HOW EFFECTIVE IS LITIGATION AS A MECHANISM TO RESPOND TO, AND REMEDY, PAY INEQUITY? A COMPARATIVE ANALYSIS OF EXPERIENCES IN AUSTRALIA, CANADA AND BRITAIN

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I INTRODUCTION

There is some uncertainty about the size of the gender pay gap in Australia. The gender pay gap calculated by reference to average weekly ordinary time earnings is 17.9 per cent.¹ The Workplace Gender Equality Agency (‘WGEA’), which measures the gender pay gap based on reports produced by non-public sector employers with 100 or more employees, provides a less optimistic figure. According to the WGEA, the gender pay gap is 19.1 per cent if calculated on full-time base salary or 24 per cent if calculated on full-time total remuneration.² What is clear despite these varied statistics is that, although Australia’s industrial relations (‘IR’) system has recognised the concept of equal pay for women for over 40 years, the gender pay gap remains stubbornly persistent and has at times widened.³

The size and persistent nature of this problem demands reflection on the effectiveness of current legal responses to gender pay inequity. Other than the reporting scheme that operates under the auspices of the WGEA, consideration of which is beyond the scope of this paper, the primary legal mechanism for addressing pay inequity in Australia is via litigation under the equal remuneration provisions of the Fair Work Act 2009 (Cth) (‘FW Act’). While some conclusions may be drawn about the effectiveness of these provisions, the minimal number of cases that have been decided to date limits the extent to which the effectiveness of litigation in this context can be assessed.

Due to a much higher volume of pay equity litigation in Britain and Canada, those jurisdictions provide a useful point of reference to consider the potential effectiveness of litigation as a mechanism to address gender pay inequity. The experiences of claimants in those jurisdictions highlight a number limitations on the effectiveness of pay equity litigation to achieve systemic change. Those limitations include: the complaints-based nature of pay equity laws; the time involved in litigating pay equity claims; restrictions on the accessibility of pay equity litigation and enforcement issues; and structural flaws in pay equity laws that undermine the likelihood of claims succeeding. However, British and Canadian experiences also demonstrate the potential for litigated pay equity claims to achieve significant financial benefits for women and discursive benefits for gender equality. In light of these benefits, litigation should remain part of a multifaceted approach to responding to pay inequity.

¹ Re Equal Remuneration Decision (2015) 256 IR 362, 377 [27].
² Ibid [28].
II BACKGROUND — THEORETICAL ISSUES AND CONTEXTUAL CONSIDERATIONS

A Why Does it Matter?

There are several important reasons to be concerned about the effectiveness of current legal approaches to closing the gender pay gap.

Non-discrimination and equality are non-negotiable human rights, which are compromised by ongoing pay inequity. International law instruments (such as the ILO’s Equal Remuneration Convention, 1951 (No 100) and the UN Convention on the Elimination of All Forms of Discrimination Against Women) confirm that the principle of equal pay for work of equal value is a fundamental labour standard of the highest priority that must be guaranteed.

In addition to ensuring substantive equality for women and complying with obligations under international law, closing the gender pay gap may lead to greater harmony between standard working conditions and care responsibilities. Gender pay equity has a symbiotic relationship with women’s unpaid labour in the home. So long as women earn less than men, there will continue to be a financial justification for them assuming primary care responsibilities within heterosexual families. If the gender pay gap is narrowed or (more optimistically) closed, the caring responsibilities undertaken by men may increase, demands for more accommodating working arrangements may become louder, and the attitudes of legislators, courts, tribunals, and employers towards these issues may shift.

There are also economic imperatives to close the gender pay gap. The World Bank has noted that the ongoing gender pay gap impoverishes not only women but also their children, families and communities and that rectifying the systemic inequalities women face in the labour market has the potential to deliver economic growth. The Organisation for Economic Co-operation and Development (‘OECD’) also recognises the link between gender equality and economic growth, and has stated that ‘investment in gender equality yields the highest returns of all development investments.’ Improving pay equity may also benefit businesses by increasing

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6 Ibid 231.
female workers’ job satisfaction, motivation, and productivity, and by providing reputational benefits.\(^8\)

At a more fundamental level, the gender pay gap needs to be closed to address the ever-growing ‘equality debt’ owed to women by businesses and governments that have benefited from their unpaid or underpaid labour.\(^9\) As recognised by Fredman, ‘women continue to subsidise both public finances and private profit through many decades of underpayment’.\(^10\)

**B What Causes the Gender Pay Gap?**

Understanding the various complex causes of the gender pay gap is critical to assessing the effectiveness of mechanisms to address it, as ‘different causes imply different solutions as to how to reduce [the] gap.’\(^11\)

Various disciplinary fields provide differing explanations for the gender pay gap.\(^12\) For example, economic approaches traditionally explain the gender pay gap by reference to women’s lack of investment in human capital (such as educational attainment and preference for lower commitment jobs due to family responsibilities).\(^13\) In contrast, sociologists focus on the relationship between pay and social status.\(^14\) Factors broadly acknowledged as contributing to the gender pay gap include: the undervaluation of work performed by women; sex segregation of women into lower paying industries and sectors that lack union representation; and the unequal division of unpaid domestic labour.\(^15\)

**C How is the ‘Problem’ of Pay Inequity Constructed?**

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\(^8\) Chicha, above n 4, 44, 47.

\(^9\) Cornish, above n 5, 232.


\(^12\) Ibid.

\(^13\) O’Reilly et al, above n 11, 303.

\(^14\) Ibid.

Before assessing the effectiveness of litigation to address and remedy pay inequity, it is necessary to consider how the ‘problem’ of pay inequity is represented. Macdonald and Charlesworth, drawing on the work of feminist theorists, assert that the meanings of social problems and policies are not fixed but are subject to differing interpretations.¹⁶

As discussed in more detail below, courts and tribunals in Australia, Canada and Britain have variously represented the problem of pay equity as relating to the undervaluation of women’s work or sex-based discrimination against women. These differing characterisations of the ‘problem’ affect the legal thresholds and evidentiary hurdles required to substantiate a pay equity claim.

The analysis set out below proceeds on the basis that the ‘problem’ of pay inequity relates to women receiving less pay than men for work of equal value both because of directly and indirectly discriminatory pay practices and because of the undervaluation of work historically or predominately performed by women or associated with women.

D How is the Effectiveness of Litigation To Be Assessed?

Just as it is important to consider how the ‘problem’ of pay equity is constructed or represented, it is also critical to identify how the effectiveness of litigation to address pay equity will be assessed.

This paper measures the success of litigation to respond to, and remedy, pay inequity by considering the following:
(a) the outcomes of successfully litigated claims (including their potential to achieve systemic and discursive benefits);
(b) the impact of litigation on negotiated outcomes;
(c) the timeliness of litigated outcomes;
(d) the accessibility of litigation as an avenue to achieve pay equity; and
(e) the likelihood of litigated pay equity claims succeeding (including by reference to evidentiary issues and the complexity of applicable legal principles).

E Why Compare Jurisdictions?

