progressive judges such as Lady Hale (The Baroness Hale of Richmond) in the UK had had a transformative effect on the courts, as played out in this litigation. Law can set a benchmark, a normative standard, and it has the capacity to aid social transformation by giving "a jolt" (MC) and in this case the law was used "to achieve a socially conducive outcome" (Anon3). Social movements can use the law to effect real change when they resonate with those who can action change. In this case the joint actions of a union, its legal arm, its members, and supportive feminist groups, and older people's lobby groups caused a reinterpretation of a seemingly ineffective law which resonated with those in power. Although law can be transformative it can also be limited in its ability to create social change: "It definitely does have its limits as a way of achieving social change for sure" (MC). Its value can become 'watered' down, or 'undone' and the myth of access to justice is often dissipated by the dictates of legal costs. Law and litigation as a mechanism to achieve an improved social outcome, "address public good issue" (TB) can come at a huge cost "in terms of money, reputation and energy" (TB).

Despite the potential failings of law as a transformative tool, this case showed that the law can be "fundamental" (Anon3) to ensuring transformative social change, providing the "critical foundation" (Anon3) and the "tools" (Anon3) to facilitate it. And as was demonstrated, although SFWU's lead strategist and lawyer were key, law requires the pressure of social movements and activists to force new interpretations, demanding and creating change. Terranova may not have transformed and changed everything, but it was certainly "a step towards" justice (JR) and transformation.

Outcome – Criticised

While the consensus of many has been that the strategic litigation was a resounding success, there are some who voice some caution when describing the litigation as successful, perceiving it as "limited" (PH) in its achievement. Civil society groups saw the union was "negotiating away equal pay" (JR) (although some claimed these groups were too "precious about what they thought the Equal Pay Act meant" (JR)). There was criticism of the settlement because it was reached without providing for back pay which felt unjust and discriminatory: "Why should women alone of all civil litigants not have the benefit of the Limitation Act and six years back pay, why should we have to wait, why should women be discriminated against?" (SD). The lack of back pay has been interpreted as a breach of women's rights and discriminatory: "giving away their right to back pay, to six years back pay it is huge, absolutely enormous" (MC), it was negotiating away a fundamental human right. Proceeding to a negotiation and settlement was not only a missed opportunity, but it was a breach of good faith, something that "the unions got pinged for in the breach of their good faith obligations to their members in the UK" (MC). One counter to the criticisms concerning the negotiating away of the right to back pay was the view there needed to be 'front' pay to encourage recruitment and slow down employee turnover,

> *"We need to be future looking because we have got an ageing workforce here and we need to attract people …E tū wanted the back pay and were probably quite willing to settle on something like $19 an hour and … we were the ones that said no look we need to embed this into and make it affordable, implement it over time and make sure the cost of livings put on so it's not losing value over time and that you are getting towards the $27 rate. Put the money in that way."* Participant (JT)

Another criticism of the case was that the litigation should have continued, "the courts did not get to decide, and we did not get to test how far the courts might have gone" (PH), and so there was no court decision about comparisons and setting a wage rate. CEVEP members were also concerned that the Human Rights Commission brought in the concept of looking at the

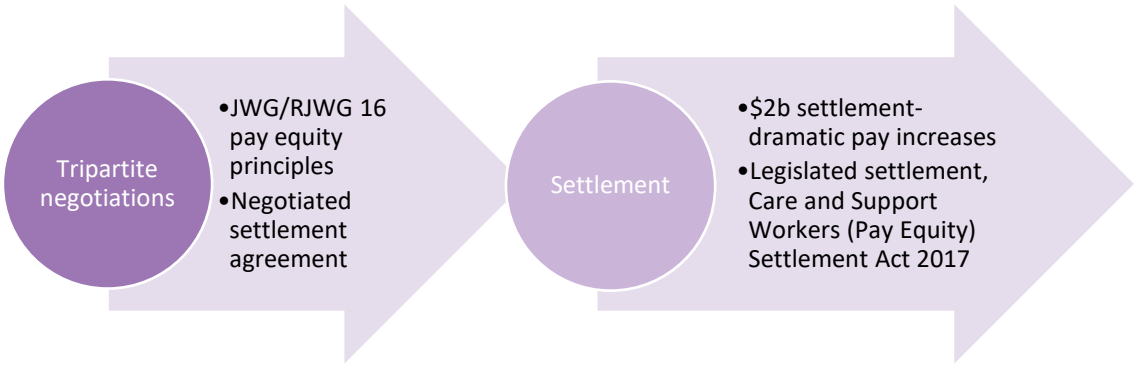
history of an occupation when determining rates of pay, yet "there is nothing in the 1972 Act which requires you to look at history, it is very much about looking at the factors in the job now" (Anon2). "Historical evidence" (Anon2) is a further and unnecessary onus on the claimant to establish. Another concern was the lack of transparency regarding the "new 'award' rates" (TB) which were "done in secrecy" (TB) in the negotiations and, thus, the question remains, have the pay increases "actually addressed the shortfall" (TB) in funding. Additionally, there were concerns that the funding was not equitable between providers, "principally because of the averaging formula used" (TB). There will always remain a 'what if' question, how would matters have proceeded differently, "what the courts would have done with the actual case if it had gone back to them to make comparisons and set a wage rate" (PC).

Despite the criticisms, the negotiations between the parties led to a settlement which was enacted by Parliament and a set of gender equity principles were established. It is to be noted, that prior to the establishment of the JWG and before the Court of Appeal case (October 2014), the SFWU/E tū with "the support of Helen Kelly" (President of the CTU) (JR) had "approached the Solicitor-General" (JR) to potentially negotiate a resolution to the pay equity claim. The request was declined because the Government wanted to await the decision of the Court of Appeal. It was not, therefore, until the Supreme Court level that the Government intervened.

Negotiations and settlement

Figure 29

Negotiations and settlement



Around the time the Supreme Court issued its decision (December 2014), the Minister of Finance, Bill English, sought an "informal meeting" (JR) with E tū leader, John Ryall. At the meeting it was made clear that the Government preferred a settlement in lieu of further litigation, while also stressing appreciation for, and acknowledgment of, the value of "the work

that was carried out by care workers" (JR). To expedite matters, John Ryall suggested a similar process as the sleepover case where a settlement was negotiated (by Crown negotiator, Doug Martin) in a way "similar to the Treaty settlements" (JR). Essentially, the Government did not want the courts to determine the pay equity principles and agreed to negotiations, thus removing the matter from the Employment Court's jurisdiction.

However, this did not take place and, in the interim, the union, wanting to maintain pressure for a resolution (using the court as a "lever" (JR), commenced preparation, to "first foot" the legal process in the event the matter (the establishing of pay equity principles) was heard by the Employment Court. SFWU/E tū prepared submissions and witness statements on what it believed ought to be the principles: Section 9 needed "efficiency and transparency" (JR), and evaluation or assessment tools needed to include the ability to apply "the relevance of gender bias" (JR). In June 2015, the union finally had its request for a hearing in the Employment Court to set down timeframes, which did not eventuate before the JWG was convened (October 2015). Nevertheless, E tū pressed on with its resolve to have pay equity principles established via the Court, if need be, and made application to the Employment Court in May 2016 to have the principles matter heard (an application that was not heard).

Contemporaneously, the Government set up the Joint Working Group (JWG) (comprised of government, union, and business representatives (Public Service Commission Te Kawa Mataaho, 2016) to work on establishing gender pay principles) and also announced "negotiations … for a care and support settlement" (JR).

The brief for the JWG was to establish pay equity principles across all occupations, to be used by the government and employers in the private and public sector. The JWG members were Richard Wagstaff (New Zealand Council of Trade Unions), Phil O'Reilly (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Enterprise) and Lewis Holden (State Services Commission) and chaired by Dame Patsy Reddy, the Governor General, with each party having their own internal working groups. The JWG recommendations were provided to Government in May 2016. However, it was not until November of the same year that the report was accepted by Cabinet. The Group's recommendations included recognition of the need to uphold the value of efficacy in resolving pay equity issues and relied upon the current framework of good faith bargaining arrangements of the Employment Relations Act 2000. The brief also included establishing a guide for assessing and raising pay equity claims and would allow for the judiciary to assist with the process. The preparation SFWU/E tū had done for a potential court hearing was integrated into the JWG "Principles" (16 in total) (Te Kawa Mataaho Public Service Commission Manatu Wahine Ministry for Women, 2020). Fundamental

to the JWG principles was the “idea of the timeliness”, that the issues and claims be dealt with “in a timely, efficient manner” (LH2) because many feared what had happened with the Pay and Employment Equity Unit (PEEU) which conducted pay equity assessments over a long period of time without achieving any actual pay increases) needed to be avoided. A coalition of women’s groups and CEVEP were completely excluded from contributing to the JWG on the Principles, despite formally requesting to be included: “we asked, and Cabinet said no” (Anon2). The court process had been “bypassed” (Anon2) and any ability to make submissions on the principles and “how you do the comparisons … select your male comparators for Kristine” (Anon2) was denied CEVEP. Many “within the union movement and outside of it” (JB) felt that going to court would have been a good option, a fair option to establish the principles.

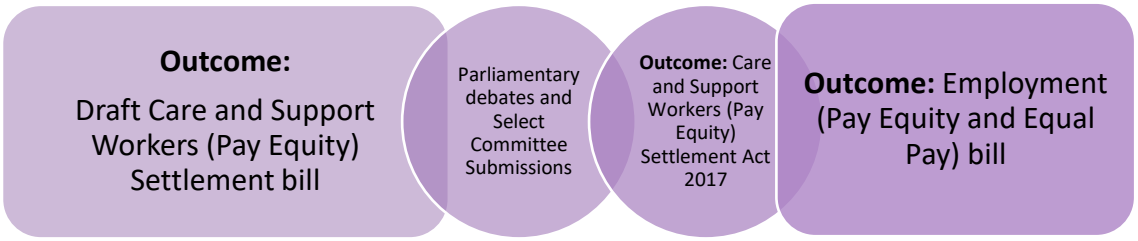
Despite the exclusion of civil society strongly opposed by many, other feminists felt that “the right people, Helen Kelly, and all of that lot” (JB), were involved in developing the principles. The basis for the unions’ approach in the JWG was the “Queensland Equal Remuneration principles (carried out by Fair Work Australia)” which were utilized in the drafting of the principles: “They were relatively successful in getting a fair amount in” (LH2). However, in the final stages of the JWG discussions the Ministry of Business Innovation and Enterprise (MBIE) proposed a hierarchy of comparators (“same workplace, different workplace same industry, different workplace different industry” (JR)) into the pay equity principles (which were endorsed by Business New Zealand and strongly opposed by the unions).

While the Government considered the JWG report the negotiations continued between the parties (the Ministry of Health, ACC, the District Health Boards and E tū, the PSA and NZNO) (Ministry of Health, 2018) to reach a specific pay equity settlement for aged care workers. The Council of Trade Unions was present but was not directly involved in negotiations and the New Zealand Aged Care Association, Home and Community Health Association, and New Zealand Disability Support Network, were part of the negotiations but were not involved in the settlement agreement (Ministry of Health, 2018). The negotiation process took 20 months to conclude and resulted in the Care and Support Workers (Pay Equity) Settlement Agreement signed on 2 May 2017 (Ministry of Health, 2017) and the Care and Support Workers (Pay Equity) Settlement Act 2017 (Mitchell, 2017) which legislated the settlement agreement reached between Government and the unions concerning pay equity for care and support workers.

Legislation outcomes

Figure 30

Legislation outcomes



The Settlement Act 2017 passed with unanimous support in the House, and the time from introduction until Royal Assent was 20 days a very "truncated" (Williams, 2017b) timeframe. At its introduction into the House the moving Minister, Dr Jonathan Coleman, noted the legislation implemented "the largest employment settlement in New Zealand history" as well as being "the first pay equity settlement achieved" (2017). The historic nature of the settlement was acknowledged as was the recognition of working women "who have been undervalued and exploited for far too long" (Logie, 2017a). The unions and employer associations were commended and thanked for their involvement (O'Connor, 2017a) and special mention was made of Kristine Bartlett, "an excellent person" (Coleman, 2017). The settlement was celebrated as a "victory for working people" and an example of "working people" working together organising "under the banner of unions" (Lees-Galloway, 2017a). The work, its challenges, and the carers who undertake it was acknowledged: "their commitment and dedication … It is an incredibly intimate job. It takes a certain disposition, it takes an incredible amount of empathy, it takes love, and it takes dedication (Lees-Galloway, 2017a). The Settlement legislation was also lauded as recognition and "acknowledgement of the elderly" because the low pay of carers was a reflection of the low esteem paid to the elderly (Lees-Galloway, 2017a). The importance of the work, "how much they make a difference" (Wagner, 2017) caring for "some of our most vulnerable people, helping them to live with dignity and with as much independence as possible"(Coleman, 2017) was noted by many Members. The Health Minister registered the accomplishment of having successfully "managed to avoid further court action" and "liability" for back pay for employers (Coleman, 2017). Contrastingly, Jan Logie framed the lack of back pay as a sacrifice by carers for a legal right in the interests of "immediate realisation" of "qualifications and the minimum standards" (2017a). Opposition Members were critical of the Minister of Health for having instructed lawyers to fight the court action "tooth and nail every step of the way" (Clark, 2017) and insisting on "challenging the decisions of the Employment Court", forcing the unions to appeal which protracted the case unnecessarily (Logie, 2017a). Furthermore, the "redacted"

regulatory impact statement provided evidence that the Government knew that pay rates determined by the court would far exceed those agreed to in any settlement agreement (Williams, 2017a). There were compliments for the "generous" union which "shared the benefits across the industry" between union and non-union workers (Clark, 2017). Finally, MP Wagner quoting comments of Cee Payne of NZNO described the benefits of the settlement which included reflecting "the skills and importance of the work" while boosting "public confidence" in how the elderly were being cared for and alleviating workforce turnover (2017).

Select committee submissions – Care and Support Workers (Pay Equity) Settlement bill

After the bill's introduction to the House, it proceeded to the select committee stage which was carried out over a very short time frame, complained of by some submitters because it gave them little time to prepare adequately. There were 34 submitters (and the Committee specifically sought contribution from a number, namely Kristine Bartlett (through John Ryall at E tū), NZNO, PSA, CTU, Aged Care Association, Home and Community Health Association, NZ Disability Support Network, CEVEP, National Council of Women of New Zealand, NZ Federation of Business and Professional Women, YWCA Auckland, Zonta, E tū, Terranova Homes & Care, Ryman Healthcare, New Zealand Law Society, Wellington Community Law Centre, Pay Equity Coalition Auckland, Pay Equity Coalition Wellington, IHC, Geneva Healthcare), including employers, unions, health care providers, civil society, such as pay equity campaigners and Grey Power who provided written submissions, and some also appeared before the Committee.

There was concern voiced by many providers (who nonetheless supported carers) that there had not been adequate provision for the funding (a funding shortfall) the result of which would disadvantage many providers and would cause facility closures and redundancies (Access Community Health, 2017; Care Association New Zealand, 2017; Geneva Healthcare, 2017; IHC, 2017; New Zealand Disability Support Network, 2017; Salvation Army New Zealand, 2017; VisionWest, 2017). The PSA was also concerned the funder (the Government) was not fully funding providers which could lead to the reduction of other favourable terms and conditions for care workers (2017). Many providers wanted the ability to negotiate and opposed the final decision resting with the funder (Salvation Army New Zealand, 2017; VisionWest, 2017). Furthermore, the increases for carers meant that many of the registered and enrolled nurses and supervisors would be paid not much more than the carers (IHC, 2017; New Zealand Aged Care Association, 2017; Spectrum Care Trust Board, 2017). NZACA and Geneva Healthcare emphasised how "undervalued" the carers were while caring for "New Zealand's most

vulnerable citizens" (2017). Many submissions were critical of the lack of a definition of 'reasonable steps' to be taken by providers to support workers in gaining qualifications (New Zealand Council of Trade Unions, 2017; Pay Equity Coalition Auckland, 2017). Grey Power echoed many of the same concerns of the providers regarding definitional issues in the Bill and emphasised the importance of paying care workers adequately "as an incentive" to work in "the age care sector" (2017). Given international obligations for equal pay, CEVEP questioned the legality of a clause which would "extinguish and bar carers from their right to pay equity by legislation and for an 11-year period". The Supplementary Order Paper provided several amendments advocated by submitters, including defining employee to include homeworkers, clarifying recognition of overseas qualification and amending 'reasonable' to 'reasonably practical' in terms of employers' required efforts to support training for employees' qualifications (Health Select Committee, 2017).

