Determination Number: AA 125/01
File Number: AEA 418/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Robyn Taylor (Applicant)
AND	Board of Trustees - Te Awamutu Intermediate School (Respondent)
REPRESENTATIVES	John Robson (NZEI), for the applicant Richard Harrison, for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	9 August 2001
DATE OF DETERMINATION	4 September 2001

DETERMINATION OF THE AUTHORITY

The employment relationship problem

1. The applicant, Mrs Robyn Taylor has, since 1983, been employed at the Te Awamutu Intermediate School as an Art teacher. On 29 June 2000, Mrs Taylor was advised by the respondent, the Te Awamutu Intermediate School Board of Trustees (the Board) that, as from January 2001 she would *be required to teach full-time in one of our regular classrooms.* In a statement of problem received by the Authority on 27 June 2001 Mrs Taylor sought:

- *A determination that (the Board's) action was unjustified.*
- *Reinstatement to the position of Art teacher.*
- *Compensation for humiliation, loss of dignity, and injury to feelings of $5000.*
- *Reimbursement, at a fair and reasonable level, of medical and legal expenses incurred in pursuance of this grievance.*

Background

2. At the time Mrs Taylor was appointed as an Art teacher (1983), and up until the mid-1990s, the staffing levels of intermediate schools were controlled by the Ministry of Education. Each school had its "general classroom" teacher staffing set by a formula based on a pupil/teacher ratio. In addition each school was entitled to specifically designated positions for woodwork/metalwork, home economics, and arts and crafts. These specialist positions are collectively referred to as "tech/arts".

3. In the mid-1990s the system of staff entitlements was changed to allow individual schools more flexibility. In a background paper prepared to assist the Authority, the NZEI explained that the new system provided for a new formula for setting staffing levels in intermediate schools. The paper explains:

> *The outcome of this formula was an allocation of teacher entitlements for year 7 and 8 pupils to be regarded as a single pool of teachers.*

And:

> *The new single pool of teachers did not distinguish between general teachers and specialist teachers, but the distinction between general and specialist positions continued in so far as intermediate (and some other schools) were still required to deliver technical training to year 7 and 8 pupil's.*

4. The Principal of Te Awamutu Intermediate, Mr Dale McCabe, says that early in 2000 he became aware that there might be a staff surplus situation in the year 2001. He based this assumption on predicted changes to the school roll and the cessation of "bulk funding" arrangements at the end of the 2000 school year. Mr McCabe says that in March and April 2000 he discussed these issues with staff. In his statement of evidence to the Authority Mr McCabe says:

> *It was the staff's unanimous view that the best possible option was to reduce the tech/art staff by one teacher and to transfer the teacher to general classroom responsibilities. This would provide us with the necessary 15 classroom teachers, reduce tech/art staff to 5 and leave the two management positions.*

5. It must be noted that Mrs Taylor says that, although she acknowledges that these meetings took place, she never accepted that the number of tech/art staff should be reduced.

6. In May 2000 Mr McCabe met with the Board of Trustees and outlined three options for future staffing:

> *1) Principal, non-teaching Deputy Principal, 14 classroom teachers, 6 specialist teachers. Average students per class would be 32.*
>
> *2) Principal, non-teaching Deputy Principal, 15 classroom teachers, 5 specialist teachers. Average number students per class would be 30.*
>
> *3) Principal, teaching Deputy Principal, 15 classroom teachers, 6 specialist teachers. Average number students per class would be 30.*

7. The minutes of the Board's meeting of 25 May 2000 record that Mr McCabe advised Board members that the next step would be a staffing needs' analysis, that this would be done and the results brought to the Board's June meeting.

8. On 12 June 2000 Mr McCabe met with the tech/art staff and suggested to them that a needs analysis of the schools technical/arts requirements should be carried out. He says that the staff did not wish to carry out a need's analysis and subsequently the tech/arts group prepared a submission to the Board of Trustees.