This paper adopts a comparative approach to considering the effectiveness of litigation to achieve pay equity in order to draw on a more extensive body of pay equity cases and to facilitate an assessment of the impact that different legal frameworks have on litigated outcomes. Further, as recognised by Fredman, comparative law ‘sharpens our understanding of our own jurisdiction and suggests alternative means of accomplishing stated aims’.\(^{17}\)

However, there are challenges associated with comparative analyses and it is important to consider any social, economic, historical or political contexts that may affect the ability to universalise laws from different jurisdictions.\(^{18}\)

Canada and Britain provide appropriate sources for comparative analysis with Australia given their shared language and common law history. These jurisdictions provide particularly useful sources of comparison in the current context given the very high volume of pay equity litigation in Britain (described as having reached ‘almost epidemic proportions’)\(^{19}\) and given that Canada is widely considered a leader in the area of pay equity,\(^{20}\) and has been described as a ‘pay equity laboratory’.\(^{21}\)

### III A BRIEF HISTORY OF PAY EQUITY REGULATION UNDER AUSTRALIAN FEDERAL IR LAWS

For approximately 65 years, Australia’s industrial courts and tribunals sanctioned and maintained gender pay inequity.

In 1907, Higgins J established the principle of the ‘living wage’ in the seminal *Harvester* judgement.\(^{22}\) This decision related to tariff protection available to manufacturers that paid their workers ‘fair and reasonable’ wages. Justice Higgins held that, to satisfy this requirement, a wage must be sufficient to support the worker’s home of about five persons in conditions of ‘frugal comfort.’\(^{23}\) In reaching this decision, Higgins J established a ‘needs-based family wage approach to setting minimum male wages [which] came to form the basis for Australia’s wage fixation system for most of the twentieth century’ and ‘legally institutionalized gender

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\(^{17}\) Sandra Fredman, ‘Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India’ (Luxembourg: European Network of Legal Experts in the Non-Discrimination Field, 2012) 11.

\(^{18}\) Ibid.


\(^{21}\) Chicha, above n 4, 2.

\(^{22}\) *Ex parte H V McKay* (1907) 2 CAR 1 (‘*Harvester*’).

\(^{23}\) Ibid.
inequality in basic wages’. The Harvester decision established a wage structure for Australian employees consisting of a basic wage common to all workers and a secondary wage or ‘margin’ to recognise the skill, responsibility or particular circumstances of the relevant worker or industry. In a later decision, Higgins J held that the minimum rate of pay for adult women should be the amount ‘necessary to satisfy the normal needs of an average female employee, who has to support herself from her own exertions’, which was set at just over half the male rate. These decisions resulted in female-headed households being severely undercompensated while unmarried male workers were overcompensated.

Different wage rates were maintained for men and women over the decades under three different models of female wages. Under the first model, equal pay was granted to women performing the same jobs as men to ensure that male employment would not be threatened by cheap female labour. The second model applied 54 to 75 per cent of the male wage rate to women on both the basic wage and the ‘skill margin’, where applicable. Under the final model, women earned the same skill margin as men but received a lower basic wage due to the concept of the family wage established in the Harvester decision.

The practice of awarding separate increases to basic wages and margins was abandoned by the Federal Industrial Tribunal in its 1967 National Wage Case, which introduced the notion of a ‘total wage’. The Federal Tribunal in this case awarded the same general wage increase to men and women but declined to introduce an equal total wage for women workers. In so doing, the Tribunal noted that introducing an equal total wage ‘would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered’. Two years after this disappointing decision, the Federal Industrial Tribunal finally adopted the principle of equal pay for equal work. However, this decision only applied where the work performed by men and women was ‘the same or a like

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26 Federated Clothing Trades v J A Archer (1919) 13 CAR 647.
27 Chapman, above n 24, 84.
29 Lyons and Smith, above n 28.
30 Ibid.
31 Ibid.
33 Ibid.
34 Ibid.
and excluded work that was ‘essentially or usually performed by females’. In 1972, the Tribunal handed down its decision in the National Wage Case, which introduced the broader principle of equal pay for work of equal value. This effectively extended the effect of the 1969 decision to also apply to female-dominated industries. The concept of the family wage was finally abandoned by the Tribunal in the 1974 National Wage Case. From that time on, minimum wage rates were not differentiated by sex.

Despite these developments, attempts to implement the principle of equal pay for work of equal value proved disappointing. In 1986, the Federal Tribunal declined to grant an application by the Australian Council of Trade Unions to vary the Private Hospitals and Doctors’ Nurses (ACT Award) based on the concept of comparable worth because it would undermine ‘long accepted methods of wage fixation’ and threaten the wage fixing principles that applied at the time.

Following a period of stagnation in gender pay equity, the federal government amended the Industrial Relations Act 1988 (Cth) in 1993 to include specific equal remuneration provisions. Those provisions were largely retained under the Workplace Relations Act 1996 (Cth) (‘WR Act’). The WR Act underwent significant amendment with the introduction of the ‘WorkChoices’ legislation in 2005. Following those amendments, both the federal industrial tribunal (then named the Australian Industrial Relations Commission (‘AIRC’)) and the newly established Australian Fair Pay Commission were required to take into account the need to apply the principle of equal pay for work of equal value in the performance of their functions. However, the WR Act also excluded the operation of state or territory laws that enabled courts or tribunals to make orders requiring equal remuneration for work of equal value. This limitation was particularly damaging for women in New South Wales and Queensland, given the very positive pay equity outcomes being achieved at the industrial relations commissions in those states (analysis of which is beyond the scope of this paper). Further, the WorkChoices amendments removed the AIRC’s ability to determine ‘test cases’ on employment issues of

35 Lyons and Smith, above n 28.
37 Lyons and Smith, above n 28.
38 Ibid.
39 Chapman, above n 24, 84.
40 Ibid 85.
42 Lyons and Smith, above n 28.
43 Ibid.
44 Ibid 14.
45 Ibid.
particular significance for women workers, which were then applied to the award system. Critics viewed this change as having undermined the principle of equal pay for work of equal value.46

The equal remuneration provisions introduced in 1993 and retained in the WR Act (including after the introduction of WorkChoices) did not provide pay equity gains for women in practice. The provisions were rarely tested and did not result in any equal remuneration orders being made.47 This has been explained by the fact that the provisions, as interpreted by the AIRC, required applicants to demonstrate that disparities in pay had a discriminatory cause.48 This requirement prevented the provisions from dealing with the systemic nature of gender pay inequity or the issue of undervaluation of women’s work.49

IV THE POTENTIAL TO ACHIEVE PAY EQUITY VIA LITIGATION IN AUSTRALIA — A MIXED REPORT CARD

A Anti-Discrimination Claims

Litigation under Australia’s anti-discrimination laws has proven ineffective to address pay equity. This is due to structural problems inherent in those laws and narrow technical interpretations of anti-discrimination provisions that have been adopted by courts and tribunals.

Charlesworth and Macdonald argue the Sex Discrimination Act 1984 (Cth) (‘SD Act’) regards the male pattern of life as the norm, which makes it difficult to address ‘deep-rooted causes of inequality’ such as pay inequity.50 This is compounded by other structural flaws with the SD Act, such as its reliance on an individual complaints model and ineffective enforcement mechanisms.51 Employees are only able to seek a remedy for pay inequity under the SD Act if they allege that they are paid less than a man employed by the same employer and undertaking similar or comparable work.52 Unlike under Australia’s federal IR laws, discussed below, it is not possible to bring a pay equity claim under the SD Act across an entire sector or industry or based on comparisons within or between industries.