Parliamentary debate – Second reading (Care and Support Workers (Pay Equity) Settlement bill

The second reading of the Bill in the House returned to concerns about the lack of back pay which had been specifically removed from negotiations because as MP Woodhouse proclaimed it was a "vexed" issue (Logie, 2017b). The removal of back pay was decried as a "denial of rights" and "discrimination" clearly pertinent to pay equity issues (Logie, 2017b). It was, however, noted that the settlement was not the endpoint, it was not final and "full compensation" (Roche, 2017a) on the matter.

Parliamentary debate – Third reading (Care and Support Workers (Pay Equity) Settlement bill

At the third reading both sides of the House congratulated all those involved in the negotiations, including the unions and the lawyers (Peter Cranney was especially complimented by the Labour MPs, as was John Ryall) and other pay equity activists such as Linda Hill, Martha Coleman and Prue Hyman (Logie, 2017c). The strategy of the union in bringing about the positive settlement was praised: "the unions came up with a masterstroke" establishing sex discrimination under the Equal Pay Act" (Lees-Galloway, 2017c). There was special mention of Kristine Bartlett: "thank you for your efforts. Thank you for your work with the unions, and for then working cooperatively with the providers" (O'Connor, 2017b) and for "being the face and the name behind an important campaign"(Woodhouse, 2017). The third reading emphasized the numbers affected, 55,000 workers (Mitchell, 2017) and the pay increases to be gained: "It is going to make a very, very real difference to the lives of tens of

thousands … . It not only recognises their contribution; it also recognises that caring for our elderly is a skilled job, is an important job" (Lees-Galloway, 2017c). There was much acknowledgment of aged care residents, "our vulnerable older people" (Williams, 2017b) . MPs noted that the legislation would circumvent a potential risk that the courts may have insisted on backdating the wages to 2012. In a foreshadowing of the Labour Government's intentions with the Equal Pay Amendment Act 2020, Lees-Galloway extolled the virtues of bargaining and negotiated settlements between employers, unions and Government, "a fantastic model" which provides a resolution to low pay workers without being forced into court action (2017c). The Green Party noted back pay would have been considered by the court and, thus, the question of back pay was the motivation for the Government to enter into negotiations (Roche, 2017b).

When the bill was passed into law unanimously, a significant step had been taken towards achieving pay equity and a significant achievement of strategic litigation had been realised.

Employment (Pay Equity and Equal Pay) Bill

With the Care and Support Workers (Pay Equity) Settlement Act 2017 passed into law, the Government returned to addressing the JWG's pay equity principles and immediately introduced a draft bill amending the Equal Pay Act, entitled the Employment (Pay Equity and Equal Pay) Bill. Unions and advocates for pay equity were unenthusiastic with the new Bill because it "diverted significantly from the JWG principles" and was not conducive to accessible and efficient resolution of pay equity settlements (Martin et al., 2018, p. 11). E tū leaders were critical of the Bill, believing it would have "created major impediments for women workers ever to achieve pay equity in the way that the care and support workers" (JR) case had achieved it. The Bill's life, however, was short-lived as a change in government in September 2017 ensured it was not "reinstated to Parliament" (Ministry of Business Innovation and Employment, 2020), commensurate with an incoming Government's prerogative.

Reconvened JWG - report (February 2018) – Employment (Equal Pay Amendment Act) bill introduced September 2018 enacted September 2020

The incoming Labour Coalition Government reconvened the JWG (known as the Reconvened Joint Working Group (RJWG)) which produced a report in February 2018 (New Zealand Council of Trade Unions, 2018) followed by introduction of the Equal Pay Amendment Bill to the House on Suffrage Day (19 September) 2018. In the interim, National Party MP Denise Lee introduced the Employment (Pay Equity and Equal Pay) private members bill which failed to pass its first reading in February 2018.

The EPA Bill's passage through the House (and its enactment) occurred while the researching and writing of this thesis was being undertaken and is significant to this thesis both because it was born out of the Terranova case, and its subsequent negotiations and settlement, and because it will have a considerable impact on the future of pay equity in Aotearoa. On a practical level the new legislation has altered the structure of the thesis (because the select committee process and enactment occurred after my research proposal was submitted), requiring inclusion of analysis of the Select Committee submissions and Parliamentary debates, both of which add to the history of pay equity in New Zealand. The participant interviews included questions about the draft Bill (but not the final Act), which many participants discussed, the analysis of which is included, as well as analysis of the Parliamentary debates and the Select Committee submissions.

The bill's intention was to provide "a pay equity regime" to fit within the "existing bargaining framework of the Employment Relations Act 2000", provide for "good faith" negotiation, mediation and "resolution services" (Lees-Galloway, 2018), and tackle discrimination manifest in the "lower pay in many female dominated industries" (Lees-Galloway, 2018). The role of E tū and Kristine Bartlett was acknowledged in bringing about the reinterpretation of the Equal Pay Act 1972 to include pay equity and highlighting the "gender-based undervaluation in the aged care sector" (Lees-Galloway, 2018). The Government wished to lower the "threshold" for making a claim (Lees-Galloway, 2018) and remove the "hierarchy of comparators" set out in the National Government's Bill (Lees-Galloway, 2018) (which essentially would have reversed the Terranova court decision (Lubeck, 2018). The Government's focus was to discourage litigation and improve the bargaining process for claims, whether the undervaluation was current or historic. There was differentiation between the right to back pay for equal pay compared to 'current' pay equity, the latter being a result of "systemic, gender-based undervaluation of female dominated jobs" and not, therefore, the sole responsibility of a single employer (Lees-Galloway, 2018). The National Party representatives stressed the cross-party nature of the proposed legislation, their support for it, but queried whether changing 'merit' to 'arguable' would lead to unmeritorious claims clogging up the system, and questioned the removal of a hierarchy of comparators and removal of the right to 6 years back pay (Kaye, 2018). The National Party claimed frustration that the Government had introduced a new Bill resulting in further delays for pay equity and emphasised the need for accessibility for women to make claims (Upston, 2018) but, incongruously, rejected reducing (from 90 to 65 days) the period within which the employer had to respond to a claim (Parmar, 2018). The Green Party and New Zealand First speakers were critical of the back pay provisions given it was a right that already existed and because back pay liability can be an incentive for claims to

be resolved quickly (Martin, 2018; Sage, 2018). The bill was then placed before the Select Committee.

Equal Pay Amendment Act bill: Select committee submissions

Many of the submissions to the Select Committee echoed the sentiments of the interview participants (and, indeed, some of the interview participants made submissions). There were over 600 submissions from business, political parties, civil society, including feminist groups, academics, professional bodies, members of the public, school students, workers, and unions. The make-up of the submitters is presented in Table 3 and Table 4 below, providing a representation of both the number of submitters, their occupations (although not all submitters included their occupation) and the organisations which submitted.

Table 3

Break down of documents presented to the Select Committee

Ministry advice	Short submissions (approximately one page)	Lengthy submissions (at least two or more pages)
13	532	80

Table 4

Categorisation of submitters to the Select Committee

ECE workers	Teacher Aid/ Support Staff	School teachers	Administrators
233	89	10	6
Unknown/Other	**Economic consultant**	**CEO/Director**	**Caregivers**
164	1	3	6
Academics	**High school/ University students**	**Retirees**	**Community support/ health workers**
6	4	2	11
Law clerk	**Public servants**	**Librarian/ library assistants**	**Defence force staff**
1	5	7	1
Process worker/ general workers	**Editor**	**Cleaner**	**Fashion industry**
20	1	1	1

Business organisations	**Human Rights Commission**		
The Employers and Manufacturers Association, Retail NZ			
Unions	**Civil Society**	**Professional Associations**	**Private companies**
NZ Meat Workers and Related Trades Union Incorporated, New Zealand Nurses Organisation Inc, New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, NZ Post Primary Teachers' Association (PPTA), New Zealand Educational Institute (NZEI) Te Riu Roa, New Zealand Council of Trade Unions, Midwifery Employee Representation and Advisory Service (MERAS), ISEA (Independent Schools Education Association Incorporated, FIRST Union, E tū	The Salvation Army New Zealand Fiji and Tonga Territory, Women's Health Action Trust, Rural Women New Zealand, Pay Equity Coalition Wellington, Pay Equity Coalition Auckland, Labour History Project Committee, Graduate Women New Zealand, National Council of Women of New Zealand, Dunedin Pay Equity Action Group, Coalition for Equal Value Equal Pay (CEVEP), Barnardos, PSA Women's Network Committee	The New Zealand Federation for Business and Professional Women inc., NZ College of Midwives, New Zealand Law Society, Library and Information Association of New Zealand Aotearoa (LIANZA)	Russell McVeagh, Essential HR Limited,

Positive reflections on bill: Select committee submissions

The submissions were, in the vast majority, supportive of the principle of pay equity. Nonetheless, many of these submitters recommended changes to the EPAA Bill draft, and these are discussed below. As a disclaimer I note many submissions repeated viewpoints and while sometimes many submitters are included for a particular issue, not all submitters are. This was merely a matter of simplification, so the text was not overrun with references). The ECE workers, school support staff, and unclassified workers followed a template which stated support for the Bill and emphasized the need for accessibility and efficacy to gain pay equity. Included was a demand for their work to be valued, and it stressed the necessity of flexibility in choosing comparators and the requirement for women not to be "adversely affected as a result of a pay equity claim" (Yang, 2018). Another submission template used by a group of submitters and also advocated by E tū emphasised the need for a review mechanism to "ensure that the value of settlements is maintained" (Le Comte, 2018) (something that was adopted in the new legislation). This template submission also underscored the importance of preventing employers from deliberately delaying the process while responding to a claim, allowing for back pay claims, and establishing an agency to support women in taking pay equity claims. Many of the submissions from individuals emphasised and sense of purpose gained from their work while articulating disappointment in the value the work is given: "I love my job but do feel we are under paid and not valued as highly as we should be for the work we do" (Best, 2018) because the "work is seen as "women's" work" (Ronalds, 2018). There were many comments about how pay equity would mitigate the sense of being both undervalued and the actuality of being under paid: "pay equity would make a big difference to me as it is one tangible way of showing how much my work is valued" (Sketcher, 2018). The desire for pay equity was not uniquely about money but was also about pride and dignity: "It's about Mana. It's about Whanau. It's about Tāngata" (Quartly-Kelly, 2018), "respect" (Smith, 2018), and about recognition of a human right (Barnardos, 2018; Tertiary Education Union Te Hautu Kahurangi o Aotearoa, 2019). Others spoke of the practical need for pay equity, of the struggle to make ends meet, and having to work "a second job for the last 14 years as a Night Cleaner at Middlemore Hospital" (Whaanga, 2018) or not being able to retire, "I'm 66 and can see I will have to keep working until I can't anymore" (Bigelow, 2018) or the reality of their meagre income, "the only reason I have been able to stay in the role that I love is because my husband earns considerably more than I do"(Miller, 2018). Others spoke of the caregivers pay increase as finally ensuring a better work life balance and no longer "missing out on important family and friend celebrations" (Baddeley, 2018). Not only was underpayment a problem practically, it represented social stigma and emotional harm: "it is demeaning to me as a woman to be

paid so poorly for the work I do" (Hainsworth, 2018) and the inability to visit the doctor, not going "to the hairdresser. I don't have insurance. I make excuses when friends ask me out to places, I can't afford to go to. It is embarrassing to admit these things, as our community sees me as a professional" (Kemplen, 2018). Many made comparisons with other family members' wages and qualifications, voicing the unfairness of their low wages when often they were more highly qualified: "as teenagers each of my sons has received better terms of employment and pay for part time jobs in waiting on tables, kitchen work, labouring, … with no requirements for professional qualifications, ongoing training or responsibilities to be carried out outside work hours" (Ross, 2018). Achieving pay equity and, thus, validation for the work done was also expressed altruistically as a means to improve outcomes for the poorest: "equal pay will help to improve the lives of many of the most vulnerable workers in New Zealand and help to eliminate child poverty" (Lewis, 2018), and "foster an equitable future" (Barnardos, 2018) for all. The PSA applauded the incorporation of the pay equity principles into legislation (as did the CTU and the National Council of Women) and opined that the "the right to collectively negotiate pay equity rates in the Act will provide women with a greater ability to advance pay equity claims, to achieve pay equity rates and to remove gender-based discrimination in their rates of pay" (New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018).

Criticisms and suggested changes for the bill: Select committee submissions

Dissatisfaction with key aspects of the proposed legislation included criticism of the convoluted "complicated and lengthy process" (Otaki Labour Electorate Women's Branch, 2018) which presented potential "for delays and significant costs" (McGregor et al., 2018) and "years and years and years" (Orr, 2018) before a claim might be successful, breaching the right to "timely and effective justice" (Human Rights Commission, 2018). E tū and PEC were highly critical of the lengthy timeframes which amount to an obstacle for achieving pay equity justice. The PSA and NZEI were critical of the process by which the parties can be forced to complete "facilitation, mediation, further facilitation, further mediation and discussions" allowing employers to delay the process which is likely to "particularly impact Māori" (2018). It was contested by many as an unnecessary delay to the process and ought to be replaced with mediation before then progressing to the Employment Court if needed (E tū, 2018; Human Rights Commission, 2018; McGregor et al., 2018; New Zealand Nurses Organisation Inc, 2018; New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018) or that it ought to just proceed directly to court (Coalition for Equal Value Equal Pay, 2018). The requirement to exhaust all options was too high a threshold (New Zealand Council of Trade Unions, 2018).

The inability to proceed directly to the Employment Court without having to raise it first with an “employer and engaging in bargaining” is highly restrictive (McGregor et al., 2018) and may “ impede access to pay equity” (New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018). The Nurses Union echoed concerns with delays and timeliness and suggested a time limit of 2 years on negotiating and many others urged the process needed to be “streamlined” (National Council of Women of New Zealand, 2018; Pay Equity Coalition Wellington, 2019) to improve justice and fairness of outcomes.

The Bill outlined a 65-day response timeframe for employers to decide whether they agreed a pay equity claim was arguable or not (this became 45 **working** days in the Act, which amounts to the equivalent time frame, but many submitters had sought 20-30 days). There was not consensus on the ‘arguable’ clause, many saw it as very problematic and sought removal of the arguable mechanism (whereby the employer had an opportunity to decide if the case was arguable or not) (McGregor et al., 2018; Pay Equity Coalition Wellington, 2019) because it places the onus on women and ought not to be an issue subject to “mediation before a claim can be commenced” (Human Rights Commission, 2018). Russell McVeagh thought it was too low a threshold and claimants ought to have to establish “on the balance of probabilities” whether a pay equity issue exists (2018). However, other submitters approved of the arguable test as it was a lower threshold than a merit test and reflected the RJWG agreement (E tū, 2018; National Council of Women of New Zealand, 2018; New Zealand Council of Trade Unions, 2018; New Zealand Educational Institute (NZEI) Te Riu Roa, 2018; New Zealand Nurses Organisation Inc, 2018; New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018).