9. The minutes of the Board's meeting of 22 June 2000 are somewhat sketchy. However from those minutes and from evidence given to the Authority by one of the Board members at the

meeting, it is clear that the Board heard reports from the representative of the tech/arts teachers and from Mr McCabe. They then resolved that the teaching staff of the school should be reorganised to achieve 15 classroom teachers and 5 specialist teachers. The evidence from the Board member present (Mrs Jan Shoobert) was that the Board members, in making this decision, understood that this meant transferring Mrs Taylor from being an Art teacher to being a general classroom teacher. Mrs Shoobert says that the Board were unanimous in this decision.

10. Shortly after the Board had made this decision Mr McCabe wrote to Mrs Taylor advising her that she would be required to teach full-time in a regular classroom from January 2001 and that:

> *I am aware of the difficulties that this situation will present for you, especially regarding your knowledge of curriculum areas.*
>
> *During the next six months you will be given every opportunity to update yourself on curriculum knowledge, planning systems, and assessment requirements to enable you to take on this position.*

11. Over the next two months somewhat of a stand-off developed between Mr McCabe and Mrs Taylor. On advice from the NZEI Mrs Taylor maintained that the Board could not require her to transfer to general teaching duties. Mr McCabe maintained that the Board could make this decision and that Mrs Taylor should undertake a professional development programme to assist her with the transition.

12. On 12 September 2000 Mrs Taylor and her NZEI representative met with the Board of Trustees. The NZEI representative read a comprehensive statement, the gist of which was that the Board could not and should not require Mrs Taylor to transfer from Art teacher to general classroom teacher. After considering the NZEI submission the Board reconfirmed its earlier decision.

13. Despite the Board's decision, the dispute between Mr McCabe and Mrs Taylor continued. Mrs Taylor continued to assert that the Board could not require her to change positions. Mr McCabe continued his attempts to develop a professional development programme for Mrs Taylor. Mrs Taylor then took sick leave from 14 October 2000 to 12 November 2000. On her return Mrs Taylor spent some time in general classrooms with other teachers in an attempt to prepare her for the 2001 transfer to general classroom teaching.

14. At the beginning of the 2001 school year Mrs Taylor commenced teaching in a general classroom. She says:

> *Two weeks into the first term I suffered a total breakdown of confidence. I persevered for the rest of term 1 with some mentoring from the Deputy Principal. I did not return to work after the first term break and have been on medical leave ever since.*

The Collective Employment Contract

15. Mrs Taylor is employed in terms of the Primary Teachers, Deputy Principals, Assistant Principals and Other Unit Holders Collective Employment Contract 1998 -- 2001 (the CEC). Part 4 of the CEC is entitled **Surplus Staffing** and says:

4.1 When staffing requirements within a school are being reviewed by an employer (including as a consequence of amalgamation, merger, change of status and/or closure of a school), the employer shall advise the employees or their representatives.

4.2 When a review shows that a staffing surplus will exist or a reduction in units is required the employer shall, at the first instance, consider in consultation with staff whether this staffing surplus and/or reduction in units can be absorbed by attrition.

4.3 If the required number of positions cannot be achieved through attrition and if a surplus staffing situation still exists, an identification of the teacher(s) to be deemed surplus will be made from among permanent teachers, pursuant to clause 4.4. If attrition cannot achieve the reduction in the units required, clause 4.4 will apply.

Part 4 then sets out the process to be used in identifying which teacher(s) are surplus and how such teacher'(s) futures are to be decided. Clause 4.7 states:

In the first instance the parties will consider whether the teacher can:
(a) Redeployment/supernumerary -- be redeployed for 26 weeks within the school or at any other school requested by the teacher……; or
(b) Retraining -- undertake a suitable course of retraining approved by the Secretary for Education, for 26 weeks which enhances or upgrades the teacher.

Finally Part 4 provides that where *these options have been thoroughly explored and no such option is suitable,* the teacher(s) should be offered severance payments.

16. As I will shortly outline, neither Mrs Taylor nor the Board of Trustees believe that Part 4 of the CEC applies to Mrs Taylor's circumstances. However the CEC contains no other provisions relating to restructuring, redeployment or redundancy.