46 Ibid 15.
47 Smith, above n 41, 658; Lyons and Smith, above n 28, 15.
48 Lyons and Smith, above n 28, 15; Smith, above n 41, 658.
49 Lyons and Smith, above n 28, 15.
50 Macdonald and Charlesworth, above n 16, 567.
51 Ibid.
52 Ibid.
Pay equity claims do not fit easily within the narrow formulations of direct and indirect discrimination contained in the *SD Act*. Any pay equity claim based on an allegation of direct discrimination would need to establish that disparities in pay were because of the complainant’s sex. Such a requirement would be impossible to establish in the vast majority of cases, where differences in pay are due to systemic issues and gender based undervaluation, rather than overt discrimination. Pay equity claims brought under the indirect discrimination provisions of the *SD Act* also face significant hurdles, including the need to identify a relevant ‘requirement, condition or practice’ and to grapple with any employer arguments that such a requirement, condition or practice was ‘reasonable’ and therefore not indirectly discriminatory. The burden of proof placed on complainants under the *SD Act* is also problematic in the context of pay equity claims given the general lack of transparency regarding relative wage rates and the criteria adopted by employers to determine rates, at least in workplaces where pay does not reflect the minima set out in an applicable industrial instrument.

Presumably due to these deficiencies, very few pay equity cases have been litigated under the *SD Act*. The few pay equity claims that have been pursued under anti-discrimination laws have not been successful. For example, in *New South Wales v Amery*, the High Court dismissed an application brought by a group of casual female teachers under New South Wales anti-discrimination laws who claimed that they had been discriminated against on the basis of their sex because they were unable to access higher pay levels provided to permanent staff performing identical work. The claimants alleged that their employer had imposed the requirement or condition of ‘permanent status’ in order to access higher salary levels. They claimed they could not satisfy that requirement because their family responsibilities prevented them from being able to be redeploed to other schools, which made them ineligible for permanent status. The majority of the High Court rejected the application on the narrow basis that the claimants were employed as ‘casual teachers’ rather than ‘teachers’. As a result of this characterisation, the majority found it was incongruous to claim that the employer had imposed a requirement or condition that the claimants have ‘permanent status’ in order to access higher salary levels.

According to Charlesworth and Macdonald, the *Amery* decision ‘reflects an unquestioned acceptance of the primacy of historic and gendered industrial distinctions between casual and permanent employees, which ultimately trump any rights employees have to pay equity under anti-discrimination law’. Further, the *Amery* decision provides scope to employers to

53 Ibid 568.
55 Macdonald and Charlesworth, above n 16, 568.
circumvent discrimination law by narrowly defining employment so that a discriminatory requirement (including a requirement that impacts on pay) can be characterised as merely an element of the particular employment.\footnote{Joanna Hemingway, ‘Implications for Pay Equity in State of NSW v Amery’ (2006) 44 Law Society Journal 44.}

B Claims Under Current Federal IR Laws

1 Overview of Legislative Framework and Key Decisions

Litigation under the \textit{FW Act} has provided a more effective mechanism to address pay inequity.

The \textit{FW Act} empowers the Fair Work Commission (‘FWC’) to make equal remuneration orders (‘EROs’) to ensure that, for those employees to whom the order applies, there will be equal remuneration for work of equal or comparable value.\footnote{\textit{FW Act} s 302(1).} EROs effectively displace and override any less beneficial terms in an applicable modern award or enterprise agreement.\footnote{Ibid s 306.} In order to make an ERO, the FWC must be satisfied that there is not equal remuneration for work of equal or comparable value for the employees to whom the order will apply.\footnote{Ibid s 302(5).} The \textit{FW Act} defines ‘equal remuneration for work of equal or comparable value’ as ‘equal remuneration for men and women workers for work of equal or comparable value’.\footnote{Ibid s 302(2).} EROs must not provide for a reduction in an employee’s rate of pay.\footnote{Ibid s 303(2).} In other words, the FWC cannot make an ERO that ensures pay equity by ‘levelling down’.

To date, only two applications for an ERO have been made under the \textit{FW Act} (one of which has not yet been finally determined). The first of these was an application made in 2010 by the Australian Municipal, Administrative, Clerical and Services Union (‘ASU’) seeking an ERO that would apply to employees of non-government employers in the social, community and disability services (‘SACS’) sector.\footnote{Re Equal Remuneration Case (2011) 208 IR 345, 351 [1].} The application sought an ERO that would increase SACS workers’ wages by 30 per cent.\footnote{Siobhan Austen and Therese Jefferson, ‘Economic Analysis, Ideology and the Public Sphere: Insights from Australia’s Equal Remuneration Hearings’ (2015) 39 \textit{Cambridge Journal of Economics} 405.} The ASU argued that SACS employees are predominantly women and that their work is undervalued given the nature of the work and the skills and
responsibilities required to perform it. The ASU further argued that historical and institutional factors contributed to the ongoing undervaluation of SACS work. In its decision on the substantive merits of the application (‘SACS No 1’), a full bench of Fair Work Australia (‘FWA’) (as it was then named) accepted that there was not equal remuneration for work of equal or comparable value in the SACS sector (by comparison with state and local government employment) because SACS work had been subjected to gender-based undervaluation due to the ‘caring’ nature of the work. In reaching this decision, FWA expressed a number of important conclusions regarding the scope and operation of the ERO provisions of the FW Act. Firstly, FWA accepted the ASU’s submission that the inclusion of the concept of work of ‘comparable value’ was a significant departure from the WR Act equal remuneration provisions and, as a result, decisions made under the WR Act are not directly applicable to applications for EROs. Unsurprisingly given the permissive language used in s 302, FWA held that it retained a discretion to determine whether or not to make an ERO after finding there was not equal remuneration for work of equal or comparable value. More significantly, FWA treated the gender-based undervaluation of work as central to considering whether equal remuneration for work of equal or comparable value exists and held that it is not necessary to establish that pay rates have been established on a discriminatory basis. Critically, FWA held that demonstrating the existence of a valid male comparator group that receives higher remuneration than a female-dominated group performing work of equal or comparable value is one way of demonstrating the need for an ERO, but is not the only way. FWA acknowledged that the presence of a male comparator group may make it easier to establish that an ERO should be made, but held that the absence of a male comparator group did not mean that an application for an ERO must inevitably fail. FWA confirmed that such cases could only succeed if the applicant established the remuneration paid was subject to gender-based undervaluation.

FWA handed down a separate decision on the terms of the ERO (‘SACS No 2’), after adjourning the matter pending submissions on the extent to which wages in the SACS sector had been

64 Ibid.
65 Ibid 407.
66 Re Equal Remuneration Case (2011) 208 IR 345, 415 [253], 422 [285].
67 Ibid 407 [226].
68 Ibid 408 [228].
69 Ibid 409 [232]–[234].
70 Ibid 409 [232].
71 Ibid.
72 Ibid 409 [233].
affected by gender.\textsuperscript{73} This followed a conclusion in \textit{SACS No 1} that the proper approach to making an ERO was to identify the extent to which gender had inhibited wages growth in the SACS sector and to then mould a remedy that addressed that situation.\textsuperscript{74} In \textit{SACS No 2}, a majority of the FWA full bench decided to make an ERO that provided percentage pay increases of between 19 per cent and 41 per cent to pay rates contained in the applicable modern award, to be phased in over eight years.\textsuperscript{75} These percentage increases were consistent with those proposed by the ASU and the Commonwealth government in a joint submission to FWA.\textsuperscript{76} In addition, the ERO provided for a four per cent loading on the modern award rates in recognition of the impediments to enterprise bargaining in the SACS sector.\textsuperscript{77}