There was, however, general consternation at the absence of transparency (National Council of Women of New Zealand, 2018; Pay Equity Coalition Wellington, 2019; Ravenswood, 2018) and back pay clauses (McGregor et al., 2018; New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018), both seen as fundamental to addressing discrimination. Transparency clauses allow claimants to gain information to assist with claims (McGregor et al., 2018) and “improve the opportunity for individuals to take action in instances of presumed gender pay discrimination and stimulate systematic action by institutional actors” (Human Rights Commission, 2018). Back pay affords a useful tool to gain leverage with employers who, fearing back pay liability, may be forced into acting on equity claims (Human Rights Commission, 2018; New Zealand Educational Institute (NZEI) Te Riu Roa, 2018) and the absence of 6 years back pay in pay equity legislation is simply discriminatory (Coalition for Equal Value Equal Pay, 2018; E tū, 2018; Human Rights Commission, 2018). Russell McVeagh supported the back pay provisions and limits (Russell McVeagh, 2018). However, Business New

Zealand did not agree with the Authority's "power to award back pay" (Business New Zealand, 2018).

The removal of an avenue to the Human Rights Commission for discrimination complaints (ISEA (Independent Schools Education Association Incorporated), 2018), undermining the fundamental human right to pay equity articulated in the numerous international human rights instruments recognized by the New Zealand government, was heavily criticized (Coalition for Equal Value Equal Pay, 2018; Human Rights Commission, 2018). Many argued that human rights were not negotiable, could not be circumvented (Coalition for Equal Value Equal Pay, 2018), and could not be upheld through a facilitation mechanism. Furthermore, the Bill did not explicitly address human rights fundamentals, with neither a "positive duty to eliminate pay discrimination" as required by international obligations (Human Rights Commission, 2018) nor a stated purpose to "promote equality" nor the strong enshrining of a "rights-based framework to achieve and consolidate either equal pay or pay equity"(McGregor et al., 2018). The Law Society similarly queried why the Bill draft referred to "pay bargaining" and "negotiation" not the "rectification of discrimination". Similar criticism was made of restricting the ability of the Court to state principles, thus limiting pay equity claims to a bargaining process which ought not to be protected in legislation (ISEA (Independent Schools Education Association Incorporated), 2018; McGregor et al., 2018).

The lack of provision for a specialized unit or the Employment Relations Authority to support claimants and provide necessary support and resources was also lamented (E tū, 2018; Human Rights Commission, 2018; McGregor et al., 2018; National Council of Women of New Zealand, 2018; Pay Equity Coalition Wellington, 2019; Ravenswood, 2018) as was the absence of a strategic plan to address inequity (McGregor et al., 2018). Many submitters were critical of the unfairness of discontinuing current pay equity claims (New Zealand Council of Trade Unions, 2018; New Zealand Educational Institute (NZEI) Te Riu Roa, 2018). Many voiced alarm that the Bill disadvantaged "non-unionised women" from making claims (McGregor et al., 2018), the College of Midwives was particularly concerned given many of its members are self-employed or contractual workers. There were other matters raised concerning the consolidation of claims (that unions ought to be able to raise claims on behalf of women) (New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, 2018), that historical undervaluation should be secondary (or removed all together) (Coalition for Equal Value Equal Pay, 2018)) and that the criterion of "current undervaluation" needed to be linked to sex not another ground (New Zealand Law Society, 2018).

There were demands that “female dominated work should be assessed in comparison with male dominated work in male dominated sectors” by CEVEP and other submitters. Many were satisfied with the flexibility surrounding selecting comparators, although there was criticism that there was “limited guidance” on choosing comparators (Russell McVeagh, 2018). There was concern that in order for the Bill to have practical effect the penalties provided needed to “be increased”(McGregor et al., 2018) and there needed to be “an enforcement process” for reluctant employers (New Zealand Law Society, 2018).

As foreshadowed above, there was a small minority who opposed pay equity as a right and the implementation of legislation to achieve it. These detractors viewed pay equity as discriminatory against men (especially low paid men) (Lavan, 2018), a “duplication” (Paris NZ Limited, 2018) of existing laws, and not something that should be remedied by government because low paid female work was a result of choices, childbearing, and the free market (Chapple, 2018).

Equal Pay Amendment Act bill: Second reading – June 2020 – Supplementary order paper

In June 2020, the Bill had its second reading, 16 months after the first reading. At this point I had concluded my interviewing of participants. The Government re-iterated its intention that the Bill would improve accessibility for good faith negotiations to resolve “a pay equity settlement while still retaining the right of recourse to the Employment Relations Authority or court through the dispute resolution process” (Lees-Galloway, 2017b). In response to comments from submitters, the meaning of “predominantly performed by female employees” was clarified to be "work that is currently, or has historically been, performed by a workforce of which approximately 60% or more members are female” (Lees-Galloway, 2017b). In addition, the requirement for “mandatory facilitation” when deciding ‘arguable’ was removed and parties can now move from mediation to the “Employment Relations Authority” for a “determination” (Lees-Galloway, 2020). Similarly, only the fixing of remuneration must involve facilitation and other matters are at the court’s discretion (Lees-Galloway, 2020). The Government also determined that back pay would be a matter to be decided between the parties but if an agreement was not reached the “authority or court may make a determination” which would take into account the time taken to reach a deal in its consideration (Lees-Galloway, 2020). Referring to consultation with the Council of Trade Unions and Business New Zealand the Government was clear that it wished to pursue good faith bargaining as “the best opportunity to build productive employment relationships through a collaborative process” (Lees-Galloway, 2020) addressing “wider workforce issues”

and "pay equity claims" at their discretion (Lees-Galloway, 2020). The Government's focus appeared to be less about advancing human rights and removing discrimination than on ensuring a smoother employment relations regime. In response to many criticisms about the discontinuation of current claims the Government amended the Bill so to allow for outstanding claims to continue and for individuals to "continue to bargain individually for pay equity" without needing union representation (Lees-Galloway, 2020).

The Education and Workforce Committee report included among other things a number of amendments regarding the consolidation of claims allowing settlements to be across "multiple employers concurrently" to avoid "multiple different settlements" for the same workplace or occupation (Genter, 2020) and a review mechanism inserted into all settlement agreements (Education and Workforce Committee, 2019). Included in the report was a clarification that historical undervaluation may be one of the factors being considered but it does not need to be determined that "an employee's work was historically undervalued" (Education and Workforce Committee, 2019).

Equal Pay Amendment Act bill: Third reading – July 2020 – Equal Pay Amendment Act 2020

In the third reading on 22 July 2020 the Government emphasised the intention of the legislation to be a fair process for both sides and to remove discrimination, "fixing the injustice of female-dominated workforces being paid less than male-dominated workforces to do work that requires a similar level of skill, effort, and education" (Genter, 2020). Again the Government emphasised the desire to avoid litigation given the cost and its "adversarial" nature posing a prohibitive obstacle for women to take claims (Genter, 2020). The Bill was passed into law with the Royal Assent on 6 August 2020 and came into force on 6 November 2020.

Epilogue

After having languished in the Committee stage for two years the bill's progress was expedited through the third reading and unexpectedly passed in August 2020 by which stage I had completed my interviews. There was strong pushback from feminists regarding the amendments to the Equal Pay Act 1972 on several important aspects which were not resolved in the enacted legislation. There remain concerns individual women claimants, and "women in the private sector" do not "benefit" from the Act and cannot easily "bring a pay equity claim" (MW). The new legislation has complicated processes, "convoluted loops of having to go up and down, and up and down, around, the possibility of appeals" (SD). This complicated

elongated process will dissuade individual women from taking claims: “They just won’t … take a claim” (SD) because it has been made very difficult for individual claimants and is far more favourable to unionized women. The claim process is “more remote, less accessible, more expensive … it’s a powerful disincentive to sit down at the table” (SD). The Act has created onerous burdens requiring claimants to prove “whether the claim is ‘arguable’” (Anon2) and there is a marked absence of a clear statement to find comparators “beyond the same workplace and same sector” (Anon2) only an ambiguous statement of the need to “avoid male bias” (Anon2) which is weaker than in the actual judgment. The inclusion in both the Principles of the requirement that women must establish “‘social, historical and structural’” discrimination to prove a claim ought not to be part of the “criteria” (Anon2) but only something that is discussed alongside the claim, as part of the context.

Another significant criticism of the Amendment Act is the way it tries to limit the effects of the Equal Pay Act and Terranova, it is “really trying to contain and break the old Equal Pay Act and to bring it back under control” (PC). The limitations include the introduction of “a much narrower framework” (PC) which in essence has “watered down” (PC) the Equal Pay Act. The new Act has meant the Terranova litigation ceases to be a precedent, it is “crushing” to “lose the benefit of that litigation which has been so stunningly successful and so influential” (SD) and which “opened a whole lot of things up” (PC) including the presence of a human rights approach in the decision-making. The Act fell short on many of the issues raised by submitters. The issues of a lack of transparency, back pay limitations, arguable threshold, facilitation, and the lengthy claim process were not resolved. John Ryall has voiced his dissatisfaction with the new Act, citing little opportunity now for cases to be “taken through the Courts” efficaciously, which will curtail the ability to leverage for negotiation. The barriers against women taking claims remain and there is little opportunity to involve the Employment Court (JR). The constraint on pay equity claims via a model which seeks to sit them within the Employment Relations Act framework is “problematic” (JR). This is a view not shared by the ILO which commented positively on the new legislation, describing it as a more “collaborative process” with a lower threshold to launch a claim and litigation being a final option (International Labour Organisation, n/d).

Nonetheless, although the new Act is decried for constraining the radical interpretation given to the Equal Pay Act in Terranova, there is optimism. This pay equity claim was never the end, it was just a starting point: “We weren’t going to agree that this was a final for all times” (JR). Whether the gains from the Terranova litigation are watered down and lost in the new legislation does not alter the fact that pay equity gains have been made for many state sector workers, there has been a growth in awareness of pay equity, gender undervaluation, and

aged care workers: “this dialogue is now on the national agenda” (SD) and significantly, the courts have shown themselves to be ready to “adopt a rights approach” (MC) which will in turn “encourage governments to be more rights focused as well” (MC). Practically, however, there has not been sufficient time for the new Act to be tested by litigation, which is a discussion for another day. Nonetheless, it is evident that pay equity advocates remain reliant on the Government’s claimed intention that the new Act will ensure claims will be more readily made and resolved. Otherwise, the value of Terranova, having emboldened a generation to litigate, strengthened the union movement, raised awareness of the issues of gender undervaluation, and empowered women will be its legacy. Furthermore, Terranova has started a momentum for seeking pay equity advances for the women of Aotearoa which is unlikely to be quelled.

Chapter Eight: Discussion and Conclusion

The objective of this doctoral research was to understand how the Service and Food Workers Union/E tū achieved a pay equity success 40 years after equal pay became a legal requirement. The thesis considers the influences of social movements on union leadership, the union as a social movement, and the role of women's agency in this strategic legal mobilization. A further aim of the thesis was to capture a record of this phenomenon and to understand whether Legal Opportunity Structures enabled this strategic litigation and how and whether this experience can be built upon for future pay equity pursuits. My analysis of findings includes consideration of the implications with reference to the literature and discussion of how this research provides an original contribution to our body of knowledge. I provide reflection on the limitations inherent in the research, as well as recommendations for both future research and pay equity advocacy. It is appropriate in this precis, given the focus of this research and the outcome of the litigation, to re-iterate the quantum of the settlement achieved. Over 55,000 carers (and support workers) "received pay" increases "of between 15 and 50%" and those earning minimum wage had hourly pay rises from $15.75 to $19 or more (Ministry of Health, 2020). For many workers "working 30 or more hours a week" this equated to an additional $5000 per year (Ministry of Health, 2020). These figures are dramatic and significant, providing measurable improvements in the lives of so many carers and their families.

Summary of key findings

The results of my study align with Campbell et al and McGregor and Davies in finding that women's agency provided impetus and influence for a litigation campaign, which was aided by feminist ideals and actors (2018; 2019). The study's results suggest the union's strategic litigation was successful due to a confluence of factors (McGregor, 2013) which aligned at the right time. Previous similar cases where litigation had provided leverage for the union offered positive precedents as did useful overseas cases. Importantly, an inquiry into the deplorable state of the aged care sector had gained publicity and credibility for the plight of poorly paid aged care workers and their clients (and was utilised effectively). A receptive judiciary, a more rights conscious bench willing to hear the human right arguments and consider different interpretations of the law was both unique and inceptive. Civil society and feminist campaigners agitating for change had been persistent. Allies and coalitions, some unlikely, formed between the sector's stakeholders were of significant assistance. A more avowedly feminist discourse was reflected in the increased presence of women in the law, in unions, and

in politics. The demographic environment of increasing numbers of elderly whose care was being outsourced to institutional facilities increased public receptivity to understanding the reality of the low paid, low value aspects of the work. Guilt was an emotional aspect inherent in this aged care case which permeated the debate and resonated with those who placed elder family members in residential institutions. The impact of guilt on the collective conscience reverberated with many in the community irrespective of political persuasion (and significantly with the elites) something which has not played out, for example, in the disability sector. The universality and commonality of the problems in the aged care sector assisted in framing the argument: valuing our carers implicitly values our elderly (a nexus which was difficult to counter). There was a growing perception that the elderly and their carers were being neglected, poorly treated and undervalued. Improved conditions would be a means to not only assuage guilt but reflect the value that ought to be bestowed on both the elderly and their carers (New Zealand Human Rights Commission, 2012, p. 21). Interestingly, an earlier report into aged care by two members of Parliament Sue Kedgley (Green Party) and Winnie Laban (Labour Party) had not had the same effect in galvanizing public concern and support for the sector.

The lack of public visibility of the 2010 report supports my theory of the significance of timing given the impact that the 2012 report made. These converging factors (unease with the sector and the 2012 report) influenced the union action and helped its success.

The litigation was consciously strategic, deliberately employing a multi-pronged approach of campaigning, educating and network building, testing a law many thought extinct, engaging, and promoting the voices of aged care workers, and reinforcing the need for those caring for our vulnerable elderly to be valued. The case exploited the necessary LOS. There was a single defendant against whom a claim could be taken. There were tenacious union advocates, with adequate financial and other resources who were aware even a litigation loss may be beneficial to the cause. The lawyers were able to interpret the law advantageously due to the simple language in the provisions and there was flexibility of process allowing for the plaintiffs to define the legal questions at issue. A receptive bench and the ability to leverage and gain consent from members ensured negotiations would succeed. Finally, there was capacity to engage international law.