Mrs Taylor's position

17. From the time she was first advised that the Board of Trustees was considering a restructuring, Mrs Taylor has relied on advice from her Union, the NZEI. It is NZEI's position that:

(1). Mrs Taylor was appointed, in 1983, to the position of Art and Craft teacher and has held this specialised position since that time. Over the subsequent 18 years the general teaching curriculum has changed considerably while Mrs Taylor has undertaken professional development only in regard to the Art curriculum.

(2). While the system of teacher entitlements was changed in 1995 to allow schools more flexibility (see para 3 above), this change did not negate Mrs Taylor's contractual right to continue as an Art teacher. NZEI says that teachers employed after the change can be required to teach either in general classrooms or specialist areas whereas teachers employed in specialist areas prior to the change are contractually entitled to remain in their specialist position.

(3). Part 4 of the CEC provides a mechanism whereby Boards of Trustees can manage situations where the total staffing entitlement of a school declines (usually due to a decline in school roll). NZEI argue that Te Awamutu Intermediate was not in a surplus staffing situation and that:

Robyn has been moved from her contractual position to another position against her will. Her collective agreement contains an instance (in Part 4 Surplus Staffing) where such an

event might occur, or worse still, where she might lose her employment altogether. These provisions are triggered in conditions of surplus staffing. There are no other triggers: expressum facet cesare tacitum, the express spelling out of the only situation wherein Robyn might have been redeployed out of the Art room means that this is the only situation in which this can happen.

(4). In a separate submission the NZEI has argued that the Employment Court decision in *Spotless Services (NZ) Ltd v. Service and Food Workers Union Inc* [2000] 1 ERNZ 125 supports their contention that Part 4 of the CEC fetters the Board's right to transfer Mrs Taylor. In particular the NZEI says:

In the instant situation, the employer's right to adjust staffing is fettered by part 4 of the collective agreement which indicates that such a right is to be exercised in surplus staffing situations. No other situation is identified, and as in the spotless case, it cannot be argued that additional rights exist "outside" the agreement.

(5). The NZEI, in written submissions to the Authority, canvasses the Board of Trustees meeting minutes and concludes:

As the prime facie evidence of the minutes shows, the Board made no "final decision" about either the number of tech art teachers or the teaching of art. Robyn's position has therefore not been validly disestablished. She has never ceased being the Art Teacher occupying the position she was appointed to in 1982.

(6). The Board of Trustees is required by the provisions of the State Sector Act to act as a good employer i.e. to *operate a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees* (Section 77A State Sector Act 1988). The NZEI argue that, even if the Board did have the contractual right to make the decisions it did, it was not fair and proper:

- To expect Mrs Taylor to transfer to a general classroom after 20 years of specialised Art teaching.
- To expect that Mrs Taylor could retrain in a new curriculum with the professional development programme announced by the principal; especially in the light of sick leave that she took in term 4 of 2000.
- To deny Mrs Taylor access to the Waikato School of Education training programme for which she had applied.
- To insist that Mrs Taylor transfer to the general classroom when another Tech/Art teacher had expressed an interest in transferring.
- Not to reverse the decision (to disestablish the specialist Art position) when it became apparent in early 2001 that the school was increasing its staffing establishment due to an increased roll.

(7). At no time has Mrs Taylor accepted that the Board was entitled to insist on her transferring to general classroom duties.

The Board of Trustees position

18. The Board of Trustees' position can be summarised as follows.

(1). The Board has, in terms of the Education Act 1989, *the complete discretion to control the management of the school as it thinks fit.* This entitles the Board to decide how it wishes to deliver its curriculum and the classes that the school will offer.