The \textit{SACS No 1} and \textit{SACS No 2} decisions (‘\textit{SACS Decisions}’) were welcomed by many as a significant development towards achieving pay equity in Australia.\textsuperscript{78} In particular, FWA’s acknowledgement of the link between care work performed by women and the undervaluation of female-dominated work was applauded for recognising the systemic gender inequality that underpins unequal pay.\textsuperscript{79} However, others were more circumspect in their assessment of the \textit{SACS Decisions}. Smith and Stewart have noted a number of limitations of the \textit{SACS Decisions}, including that FWA adopted an ‘ambiguous’ approach to undervaluation, set the applicants a ‘complex task’ by requiring submissions on the proportion of undervaluation that could be attributed to gender, and failed to articulate an equal remuneration principle to more explicitly guide parties on the operation of the provisions.\textsuperscript{80} Smith and Stewart also raised concerns that the requirement to identify the extent that undervaluation was attributable to gender may limit the operation of the provisions to applications concerning a single workplace or to narrowly cast intra-industry or intra-occupation applications.\textsuperscript{81}

Charlesworth and Macdonald have raised similar concerns about the \textit{SACS Decisions} and have queried their precedent potential beyond feminised occupations involving care work, given that FWA declined to follow the approaches to pay equity developed in New South Wales and Queensland (which effectively take judicial notice of the factors that contribute to gender

\textsuperscript{73} Ibid 422 [286], 424 [292].
\textsuperscript{74} Ibid 421 [282].
\textsuperscript{75} \textit{Re Equal Remuneration Case} (2012) 208 IR 446, 463 [66]–[67].
\textsuperscript{76} Ibid 463 [67].
\textsuperscript{77} Ibid 463 [69].
\textsuperscript{78} Macdonald and Charlesworth, above n 16, 563, 577.
\textsuperscript{79} Ibid 578.
\textsuperscript{80} Meg Smith and Andrew Stewart, ‘Equal Remuneration and the Social and Community Services Case: Progress or Diversion on the Road To Pay Equity?’ (2014) 27 \textit{Australian Journal of Labour Law} 31, 51.
\textsuperscript{81} Ibid 52.
undervaluation in pay).\textsuperscript{82} The precedent value of the \textit{SACS Decisions} is also questionable given the apparent influence of the Commonwealth government’s funding commitment to the outcome of the case. Finally, Charlesworth and Macdonald criticised FWA’s unwillingness to link the terms of the ERO to market rates of pay in state and local government (rather than award rates) in circumstances where SACS workers are largely employed at or just above the minimum safety net established by the relevant modern award and have generally been unable to gain pay increases through collective bargaining.\textsuperscript{83}

While some of these concerns were addressed in an equal remuneration decision delivered by a Full Bench of the FWC in late 2015 (‘\textit{Childcare Workers Decision}’), other aspects of that decision are likely to further limit the effectiveness of litigation under the \textit{FW Act} as a mechanism to achieve pay equity. The \textit{Childcare Workers Decision} related to applications for an ERO made by three unions on behalf of employees of long day care centres and preschools (other than local council employees) and early childhood teachers.\textsuperscript{84} The FWC has not yet concluded whether an ERO should be made in relation to these workers. It delivered the \textit{Childcare Workers Decision} to articulate its conclusions on the key relevant legal issues to guide the parties before they advance their evidentiary case.\textsuperscript{85}

The \textit{Childcare Workers Decision} restates and confirms a number of the principles established in the \textit{SACS Decisions}, including that FWC’s power to make an ERO is discretionary,\textsuperscript{86} and that it is not necessary to establish that rates have been established on a discriminatory basis in order to obtain an ERO.\textsuperscript{87} However, the FWC also departed from the approach adopted in the \textit{SACS Decisions} in several important respects. Following the \textit{Childcare Workers Decision} it is no longer necessary to establish that any difference in remuneration is ‘gender-related’.\textsuperscript{88} A male comparator employee or group of employees is now required in all cases and demonstrating gender-based undervaluation will no longer be sufficient to obtain an ERO.\textsuperscript{89} Instead, gender-based undervaluation cases may only be advanced under ss 156 or 157 of the \textit{FW Act}, which allow the variation of minimum rates of pay in modern awards for work value reasons.\textsuperscript{90} The implications of these conclusions are addressed below.

\textsuperscript{82} Macdonald and Charlesworth, above n 16, 579.
\textsuperscript{83} Ibid 579–80.
\textsuperscript{84} \textit{Equal Remuneration Decision} (2015) 256 IR 362, 372–3 [1]–[4].
\textsuperscript{85} Ibid 374 [8].
\textsuperscript{86} Ibid 420 [196].
\textsuperscript{87} Ibid 418 [187].
\textsuperscript{88} Ibid 447–8 [306]–[307].
\textsuperscript{89} Ibid 442 [290].
\textsuperscript{90} Ibid 443 [292].
2 Benefits of Litigating for Pay Equity Under the FW Act

The SACS Decisions demonstrate the capacity of litigation commenced under the FW Act equal remuneration provisions to achieve pay equity. As noted above, SACS workers achieved substantial pay increases as a result of these decisions. The public nature of the litigation that led to that outcome also arguably achieved discursive benefits by raising the policy and political profile of equal pay.91 As recognised by Austen and Jefferson, the SACS proceedings enabled in-depth public discussion of gender-based undervaluation of particular types of work.92

The current lack of litigated outcomes under the FW Act equal remuneration provisions limits our capacity to assess the effectiveness of litigation to achieve pay equity in this context. However, several aspects of the provisions (as interpreted by the FWC) support the view that litigated claims for EROs have the potential to effectively respond to, and remedy, pay inequity.

Firstly, EROs are clearly capable of achieving systemic change. Section 302 of the FW Act empowers the FWC to make ‘any order it considers appropriate to ensure that, for the employees to whom the order will apply, there will be equal pay for work or equal or comparable value’. The breadth of the FWC’s discretion over the terms of any ERO empower it to craft agile and targeted orders that respond to the particular causes of pay inequity in the relevant workplace, industry or sector. The FWC’s broad discretion over the form of an ERO was recognised in the Childcare Workers Decision, which noted that an ERO could include increases in wages or allowances, variations to bonus schemes, the establishment of new classifications or the variation of job descriptors.93 The requirement that an ERO ensure there will be equal remuneration for the employees covered by the order requires EROs to be forward-looking and mandates that the terms of any ERO deliver pay equity in practice. Finally, as demonstrated by the SACS Decisions, EROs may be made on a broad sectoral level. This further strengthens the potential of EROs to address the systemic nature of gender pay inequity.

The capacity of EROs to address pay inequity on a systemic level is also supported by the broad interpretation of ‘remuneration’ adopted by the FWC. The FWC has confirmed that ‘remuneration’ in this context is not confined to wages or salary and includes all other monetary and non-monetary compensation paid as consideration for service under an employment contract.94 Further, the FWC has now clearly accepted that the equal remuneration provisions

91 Charlesworth and Macdonald, above n 3, 435.
92 Austen and Jefferson, above n 6 3, 406.
94 Ibid 439 [276].
of the *FW Act* are concerned with equality in the actual remuneration for the employees covered by an ERO. The operation of the provisions is not limited to the minimum rates of pay and conditions provided for employees through modern awards and the national minimum wage. This interpretation allows the FWC to give due consideration to the absence of effective enterprise bargaining in relation to particular female-dominated work when assessing whether there is equal remuneration for work of equal or comparable value.