But what is the legacy of this legal action? Potentially, it will not provide a legal precedent in the wake of legislative amendments aimed at deterring litigation and precluding similar pay equity action under the newly minted Equal Pay Amendment Act 2020. To litigate or not has become the point of tension and something manifestly subject to political will. Furthermore,

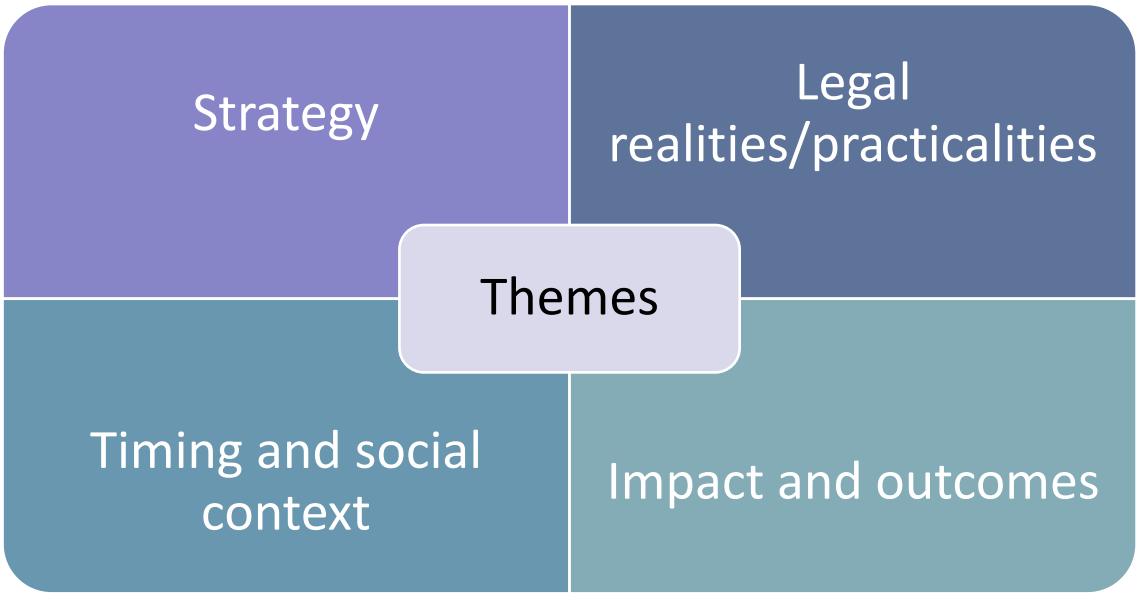
the legislative amendments to the EPA have neither fully embraced the pay equity principles decided by the significant stakeholders, nor upheld pay equity as a human right, nor endorsed the goal of substantive equality and an end to sex discrimination in pay. The astounding legal achievements of the strategic litigation have been somewhat nullified by a distinct disinclination by politicians to encourage future pay equity litigation. Yet unquestionably there has been the setting of non-legal precedents, an endorsement in political and social discourse of the principle of pay equity, and comprehension that it is a human right. There has been an unprecedented and substantial improvement in wages and conditions for aged care workers. Lowly paid women workers have gained an unparalleled voice and increased financial security. The litigation win has caused a domino effect of additional pay equity wins for other female dominated occupations in the public sector. Comprehended and appreciated, gender pay undervaluation has entered popular discourse. The aged care sector has become more fully appreciated as has the nexus between paying adequately for those who care for the vulnerable elderly as a reflection of valuing the elderly themselves. And significantly the union movement has gained a momentum it has not had for decades.

Themes

The gathered data, when analysed, identified four major themes, firstly **Strategy**, secondly, **Legal Realities/Practicalities,** thirdly **Timing and Social Context** (Philosophical/Ideological/Political/Human Rights), and lastly **Impact/Outcomes** with many sub-themes within these four dominant themes.

Figure 31

Four themes



The first theme, **Strategy** captured the multi-pronged dimensions of the case, the complementary campaign alongside the litigation to raise awareness of the value of aged care work amongst the community, the elites, and the workers themselves. The theme demonstrated that a co-ordinated and harmonized campaign creates additional opportunities if the litigation fails. As Alter and Vargas have noted test cases either achieve a win, or alternatively, successfully demonstrate the law is inadequate and requires changing (2000). The **Strategy theme** was underscored by LOS and incorporated the union's determination to use the EPA as a vehicle for change. Despite the deliberate litigation strategy, litigation was equally a last resort (Alter & Vargas, 2000; Chun, 2016) response in a context in which collective bargaining had been weakened (Colling, 2006; Conley, 2014; Guillaume, 2015, 2018; O'Reilly et al., 2015) for some time and with a workforce disinclined to take industrial action (Folbre et al., 2021; Hyman et al., 1987). The **Strategy theme** identified the importance of previous litigation precedents (Andersen, 2005) both in local and overseas jurisdictions for framing pay equity arguments, courtroom strategy, and for leverage and forced negotiation and settlement manoeuvres. Finally, the **Strategy theme** highlighted the importance of the catalysing Human Rights Commission report, the specific techniques employing LOS in the courtroom, and the reliance on international law arguments.

The second theme **Legal realities/practicalities** identified the LOS involved in bringing a case to court, interpretation of legal wording, and the ability to negotiate and leverage a settlement, a point evidenced by Vanhala (2012). Equally the second theme highlighted practical factors such as the industry's peculiarities and the importance of resources, be they financial, legal, material, human, or organisational and recognised in the literature (Case & Givens, 2010; Epp, 2008; Guillaume, 2018; Lemaitre & Sandvik, 2015; McCammon & McGrath, 2015; McCann, 1994; Vanhala, 2009, 2011, 2012). Finally, the second theme demonstrated the reality of the importance of the role of court judges and of the appetite for legal action.

The third theme, **Timing and Social context** (Philosophical/Ideological/Political/Human Rights) sought to place the Terranova case in historical, legal, and social context emphasising the conducive environment which enabled pay equity litigation, including a persistent feminist voice. The traditional disinclination of unions to litigate (Alter & Vargas, 2000; Guillaume, 2015, 2018; McCann, 1994; NeJaime, 2010; O'Reilly et al., 2015; Vanhala, 2012) and advocate for women explained in part the delay in the mounting of a pay equity case as did the political and legislative context enmeshed in the neoliberal paradigm (Douglas & Ravenswood, 2019b; Hume, 1993; Pollert, 2007). The **Timing and Social context** theme highlighted how the perceived irrelevancy of the Equal Pay Act also hindered pay equity litigation as well as

demonstrating that increased awareness of human rights had a positive influence and role in the pay equity case succeeding.

The final theme, **Impact and outcomes** conveys the precedents gained, how the strict legal precedent was lost, undermined by political will and legislative change but the impact on discourse, on workers, on aged care, the union movement and women's agency is likely to be a positive lasting precedent.

These four themes represent how the data were interpreted. The six findings extrapolated provide responses to the three questions shaping my research:

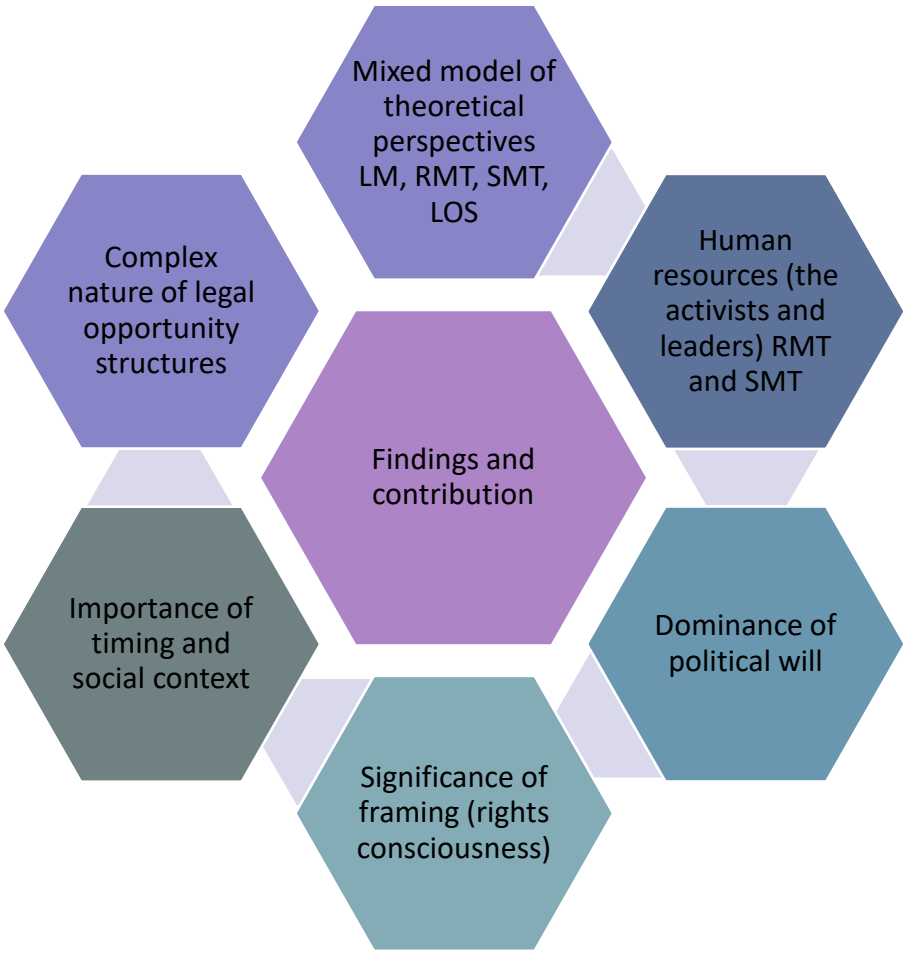
1. Why, at this time, did women find agency, and why did a social movement influence union leadership to take a pay equity case under the Equal Pay Act 1972?
2. What caused the Union's strategic litigation to be successful in a pay equity case over 40 years after the enactment of the Equal Pay Act?
3. How were New Zealand's Legal Opportunity Structures (LOS) able to provide for this strategic litigation's success and will this provide a precedent for other sectors/employees/unions seeking pay equity?

Contributions to knowledge

This qualitative research is a comprehensive, unique, in-depth socio-legal investigation into the SFWU/ E tū's strategic litigation and settlement on pay equity. It is unique research with its focus on social movement theory, Legal Opportunity Structures, legal mobilization and its exploration of the preliminary precedents, and reflections on the more long-term precedents for pay equity in Aotearoa. The research, importantly, involved unique access to the key participants which included a spread of the elite and workers' voices. The key protagonists were extended an opportunity to be interviewed and participate in the research, although not all of those approached took up the offer. I am indebted to these contributors who generously and willingly shared their perspectives and knowledge. This thesis is theirs too. The six major findings set out in the diagram below present a rich contribution from those involved in the litigation and from those with perspectives on the litigation and engagement with pay equity advocacy and activism.

Figure 32

Contribution



My overall finding indicates there is no one path to achieving social change and the removal of injustice and discrimination. Effective change in a socio-legal context demands many different engagements on many different fronts as identified by Guillaume, Anagnostou and Millns and Skeet (2013; 2018; 2013). Correspondingly, there is no one theoretical lens but rather as Pedriana (2006) asserts a **mixed model of theoretical perspectives**. There is a temptation with theory to approach an issue within the bounds of a linear framework to define the problem. The linear framing is less helpful when factors converge at the same and or at recurring times and thus, I suggest a framing which is both circular and interwoven as a more appropriate means to describe the phenomenon of this case. A mixed theoretical model provides an encompassing, constructive, and incisive method to delineate what occurred, for outlining the precedents, and for identifying what was critical to the success of this case. Recourse to a multi-pronged approach was dictated by the political environment, the constrictions of neoliberalism, and the actuality of women not having full equality. In the contemporary context the union movement and the feminist movement remain disadvantaged and comparatively powerless. This position of relative disempowerment requires agitation,

activism, strategy, and dogged persistence on many levels. My results suggest, from a theoretical perspective, in line with Alter and Vargas and Guillaume's assertions (2000; 2018), that no one method is sufficient, and various theoretical models are relevant to describing and understanding the case's success. The variety of theories co-exist alongside the necessity of multiple fronts and multiple approaches to realise change and to understand the process. My analysis demonstrates the leverage achieved by the litigation was extraordinarily effective and a product of the multi-pronged approach discussed by Alter and Vargas (2000) as effective strategy. However, without a receptive judiciary, concerted campaigning by women to have pay equity and equality in the discourse, dedicated activists, supportive members, strong alliances, the weighty reminder of international law, a spotlight on problems in the care sector, and the crucial LOS factors, the leverage may never have been achieved. This is further exemplified by the fact that non-litigious means exemplified in feminist bureaucratic action (illustrated by the PEEU), and via legislative means (the Employment Equity Act) had not been able to achieve what this litigation accomplished, a point stressed by Cowan (2016). The mix of theoretical perspectives and inter-dependent dynamics producing the successful result is testament to the fragile, complicated nature of social change and progress. The pay equity struggle has amounted to years of gains and setbacks. The process has included an array of factors which are underscored and complemented by a mixed model of theoretical perspectives.

The second significant finding resides in both Resource Mobilization Theory (RMT) and Social Movement Theory (SMT), both elements within the mixed-model theory. The former offers invaluable insight into this phenomenon's success via its insistence on the significance of resources, in particular people resources as demonstrated in the work of Vanhala, Hilson and Lemaitre and Sandvik (2002; 2015; 2012, 2016). Similarly, SMT's importance lies with its acknowledgement of the importance of lawyers and activists in heralding a rights-focus, and in empowering the powerless, a point supported in the work of Vanhala (2011). Essential to this socio-legal engagement was activism and the activists whose persistence and tenacity was paramount and steadfast. These **human resources (the activists and leaders)** propelled this case to its positive outcome, and as my research indicates, no one person could have achieved it alone. The literature on RMT is concerned generally with the lawyers, in-house or instructed counsel (McCann, 1994; Vanhala, 2016) with less focus on actors outside of the legal realm and has often placed less significance on the role of individuals within movements who bring about change. My results support Epp, Lemaitre, Sandvik, and Guillaume's (2008; 2018; 2015) emphasis on the importance of RMT, and especially people resources, in understanding legal mobilization and the bringing about of this successful case. My research demonstrates how the

activists and leaders campaigned in various ways, and were completely committed to the cause, to the women, and to the ideals. They were unwaveringly focused on bringing justice for low paid women, on achieving pay equity, and on ensuring the human rights of both workers and the vulnerable elderly were upheld. The dedication to the cause and the dogged desire to improve the conditions for the workers by key actors was a rich resource which greatly affected the success of this case and was present not only many years before the case was filed in court, but throughout its progression and eventual positive conclusion. Furthermore, experienced, and respected lawyers in the case often acted pro bono indicating as Alter and Vargas and Vanhala have found (2000; 2016), the lack of financial resources does not need to be determinant of whether mobilization will be successful or not. RMT has been perceived by some as rather contentious or inadequate (Pedriana, 2006; Vanhala, 2011), but my findings suggest understanding the importance of resources (especially people) in activating change is both significant and relevant.

My third important finding/contribution is also extrapolated from Social Movement Theory and encompasses the **significance of framing (rights consciousness**) which has contributed to visible ideological shifts in the wake of this case. Ainsworth et al, Pedriana, Vanhala and McCammon and McGrath emphasise the significance of framing for collective and legal action (2014; 2015; 2006; 2016). My research suggests that the framing of the problem of low pay for these women workers as an injustice (Ainsworth et al., 2014), a human rights infringement, an example of basic sex discrimination, and a result of gender undervaluation (due to historical and contemporary negation of skills) was fundamental to the litigation strategy and success and has resulted in a philosophical and political impact in Aotearoa. This was reflected in the agency women gained during the campaign and in the acceptance of the principles of pay equity and gender undervaluation. Additionally, coupling the workers' human rights with the rights of the vulnerable elderly was a significant strategic move both for the legal arguments and in garnering political and public support for the cause. Framing the issue as a connection between the workers and the elderly's rights spoke to the wider issue of collectivism so crucial to union and social movement action and theory identified by Vanhala (2020). In addition, public support was borne in part from a sense of contrition and guilt that elderly parents were being institutionalised and the caring out-sourced. The sense of guilt could be partly assuaged by ensuring that the carers were adequately recompensed. The triumph of the union's recourse to human rights arguments came with the acceptance by the Employment Court to interpret the law with a human rights lens. This acceptance of the human rights framing not only ensured the legal victory but has had an impact ideologically, and fundamentally changing the discourse.

Another aspect of this case identified in the research was the **importance of timing and social context** in contributing to the phenomenon and articulated in the theoretical combination of both LOS and SMT. The timing elements included, a sympathetic bench, more women (in court, in the political sphere, and in the union movement), the reinvigoration of the feminist movement, increased understanding of in/direct discrimination, increased awareness of societal inequality, a human rights framework of domestic legislation and international law, and the powerless position of the union movement (in a political and labour relations context still heavily influenced by the ideology of neoliberalism) which ensured litigation was a necessary last resort.

