Determination Number: AA 487/05
File Number: AEA 838/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

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| **BETWEEN** | Tertiary Institutes Allied Staff Association Inc (TIASA) Applicant |
| **AND** | Unitec Institute of Technology (Unitec) Respondent |
| **REPRESENTATIVES** | Philip Bartlett, for Applicant<br>Emma Butcher, for Respondent |
| **MEMBER OF AUTHORITY** | Janet Scott |
| **SUBMISSIONS RECEIVED** | 13 December 2005 & 15 December 2005 |
| **DATE OF DETERMINATION** | 16 December 2005 |

DETERMINATION OF THE AUTHORITY

## Issue

The respondent in the substantive matter (Unitec) has applied to the Authority for the removal of the matter to the Employment Court for hearing and determination.

The applicant in the substantive matter (TIASA) opposes the application.

## Respondent's Submissions for Removal

The respondent makes is submission under s.178 of the Act and relies on s.178 (2) (a) and says that an important question of law is likely to arise in the matter other than incidentally.

It is submitted that the determination sought by the applicant TIASA will involve consideration and determination of the correct application and interpretation of new section 59B. In particular it will require determination of various terms within s.59B which are entirely new, have no precedent in previous legislation and have as yet had no judicial consideration. The terms requiring interpretation include:

"Agree" in s. s.59B (1) & s.59B (3).

"Undermining" in s.59B (2) & s.59B (4)

"Intention" and "effect" in S.59B (2) & s.59B (4)

"Bargaining" in s.59B (6) (a)

It is submitted these questions cannot be classified as incidental. Rather they are central and determinative of the applicant's claim. The questions of law are important for the following reasons:

- The new "passing on" rules in s.59B introduce a new test to be considered in the relationship between unions and employers. Many of the terms and wording used with s.59B are not defined within the Act and will require considered judicial interpretation in order to determine their correct interpretation. As a consequence the determination will have major consequences for employment law in general. It would be a test case.

- The determination is likely to affect employers, unions and employees across industry.

- The resolution of the questions of law will be decisive of the case *Hanlon v International Education (NZ) Inc* [1995] 1 ERNZ 1.

In determining the removal application the Authority was asked to have regard to the guidance given by the Court in *Auckland District Health Board v X* AC 33/05.

There it was confirmed that the new test for justification s. 103A was integral to the case and as such was an important question of law.

The Authority was also referred to the guiding principles contained in the ADHB case (cited above) to be applied in considering removal applications. It was acknowledged that once one of the express statutory tests for removal has been satisfied the Authority has a residual discretion to determine if, in all the circumstances, the Court should determine the matter. However, that case supports the proposition that the Authority should apply its discretion to determine whether there may be a good or sufficient reason *not* to remove a particular case in spite of the establishment of one or more of the tests

## Applicant's Submissions Opposing Removal

The applicant makes the following submissions:

- It is submitted that the mere fact that a legislative provision is new does not necessarily mean that it gives rise to an important question of law.

- It is not accepted that Unitec has shown that there are important questions of law that arise other than incidentally and all Unitec has done is to identify a number of words used in the legislation that may require judicial consideration. However, it is unclear from the submissions how any of these words are thought to give rise to important questions of law in the context of this case.

- An important feature of s.59B is the subsection (6) which requires certain factors to be taken into account in determining whether there have been breaches of s. 59B (2) & (4). The legislative intent of s.59B was to give signposts to the Authority to assist in the interpretation of the words "intention", "effect" and "undermining". These signposts involve extensive factual inquiry. However, Unitec is inviting the Authority to remove the matter in reliance on s.178 (2) (a) despite the fact that Parliament has gone out of its way to explain how these questions are to be resolved.

- Unitec's submission that this is a test case overlooks the importance of s.59B (6). The way the matters listed in s.59B (6) are applied in this case are unlikely to be replicated in any future case and therefore the outcome is unlikely to be of wider significance.

