

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN New Zealand Educational Institute (Inc) (Applicant)
AND Board of Trustees, Waiuku College (Respondent)
REPRESENTATIVES John Robson (Advocate for Applicant)
Paul Robertson (Counsel for Respondent)
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 2 and 3 March 2006
SUBMISSIONS 13 March and 12 April 2006 (Applicant); 4 April 2006 (Respondent)
DATE OF DETERMINATION 15 June 2006

DETERMINATION OF THE AUTHORITY

[1] The New Zealand Educational Institute (“NZEI”) seeks a declaration regarding the grading of the position of Laboratory Technician at Waiuku College. One of its members, Jillian Blacker has held that position since 1982.

[2] Ms Blackler is employed by the respondent (“the Board”) under the terms and conditions of the current Support Staff in Schools Collective Agreement (“the SSSCA”), an agreement to which NZEI is a party. The SSSCA is the successor to a collective employment contract first negotiated in 1996. Since then it has been renegotiated for varying terms several times.

[3] The 1996 agreement amalgamated previous arrangements with a number of unions representing a diverse range of occupational groups providing support services in schools. It also introduced a standardised three-grade pay scale for employees holding administrative and associate positions – the innovation important in this matter.

[4] The criteria for grading associate positions – including staff employed as technicians or assistants in school laboratories – remains largely unchanged from those agreed in 1996, apart from two aspects discussed below.

[5] It is the application of these criteria to the specific facts of the position held by Ms Blackler that is at dispute between the parties. The respondent board has classified Mrs Blackler as an Associate Grade B. Mrs Blackler and her union representatives consider she is more appropriately classified as an Associate Grade C.

[6] The matter was not resolved in two mediation sessions held last year. The Authority’s investigation – held over one-and-a-half days – heard in person from Mrs Blackler, NZEI field officer Rosemary Simpson, College principal Stuart Harrison, Board of Trustees member Julie

Thompson and by telephone from the College Head of Department for Science Colin North, Ministry of Education advisor Paul Kimble and former NZEI advocate for the SSSCA Marion Norton. Representatives for the parties had the opportunity to question witnesses and provided closing submissions in writing.

- [7] Issues to be determined now include:
- (i) how the agreement requires grading to be determined
 - (ii) the nature of the job presently done by Mrs Blackler
 - (iii) whether the Board has correctly classified the job

Preliminary matters

[8] I declined an application by the respondent for joinder of the Secretary of Education (“the Secretary”) on this matter for reasons set out in a minute dated 21 February 2006. The respondent suggested the Secretary should be joined because of the provisions of the State Sector Act 1988 s74A(b). That allows for the State Services Commissioner (in a role delegated here to the Secretary of Education) to require the employing board to act together or in consultation with him in responding to a dispute about the interpretation or application of a collective agreement. In deciding the joinder application I had the benefit of representations on behalf of the Secretary from Andrew McKenzie, a senior solicitor for the Ministry of Education. He advised that the Secretary was aware of these proceedings from December 2005. The Secretary considered the matter related wholly to the facts of the particular case and did not require the Board to act in consultation or together with him. He also considered that even if the matter did entail a dispute about the interpretation or application of the Support Staff in Schools Collective Agreement, it was not a case that required the Board to act together or in consultation with the Secretary.

[9] The Secretary was not in a position to comment on the application of grading provisions to the specific circumstances of the applicant but could give evidence on the historical and contextual background to the relevant wording in the collective agreement. He volunteered to provide that evidence and authorised Paul Kimble, an industrial relations advisor to the Ministry to give that evidence on his behalf. Mr Kimble provided an eight page witness statement and a number of background documents.

[10] The applicant provided written statements by three support staff at other schools supporting its position. The respondent provided a written statement from a former Waiuku College Board of Trustees member. I did not hear from those potential witnesses as their statements were either uncontroversial or dealt with matters on which I had enough evidence from others directly involved.

How the agreement requires grading to be determined

The SSSCA provisions

[11] The relevant provisions of the SSSCA are:

3.3 Operation of Grades for Associate and Administrative Classes

3.3.1 Grading

Every position shall be classified as either administrative or associate and then graded by the employer according to the level of skill, qualifications, relevant experience and responsibility which are required according to the definitions set out in 3.6.1, 3.6.2 and 3.6.3.

Any employee performing a mix of similar duties across two or more grades within one class shall be placed in the grade which reflects the substantive part of the job.

...

Note: Attention is drawn to the memorandum attached to this agreement. In this memorandum is a list of job titles provided by the parties to act as a guideline for Boards of Trustees as to the appropriate grading for a variety of occupational classifications. However, the parties acknowledge that as particular job titles may relate to positions with differing job content, the grading of particular job titles may differ from school to school.