The *FW Act* equal remuneration provisions adopt a complaints-based approach to pay equity. However, while the FWC cannot make an ERO on its own initiative, it is not left to individual workers alone to litigate for pay equity. Unions and the Sex Discrimination Commissioner may also apply to the FWC for an ERO. Unions have already demonstrated their willingness to do so in the two applications that have been lodged to date. Whether the Sex Discrimination Commissioner will also exercise their power to issue proceedings under these provisions remains to be seen. The *FW Act* equal remuneration framework also provides a role for the federal industrial relations regulator in enforcing pay equity. Contravening an ERO constitutes a breach of a civil remedy provision of the *FW Act* and is therefore subject to potential prosecution by the Fair Work Ombudsman (‘FWO’).

Another key benefit of litigating to achieve pay equity under the *FW Act* equal remuneration provisions is the absence of any requirement to establish discrimination. As noted above, the FWC has confirmed that, unlike the underused and ineffective *WR Act* equal remuneration provisions, applicants for an ERO are not required to demonstrate that disparities in pay had a discriminatory cause. Further, the FWC has now established that applicants need not demonstrate that any difference in remuneration is ‘gender-related’ to obtain an ERO. As a result of these interpretations, the *FW Act* equal remuneration provisions have much broader potential scope than the British pay equity provisions considered below.

3 Limitations on Achieving Pay Equity Via *FW Act* Proceedings

Despite the advantages noted above, a number of aspects of the *FW Act* equal remuneration framework limit the potential effectiveness of litigation as a mechanism to achieve pay equity.

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95 Ibid 439 [277].
96 Ibid.
97 *FW Act* s 302(3).
98 Ibid.
99 Ibid ss 305, 539.
Other than in limited exceptional circumstances, the FWC is generally a no-costs jurisdiction.\textsuperscript{100} This is significant given that the ASU has estimated its costs in pursuing the SACS application were approximately $1 million.\textsuperscript{101} As Macdonald and Charlesworth have highlighted, litigating for pay equity via an ERO is a complex and onerous task and some unions may consider the process too costly to pursue.\textsuperscript{102} Given these costs, potential applicants may be reluctant to litigate for an ERO if this would not result in an award of compensation. Although the FWC has a broad discretion to determine the terms of EROs, the forward-looking focus of EROs noted above suggests it has no power to order compensation or back-pay. In addition to dissuading applicants from litigating to obtain an ERO, this limits the potential systemic benefits of the provisions as employers do not have an incentive to proactively audit and adjust pay practices to reduce potential liability for back-pay.

A related limitation of pursuing pay equity under the \textit{FW Act} equal remuneration provisions is the delay involved in litigating such claims. It took almost two years from the time that the ASU lodged its initial application for an ERO for the \textit{SACS No 2} decision to be delivered. The applications that prompted the \textit{Childcare Worker Decision} were first filed over three years ago and have still not been finally determined. However, these delays are insubstantial when compared with the timeframes associated with pay equity litigation in Canada, discussed below.

The cost and delay associated with pay equity litigation under the \textit{FW Act} is linked to the complexity of the equal remuneration provisions. The considerable complexity of these provisions was recently recognised by the FWC in the \textit{Childcare Workers Decision}.\textsuperscript{103} Applicants bear the burden of establishing the ‘jurisdictional fact’ required to obtain an ERO.\textsuperscript{104} As a result, it falls to applicants to grapple with the complexity of the provisions in order to establish that there is not equal remuneration for work of equal or comparable value. The onerous nature of this task can be expected to dissuade many employees and their unions from pursuing pay equity via litigation under the \textit{FW Act}.

Employees and unions may also be reluctant to pursue litigated pay equity claims under the \textit{FW Act} due to uncertainties about the operation of the equal remuneration provisions. The FWC declined to issue any formal guiding statement of principles on equal pay in both the \textit{SACS
Decisions and the Childcare Workers Decision. The FWC has also declined to provide specific guidance on the identification of appropriate comparators to obtain an ERO. The FWC’s failure to provide more guidance on the operation of the provisions is problematic given its inconsistent approach to key principles to date.

The most significant limitation on the potential for litigation under the FW Act equal remuneration provisions to remedy pay inequity is the discretion provided to the FWC to decline to make an ERO, even where unequal pay for work or equal or comparable value is established. While the FWC has identified some limits to that discretion, it remains extraordinarily broad. It is arguable that the FWC cannot be relied upon to appropriately exercise such a broad discretion in light of the history of institutionalised sexism in wage setting in Australia identified by academics such as Smith.

The decisions delivered to date clearly suggest that economic and market based considerations will be relevant to the FWC’s exercise of its discretion to make an ERO. For example, in the Childcare Workers Decision, the FWC identified employer capacity to pay, the effect of any order on service delivery, and the effect of any order on a range of economic considerations (including employment, productivity and growth) as potentially relevant to the exercise of the discretion. Similarly, in SACS No 1, FWA noted that issues regarding cost, funding and the prospect of an ERO leading to significant unemployment could all be taken into account. The decision to exercise the discretion in favour of making an ERO in the SACS Decisions was clearly influenced by the widespread support for the proposed pay increases among most of the interested parties to the proceedings and the fact that the Commonwealth government had committed to fund its share of the increased costs arising from the pay increases ordered. There is a real risk that the FWC will be less inclined to exercise its discretion to order an ERO in circumstances where the application is opposed by employers on economic grounds and there is no forthcoming government funding to alleviate the cost implications of an ERO.

The FWC has suggested that the ‘all or nothing’ character of the FW Act equal remuneration provisions may make it less likely to exercise its discretion to make an ERO in some cases. However, this may be alleviated by the FWC’s power under s 304 of the FW Act to make an

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105 Ibid [367]; Re Equal Remuneration Case (2011) 208 IR 345 [289].
107 Ibid 421 [200]–[202].
108 Smith, above n 28, 654.
109 Re Equal Remuneration Case (2011) 208 IR 345 [230].
ERO that implements equal remuneration in stages. For example, in SACS No 2 FWA raised concerns about the impact the ERO may have on non-government funded programmes and activities and on the finances of a number of state governments but decided that those risks could be satisfactorily addressed by extending the length of the implementation period.112

Finally, the recently recognised requirement to identify an appropriate male comparator can be expected to limit the capacity of litigated ERO claims to respond to, and remedy, pay inequity. Smith and Lyons have recognised the difficulty of identifying a male comparator group for women who are employed in gender segregated industries and occupations.113 The Independent Education Union is currently grappling with this difficulty in its application for an ERO for early childhood educators.114 Further, in comments that were quoted by the FWC in the Childcare Workers Decision, Smith and Stewart noted that ‘narrow and binary forms of job comparison may not be capable of assessing the complex means through which undervaluation may be embedded in the classification, organisation and remuneration of women’s work’ and that comparator approaches are ‘unlikely to uncover the sources of inequity and cannot address thoroughly the issue of undervaluation of work performed by women’.115

V LESSONS FROM CANADA AND BRITAIN — SUCCESSES AND CHALLENGES IN LITIGATING FOR PAY EQUITY

A Summary of Legislative Framework

Both Canada and Britain address pay equity under anti-discrimination laws. A brief overview of those laws is set out below.

