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EEO Commissioner
Human Rights Commission
PO Box 12411
Wellington

Attention: Dr Judy McGregor

Dear Judy

The 'good employer' and Equal Employment Opportunities in the Public Sector

1. I have been asked to advise on the obligations of Public Service Chief Executives (CEs) to implement findings that have arisen from the Public Sector Pay and Employment Equity Reviews, and equal employment opportunities (EEO) in general.
2. This arises out of a recent decision to disband the Department of Labour's Pay and Employment Equity Unit. The Unit had been responsible for conducting pay equity reviews. Phase 1 and 2 of these reviews comprised the public sector, Crown entities and local government. Phase 3 was to look at the private/NGO sector.
3. As a result of the first two phases, the Unit identified significant gender pay gaps ranging from 3 to 35%, cases of different starting rates for women and men, with men moving more rapidly through pay scales. Women were also under-represented at senior levels.
4. An overview report on the public sector pay and employment equality reviews has been prepared by the Department of Labour Pay and Equity Employment Unit. Having identified the problems, the report notes that the next step would be implementation. Not all aspects of this would be costly. They include greater clarity and guidelines around pay and progression and flexible working conditions.
5. In February 2009, the Minister of State Services, Tony Ryall, announced as part of the Government's Expectations for Pay and Employment conditions

in the State Sector, that two pay and employment equity investigations underway would be discontinued.¹ He stated:

They generate an additional form of remuneration pressure that is unaffordable in the current economic and fiscal environment. However departments will still be expected to continue to address equality issues as part of being a good employer.

6. He added that the overarching policy was based on “human rights, good employer practice and requirements and relevant legislation”. The State Services Commissioner would hold CEs to account for meeting these expectations, and Crown entities must also keep their responsible Minister informed.
7. The question therefore is, what are the obligations of the CEs to comply with the on-going duties as good employers, in light of both the findings of the Pay and Equity review, and the directions of the Government?

Legal Framework

State Sector Act

8. The long title of the State Sector Act 1988 provides that, among other things, it is an Act to ensure that every employer in the State Services is a good employer and to promote equal employment opportunities in the State Services.
9. Under s 56(2), CEs are required to be good employers and operate personnel policies for the fair and proper treatment of all employees including:
 - (b) An equal employment opportunities programme; and
 - (g) Recognition of the employment requirements of women.
10. Section 58(3) defines an EEO programme as one that is aimed at the identification and elimination of all aspects of policies, procedures and institutional barriers that cause or perpetuate inequality of employment of any persons or groups.
11. Previously s 58 also required that CEs publish an EEO programme for the Department and ensure it was complied with.² In 2005 this provision was repealed but largely incorporated into the Chief Executive’s duties in a new s 56(1).

¹ Tony Ryall “State Sector pay expectations released” 19 February 2009
www.beehive.govt.nz

² State Sector Act (SSA), s 58(1) and (2)

12. Chief Executives are also responsible to the Minister for carrying out the functions and duties of the Department, including those imposed by this Act and the “efficient and economical management of the activities of the Department”.³
13. In addition, one of the principal functions of the State Services Commissioner is to promote, develop and monitor equal employment opportunities, policies and programmes for the Public Service.⁴
14. In line with this obligation, SSC and Cabinet have required departments to address pay and employment equity in the development of their statements of intent.⁵ In June 2008, SSC advised that it reported monthly to its Minister on pay and employment equity.
15. The State Services Commission also issued a new Equality and Diversity Policy in April 2008. It requires CEs to show leadership in modelling and valuing equal employment opportunities and to lead staff in valuing equity and diversity.
16. The requirements of a CE are further set out in his or her contract with the Commissioner.⁶ I have not seen any of these contracts, but it is reasonable to assume that a standard clause in those contracts will be for the CE to comply with the obligations imposed by the SSA, and may expressly include the obligation to be a good employer and to recognise the employment needs of women.