Another finding from my results, extrapolated from my analysis of the precedents and epilogue chapter is **the dominance of political will**. As the data have demonstrated (and as has been seen in the past) Parliament can swiftly invoke its full capacity to create law and shape policy. In this case its actions (the EPAA 2020) will likely undermine the litigation achievements of Terranova. The significance of political will demonstrates succinctly Munro's (2017) theory that feminist achievements are at perpetual risk of un-doing. And as Rubery and Grimshaw (2015) suggest political will dictates ever-changing goalposts in the quest for equal pay.

My final contribution concerns the **complex nature of legal opportunity structures** which permeated the case in significant and varied ways and facilitated its success. There was abundant legal opportunity apparent in the Equal Pay Act which had never been realised. The opportunity structures included many aspects: The Act's wording, the broad interpretation and comparisons made possible by the simple and non-specific language, the ability to conflate equal pay and pay equity, and the Act's survival intact through legislative changes (namely the Employment Contracts Act 1991 and the Employment Relationships Act 2000). The 1972 Act had operated in an era of awards and arbitration and yet was also able to operate in the contemporary setting, remaining wholly relevant 40 years later. My research identifies a nuanced and varied application of LOS, apparent in the ability for a new right to be created, represented in judicial receptivity, the facility to engage human rights law, the filing opportunities and, finally, the leverage afforded within the legal system. My research suggests that LOS were fundamental to the success of this case, and co-existed synergistically with SMT, RMT and strategic litigation theories.

The fusing of the theories (LOS, SMT, RMT and Legal Mobilization) in this mixed theoretical model is mirrored in the practical multi-pronged approach of the case. The confluence of these social and legal factors and theoretical aspects is represented in my theoretical contribution, Socio-legal Convergence Theory (SCT). Socio-legal Convergence Theory builds on the

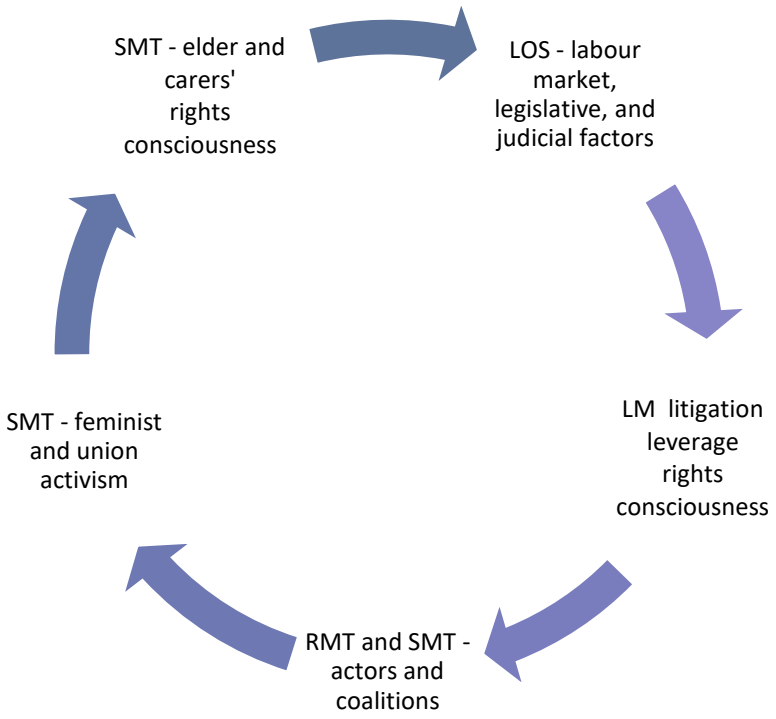
confluence concept by illustrating that not only was the coming together of factors significant, but the timing of when these factors converged was also significant. Additionally, while the actions taken were varied so too are the theories, which explain the activity undertaken. Different social and legal actions and social and legal theories combine to illustrate SCT which, it is hoped, may assist not only future pay equity pursuits but other campaigns for social justice and change.

Findings: Mixed model of theoretical perspectives

My analysis suggests Legal Mobilization (comprising strategic litigation) provides an explanation for this pay equity phenomenon but equally Resource Mobilization Theory, especially non-financial resources, SMT, and LOS were fundamental to the case. These theories individually and in combination explain and contextualise this case.

Figure 33

Mixed model of theoretical perspectives



Legal Mobilization (LM) theory assists in diagnosing the success of the Terranova litigation by envisaging how a union successfully turned to the law to improve working conditions and rectify the injustice of pay inequity. On many levels LM supports what was borne out in this case, litigation was accessible, efficacious, and extra-judicial leverage gained a positive outcome (Milner et al., 2019; O'Reilly et al., 2015; Vanhala, 2006). However, litigation was equally a last resort in a political environment relatively hostile to unions and feminist aspirations as has been identified by Alter and Vargas (2000). Litigation was a means by which

those without the ability to strongly bargain and negotiate regained some power. As Fuchs and Vanhala expound LM specifies rights focused strategy, heralding rights, revolutionising self-perception, and raising rights consciousness, to attain positive results, a component which was manifestly apparent in E tū's campaign (2013b; 2011, 2012). Additionally, as McCann (1994) asserts rights raising can consolidate activism for future action and assists in measuring and appreciating the effects and repercussions of litigation. My results suggest tentative concurrence with Munro (2017) and Cowan's (2016) concern that feminist action can be subject to nullification and backlash given new amendments which seek to restrict future pay equity litigation. Equally, Alter and Vargas' (2000) theory on follow-through laws has been seen in the positive results from this litigation (Settlement Care Act and EPAA). My research suggests concurrence with Cummings (2017) and Fuchs (2013a, 2013b) view that legal mobilization can modify cultural norms (in this case the empowerment of women and the broad acceptance of gender undervaluation) reiterated in the discursive weight of the judicial decisions. LM as Vanhala, Guillaume and Millns and Skeet note encompasses non-legal mobilization methods too, relying on campaigning, educating, awareness raising and publicity, because the existence of black letter law may have little bearing on legal action (clearly manifest in this situation with the 40-year lag before anyone fully turned their mind to the wording of the legislation)(2018; 2013; 2016). Non-legal methods of mobilization were very much present in this case. The union garnered support from other unions, the public and other civil society groups, forged networks and created alliances. Gaining support was successful due to the compelling and relatable nature of the circumstances, that is, the aged care sector to which many in the population have a connection. For McCann, Cummings, Fuchs, Arrington, and Guillaume LM and strategic litigation theory emphasise how litigation can boost publicity and the significance of presenting personalised stories and credible spokespeople (2019; 2017; 2013b; 2015; 1994). All are factors evident in this litigation which gained significant public support and was so ably articulated by Kristine Bartlett. Bartlett's authenticity added credibility and worthiness to the cause and gained valuable support for the campaign. Finally strategic litigation and LM appreciate the emotional and financial costs and the risks associated with legal action (O'Reilly et al., 2015; Vanhala, 2012). My analysis (and the results of the litigation) suggests that this fine line between risk and tactical leverage was artfully managed. Leverage was gained, endless litigation was avoided, and a satisfactory result for most was achieved (notwithstanding the lack of back pay).

However, my findings also diverge from aspects of LM in several ways, firstly in the absence of a galvanising loss factor articulated by Millns and Skeet and NeJaime to motivate the legal action (2013; 2010). There was no consolidation by union and feminist social movements to

move to legal action when the Clerical Workers' pay equity claim was defeated in 1986. Secondly, my results do not align with the theory that litigation only privileges the powerful (Cummings, 2017; Wilson & Gianella-Malca, 2019) and that a win will usher in complacency (Albiston, 2010-2011). To the contrary the union movement has been reinvigorated, feminist ideals have been popularised, policy amendments have resulted in the enactment of pay equity into law, and the 'powerless' won. Thirdly, LM theorists posit courts and litigation cannot be agents of social change (Alter & Vargas, 2000; Cummings, 2017; Deakin et al., 2015; McCammon & McGrath, 2015). My analysis suggests this negative theory, Scheingold's 'myth of rights' (NeJaime, 2010) is perhaps extreme in its pessimism given the social change progressed in this litigation. The recognition of pay equity as a concept was established both socially and politically, there was a collective understanding and there was realisation of the import and the actuality of its definition. Parliament acknowledged the concept by enacting pay equity into legislation (EPAA 2020). The final divergence in my findings from aspects of LM is the theoretical rejection of litigation due to its adversarial resolution of problems (Cowan, 2016). However, my analysis suggests this is an unwarranted criticism and counter to the experience for these plaintiffs. Litigation was highly successful for a marginalised and powerless group of workers.

While LM provides some very useful perspectives on the success of the litigation and its precedents SMT equally provides a necessary theoretical standpoint for understanding the litigation and its aftermath. The interwoven nature of LM and SMT is encapsulated in Pedriana's (2006) articulation of the essential objective of social movements, the rendering of a cultural frame into a recognized legal right via legal structures and the identification of new rights. In this case gender undervaluation and the low pay of a female dominated sector was defined and encapsulated as pay equity discrimination, a right arguable under law (re-interpreting the EPA). My results suggest, in agreement with McCammon et al and McCann that legal strategising has assisted movement building for pay equity (2018; 1994). Framing the proponents as rights holders and their grievance as a rights issue speaks to the fundamentals of social movement theory (Vanhala, 2009, 2012). SMT understands the significance of raising rights consciousness both to initiate activity and gather support for movements (Anagnostou & Millns, 2013; Guillaume, 2015; McGregor & Graham Davies, 2019; NeJaime, 2010). My results indicate, like Ainsworth et al (2014) propose, when the care workers shaped their identity by reframing their poor pay and conditions in terms of discrimination, they not only raised and increased rights consciousness, but they melded and cemented a collective identity (McCann, 1994). Having rights focused lawyers utilising the law and framing the workers as rights holders exemplifies SMT (Lejeune, 2017; Maiman, 2004). SMT also appreciates norms are challenged

and re-formed by social movement actors (Cummings, 2017; Maddison & Martin, 2010) whose intent is to reshape politics, demonstrated in the persistent advocacy by women and feminists to make pay equity a reality. A feminist presence in the unions advocating for pay equity (and growing female numbers in the union movement), and within political parties, and the pressure from civil society groups such as the National Council of Women, CEVEP, and the Women's Centre in Auckland continued to insist on political change. Similarly, the feminist credo underlying the Caring Counts Report, the blatantly feminist objectives of the Australian policy drivers, and legal precedents from Australia are all part of a broader social movement which pursued political transformation.

My research suggests concurrence with SMT's appreciation of the importance of connections between feminists and women workers and unions (McCammon & Brockman, 2019; McCann, 1994), the weakening of the latter affecting successes by the former. In Aotearoa there was active cross community engagement by women union members with other organisations and social movement campaigns, E tū, was class-conscious, progressive, and connected to civil society movements.

Another component of SMT is agency which conceives of the importance of engaging in decision-making and gaining a voice, (Campbell et al., 2018; McGregor & Graham Davies, 2019) an aspect that was essential to this case. Women's agency was in the narrative of the carers in Caring Counts, in the union's 'member organising' to raise awareness and support amongst carers, and in the prominent and articulate voice of Kristine Bartlett. Gaining agency helped influence the decision to launch the case (through an investigation which gave voice to the narrative of the women workers) and via a human rights framework which gave women agency and self-recognition of their value, building their confidence, and crystallizing their rights. Women's voice and agency, so well-communicated by Kristine Bartlett, understood and actioned by so many of the workers, and evident in the feminist lawyers and campaigners who provided resources and skills, carried the litigation forward.

My preference for a mixed theoretical model to explain and understand this pay equity litigation phenomenon is exemplified by the fact that no one theory adequately encapsulates the entirety of converging factors relevant to the case. As Fuchs (2013a) and Hilson (2002) contend LOS may be inadequate for explaining norms and value shifts in respect of pay equity litigation, but LOS nonetheless provide significant insights into the influences and facilitators of litigation. Equally, LOS may be inadequate to incorporate the relevance of the characteristics of individuals and their actions (an aspect which is comprehended by RMT (Hilson, 2002; Vanhala, 2012)) further enforcing the appropriateness of a mixed theoretical model. My

research suggests, however, that 'LOS factors' significantly aided litigation discussed in my final finding.

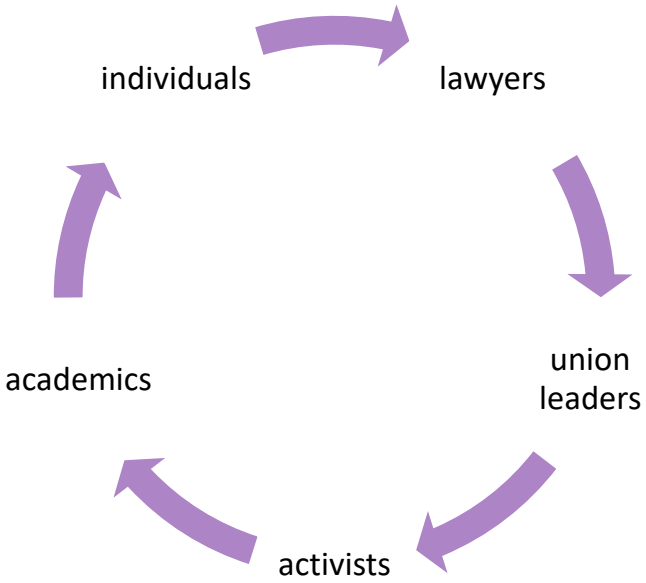
Resource Mobilization Theory is closely connected to LM as it pertains to legal action and specifically explains critical factors of resourcing which may enable litigation. Generally defined as legal and financial resources RMT has been expanded to include non-financial resources including human resources which my research suggests were significant in the litigation's existence. Consistent with the mixed model of theory suggested in my results, RMT cannot in and of itself explain mobilization of the law however, it is a significant piece to the puzzle. RMT's human resource significance is discussed below. LOS alone therefore cannot explain the phenomenon but necessitates incorporating SMT and LM and RMT to understand the whole action.

Findings: Human resources (the activists and leaders) - RMT

My findings suggest that expanding RMT to include resources beyond legal and financial ones is crucial to understanding strategic litigation and legal activism because individuals played such pivotal roles. Furthermore, the presence of dynamic people (human resources) is a prerequisite for social change which expands upon Epp's (2008) theorising on the necessity for legal and financial resources to effect change. I adhere to Alter's and Vargas' (2000), Hilson's (2002), and McCammon and McGrath's (2015) expansion of the typology within RMT to include individuals as a human resource.