Since the introduction of the Public Sector Equitable Compensation Act, SC 2009, c 2 (‘PSECA’), pay equity is now addressed in two separate pieces of legislation at the federal level in Canada. The focus of this paper is on litigated pay equity outcomes under the Canadian Human Rights Act, RSC 1985, c H-6 (‘CHRA’). The CHRA specifically deals with pay equity under s 11, which states that it is a discriminatory practice for an employer to establish or

112 Re Equal Remuneration Case (2012) 208 IR 446, 462–3 [65].
113 Lyons and Smith, above n 28, 16.
maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value. Whether employees are performing work of equal value is assessed by considering the skills, effort and responsibility required in the performance of the work and the conditions under which the work is performed. Differences in pay based on a factor prescribed in guidelines issued by the Canadian Human Rights Commission (‘CHRC’) do not contravene s 11 of the CHRA. Sections 7 and 10 of the CHRA contain more general prohibitions on discrimination in employment, which are capable of encompassing wage discrimination. These provisions have also been relied on by Canadian women to challenge pay inequality.

The British legislative entitlement to pay equity is more complex. That entitlement is derived from the Equality Act 2010, c 15, (‘Equality Act’). The Equality Act contains a ‘sex equality clause’ that is implied into contracts of employment of persons employed on work that is equal to the work that a comparator of the opposite sex does. The effect of the sex equality clause is to ensure that the terms of the person’s employment contract are no less favourable than those of the relevant comparator. Work is regarded as ‘equal’ under the Equality Act if it is: ‘like work’; rated as equivalent pursuant to a job evaluation study; or of equal value in terms of the demands made on employees by reference to factors such as effort, skill and decision-making. The sex equality clause has no effect if the employer can show that the difference in pay or other contractual terms is due to a material factor that does not directly or indirectly discriminate against the employee. The material factor must not be directly discriminatory and, if it is indirectly discriminatory, it must be justified as a proportionate means of achieving a legitimate aim.

B Outcomes of Successful Litigation

Pay equity litigation has achieved substantial financial payouts for large numbers of women in both Canada and Britain.

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116 CHRA s 11(1).
117 Ibid s 11(2).
118 Ibid s 11(4).
120 Equality Act ss 64, 66.
121 Ibid s 66.
122 Ibid s 65.
123 Equality Act s 69; Equal Pay Statutory Code of Practice [75].
124 Equality Act s 69; Equal Pay Statutory Code of Practice [80], [87].
For example, in a British pay equity case brought by the National Union of Public Employees on behalf of 300 workers employed by North Yorkshire Council to work in school dining rooms, £2 million in back-pay was awarded after the House of Lords found that the workers were paid less than men engaged on work rated as equivalent.\(^{125}\)

An example of the significant potential financial benefits available to female workers via pay equity litigation in Canada is the Federal Court’s decision in *Canada (Attorney General) v Walden*.\(^{126}\) *Walden* related to an application brought under ss 7 and 10 of the *CHRA* by over 400 registered nurses who worked in the female-dominated job class of Medical Adjudicators. The nurses were paid less than the male-dominated job class of Medical Advisors, despite the fact that both groups performed similar work making disability determinations under the Canadian Pension Plan. The Federal Court in *Walden* upheld the remedial order that had been made by the Canadian Human Rights Tribunal (‘CHRT’) requiring the government to compensate the complainants for over 30 years in lost wages and dismissed the government’s application for judicial review.\(^{127}\)

There is some potential for the orders made following successful pay equity litigation in both Britain and Canada to achieve systemic benefits and reduce ongoing pay inequity. If an Employment Tribunal upholds an equal pay claim brought under the *Equality Act*, the Tribunal may make a declaration as to the rights of the parties to the claim.\(^{128}\) This could include a declaration that the employer provide the employee with a pay rise to the level of the relevant comparator’s pay, or the inclusion of any beneficial term not in the employee’s contract.\(^{129}\) Further, equal pay claims upheld by the Tribunal after 1 October 2010 must result in an order requiring the employer to carry out an equal pay audit, unless an exception applies.\(^{130}\) Such audits must be sent to the Tribunal to assess compliance and employers that unreasonably fail to complete an audit are subject to penalties.\(^{131}\) Similarly, in Canada successful pay equity claims can result in an order requiring the employer to take measures to redress discriminatory pay practices and prevent such practices from occurring in future.\(^{132}\) However, the complaints-based nature of pay equity laws in both Canada and Britain results in an uneven application of

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125 *Ratcliffe v North Yorkshire County Council* [1995] 3 All ER 597; McLaughlin, above n 19, 9.
126 [2010] FC 490 (’Walden’).
127 Cornish and Quito, above n 119, 18.
128 *Equality Act* s 132.
129 *Equal Pay Statutory Code of Practice* [146].
130 The *Equality Act (Equal Pay Audits)* Regulations 2014, No 2559.
131 Ibid.
132 *CHRA* s 53(2).
pay equity obligations which limits the potential systemic benefits that may be achieved via litigation.\textsuperscript{133}

Beyond the financial and systemic benefits of successfully litigated pay equity claims, Canadian and British pay equity litigation demonstrate the potential for publicly litigated claims to provide discursive benefits for pay equity. For example, large-scale pay equity litigation in Canada in the late 1990s prompted substantial public discussion about pay equity.\textsuperscript{134} On one view, regardless of its tenor, such discussion at least projects the issue of pay equity onto the public consciousness and has an educative role in informing employees and employers of their respective rights and obligations. O’Reilly et al have recognised how media reporting of multimillion dollar compensation awards keeps the subject of gender pay inequality in the public eye and maintains pressure on governments and organisations to address pay inequity.\textsuperscript{135} As recognised by Cornish, the process of making women’s work visible and acknowledging its importance is valuable in and of itself.\textsuperscript{136} Pay equity litigation provides a mechanism to do so.

However, it is also arguable that the public discussion generated by pay equity litigation can harm efforts to address and remedy pay equity. Fudge described the Canadian pay equity cases referred to above as ‘flashpoints around which the daily press, businesses, and government rallied against pay equity, decrying substantive equality as bureaucratic meddling and reasserting the supremacy of the market as the only legitimate way to value work’.\textsuperscript{137} According to Fudge, these cases resulted in ‘discursive defeats’ for pay equity, as political attacks were made on the CHRC, the courts and the concept of pay equity itself.\textsuperscript{138} Further, the potential discursive benefits offered by pay equity litigation are limited by its typically adversarial and antagonistic nature, described as Fredman as ‘a site of conflict and resistance’.\textsuperscript{139}

C Impact of Pay Equity Litigation on Negotiated Outcomes

Litigation appears to have had a more significant impact in remedying pay inequity in Canada and Britain through the achievement of negotiated settlements.