Other Legislation

17. Similar requirements exist under a number of statutes dealing with particular departments.⁷ In s 118 of the Crown Entities Act 2004, Crown entities must also be good employers and ensure compliance with their EEO policies.⁸
18. The obligation on Crown entity boards was reinforced on 22 December 2008, when the Minister of Finance, Bill English, wrote to Chairs of Crown entities setting out the Government’s expectations of them. These included to “comply with the equal employment opportunities provisions as set out in the Crown Entities Act”.⁹

³ SSA, s 32(a) and (d)

⁴ SSA, s 6(g)

⁵ CAB Min (04)34/8 and www.ssc.govt.nz/soi-guidance

⁶ SSA, s38

⁷ Eg Conservation Act 1987, Defence Act 1990

⁸ See also Local Government Act 2002 ss39(d) and 59(1)(b) and Sch 7,cls 33(f) and(g), 36

⁹ Enduring Letter of Expectations to Statutory Crown Entities (www.ssc.govt.nz)

The Human Rights Act

19. Among the functions of the Equal Employment Opportunities Commissioner is to act independently and provide advice and leadership on EEO.¹⁰ Section 21(1)(a) prohibits discrimination on the grounds of sex, and s 22 provides that it is unlawful for any employer to offer any applicant or employee less favourable terms of employment on any of the prohibited grounds.
20. Section 19 of NZ Bill of Rights Act also prohibits discrimination on any grounds set out in the Human Rights Act. While there could be an argument that fiscal constraints might represent a justifiable limitation on some rights, this would be very hard to establish in the light of a clear statutory requirement to progress EEO. There would be an onus to establish that reasonable steps had been taken in relation to EEO.

International Obligations

21. New Zealand also has obligations under article 11 of the Convention on the Elimination of Discrimination Against Women (CEDAW) to promote equal remuneration and equal treatment for work of equal value.
22. In response to New Zealand's recent periodic report to the CEDAW Committee, the Committee noted concern about women's disadvantaged status in the labour market and that efforts be intensified to eliminate occupational segregation and close the wage gap. It called on the government to monitor the impact of measures taken in both the private and public sectors and to report on the measures in the next periodic report.¹¹

Case Law

23. There appears to be little directly applicable case law.
24. A decision of the Supreme Court of Canada¹² in relation to a government decision to delay the implementation of pay equity because of a financial crisis faced by the Government has a very different legal basis. In that case, the legal obligation to give a sector of workers equal pay was superseded by legislation.¹³ Here in New Zealand there has a policy change to disband the Unit but the law itself is unchanged.

¹⁰ HRA, ss 17 and 19

¹¹ CEDAW/C/NZL/CO/6

¹² *Newfoundland and Labrador Association of Public and Private Employees v Newfoundland* (2004) SCC 66; [2004] 3 S.C.R. 381

¹³ The question in that case was whether it was incompatible with the Canadian Charter of Rights, which is fundamental law. The Court held that, although the legislation was discriminatory, in the circumstances of the fiscal crisis, a delay in implementation represented a reasonable limitation on the right of freedom of discrimination