Figure 34

Activists and leaders



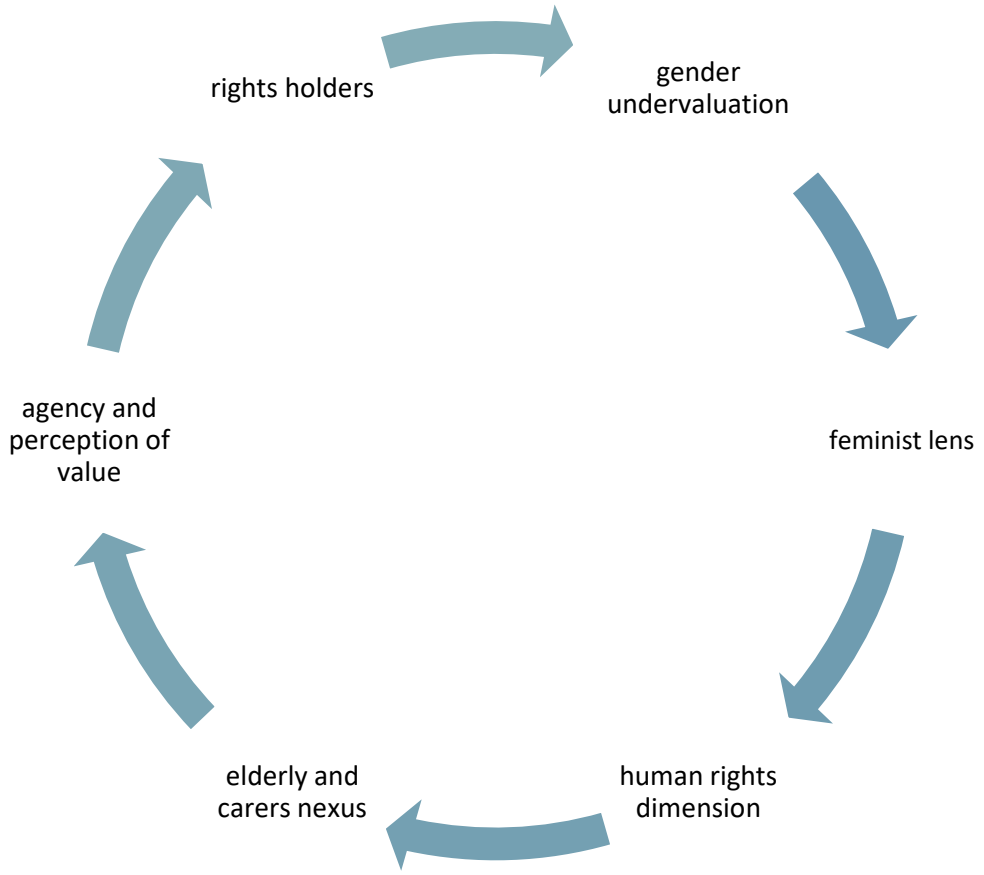
The research results indicate the significance of activists, the union leaders, and individual women in the background and foreground of this case without whom there may never have been this pay equity case. The union leaders were committed, unwavering in their desire to improve the working conditions and pay, and ultimately the lives of these workers. The persistence of the leaders in campaigning, lobbying, litigating, learning from leverage lessons and being continually focused on justice for these workers was significant in ensuring the success of this litigation. The advocacy of Peter Cranney was audacious, bold, pushed boundaries, and was instrumental in the case winning. Furthermore, Peter Cranney and John Ryall were politically committed to social justice, equity, and tenacious about improving the lot of these workers who had been exploited for decades. Similarly, individuals highlighted in the research who were singularly important include Elizabeth Orr, Prue Hyman, and Linda Hill (long time equal pay for equal work campaigners), Steph Dyhrberg and Martha Coleman (employment lawyers) and Judy McGregor (former EEO Commissioner and academic). These women were influential activists continually demanding pay equity measures, lobbying, campaigning, and many were directly involved in the court action. These people were unwavering in their commitment and often contrary to the prevailing opinion, convinced they could get traction with pay equity arguments. Another significant individual was Kristine Bartlett who triumphed as a titular plaintiff. Bartlett gained both public and member support and won over many to the cause with her open demeanour and heartfelt articulation of the issues. It was a deliberate tactic to promote Kristine Bartlett (not the lawyers) and it allowed aged care workers to relate to one of their own. My research indicates that without these key people providing leadership, strategising, pursuing their principles and employing effective activism, this case would likely not have succeeded. Extending RMT to include the value of individuals, the people resources, intersects with LOS because as Vanhala (2012) opines the opportunities created to exploit LOS require someone with the motivation to do so. It was the people with the vision and belief that were able to exploit the inherent opportunity in the LOS which demonstrates my mixed theory model, the integration and interdependence of RMT and LOS.

Findings: Significance of framing (rights consciousness)

Shifting the framing of the argument from a demand for a pay increase into an issue of historical and contemporary gender undervaluation fundamentally altered the narrative. Just as the discourse in Australia had been moved from ‘choice’ to ‘rights’ (Ainsworth et al., 2014), and disability disadvantages were re-framed as discrimination in Canada (Vanhala, 2011), so too the low pay of aged care workers became a human rights issue of discrimination.

Figure 35

Framing



Initial framing by the Caring Counts Report established low-paid women as right holders and the issue as one of gender undervaluation and discrimination. The union leadership, also employing a feminist lens, reconceived low pay in terms of a negated human right, and one of historical gender undervaluation with remedy via human rights arguments, a conception CEVEP (and other feminists) had long held and campaigned for. The ability to rely upon international law, illustrative of LOS, aided the consolidation of the human rights dimension and assisted to develop new legally enforceable rights identified as crucial by McCammon and McGrath (2015). SMT understands (and as illustrated in this case) that the re-purposing of a grievance into a legal demand (Pedriana, 2006) makes the injustice and the rights' breach more evident. Furthermore, SMT in its concern with frames and political opportunities acknowledges that these can fundamentally reshape politics and establish new norms, a point endorsed by Cummings and Maddison & Martin (2017; 2010). Moreover, politically, aged care workers were a worthy cause, and this was coupled with guilt by those outsourcing care of their elderly family to others. Similar attempts in different sectors such as disability have not been as successful because of the lack of a universality of an emotional connection. Equally, the framing of the argument around worthy carers looking after the vulnerable elderly was

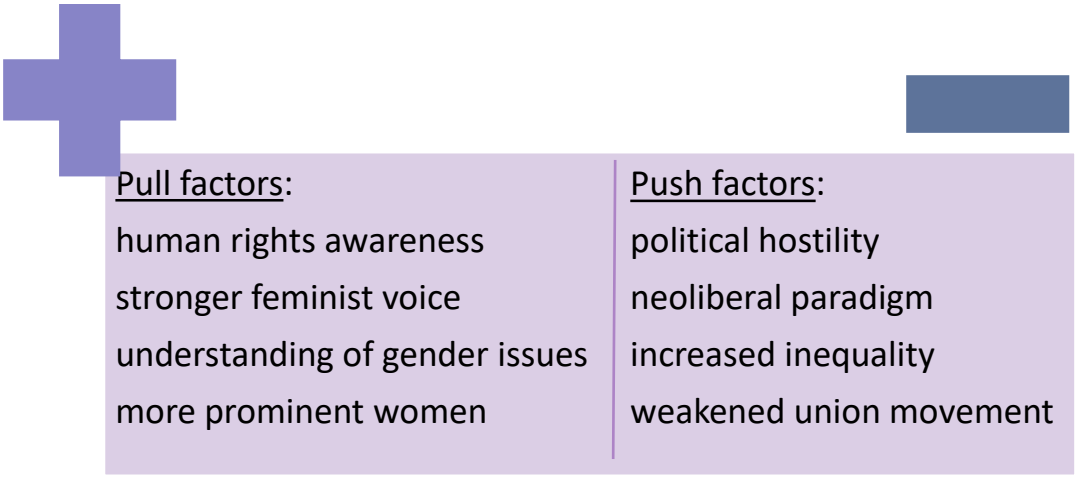
hard to negate. The reframing of the problem of low paid undervalued work (a result of cultural norms which had ignored its value) changed not only the legal arguments but gave women a sense of agency and made a philosophical and political impact in New Zealand. Pay equity and gender undervaluation became subjects acknowledged and accepted in Parliament, the media, and popular discourse. The campaign solidified a collective voice reflecting Beckwith's (2001) research which recognises collective identity can assist in realising feminist ambitions. The reframing of the low-pay problem exemplified the nexus between the rights of the workers and the rights of the vulnerable elderly to adequate care. The reframing and raising of rights consciousness amongst the workers (giving them a sense of agency and value) was a significant aspect of both the campaign, support building, and the litigation arguments. The workers perceived their own value. My research corroborates research by Vanhala (2009, 2012), Guillaume (2015, 2022), Anagnostou and Millns (2013), Fredman and Goldblatt (2015), NeJaime (2010) and McGregor and Davies (2019) which has shown that the raising of rights consciousness is integral to social movement theory and to mobilizing legally. Similarly, the framing process assisted women's agency because women who had traditionally not had a voice were heard (Milner et al., 2019). Gender undervaluation so credibly articulated by the social movements had resonance and recognition amongst women, in the legal system, and ultimately with lawmakers. The gaining of agency and the rights-based framing achieved a legal victory, a victory for union collectivism and a substantive equality victory.

Findings: Importance of timing and social context

My analysis suggests a complicated set of historical, legal, political, and ideological dynamics ensured that litigation, while ultimately successful, did not occur until many decades after the Equal Pay Act became law. The converging of factors, at this time, and the significance of context is fundamental to the outcome achieved and why litigation had not occurred prior. There are two aspects to the 'context dynamic': one, the conducive positive factors (those factors that pulled or buoyed the litigation along) and two, those negative factors (which pushed or forced the litigation).

Figure 36

Push and pull factors



The positive (pull factors) were the contextual dynamics of growing human rights awareness in public consciousness, amongst the judiciary and the legal profession, and within the union movement. The litigation capitalised on these dynamics to enforce and expand legal rights. The Caring Counts Report raised human rights awareness by framing the narrative and the issues in the sector through a human rights lens. Similarly, the Waitangi Treaty Settlement process, engagement with international conventions and the courts readiness to make rights-based interpretations of the law all contributed to a growing human rights awareness conducive to the positive reception of pay equity principles (and the concept of indirect discrimination). Added to this growing human rights awareness was a resurgent feminist voice, demands for female equality, and increased female presence in the union movement. The reigniting of a stronger feminist voice in the public arena was evidenced in the impetus for the #metoo movement. There was increased acceptance around having a feminist approach to policy in the community, illustrated in the establishment of a pay equity officer in the PSA. There was increasing understanding of gender undervaluation, equal pay, and female exploitation. And, finally, there were generally more women in active positions of influence and power.

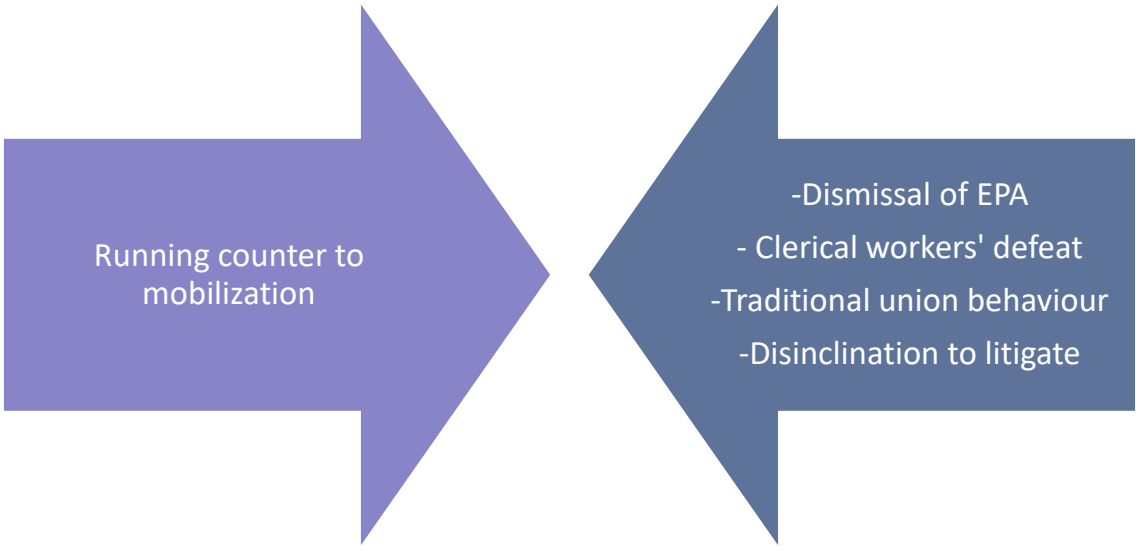
The negative (push) factors (ultimately perversely beneficial) were the hostile political conditions, the entrenchment of neoliberal policy and ideology, enduring sexism (exemplified in the gendered low pay of women workers), and the growing inequality and poverty of the low-paid. My data indicate the growing disquiet around inequality became part of what forced litigation. Poverty was rising, wages were not keeping up with the cost of living, the living wage movement was gaining momentum, and the union was able to tap into the growing awareness and extract community support for the poorly paid aged care workers. Weakened union

strength, the dwindling potencies of collective bargaining and a fraught funding model dictated a more drastic approach to improving conditions while also indicating the impossibility of achieving improvement in conditions via other industrial mechanisms. Specific peculiarities of the sector, namely the high staff turnover and the disinclination for many members to walk off the job (thereby abandoning their clients) similarly forced the litigation option. The radically altered labour relations environment caused by the Employment Contracts Act and the ideology of neoliberalism with its focus on individualism, the market resolving inequality, and the curtailing of workers' rights was a negative contextual 'push' factor. The hostility of the political environment writ large in the legislative agenda had retrenched not only the union movement but the feminist one too. These aspects were all part of the 'push' factor which ultimately forced litigation as the only recourse.

Although aspects of the 'negative environment' ultimately had a galvanising effect on litigation my findings demonstrate there were other negative aspects which ran counter to mobilization, negatively affecting litigation as an option.

Figure 37

Social context and timing theme



One significant aspect which had precluded litigation was the powerful belief that the Equal Pay Act was irrelevant for pay equity claims (and even unhelpful for equal pay claims). Feminist politicians had thought to repeal the EPA, employment lawyers gave it wide berth, and the perceived wisdom amongst many unionists, lawyers, politicians, and activists was that it was ineffective legislation. This dim view of the EPA gained traction with the failure of the Clerical Workers pay equity claim. The case's defeat was definitive in signalling to many the uselessness of the 1972 Act and represented an enormous obstacle to litigating. My findings

also indicate there were aspects of union behaviour and beliefs which had traditionally thwarted or stalled the realisation of equality aims for women. Traditionally, unions had accepted stereotypical gender roles endorsing the breadwinner concept and were invariably dominated and led by men who did not necessarily embrace female demands for equality. An aspect reflected in overseas research (Beckwith, 2001; Guillaume, 2017). Furthermore, litigation represented risk, cost, and adversarial resolution rather than collective bargaining and negotiated processes or alternative action such as pickets and strikes (and historically there was some suspicion and mistrust of courts and politicians by unions and workers).

My analysis of the importance of context and timing illustrates how political hostility to unions, unions' traditional disinclination to litigate, and recourse to both implementing pay equity via legislation and the bureaucracy caused litigation approaches to be eclipsed for decades. Important contextual environmental and push-and-pull factors converged at the same time: The Caring Counts Report was influential, human rights and discrimination awareness had increased, the unions were in a weakened position but were seeing litigation as a viable strategy, women were more influential, the growing societal inequality had become very visible, and feminism was on the ascendance again.