- Some of the terms referred to in Unitec's submissions have indeed been the subject of prior judicial consideration. "Undermine", for instance, was considered by the Court in *AUS v Vice Chancellor of University of Auckland* [2005] 1 ERNZ 224, in context of s 32 ERA. And "bargaining" must on any view at least include the concept of negotiations: see for instance *NZ Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, at 101, para (5), where the majority in the Court of Appeal treated the expressions as interchangeable under the ECA 91; and see also the definition of "bargaining" in s 5 ERA (where, in relation to collective bargaining, the term is defined to include "negotiations that relate to the bargaining"). The concept of negotiations, in turn, has a well-established meaning in employment law: see, for instance, *Capital Coast Health Ltd v NZ Medical Laboratory Workers Union* [1995] 2 ERNZ 305 (CA).

Alternatively, it is submitted that if the Authority is of the view that the case does give rise, other than incidentally, to important questions of law then the Authority should decline Unitec's application in its residual discretion. It is submitted in this regard that the collective agreement under consideration is to expire on 31 December 2005. It would be preferable to have an outcome on this matter prior to commencing bargaining. However, it is anticipated the inconvenience in commencing bargaining pending an outcome of a determination by the Authority would be minor compared to the uncertainty that will attend bargaining as a result of the lengthier delays that will be incurred if the matter is removed for hearing and determination by the Court.

Another factor to be considered is Unitec's delay in applying for removal i.e. 2 ½ months after TIASA's filing of the original statement of problem.

## Discussion

The Act was amended in 2004 to insert s.59B Breach of duty of good faith to pass on, in certain circumstances, in individual employment agreement terms and conditions agreed in collective bargaining or in collective agreement. The insertion of this section was deemed by Parliament to be an important corollary provision to support the fundamental principles of the Act pertaining to good faith and the encouragement of collective bargaining.

Section 59B goes to the heart of the problem referred to the Authority and the outcome is likely to have ramifications beyond the particular facts of this case.

Having considered the submissions I find that a very important question of law arises in the matter other than incidentally. It is not the case that the questions posed by the application only narrowly attain the test described in s.178 (2) (a).

In arriving at this view I have focussed on the section in its entirety and its application to the problem referred to the Authority having regard to the objects of the Act. Without question there are new terms to be considered and terms that have been the subject of judicial consideration under previous legislation may require reconsideration in light of the objects and substantive provisions of the 2000 Act and its amendments.

In this respect, I am of the view that TIASA's submissions on the application of s.59B (6) to the matter to be determined support, rather than detract from, the arguments for removal. It is appropriate that the Court consider the questions of law arising in light of the whole of s.59B including what, if any, matters should be weighed under s.59B (7).

TIASA has raised the issue (in the context of the Authority's discretion to remove) of the delay in achieving certainty in the matter should this matter be removed to the Court.

I have considered TIASA's submissions in light of the discussion in that section of the ADHB judgement entitled *"A realistic prediction of the future from the past".* This is an important case for the parties. It has been signalled for Unitec that it may seek special leave from the Court pursuant to s.178 (3) if its application for removal is declined by the Authority. There is also the possibility of a de novo challenge to any determination by the Authority. The potential for delay in reaching an outcome in the substantive matter is significant regardless of the Authority's immediate determination and I am not, therefore, persuaded by TIASA's submissions on delay.

I note, too, that removal of this contentious issue from context of bargaining in the upcoming bargaining round may have a positive influence on negotiations and it is quite possible that the outcome will be known before individual employment agreements are considered consequent to the 2005/06 collective bargaining round.

Lastly on this topic I note the Court's power (s.178 (5)) to direct the Authority to investigate the matter if it considers it has not properly been removed.

## Determination

I am satisfied that the application for removal satisfies the test set out in s.178 (2) (a) that an important question of law is likely to arise in the matter other than incidentally.

Further, having regard to the guidance in the ADHB case (cited above) the Authority does not consider there are good and sufficient reasons not to remove the case. That being the case the Authority is of the opinion that in all the circumstances the Court should determine the matter.

## Costs

Costs are reserved. The parties are to attempt to resolve costs between them failing which they may make submissions to allow the matter to be determined.

Janet Scott
Member of Employment Relations Authority