...

3.3.4 Movement between grades

Movement between grades shall occur by appointment to an established position, or by regrading of a position where the requirements of the position have altered substantially. An employer shall consider the factors in 3.3.1 as the criteria for movement between grades. ...

3.6 Associate Class

An associate position primarily involves working either directly or indirectly with teachers and students to support the teaching and learning outcomes of students.

3.6.1 Grade A

- (a) *The position is closely supervised. It involves duties and tasks which are specified and clear and are carried out in accordance with well defined procedures.*
- (b) *Some examples of the duties required within this grade are:*
- *prepare and/or maintain resources;*
 - *support teaching programmes and student learning;*
 - *assist with routine needs of students.*

3.6.2 Grade B

- (a) *The position involves a range of duties for which advanced knowledge, skills and experience are required. The position is likely to involve periods without supervision or may be sole charge.*
- (b) *Some examples of the duties or levels of duties required within this grade are:*
- *support and contribution to teach programmes and curriculum delivery, including work with students either individually or in groups which assists their learning;*
 - *contributing to and maintaining healthcare programmes for students;*
 - *management of equipment and resources.*

3.6.3 Grade C

- (a) *The position involves a high level of responsibility and specialist knowledge. It will include management and/or administrative and/or financial responsibilities. Where the position does not involve supervision of staff, it will involve management of specialist equipment and resources which make a significant contribution to the delivery of the curriculum.*
- (b) *Some examples of duties or levels of duties required for this grade are:*
- *Management of systems and/or specialist equipment and resources;*

- *Management of healthcare programmes.*

[12] These provisions are largely unchanged from the grading structure originally agreed in 1996 except for two aspects relevant here.

[13] Firstly, the agreement reached in 2001 for the 2001-3 period added the words referring to “management of specialist equipment and resources” making a “significant contribution to curriculum delivery” to clause 3.6.3 (a) and to the examples of levels of duties given at clause 3.6.3 (b).

[14] Secondly, the 1998-2000 agreement has included the note at clause 3.3.1 which, while it added nothing new, highlighted the memorandum on job titles attached to the 1996 agreement.

[15] This memorandum lists the following job titles in the Associate Class:

Grade A	Grade B	Grade C
<i>teacher aide</i>	<i>brailist</i>	<i>technician</i>
<i>library assistant</i>	<i>library assistant/librarian</i>	<i>librarian</i>
<i>technical assistant</i>	<i>technical assistant</i>	<i>nurse</i>
<i>nurse aide</i>	<i>nurse</i>	<i>network administrator</i>
	<i>signer</i>	
	<i>teacher aide</i>	

Interpreting the SSSCA

[16] The relevant principles for interpretation of the SSSCA are not controversial.¹ Agreements should be construed according to their ordinary and natural meaning, and, where clear, the plain words must be applied. The circumstances surrounding the entry into an agreement may be taken into account not to contradict or vary the plain meaning of a written agreement, but to understand the setting in which it was made and construe it against that background.

[17] For this reason, while I was assisted by Mr Kimble’s written evidence, and the oral evidence that he and Ms Norton gave on the context and course of negotiating changes to the grading clauses of the SSSCA, I do not give any weight to the views they expressed on what they understood or intended particular words to mean. For example Mr Kimble believes the new wording added to clause 3.6.3 in 2001 regarding management of specialist equipment and resources was developed in relation to concerns about the grading of computer technicians and librarians. Those were the examples he recalls being discussed at the time. However the wording as agreed makes no specific reference or limitation in relation to those particular jobs for the application of Grade C. It is the plain words that must be applied.

[18] Similarly, interpretation of the agreement is not greatly assisted by the results of a survey carried out by Ms Blackler in 2004 of the grading of 21 science technicians in 16 South Auckland schools. Her survey showed most (but not all) of those technicians were graded C by their school board. She suggested that those technicians had substantially similar job descriptions and work as her. What most school boards do may give some indicator of how the SSSCA provisions are interpreted and applied – assuming that is done reasonably by those boards. However that cannot determine the present matter. Neither Mrs Blackler’s survey nor an additional example provided

¹ See *Wisniewski & Rubicon* (unreported, ERA Auckland, AA341/02, 22 November 2002, Member Rosemary Monaghan) and *Clarke and Cleeve v Vita New Zealand Ltd* (unreported, EC Auckland, AEC21/97, 17 March 1997, Colgan J).

by the respondent describe the actual work of those particular technicians. It may be that their work and job descriptions vary or that there are other factors at play in the grading decisions made by those other school boards. For example, it may be that in the prevailing labour market, it is hard to recruit and retain good laboratory staff at the pay rates provided by grade B. Other boards may just be more able or willing to ‘stretch’ their application of the criteria to provide better pay to their staff by grading their positions as C.