(2). Since the mid-1990s, teachers have been regarded as being part of the general pool who could be organised as required within the school in order to meet its curriculum requirements i.e.:

> *There is no longer a distinction between specialist and general teachers and subject to professional development systems, the Board was able to direct teachers in this way without such direction amounting to a breach of contract.*

(3). The CEC creates no distinction between specialist staff and general staff. The Board is of the view that *a teacher is a teacher*. Mrs Taylor was trained as a teacher and, with appropriate professional development, is able to teach in a general classroom. The Board sites a number of Employment Court cases including: *Group Rentals NZ Ltd v. Canterbury Clerical Workers IUOW* [1997] NZILR 255, *Wellington etc Federated Furniture IUOW v. B C Heart (Nelson) Ltd* (1989) 1 NZILR 457 and *Sanson v. Auckland Regional Council* (2000) 5 NZELC, to support their argument that no employee's terms of employment are set in concrete. On behalf of the Board Mr Harrison submits that it was not unreasonable to expect Mrs Taylor to transfer from one teaching position to another.

(4). The Board did not apply the provisions of Part 4 of the CEC because they did not believe that there was a surplus staffing situation. The Board contends that the general law with respect to restructuring applies and that the principles of good faith consultation as outlined by the Employment Court in *Baguley v. Coutts Cars Ltd,* (2001) AC 25/01 (unreported), are applicable. The Board contends that, in Mrs Taylor's case, they met the minimum requirements set out in *Baguley* and that Mrs Taylor was redeployed to a new position following a fair process.

(5). If a surplus staffing situation did apply i.e. the provisions of Part 4 of the CEC are applicable, then these would, according to the Board's submission, *need to be read in a robust manner as both parties have not considered their application.* It is the Board's position that, if Part 4 is applicable the outcome would be the same: - Mrs Taylor would be redeployed to a general classroom position.

(6). Irrespective of whether the staffing surplus provisions or the general law regarding restructuring applied, the Board had undertaken a fair and reasonable process when implementing this change. In the submissions Mr Harrison suggests that:

> *If there was inadequate consultation leading up to the 22 June meeting (which is not accepted) then it was certainly made up for following this meeting. The meeting with representatives was unsuccessful as Mrs Taylor wanted to address the full Board, this was then agreed and her views were well presented at the 12 September Board meeting. An employer is able to put right any earlier procedural flaw or oversight in this way: see Rankin v. The Attorney General (2001) Goddard C. J., WC 22A/01 at p57.*

(7). The professional development options offered to Mrs Taylor *were practical and covered a range of support and guidance which were sufficient to assist Mrs Taylor with new duties.* The Board believes that Mrs Taylor's concerns were not to do with the inadequate professional development but because she was strongly opposed to the Board's decision not to offer Art as a specialist subject.

(8). The Board contends that, although it started later than the Board would have wished, the assistance programme provided to Mrs Taylor was successful. Those providing supervision of Mrs Taylor in the first term of 2001 reported favourably on her performance and give no hint of a teacher struggling to cope with new curriculum and/or duties.

The issues for determination

19. In order to determine whether or not Mrs Taylor has a grievance against her employer, it is necessary to answer a series of questions.

Question 1. Did the Board have a legal/contractual right to undertake the reorganisation of teaching positions?

Question 2. If the answer to question 1 is yes, did the Board have the legal/contractual right to require Mrs Taylor to transfer from Art teacher to general classroom teacher? In this regard:

- Is the Board entitled to transfer Mrs Taylor to a general classroom on the basis that *a teacher is a teacher*? Or
- did the Board's decision give rise to a surplus staffing situation thus triggering the provisions of Part 4 of the CEC?

Question 3. If the Board was able to restructure the teaching resources of the school, was the process used to achieve this restructuring fair and reasonable i.e. did the Board act in good faith, and in accordance with the rules of natural justice, when consulting with Mrs Taylor with regard to the requirement that she transfer/redeploy?

Was the Board entitled to restructure the teaching resources?