\textsuperscript{133} Fredman, above n 10, 207.
\textsuperscript{134} Fudge, above n 20, 326.
\textsuperscript{135} O’Reilly et al, above n 11, 302.
\textsuperscript{136} Cornish, above n 5, 230.
\textsuperscript{137} Fudge, above n 20, 326.
\textsuperscript{138} Ibid 338.
\textsuperscript{139} Fredman, above n 10, 207.
For example, in 2006 telephone operators at Bell Canada received a $104 million pay equity settlement that included payment for pain and suffering.\(^\text{140}\) Litigation was critical to achieving this outcome given that Bell Canada had been unwilling to act on the findings of a joint committee pay equity study completed in 1992 that found the female-dominated jobs performed by telephone operators and clerical workers at Bell Canada were paid at a much lower level than predominately male jobs.\(^\text{141}\)

In an even more stunning result, a pay equity dispute between the Canadian federal government and Public Service Alliance of Canada (‘PSAC’) was settled in 1999 for over $3 billion, to be paid to approximately 230 000 current and former public service employees.\(^\text{142}\) This settlement was prompted by a legal victory achieved by PSAC in the Federal Court, which denied every ground for review of the CHRT’s decision advanced by the government and awarded PSAC costs.\(^\text{143}\) The quantum of the final settlement achieved in this case is significant given the much more modest pay equity adjustments offered by the government at earlier stages of the dispute. The government initially offered pay adjustments of $76 million per year and $316 million in back pay.\(^\text{144}\) This offer was increased to $360 million in early 1990.\(^\text{145}\) By 1997, the government increased its settlement offer to $1 billion.\(^\text{146}\) PSAC rejected that offer on the basis that it represented only 65 per cent of the amount it argued workers were due.\(^\text{147}\) Its decision to hold out and pursue its members’ pay equity claims via lengthy and contested litigation was validated by the final settlement outcome it achieved.

Pay equity litigation has also assisted women to achieve beneficial negotiated settlements in Britain. For example, around 1 200 caterers, cleaners, carers, school support staff, and leisure centre attendants were compensated approximately £30 million after the Court of Appeal dismissed a local council’s appeal against a finding that it had breached British pay equity laws by paying bonuses to manual workers under pay protection schemes.\(^\text{148}\) An even heftier £300 million pay-out was negotiated in 2005 to settle a pay equity claim brought on behalf of 1 600

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\(^{140}\) Cornish, above n 5, 237.

\(^{141}\) Fudge, above n 20, 329.

\(^{142}\) Ibid 336.

\(^{143}\) Ibid.

\(^{144}\) Ibid 328.

\(^{145}\) Ibid.

\(^{146}\) Ibid 330.

\(^{147}\) Ibid.

National Health Service (‘NHS’) employees working as cleaners, telephonists, and sterile services staff.\(^{149}\)

The threat of potential pay equity litigation has also prompted British employers to proactively review and adjust discriminatory pay practices. For example, in response to the threat of equal pay claims in the local government sector, the ‘Single Status Agreement’ was negotiated to harmonise the conditions enjoyed by manual workers with those of administrative, professional, technical and clerical staff.\(^{150}\) Similarly, in 2004 the NHS negotiated the ‘Agenda for Change’ collective agreement to implement pay equity in the NHS and avoid further litigation.\(^{151}\)

**D Timeliness of Outcomes**

Although pay equity litigation has achieved significant financial benefits for women in Canada and Britain through compensation orders and negotiated settlements, those benefits are tempered by the time involved in litigating pay equity claims.

The Bell Canada and PSAC cases referred to above took 12 and 14 years respectively to reach a final outcome. In an even more extreme example, equal pay litigation brought by PSAC on behalf of 30 000 Canada Post employees had been on foot for 30 years before it was settled.\(^{152}\)

As recognised by Pelletier J during the Bell Canada litigation, ‘pay equity claims are like education savings plans: they are investments made by one generation for the benefit of the next’.\(^{153}\)

The delays involved in Canadian pay equity litigation have been explained by the lack of clear criteria in the \textit{CHRA} in relation to a number of key issues, resulting in several technical issues remaining open for dispute through procedural applications to the courts and applications for judicial review.\(^{154}\)

British pay equity litigation has not been immune to this problem. As recognised by Fredman, some British pay equity claims have gone all the way to the House of Lords on a preliminary


\(^{150}\) Ibid 376; Deakin et al, above n 148, 387–8.

\(^{151}\) Guillaume, above n 149, 376.


\(^{153}\) \textit{Bell Canada v Canadian Telephone Employees Association}, 2000 CanLII 15753 (FC) [1].

point, only to be remitted to be heard and determined by the Tribunal. Even claims that are not appealed on preliminary points take a long time to resolve at the Tribunal. The average time involved in a pay equity claim before the Tribunal in 2013 was 229 weeks.

### E Accessibility of Litigation to Achieve Pay Equity

The capacity of litigation to effectively remedy and address pay inequity is affected by issues of accessibility and enforcement.

In Canada, not all women workers are able to litigate pay equity claims under the CHRA. The pay equity provisions of the CHRA apply only to employees working for some federal government employers and private companies regulated by the federal government, such as railroads, airlines, banks, telephone companies and radio and television stations. Since the introduction of the PSECA, most federal government employees are no longer covered by these provisions. This is significant due to the many limitations of the PSECA, discussion of which is beyond the scope of this paper. The CHRA applies to ‘employees’ but does not include a definition to clarify whether the CHRA covers workers performing non-standard work. As Cornish has recognised, the focus on formal employment arrangements in pay equity legislation is problematic given that women increasingly work in the informal unregulated economy.

While the Equality Act covers all British employers, its impact in practice appears to have largely been limited to the public sector.

The accessibility of litigation as a mechanism to achieve pay equity is also affected by the range of parties able to issue proceedings. Academics in both Canada and Britain have criticised the complaints-based nature of pay equity laws for unfairly placing the burden on individual women to take steps to remedy pay inequity. In both jurisdictions there is some capacity for

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155 Fredman, above n 10, 206.
156 Victoria Hooten, ‘This is a (Wo)Man’s World: Reforming UK Equal Pay’ (2015) 3(2) Legal Issues 65, 66.
157 Fredman, above n 17, 43.
158 Cornish and Quito, above n 118, 25.
161 Cornish, above n 5, 227.
162 Equal Pay Statutory Code of Practice [18].
163 Deakin et al, above n 148, 401; McLaughlin, above n 19, 16.
others to litigate pay equity claims on behalf of individual women workers. The CHRA permits group complaints. It also empowers the CHRC to initiate complaints. However, this has not occurred in practice. Since the introduction of the PSECA, the ability of Canadian unions to pursue pay equity litigation on behalf of their members has been dramatically curtailed. The position in Britain is more favourable as the Equality and Human Rights Commission (‘EHRC’) has power to institute legal proceedings to support an individual to achieve equal pay, and unions have on the whole (despite some difficulty addressing gendered divergent interests among their members) played a significant role in equal pay litigation. Despite this, many non-unionised employees in Britain remain unable to pursue pay equity claims.

The accessibility of litigation as a mechanism to address and remedy gender pay inequity is also affected by the substantial costs involved in pursuing pay equity claims. In both Canada and Britain, complainants have to pay their own legal costs in cases before the relevant tribunal.

F Likelihood of Success

The effectiveness of litigation as a mechanism to address and remedy gender pay inequity is dependent on the likelihood of equal pay claims being upheld. At least in Britain, success rates of pay equity claims in recent years have been very low. The EHRC noted in 2013 that less than 1 per cent of equal pay claims were successful. This is consistent with data for the preceding five years, during which success rates before tribunals ranged from zero to 1 per cent.