Findings: The dominance of political will

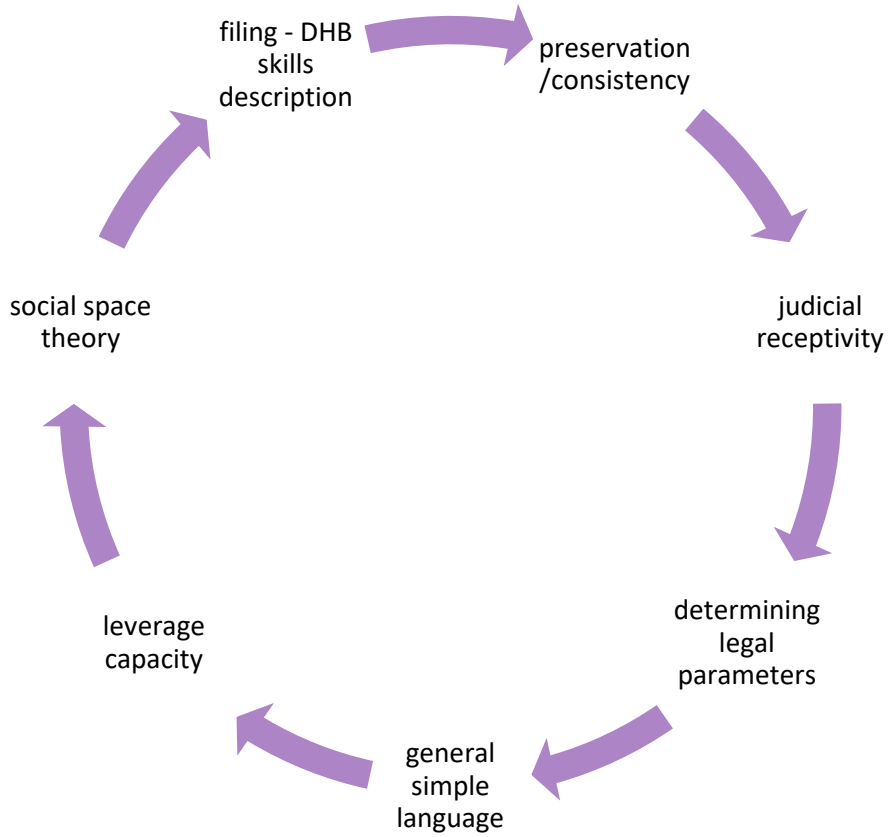
The Equal Pay Amendment Act came into force in late 2020 and thus the new sections are yet to be tested. Nonetheless, these amendments have been criticised by many pay equity campaigners, the union leaders that led the case, and academics alike concerned that the ability to achieve pay equity such as occurred in the Terranova case has been circumvented. The Government, intent on a bargaining model, has sidestepped the issue of a human right to pay equity (and the issue of sex discrimination) as established and ratified at international law. In essence, despite the heroic actions of the union, the dogged campaigning by feminists and pay equity proponents, the work of academics, the Human Rights Commission, and others, once again recognition of the fundamental human right for pay equity is subject to the vagaries (or purposefulness) of political will. The significance of political will when considering the pay equity agenda has been apparent on many occasions: The repealing of the Employment Equity Act in 1991, the disbanding of the PEEU in 2009, and the defeat of Pay Transparency Bill in 2017 all demonstrate pay equity is a political football. This football analogy is extended by Rubery and Grimshaw who suggest the goal posts for pay equity are continually shifted (2015). As Parker and Donnelly maintain pay equity may always remain beyond the horizon, a "perpetual pursuit" exacerbated by the fact that "pay setting is a political not a technical issue" (Rubery & Grimshaw, 2015, p. 338).

Findings: Complex nature of Legal Opportunity Structures

The complexity of LOS lies in its nuanced and varied application and its apparent obscurity. The EPA's potential, its accessibility, and its usefulness had always existed but had never been utilised. The 1972 Act had been ignored and dismissed. When it was, finally, properly considered it provided much legal opportunity and benefit.

Figure 38

Components of legal opportunity structure



The inherent LOS were apparent in the preservation by Parliament of a statute which had endured through huge industrial relations and economic reform yet remained relevant and consistent with current legislation. The legislation's enduring capacity was also evident in its general, rather than prescriptive, language. There was no prescription regarding a requirement to make comparisons with other industries or sectors or occupations and the Act provided little in the way of operationalising. LOS features included the simplified wording of the statute which enabled it to be interpreted broadly and in an entirely different industrial relations context. The simplification of language and process allowing for a broad interpretation ensured equal pay could be conflated to include pay equity. Further the broad interpretation available in the statute could be exploited and realised because there was a receptive bench.

The ‘looseness’ of the EPA with its lack of operational mechanisms and enforcement measures ensured it was still workable, an explicit demonstration of how LOS facilitated this litigation.

LOS was evident in the judicial receptivity (De Fazio, 2012) which was so fundamental: The court understood the human rights issues; understood it was a test case and accordingly convened a full bench and invited interveners to assist. The important issues raised in the case were the significance of gender undervaluation, the legislative purpose of the Equal Pay Act, and the issue and concept of comparators. The bench was receptive to both the plight of the workers but also to human right arguments. The judgments demonstrated significant changes in attitudes regarding the perception of feminism and the perception of arguments on the predicament of women in low paid work. No longer were concepts of choice being rolled out and accepted as a cause of low paid work. There was flexibility and opportunity within the legal system for the plaintiffs to believe the judiciary might be receptive and see it as a test case. The test case status also ensured experienced and respected lawyers became involved on both sides and as interveners. LOS was exemplified in the procedural possibilities of a titular plaintiff (because Kristine Bartlett had an individual employment contract rather than a collective agreement) with a significant employer in the industry. Additionally, employment contracts and collective agreements in the industry included District Health Board criteria and skills for the work which assisted in the filing and establishing the facts of the case. Equally, the opportunity of being able to settle the matter out of court rather than continuing with potentially lengthy and costly litigation was significant. The ability to leverage (Alter & Vargas, 2000) out of the court system to the point of negotiation and settlement is a distinct advantage for those with limited financial resources such as unions. The LOS were evident in the capacity for the plaintiffs to define the narrow parameters of the legal question for the court to decide (separating the legal question from the evidence and facts and removing back pay from the equation). This ability expedited and simplified the process and demonstrated a flexible procedural system. Similarly, the lawyers’ knowledge of the likelihood of costs and their understanding of procedure and precedents (including recent examples of successful leveraging) was important. The ability to rely on international law provided for by the ratification of international treaties and the receptivity of the bench to human rights arguments was an equally significant LOS. Social space theory as Cichowski articulates, (2013) is an extension of LOS, and comprehends the importance of the opportunity for additional spaces from where mobilization can occur or emerge. The impact of international law on gender equality in New Zealand is one such space where civil society can mobilise and is demonstrated in the influence the CEDAW Committee’s commentary has had. CEDAW and

other international treaties' provisions were referenced throughout the legal submissions and decisions in this case.

While I accept Vanhala's (2009) and NeJaime's (2011-2012) hesitancy to include judicial receptivity as a LOS factor given that the disadvantaged turn to litigation (in a last resort scenario), my findings suggest that judicial receptivity as De Fazio (2012) proposes perhaps ought not to be so readily dismissed. In the Terranova case the indication of judicial receptivity (gleaned from past cases and evidenced in the convening of a full bench, and the presence of women on the bench) not only assisted in a legal sense but was also a morale boost for the union. The union knew, given the likely receptivity to their arguments, that filing a claim was not a waste of time, energy, and resources. Further, my findings align with Vanhala's (2011) rejection of legal stock (precedent) being an essential aspect of LOS because social movements do not merely rely upon precedent but seek to expand rights and legal protections. My findings suggest the union leaders and strategists were very alive to the idea of extending and expanding upon legal rights. They sought to expand the definition of equal pay to include pay equity and they sought to have pay equity comprehended in a human rights framework, the lack of a precedent was immaterial (given there was no direct precedent to rely upon).

Limitations and future research

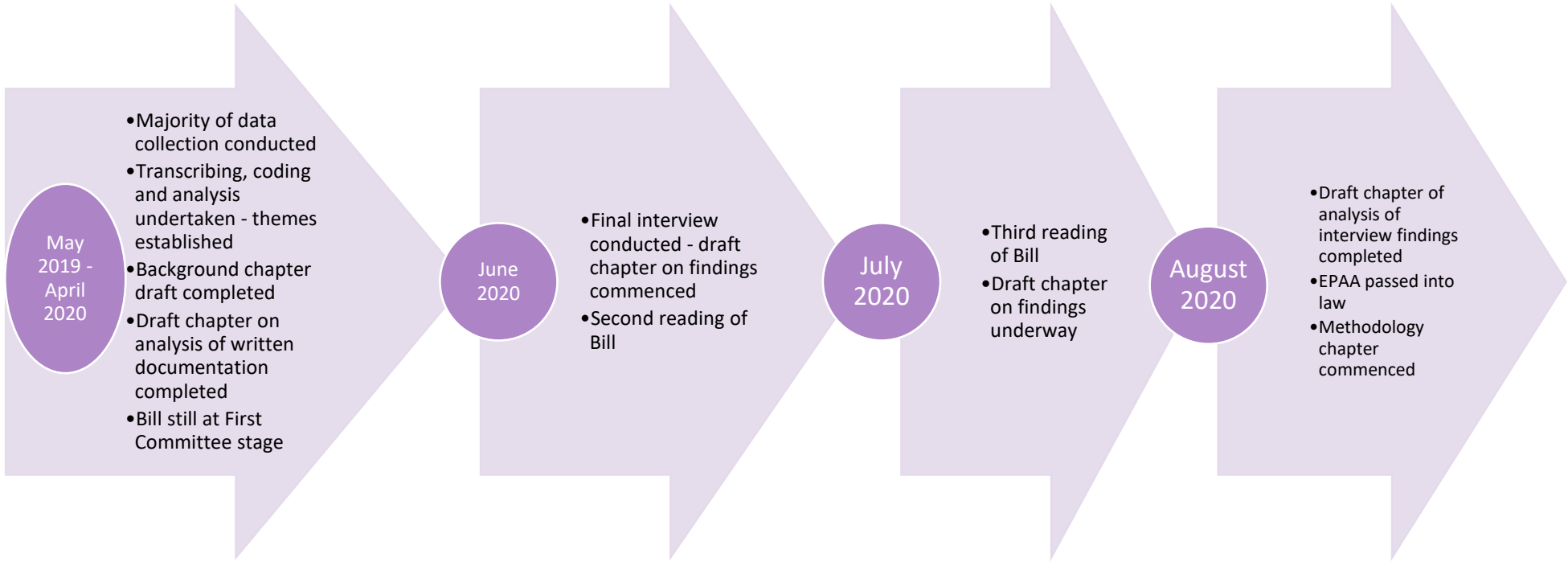
An obvious limitation of this research is the pragmatic constraints caused by the inability to capture the voice of all participants engaged in this legal case and campaign. This is especially significant given a purpose of this research was to capture a full record of the phenomenon. However, a full record was not practical nor possible. The opportunity to participate in the research was extended to most of the 'protagonists'; however, some were unable to commit for varying reasons. Although a huge number of the 'protagonists' in the case and in pay equity advocacy were included there were inevitably some gaps. Moreover, there were ethical constraints in obtaining participants given the guidelines limit the number of times potential participants may be contacted. These limits are to ensure there is no coercion or harassment in the recruiting process. Thus, potential participants were contacted via email only once and were not pressed further to participate if they did not reply. Naturally, this may have limited the participant pool possibly due to potential participants (with busy lives) not being able to be reminded to respond to my requests, although it is acknowledged not every participant approached would necessarily wish to participate. On several occasions participants themselves suggested, and even engaged, other participants, providing welcome assistance. While the snowball technique resulted in suggestions and introductions to potential participants, equally suggestions and advice about who might not be willing or able to engage

in the research were also heeded. The data gathered elicited rich results and included the voices of many of the significant protagonists in this phenomenon, yet as acknowledged at the outset, there were some limitations on who did participate.

As prefaced in Chapter Three in the discussion on interviewing and the timeframe of the enactment of the Equal Pay Amendment Act the two-year time delay between the introduction of the Bill and the second reading in the House resulted in the commencement and finalisation of my interviewing prior to the second reading. The timeframe is represented in the following diagram:

Figure 39

Timeframe of data collection and bill progression



It was somewhat unexpected that the bill's final reading and enactment of the legislation occurred within the very short time frame of one month. Although participants had been questioned about the bill the enactment of the legislation occurred after the interviewing had finished. In fact, the bulk of the interviewing had been completed prior to the March 2020 lockdown. The unexpected finalisation of the legislation meant that the data had been analysed and written up by August 2020.

When seeking to define and explain this phenomenon the theoretical limitation of reliance on one theoretical model became apparent. The phenomenon under study required explication via several theoretical frameworks. No one theory can fully encapsulate the varied and complex nature of this phenomenon and reliance on one theoretical framework would not do justice to explaining this complex case. For that reason, several theoretical lenses are employed, and it is from this rather circular (as opposed to linear) framework that the conception of a socio-legal convergence model to interpret and understand this unique case emerged.

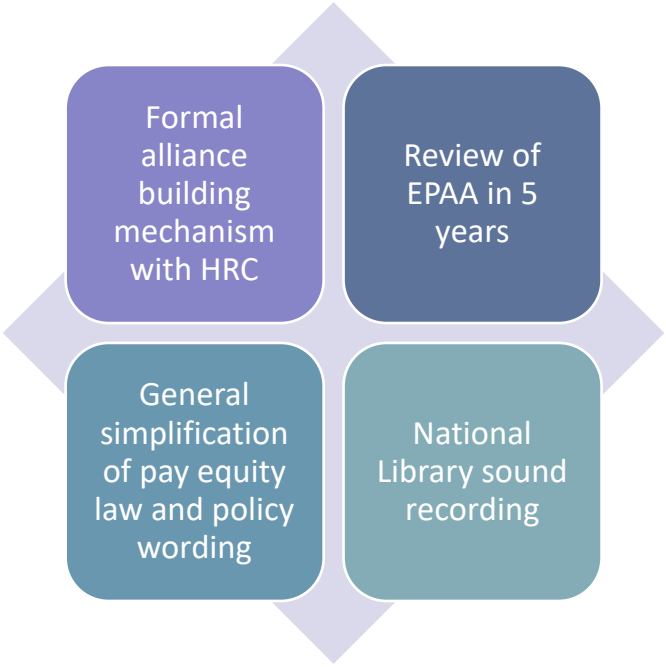
While SLCT, incorporating a mixed theoretical model to interpret this strategic litigation provides some insights there is much further research to be done to understand the theories and themes within legal mobilization action by social movements. An area ripe for further work is research into ways to better understand how unions set their agendas for pay equality (Fuchs, 2013a, p. 207). Legal mobilization in the workplace remains an important and viable area of research given the constantly evolving political and social views about equity (Portillo, 2011, p. 954). McCammon and McGrath identify the need to more fully consider "activist litigation" (2015) because, despite the diverging opinions on legal mobilization and how and when it is initiated, the study of how and why social movements turn to legal mobilization and decide to "engage in" strategic litigation and how those strategies can be successful, is a rich area for study (2015, p. 136). Maiman identifies a gap in the literature which could explain the "cross-fertilisation between law and politics", together with the myth that somehow our legal system is "apolitical" compounded by our attachment to the belief in "absolute Parliament sovereignty" (2004, p. 103). There is also a gap in terms of socio-legal studies as it pertains to human rights (which forms part of my philosophical perspective but also permeates the research questions which are concerned with a fundamental human right, women's right to fair pay) because "the social sciences have traditionally neglected the study of human rights" (Halliday & Schmidt, 2004, p. 2). Similarly, scholars "point to a gap between social movement research and socio-legal studies" (McCann, 2006; Rubin, 2001) and few studies have combined the "insights of the legal mobilization and neo-institutional lines of research" (Epp, 2008, p. 609). The application and implementation of human rights in the domestic sphere beyond the

"legislatures and constitutional courts" (Halliday & Schmidt, 2004, p. 3) is often not fully addressed in the literature and there is further work required on "theoretical perspectives about substantive equality" as applied to equal pay mobilization (McGregor & Graham Davies, 2019, p. 630). Finally, the significance of "media coverage and organisational action frames" (Fuchs, 2013a, p. 206) in influencing the prospect of litigating also has scope for further research (Fuchs, 2013a, p. 205). As McGregor and Graham Davies identify, there is a need for further equal pay research into the role of women "as intermediaries and actors" and that of the "lawyers, agencies, the media and state parties" (2019, p. 630). Finally, Parker and Donnelly (2020) suggest the new legislation (EPAA 2020) may tip New Zealand into the displacement typology which is in an aspect deserving some consideration. Future research into the impact and ramifications of this new legislation is also a ripe area for exploration.