20. Both parties accept that the Board of Trustees is Mrs Taylor's employer. The Education Act 1989 sets out the statutory powers of school Boards of Trustees and Principals. Sections 75 and 76 state:

> *75. **Boards to control management of schools** -- Except to the extent that any enactment of the general law of New Zealand provides otherwise, a school's Board has complete discretion to control the management of the school as it thinks.*
>
> *76. **Principals** -- (1) A school's principal is the Board's chief executive in relation to the school's control and management.*
>
> *(2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal --*
>
> *(a) Shall comply with the Board's general policy directions;*
>
> *(b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day-to-day administration.*

21. Section 65 of the Education Act gives a Board the power to *appoint, suspend, and dismiss staff*. Section 65(2) requires the Secretary (of Education) to *specify a maximum and minimum permissible number of teachers* and requires the Board to ensure that the number of teachers employed does not drop below or rise above the number of teachers prescribed for it.

22. Although not within the usual jurisdiction of the Authority, the Education Act clearly gives a Board of Trustees the power to determine the appropriate mix of teaching staff. Neither party attempted to argue that some *other enactment* removed or fettered the Board's discretion in this regard.

23. The NZEI argue that the Board's power to decide the appropriate mix of staff does not include power to override Mrs Taylor's right to maintain her position as an Art teacher -- unless there is an overall reduction in teaching positions in which case Part 4 of the CEC applies. While I accept that

Mrs Taylor has certain contractual rights, I do not accept that these rights require the Board to maintain a specialist Art teacher position. To accept the NZEI argument would be to accept that, unless there is a specific contractual right to do so, no employer could restructure their enterprise if such restructuring resulted in individual employees losing their specialist positions. It has long been established that the issue of whether or not a particular position is to be disestablished is a matter, after proper consultation, for the employer to decide. This decision is separate from whether or not an individual is to be made redundant, redeployed etc.

24. I do not accept the NZEI position that the effect of Part 4 of the CEC is to fetter the Board's right to disestablish the position of Art teacher or to redeploy Mrs Taylor. As will be seen later in this determination, I believe that, in any event, Part 4 applies to Mrs Taylor's situation. This being the case the NZEI argument is somewhat academic. Even if Part 4 did not apply, I do not believe that the *Spotless* (supra) case supports the NZEI argument. In *Spotless* the issue was one of interpretation of a particular Contract provision. The Court held in effect, that having agreed to the provision in the CEC the employer could not avoid its consequences. The employer had agreed to circumscribe their "right to manage" and was required to abide by that agreement. I can find nothing in the *Spotless* decision which can be said to support the NZEI position.

25. I find that the Board of Trustees was entitled to review the mix of teaching staff and to determine that the specialist position of Art teacher would be disestablished.

Did the Board have the legal/contractual right to require Mrs Taylor to transfer?

26. The Board argues that it has a right to require Mrs Taylor to transfer to general classroom duties as she is a trained teacher and *a teacher is a teacher*. While I accept that teachers employed since the mid-nineties may be transferred -- that *a teacher is a teacher* -- I do not accept that this applies to Mrs Taylor. Teachers employed since the mid-nineties have accepted specialist positions (such as the teaching of Art) knowing that they could be required to transfer to general classroom duties. They have therefore been able to maintain their familiarity with the general curriculum and thereby minimise any difficulty in transferring. Mrs Taylor has not had this luxury. For more than 18 years she has specialised in teaching of Art. For the first 12 of these years, along with all other specialist teachers, she assumed that she would not be required to transfer to a general classroom. She had no need and was not expected to maintain a familiarity with the general curriculum.

27. Mr Harrison has drawn my attention to the Arbitration Court decision in *Group Rentals NZ Ltd v. Canterbury Clerical Workers IUOW* (1987) NZILR 255. In that case the Court recognised that, even in the absence of contractual provision permitting a change in a job description, *a worker employed generally cannot expect that his or her duties will never be altered.* However in *Sanson v. Auckland Regional Council* (2000) 5 NZELC, Judge Travis in the Employment Court said:

> *Any consideration of the similarities and differences between two positions must be carried out on an objective basis and not on the employee's subjective view: Pilgrim v. Director-General New Zealand Department of Health [1992] 3 ERNZ 190. However the characteristics of the employee may be relevant: Matthes v. NZ Post Ltd [1994] 1 ERNZ 994. In Pilgrim the Chief Judge, in dealing with the issue of what was a "suitable position" stated:*
>
> > *Suitability, as defined in the employment contract in question, must therefore be determined objectively. It is a question of fact and degree. That does not mean that the employees affected and the employing department are not entitled to have opinions on the subject but their opinions cannot be allowed to prevail if, upon an objective view of the matter, such as would be taken by a reasonable and disinterested but not*

> *uninformed person, a different result would be produced. Suitability is within reasonable limits a flexible concept and involves a contrast with the narrow approach authorised for reconfirmation in position.*
>
> *Counsel are agreed that the test of suitability of the position is an objective one but they were not agreed about what this means and entails.* ***First and foremost an objective test means that suitability is not to be determined by the subject of opinion of either employer or employee.*** *Employers have to recognise some restriction on the absolute power to dispose of their employees as they see fit. On the other hand, employees must overcome that resistance to change which is a natural attribute of the human condition.* (My emphasis)

28. The Board suggests that the differences between Mrs Taylor's job description as an Art teacher and that of a general classroom teacher are not great. They argue that both job descriptions set out general responsibilities which are the same and that the differences are merely the requirement for Mrs Taylor to *come up to speed* with the general curriculum areas. The Board contends that all teachers must cope with significant change to curriculum requirements and such changes are not regarded as a variation to a teacher's terms of employment. I do not accept the Board's arguments in this regard. While the two job descriptions have many similarities these similarities are mainly in respect to the non-specific and/or generic aspects of a teacher's job e.g. communication, planning, professional development etc. The core aspects of the job descriptions, knowledge and delivery of the curriculum and assessment and evaluation of the pupils' learning of that curriculum, are very different. As an Art teacher Mrs Taylor has been able to develop a high level of expertise in her specialist subject. She was never expected, and has not, maintained an expertise in the general curriculum. Taking into account Mrs Taylor's personal characteristics and the degree of difference between the positions I find that, in Mrs Taylor's case the position of the general classroom teacher cannot, when looked at objectively, be considered to be the same as her position as an Art teacher.

29. I have found that the Board did have the right to undertake a re-organisation of teaching positions but that a general classroom position was not the same as Mrs Taylor's position as an Art teacher. The Board, as it was entitled to and following a review of the school's staffing requirements, disestablished the position of specialist Art teacher. Despite both parties' belief that Part 4 of the CEC does not apply, I am of the firm opinion that Mrs Taylor is surplus i.e. that Part 4 of the CEC does apply. Part 4 does not confine the definition of staffing surplus to an overall reduction in teaching staff numbers but rather encompasses any situation *when staffing requirements within a school are being reviewed.* Mrs Taylor's position has been disestablished. She is a specialist Art teacher. In that capacity she is surplus. Where a staffing surplus situation exists, Part 4 of the CEC applies.

Was the Board's process fair and reasonable?

30. When considering the Board's decision-making process it is appropriate, if somewhat artificial, to divide the process into two parts; the process used by the Board in deciding that the specialist Art teacher position would be disestablished and the process used when considering the options available to Mrs Taylor.

31. The first part of the process must be viewed in the light of Part 4 of the CEC. Although the consultation process carried out by the Board took place before the Employment Relations Act 2000 was passed, it is also useful to consider the Board's process in the light of the Employment Court decision in *Baguley v. Coutts Cars Ltd* (supra)

32. Part 4 of the CEC requires that the employer (the Board), when reviewing the staffing requirements within the school, advise the employees or their representatives. Despite the Board not believing that Part 4 applied they did in fact advise the employees that a review was taking place. To this extent the Board complied with the contractual provisions. In *Baguley* the Court set out the minimum requirements that an employer must meet when undertaking a review of staffing requirements since the enactment of the Employment Relations Act 2000. In this regard the Court said:

> *… will usually require some real dialogue with the employee starting with the provision, in all good faith of accurate information. The employer needs to find out what will cause the greatest havoc to the employee in order to try to avoid it, what will injure him the least in order to try and achieve it, whether the employee can be used in another position though his or her current position may be redundant, and which employees should be selected for redundancy if there is a choice to be made. It is convenient to call this dialogue consultation but that term does not imply that the employer has to seek the employees' concurrence in the commercial decision, although sometimes employers may have found other solutions as a result of the employees' input.*

33. Despite its belief that Part 4 of the CEC did not apply, the Board did undertake a consultation process. It is, of course, arguable that at the time the Board made its decision the requirements in *Baguley* did not apply and that a less stringent obligation existed. In any event, while the NZEI has pointed to some defects in the Board's recording of the process, I find that the process used by the Board did meet the minimum requirements set out by the Court in *Baguley*.

34. In *Rankin v. the Attorney-General* (2001) WC 22A/01 (unreported), Chief Judge Goddard in the Employment Court said:

> *But on 8 December the plaintiff through Mr Quigg asked him to reconsider and he agreed. What is the effect of that? It is well recognised that sometimes the invalid exercise of a power can later be validated by affording a right to be heard that had been inadvertently denied earlier. Likewise, a breach of contract can be put right before it has caused any damage.*

Even if I am wrong in my assessment that the Board's process in making its decision was fair and reasonable, the Board remedied any procedural flaw or oversight by meeting with Mrs Taylor on 12 September 2000. At that meeting Mrs Taylor, through her representative, was given a full opportunity to present her case to the Board. The Board considered the submissions and reviewed and confirmed its earlier decision.

35. Because of the firmly held opinions of the parties regarding their rights and obligations, the second part of the Board process (consulting with Mrs Taylor regarding her options) has not been given due weight by either party. The Board, because of its view that a *teacher is a teacher* did not invoke the provisions of Part 4 of the CEC and did not therefore properly consider all the options available to Mrs Taylor. Mrs Taylor on the other hand, because of her view that the Board could not require her to transfer, may not have given sufficient consideration or attention to the professional development required for her to successfully transfer to a general classroom.

Determination

36. In summary I have found that:

- The Board of Trustees did have the right to review the staffing requirements at the Te Awamutu Intermediate School, and to disestablish the position of specialist Art teacher.

- In making the decision to disestablish the position of specialist Art teacher the Board created a "staffing surplus" situation thus triggering the provisions of Part 4 of the CEC.
- In making the decision to disestablish Mrs Taylor's position, the Board undertook a fair and reasonable process, which met the minimum requirements of the CEC and the obligation to consult in good faith.
- Because of their incorrect belief that the provisions of Part 4 of the CEC did not apply, the parties have not met their obligations to consider the options set out in Part 4 with respect to Mrs Taylor's future employment.

37. Given these findings, it is not appropriate that I order that Mrs Taylor be reinstated to her position as an Art Teacher or that she receive compensation. However, I am reluctant to direct the parties as to Mrs Taylor's future. This is more appropriately a matter for the parties themselves to discuss and if possible agree. To date the process set out in Part 4 of the CEC has not been carried through. In the absence of proper consultation in terms of these provisions it would not be appropriate for me to impose an outcome.

38. The Parties are directed to meet as soon as practicable to consider Mrs Taylor's future options in the light of the findings set out above and Part 4 of the CEC. It may be that the services of an Employment Relations Service mediator may prove of some use in this process. Should agreement not be possible the parties may apply to the Authority for further determination.

Costs

39. Costs are reserved meantime. Mrs Taylor has pursued her case, with the support of the NZEI, in the genuinely held belief that the Board had no ability to require her to transfer. The Board, also acting on advice, genuinely believed that the reconfiguration they undertook was appropriate and the process fair. While it is generally accepted that "costs should follow the event", it is difficult in this case to determine which party could be said to have won. However, if either party wishes to pursue costs they should first discuss this with the other party. If no agreement can be reached an application for an award costs should be filed and served with the Authority within 21 days of the date of this Determination. The other party will be given 14 days in which to respond.

James Wilson
Member of Employment Relations Authority