There are a number of factors that limit the prospects of success for litigated pay equity claims in both Canada and Britain. Firstly, despite a favourable burden of proof in both jurisdictions, applicants still face substantial evidentiary difficulties in establishing pay equity claims. In the British context, these difficulties arise due to the need to identify a comparator in circumstances

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165 CHRA s 40.
166 Fudge, above n 20, 325.
167 Kruth, above n 159, 19.
168 Equality Act ss 28, 30.
169 Guillaume, above n 150, 364, 366.
170 Fredman, above n 10, 207.
171 Canada (Human Rights Commission) and Mowat v Canada (Attorney General) (October 28, 2011) CHRR Do. 11-3098, 2011 SCC 53; Hooten, above n 156, 72.
172 Hooten, above n 156, 66.
173 Deakin et al, above n 148, 392.
where most of the relevant information is held by employers,\textsuperscript{175} and due to controversial judicial authority that effectively requires applicants to demonstrate that differences in pay are tainted by sex discrimination in order to succeed in an equal pay claim.\textsuperscript{176} In Canada, courts have recognised the inherent difficulty of resolving pay equity claims due to the combination of ‘art, science, human rights, and labour relations’ involved in such claims and the difficulty of fitting ‘multi-disciplinary inquiries of this nature within a legal framework’.\textsuperscript{177}

The complex nature of pay equity laws in both Canada and Britain also affects the likelihood of litigated claims succeeding, as there is considerable scope for employers to challenge claims on narrow and technical legal grounds. For example, in Canada, disputes have arisen about issues such as the meaning of ‘establishment’ and the identification of an appropriate comparator.\textsuperscript{178} In Britain, difficulties have arisen due to, among other things, the complex concepts of direct and indirect discrimination being imported into pay equity law.\textsuperscript{179} These complexities have arisen due to the open-textured nature of pay equity laws in both jurisdictions. Despite the further clarification provided by the British Equal Pay Statutory Code of Practice and the Equal Wage Guidelines issued by the CHRC, the provisions remain complex and open to substantial debate.

Finally, the prevailing economic and political climate can affect the ultimate success of litigated pay equity claims. For example, less than three months after a loss in the Federal Court of Appeal in its long-running pay equity dispute, Bell Canada announced that it was selling its telephone operator division to a US-based company.\textsuperscript{180} This decision had the potential to cause pay cuts of up to 40 per cent and enable Bell Canada to avoid ongoing liability for future pay equity adjustments.\textsuperscript{181} A similar risk arose in PSAC’s pay equity dispute with the Canadian federal government which, at one point, threatened to legislate in order to minimise its liability.\textsuperscript{182} These examples demonstrate the hollowness of litigated pay equity victories in circumstances where employers may restructure or, in the case of government employers, legislate in order to limit or avoid liability.

\textsuperscript{175} Fredman, above n 10, 207.
\textsuperscript{176} Hooten, above n 156, 78, 79.
\textsuperscript{177} Public Service Alliance of Canada v Canada Post Corporation and Canadian Human Rights Commission [2010] FCA 56 [165].
\textsuperscript{180} Fudge, above n 20, 335.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid 329.
VI Conclusion

Analysis of litigated pay equity outcomes in Australia, Canada and Britain demonstrates that whether litigation is an effective mechanism to address and remedy gender pay inequity is a paradox. On one level, pay equity litigation can achieve substantial financial benefits for women workers. However, the potential to achieve systemic and discursive benefits is less clear. The potential benefits of pay equity litigation are tempered by the length of time involved in pursuing claims, restrictions on the accessibility of litigating pay equity claims, deficiencies in enforcement, and the low prospects of claims succeeding due to evidentiary issues and the complexity of pay equity laws.

This analysis suggests that litigation is an imperfect and incomplete mechanism to address and remedy pay inequity. Despite this, litigation remains an important element of the patchwork of legal responses to gender pay inequity. As recognised by numerous academics in this field, pay equity is a complex problem that requires a multifaceted response.183

Further research is required to identify and assess the other elements that should be incorporated into such a response, which could include: positive duties on employers; imposing pay equity obligations during enterprise bargaining; taxation and childcare policies; boardroom quotas; and requirements to increase the transparency of employer pay practices. Another question for further consideration is whether litigation would offer a more effective mechanism to achieve pay equity if proceedings could be commenced by an appropriately resourced government regulator, such as the FWO. The FWO has proven active and innovative in using litigation as a strategy to achieve compliance with Australia’s workplace laws relating to minimum wages, sham contracting and adverse action.184 Giving it a more direct enforcement role in relation to this issue could render litigation a more effective mechanism to achieve pay equity.

183 Cornish, above n 5, 244, 248; Macdonald and Charlesworth, above n 16, 585.
BIBLIOGRAPHY

A. Articles/Books/Reports


Fredman, Sandra, ‘Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India’ (Luxembourg: European Network of Legal Experts in the Non-Discrimination Field, 2012)

Fudge, Judy, ‘The Paradoxes of Pay Equity: Reflections on the Law and the Market in Bell Canada and the Public Service Alliance of Canada’ (2000) 12 CJWL/RFD 313


Hooten, Victoria, ‘This is a (Wo)Man’s World: Reforming UK Equal Pay’ (2015) 3(2) Legal Issues 65


Lyons, Michael and Meg Smith, ‘Gender Pay Equity, Wage Fixation and Industrial Relations Reform in Australia’, (2007) 30(1) Employee Relations 4


McLaughlin, Colm, ‘Equal Pay, Litigation and Reflexive Regulation: the Case of the UK Local Authority Sector’ (2014) 43(1) Industrial Law Journal 1


Smith, Meg and Andrew Stewart, ‘Equal Remuneration and the Social and Community Services Case: Progress or Diversion on the Road to Pay Equity?’ (2014) 27 Australian Journal of Labour Law 31


B Cases

Air Canada v Canadian Human Rights Commission and Canadian Union of Public Employees [2006] 1 SCR 3

Attorney General of Canada v Walden [2010] FC 490

Bell Canada v Canadian Telephone Employees Association, 2000 CanLII 15753 (FC)
Canada (Human Rights Commission) and Mowat v Canada (Attorney General) (October 28, 2011) CHRR Do. 11-3098, 2011 SCC 53

Canada (Attorney General) v Public Service Alliance of Canada [2000] 1 FCR 146

Council of the City of Sunderland v Brennan [2012] EWCA Civ 413

Re Equal Remuneration Case (2011) 208 IR 345

Re Equal Remuneration Case (2012) 208 IR 446

Equal Remuneration Decision (2015) 256 IR 362

Ex parte H V McKay (1907) 2 CAR 1

Federated Clothing Trades v J A Archer (1919) 13 CAR 647

Haq v The Audit Commission [2012] EWCA Civ 1621

Public Service Alliance of Canada v Canada Post Corporation [2011] 3 SCR 572


Ratcliffe v North Yorkshire County Council [1995] 3 All ER 597


C Legislation

Canadian Human Rights Act, RSC 1985, c H-6

Equality Act 2006, c 3

Equality Act 2010, c 15

Equality Act (Equal Pay Audits) Regulations 2014, No 2559

Fair Work Act 2009 (Cth)

Public Sector Equitable Compensation Act, SC 2009, c 2

Sex Discrimination Act 1984 (Cth)

D Other


Lu, Vanessa, ‘Canada Post, Union End 30 Year Pay Equity Fight’, *The Star*, 27 June 2013

Treasury Board of Canada, ‘The *Public Sector Equitable Compensation Act* and the Reform of Pay Equity’ (November 2012)

Workplace Express, *Teachers’ Union Searches for Equal Pay Case Comparator* (8 September 2016)  