25. In *Commissioner of Police v Campbell*, the Court of Appeal held that ss 56 and 58 of the State Sector Act could not found a private claim for damages based on breach of duty of the CE, but added:¹⁴
- This is not to say that disregard or neglect of the chief executive's obligations will go without a remedy, but the enforcement of such obligations is appropriately by means of a public law proceeding – judicial review or declaration – seeking compliance.
26. The Court added that, subject to any express contractual obligations, s 58(3) did not of itself create any enforceable obligation, but taken with s 56 required the CE to follow the policies of a good employer, to establish an EEO programme and to maintain and report on its effectiveness.¹⁵
27. As the Court of Appeal suggested, the Judicature Amendment Act could form the basis of an application for review “in the nature of mandamus”, that is to order a public body to perform a statutory or other duty.¹⁶
28. Courts will not enforce purely policy decisions of Government, and could not intervene in the decision to disband the Unit.¹⁷ They can nevertheless enforce obligations which arise under statute, provided the duty is held to be a mandatory duty, not merely a directive or target duty.¹⁸
29. “Target duties” are not directly enforceable by individuals, but a public authority must nevertheless “do its best” to implement them.¹⁹ While courts will not intervene in the allocation of scarce resources, the public authority cannot ignore its statutory obligations. It must keep those obligations actively under review and cannot decide to shelve them because there has been a change of policy.²⁰
30. Even where implementation of a duty is discretionary, the discretion must be exercised consistently with the objects of the legislation.²¹ Therefore, while CEs retain considerable discretion as to *how* they implement EEO within their department or organisation, to ignore it would be contrary to the legislation.
31. CEs must also exercise their discretion on the basis of the best information reasonably available. This would include the results of any reviews relating to EEO in their department.

¹⁴ [2001] 1 ERNZ 432, [15]

¹⁵ This was of course prior to the repeal of ss 58(1) and (2)

¹⁶ Judicature Amendment Act 1972, s 4

¹⁷ *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) and *Creednz v Governor-General* [1981] 1 NZLR 172 (CA)

¹⁸ De Smith's *Judicial Review* (6th ed 2007), 257.

¹⁹ *R v Inner London Educational Authority, ex p Ali* (1990) 2 Admin LR 822.

²⁰ *R v Secretary of State for the Home Union Ex p Fire Brigades Union* [1995] 2 AC 513

²¹ *Padfield v Minister of Agriculture*. [1968] 1 All ER 694 (HL), *Fiordland Venison v Minister of Agriculture* [1978] 2 NZLR 341

32. A decision of the Privy Council in relation to Maori broadcasting is instructive as to the approach to statutory requirements on the Crown.²² In that case the Crown had promised to take steps to develop Maori TV, but with the proposed transfer of broadcasting to state enterprises, Maori were concerned that the SOE would find this uneconomic.
33. The principal objective of any state owned enterprise was to operate as a successful business and, to that end, to be as profitable as comparable non-Crown bodies, to be a good employer and to exhibit a sense of social responsibility.²³
34. The Privy Council held that to meet its objective to be successful, all three criteria were equally important. Provided the state enterprise had the necessary resources, it could become involved in loss making but socially responsible activities (in that case Maori broadcasting).²⁴
35. Another key factor in the Privy Council's decision was that the Crown had an obligation under the State Owned Enterprises Act not to act inconsistently with the principles of the Treaty. This created a legally enforceable right. It did not mean however that the obligation is "absolute and unqualified" and the Crown was not required "to go beyond taking such action as is reasonable in the prevailing circumstances."
36. The Privy Council held that heavy expenditure might not be required in times of recession, but this would not be acceptable when the economy was buoyant. But where, as in this case, the Maori language was vulnerable, it might require particularly vigorous remedial action by the Crown.

Conclusion

37. Similar arguments would apply in relation to the public sector's obligation to be a good employer. Although CEs must balance competing priorities in order to carry out the "efficient and economical management of the activities of the Department", this includes an express statutory obligation to be a good employer.
38. Fiscal constraints will be a factor in assessing how that duty is carried out, but cannot obviate the duty.²⁵ In addition, where women in that sector have been identified as being vulnerable to pay inequities, the need for action is greater. CEs must take reasonable steps, based on current information, to implement those duties.

²² *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513
²³ State Owned Enterprises Act 1986, s 4(1)
²⁴ Page 519

²⁵ It should also be noted that studies have shown that EEO and good employer practices contribute to financially successful enterprises and quickly offset any initial costs.

39. While the requirements set out in the contracts of CEs are matters of private employment law, those contained in the State Sector Act and other relevant legislation would be enforceable at the suit of those affected as matter of public law.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen Aikman', with a long horizontal flourish at the end.

Helen Aikman