Recommendations

Figure 40

Recommendations



My preoccupation with the attainment of pay equity via strategic litigation is matched by a motivation to discern ways to maintain and repeat the elevation of (female) workers' conditions and pay. My concern at maintaining this current outcome is not unfounded: as previously noted, Munro (2017) worries feminist gains are tenuous and constantly subject to undoing (Cowan, 2016), and Rubery and Grimshaw (2015) cast the equal pay struggle as a striving for goalposts which remain perpetually beyond reach. Understanding that the 'job' is not done (and is at risk of being un-done) is mitigated by the positive collective, coalition

building, and networking that was achieved. Alliance building, and collective action was imminently helpful in this case and this strategic element ought to be capitalised upon. Cementing the connections between women and unions improves possibilities for future action as noted by McCann (1994). Therefore, my first recommendation is premised on maintaining the existing human rights focused alliances (for future actions) via a specific mechanism. I propose a statutory structure which would formally combine unions, feminists, and civil society under an umbrella organisation to advance pay equality. As Beckwith (2001) insists, formal structures and efficient organisation can greatly assist feminist action. The Human Rights Commission established such a coalition during this pay equity campaign and the continuation of such a coalition could naturally reside in the office of the EEO Commissioner. Facilitation by the EEO Commissioner of such a framework, is eminently appropriate given the Office's focus on women and work. The prioritizing of women and employment equity by the Commission is unique to Aotearoa and in contrast to other jurisdictions such as Britain and Australia which deal with gender issues more generally. The provision of a statutory structure and framework for networking would require the allocation of more resources to the EEO Commissioner. This recommendation, resourcing, and implementing of an employment equity alliance would ensure pay equity remained relevant and may also assist in developing activists and leaders. The intended outcome would be ensuring the issue of pay equity was less dominated by and less subject to the will and decisions of politicians.

My research has explored the initial precedents provided for by this litigation including the Equal Pay Amendment Act. Obviously, the impact of the EPAA (which came into force in late 2020) may not be evident for some time. Therefore, my recommendation is for a Pay Equity Review of the impact of the EPAA to ascertain its effectiveness or otherwise since implementation. As Deakin et al emphasise research is vital to ascertain a law's "intended effects" especially in terms of consequences for both "litigation" and "enforcement" (2015, p. 382). Given the complicating, all-encompassing reality of the Covid-19 pandemic, and its uncertain end, I suggest such a Review would be practical in 5 years.

Thirdly, a recommendation highlighted by the LOS implicit in the simplified language of the 1972 Act, suggests generalised statutory language is an imperative. The EPA survived successive employment enactments and was able to operate in a markedly different labour market regime due to a simplicity of language which allowed for broad statutory interpretation. The absence of prescriptive regulatory requirements for comparators and assessment measures ensured this legislation was still workable in the contemporary context. This is a lesson learnt for future legislation (and a required further amendment to the EPAA):

the less complicated the wording and less operationalising provided in the statute the better it may be for achieving pay equality aims in an ever-changing future legal and political environment.

The fourth recommendation to emerge from these research findings is connected to the historic nature of this unique phenomenon. The recorded interviews of the participants provide a unique authentic voice and are historically significant. These recordings are suitable for storing as audio archives with an institution such as the National Library. The recordings are significant, not only as a future resource, but because these participants were involved in a very important historical event and, finally, because of the advancing age of many of the participants. The recordings capture historically significant voices, and the collection of these voices provides an important repository for future data.

I make these recommendations with the intention that they be taken up jointly by the Council of Trade Unions and its affiliate unions (including E tū) and the Office of the Equal Employment Opportunties Commissioner. These entities have the capacity, proven record, and political influence to ensure the best chance of adoption.

Conclusion

The success of this strategic litigation was multifarious. Success was evident in the improvement in wages and conditions for a very low paid female dominated workforce. This success spilled into other sectors with many female-dominated public sector occupations gaining pay equity. There were ideological shifts including greater societal comprehension of gender undervaluation, of the value of carers, and the nexus between caring for our elderly and ensuring our elderly's carers have decent pay and working conditions. The narrative has shifted. Pay equity principles have been enacted into law and are more readily understood within society and notably by the political elite. The importance of pay equity has been consolidated and the value of a human rights framework to unpack discrimination has been accepted. Despite these attainments, political will has exerted its dominance with the enactment of legislation that seeks to preclude similar litigation in the future and has failed to uphold principles of substantive equality and the removal of discrimination based on sex. The Government's failure to formalize and validate anti-discrimination measures ensures that the quest for pay equity for women continues. Nonetheless social movements have proven their ability to legally mobilise and forge a new space for achieving social change. It is hoped that this legacy of legal mobilization will continue, and unions and other social movements will be emboldened to take future action. As my research has shown, key people can have significant

impact within social movements, activism, and politics and future action requires dedicated actors. The pursuit for pay equity must continue. My personal ambition to understand and investigate this pay equity goal was the genesis of this thesis, a motivation that will be transposed from the theoretical into the practical as I take up a position as a lawyer for E tū. In the cogent words of UK Labour MP Tony Benn alerted to me by John Ryall “there is no final victory as there is no final defeat” (2020) and so the struggle to realise full equality for women will continue.

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Appendices

Appendix A: Court of Appeal Minute

IN THE COURT OF APPEAL OF NEW ZEALAND
I TE KŌTI PĪRA O AOTEAROA

CA631/2013

BETWEEN	TERRANOVA HOMES & CARE LIMITED Appellant
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED First Respondent
	KRISTINE BARTLETT Second Respondent

Counsel: E J Coats for Appellant
P Cranney for Respondents

Date of Minute: 19 May 2020

MINUTE OF FRENCH J

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[1] Ms Griffin has applied under the Senior Courts (Access to Court Documents) Rules for access to the audio recording of the hearing in this appeal held on 3 and 4 February 2014.

[2] Ms Griffin is a doctoral student at AUT and the request is made as part of her research for a socio-legal case study of the Terranova/Bartlett litigation. She has read the key written material on the Court file but considers the oral submissions and actual Court proceedings are also likely to be valuable data.

[3] The parties have no objection to the application being granted.

[4] It is not the usual practice of this Court to provide an audio recording of hearings. However, I am satisfied this is an exceptional case and am therefore willing to grant access, subject to Ms Griffin undertaking in writing that (a) she will not use

or disseminate the recording for any other purpose than her research and (b) that on completion of her case study/thesis she will destroy the copy of the audio provided to her by the Court.

[5] On receipt of that undertaking, the Registry is to provide a USB with the audio to Ms Griffin as well as instructions on how to ensure she can hear the audio clearly.

_____

French J

Solicitors:
Bell Gully, Auckland for Appellant
Oakley Moran, Wellington for Respondents

Appendix B: Ethics approval

Auckland University of Technology Ethics Committee (AUTEC)

Auckland University of Technology
D-88, Private Bag 92006, Auckland 1142, NZ
T: +64 9 921 9999 ext. 8316
E: ethics@aut.ac.nz
www.aut.ac.nz/researchethics

1 April 2019

Jane Verbitsky
Faculty of Culture and Society

Dear Jane

Re Ethics Application: **19/69 The role and significance of strategic litigation (under the Equal Pay Act 1972) in the 2017 historic pay equity settlement for aged care workers**

Thank you for providing evidence as requested, which satisfies the points raised by the Auckland University of Technology Ethics Committee (AUTEC).

Your ethics application has been approved for three years until 1 April 2022.

Standard Conditions of Approval

1. A progress report is due annually on the anniversary of the approval date, using form EA2, which is available online through http://www.aut.ac.nz/research/researchethics.
2. A final report is due at the expiration of the approval period, or, upon completion of project, using form EA3, which is available online through http://www.aut.ac.nz/research/researchethics.
3. Any amendments to the project must be approved by AUTEC prior to being implemented. Amendments can be requested using the EA2 form: http://www.aut.ac.nz/research/researchethics.
4. Any serious or unexpected adverse events must be reported to AUTEC Secretariat as a matter of priority.
5. Any unforeseen events that might affect continued ethical acceptability of the project should also be reported to the AUTEC Secretariat as a matter of priority.

Please quote the application number and title on all future correspondence related to this project.

AUTEC grants ethical approval only. If you require management approval for access for your research from another institution or organisation, then you are responsible for obtaining it. You are reminded that it is your responsibility to ensure that the spelling and grammar of documents being provided to participants or external organisations is of a high standard.

For any enquiries, please contact ethics@aut.ac.nz

Yours sincerely,

Kate O'Connor
Executive Manager
Auckland University of Technology Ethics Committee

Cc: emily@emilygriffin.co.nz; Judy McGregor

Appendix C: Information Form and Participants' Consent Form

Participant Information Sheet

This information sheet is for the interview participants.

Date Information Sheet Produced:

15 February 2019

Project Title

The role and significance of strategic litigation (under the Equal Pay Act 1972) in the 2017 historic pay equity settlement for aged care workers

An Invitation

Tena koe,

My name is Emily Griffin and I am a PhD student in the School of Social Sciences and Public Policy at AUT. I am conducting research into the Kristine Bartlett/Terranova pay equity case and the negotiated government settlement reached in 2017.

I am looking into the legal case and how it came about, the use of strategic litigation and how social movements contributed to the decision to take the case and its ultimate success. I want to interview those involved in the litigation, including the union members, lawyers and workers, and more broadly academics, politicians, and others with an interest in pay equity and this case. This is my criteria for who I will interview, and I believe that you are an important figure in this research.

Being interviewed is a time commitment and I am very appreciative that, in agreeing to be interviewed, you are giving up your time and the gift of your knowledge to assist me with my research. I intend for the interview duration to be approximately 1-1.5 hours and there will also be further time required to read and comment on the transcript.

If you do not wish to be interviewed that is entirely your decision and this will not be recorded in my research in any way.

I do not consider there are any potential conflicts of interest. I intend to produce a thesis from my research to gain a Doctor of Philosophy qualification.

What is the purpose of this research?

The purpose of this research is to understand and analyse how and why this strategic litigation was effective and to provide valuable insights for future equity claims, policy initiatives, and for other equality goals for women in Aotearoa New Zealand. This case study will provide a record of an historically important social and legal phenomenon. I hope to obtain a doctoral qualification from the research. I also intend for the work (or parts of it) to be published in academic journals and presented at conferences.

How was I identified and why am I being invited to participate in this research?

I have obtained your name from the legal cases, the news media and or from my supervisor Dr Judy McGregor, because I know you already, or you have responded to my advertisement. I have chosen you either because of your role in the case or your interest and involvement in pay equity issues in Aotearoa New Zealand.

How do I agree to participate in this research?

Your participation in this research is voluntary (it is your choice) and whether or not you choose to participate will neither advantage nor disadvantage you. You are able to withdraw from the study at any time. If you choose to withdraw from the study, then you will be offered the choice between having any data that is identifiable as belonging to you removed or allowing it to continue to be used. However, once the findings have been produced (the draft thesis completed), removal of your data may not be possible.

A consent form is attached to this information sheet and it will be discussed in more detail if you agree to participate in the research. Before the interview commences, the Consent Form will be completed, and a copy given to you. By signing the attached Consent Form you agree to participate in the research.

Given the small pool of participants (approximately 30) it is likely that the content of your interview might be readily discernible and therefore there is a strong possibility of you being identified. There are limitations around my ability to maintain confidentiality.

What will happen in this research?

The case study involves an interview with me that will be recorded on my iphone. I will also take notes during the interview. I will then transcribe the interview myself or I will use voice to text software to do the same or I will employ someone to transcribe it (a Confidentiality Agreement will be signed by any transcriber I employ). I hope to interview about 30 people.

Once I have completed the transcription of the interview, I will send you a copy to read and amend, if, and, as you wish.

I will code the data from the transcript thematically and logically. It may be that some participants are directly quoted and so I ask you to indicate in the Consent Form whether you wish to be identified or not if a quote of yours is used.

I intend to submit my case study for my doctoral qualification. I also hope that separate papers will be published in academic journals, as chapters in books and I will present my research at conferences. Aspects of my research may also be in the media and potentially placed into institutional archives (eg Archives NZ).

What are the discomforts and risks?

I do not intend for there to be any discomforts or risks involved as a result or in the course of your participation in my research.

If there are any questions that make you feel uncomfortable you do not have to answer them. We can also stop the interview at any time.

Given the publicity surrounding this case and the public nature of legal cases it may be possible for the information you provide to me to be attributed to you. I will not quote you directly if you do not wish to be identified but I may not be able to prevent others identifying your comments/quotes. I cannot guarantee that your confidentiality will be maintained.

What are the benefits?

The benefits of this research include the benefit of having a written record of the factors that came together to ensure this pay equity success because it is a phenomenon of significance to New Zealand. The benefit of this research is the potential it will provide for policy initiatives for future pay equity claims and pay equity policy. The benefits of this research also include a personal benefit to me as I intend to produce a thesis from my research and gain a Doctor of Philosophy qualification.

What are the costs of participating in this research?

The costs of participating in the research will be your time to be interviewed (approximately 1-1.5 hours) and further time to read and comment on the transcript.

What opportunity do I have to consider this invitation?

If I have not heard from you in one month, I will send you a further email. If following the second email I do not hear from you I will not contact, you again.

Will I receive feedback on the results of this research?

I will provide you with a copy of your transcript. I will also provide a link to my thesis once it is completed so that you can access if you wish.

What do I do if I have concerns about this research?

Any concerns regarding the nature of this project should be notified in the first instance to the Project Supervisor:

Dr Jane Verbitsky jane.verbitsky@aut.ac.nz or Jverbits@aut.ac.nz. Telephone :09 921 9999 ext 5116

Concerns regarding the conduct of the research should be notified to the Executive Secretary of AUTEC, Kate O'Connor, *ethics@aut.ac.nz* , 921 9999 ext 6038.

Whom do I contact for further information about this research?

Please keep this Information Sheet and a copy of the Consent Form for your future reference. You are also able to contact the research team as follows:

Dr Jane Verbitsky jane.verbitsky@aut.ac.nz or Jverbits@aut.ac.nz. Telephone :09 921 9999 ext 5116.

Emily Griffin emily@emilygriffin.co.nz. Telephone: 021 541 160

Researcher Contact Details:

Emily Griffin emily@emilygriffin.co.nz. Telephone: 021 541 160

Project Supervisor Contact Details:

Dr Jane Verbitsky jane.verbitsky@aut.ac.nz or Jverbits@aut.ac.nz. Telephone :09 921 9999 ext 5116.

Dr Judy McGregor judy.mcgregor@aut.ac.nz. Telephone : 09 921 9999 ext 9349

Approved by the Auckland University of Technology Ethics Committee on 1 April 2019, AUTEC Reference number 19/69

Consent Form

For interview participants

Project title: ***The role and significance of strategic litigation (under the Equal Pay Act 1972) in the 2017 historic pay equity settlement for aged care workers***

Project Supervisors: ***Dr Jane Verbitsky and Professor Judy McGregor***

Researcher: ***Ms Emily Griffin***

(please tick each sentence)

- ○ I have read and understood the information provided about this research project in the Information Sheet dated .....
- ○ I have had an opportunity to ask questions and to have them answered.
- ○ I understand that notes will be taken during the interviews and that they will also be audio-recorded and later transcribed.
- ○ I understand that taking part in this study is voluntary (my choice) and that I may withdraw from the study at any time (until the writing up of the thesis draft is complete) without being disadvantaged in any way.
- ○ I understand that if I withdraw from the study then I will be offered the choice between having any data that is identifiable as belonging to me removed or allowing it to continue to be used. However, once the findings have been produced (the thesis draft is complete), removal of my data may not be possible.
- ○ I agree to take part in this research.
- ○ I understand that I will receive a copy of the transcript of my interview but that if I do not respond within the time-frame I will not be able to amend it after that date.
- ○ I understand given the nature of the legal case and its public nature that my confidentiality cannot be guaranteed, and I am likely to be identifiable. Despite understanding the lack of confidentiality I consent to being involved in the research.

Please tick either yes or no for each question below

I consent to being named:	Yes○	No○
I consent to being directly quoted:	Yes○	No○
I wish to receive a summary of the research findings:	Yes○	No○
I wish to receive a link to the final thesis:	Yes○	No○
I consent to being named in the acknowledgment section of the final thesis	Yes○	No○

Participant's signature : .....

Participant's name : .....

Participant's Contact Details (if appropriate) :

.....

.....

Date : ***Approved by the Auckland University of Technology Ethics Committee on 1 April 2019***

AUTEC Reference number 19/69. *(Note: The Participant should retain a copy of this form).*