[19] Such considerations are subjective and not the proper inquiry here. Boards that make more conservative decisions are not necessarily wrong, provided they have complied with those terms of the SSSCA. What is required is an objective approach to interpreting and applying the words of the SSSCA by considering what a reasonable person in the field, knowing all the background, would take the words in question to mean.

[20] The SSSCA – now in its fifth iteration over almost 10 years – is the result of extensive negotiations, led by the experienced professional advisors of the Ministry of Education and the support staff unions. It must be assumed that the words used are carefully considered and agreed with the benefit of input from the employers through the School Trustees Association and the workers through their unions. In turn, those using the SSSCA “on the ground” in schools – trustees, principals and staff – must rely largely on what the plain words mean rather than any special understanding of the meaning of the words in questions.

[21] Similarly the Authority’s role is to ascertain and give effect to the intention of the parties by reference to the language in which they have expressed their agreement. It is the same approach that the Authority adopted in *NZEI v Board of Trustees, Red Beach School* (unreported, AA 437/05, 7 November 2005, Member Oldfield), also a case regarding the application of the Associate grades under the SSSCA.

Requirements of the SSSCA

[22] In relation to the particular issue here, the SSSCA requires that movement between grades “shall occur by ... regrading of a position where the requirements of the position have altered substantially”. The issues are whether what is required of a position has changed and whether that alteration is substantial. If both elements are satisfied, regrading is mandatory.

[23] In making that assessment, the employer must look at the level of skill, qualifications, relevant experience and responsibility required under the definitions for each grade. Where the mix of the associate’s work falls into two or more grades, the assessment must determine what parts of that work are the substantive part of the job and place the associate in the grade appropriate for that part of the work.

[24] The reference to management in these clauses has its plain meaning of being in charge of, running, administering or regulating use of resources (see definition of “manage” in Concise Oxford English Dictionary (11th ed, 2004)). Duties under both grades may involvement management of equipment and resources – the distinction is whether it is simply equipment and resources or of a specialist nature contributing significantly to curriculum delivery. The other distinction is the level of knowledge and responsibilities. Grade B involves duties requiring “advanced knowledge, skills and experience” but makes no reference to “responsibilities”. Grade C involves a “high level of responsibility and specialist knowledge”. [my emphasis]

[25] Whether alterations to the requirements of a position are so substantial as to warrant regrading – as referred to in clause 3.3.4 – is a matter of fact and degree. There may be some guidance on the approach to take to that issue from the consideration in redundancy case law as to whether a

particular position is substantially similar. There the general test asks whether the job content has changed and to what extent. The question to be determined is whether the job is the same with a change of focus or emphasis or is a different position. There is no hard and fast rule as to the proportion of difference required to safely say that the job is substantially altered. Similar issues of substantive difference may arise under clause 3.3.1 where a support staff member performs a mix of similar duties across two grades and must be placed in the grade reflecting “*the substantive part of the job*”.

[26] There is little else in the SSSCA to assist the Board in making these decisions. The job titles are expressly stated to be a guide only with differing job content resulting in differing grading from school to school. This is clear from job titles such as librarian and nurse which are listed under both Grade B and Grade C.

[27] It is not the title of the job but the content of the job that is relevant to determining the appropriate grading. Both Mrs Blackler and Mr Harrison appropriately accepted this in their evidence.

[28] Proper grading is also based on what is ‘required’ for the purposes of the position – that is what the employer asks to be done to meet its needs and not the worker’s own assessment of what she or he believes should be done. Equally, the assessment of appropriate grading is to be made on what the worker actually has to do to meet the employer’s requirements. Here a job description – and other or subsequent instructions given by the employer – are relevant but only to the extent such documentation accurately describes the work actually done in the position. The employer cannot on the one hand have the benefit of different or additional work it knows is being done by the worker and on the other hand rely on an out-of-date job description to deny a grading appropriate to the actual work.

The nature of the job presently done by Ms Blackler

[29] Ms Blackler was appointed as a Laboratory Technician at Waiuku College in 1982. Following the introduction of the present grading system in 1996 – under the agreement which survives today as the SSSCA – her position was confirmed in 1998 to be that of “*Laboratory Technician – Associate Class B*”. She signed a letter accepting this in July 1998.

[30] Mrs Blackler had a job description. It was compiled in 1990. Her undisputed evidence was that she wrote it herself and it was adopted by the school. Its layout has been reformatted but its wording remains unchanged from then.

[31] The job description requires the Laboratory Technician “to work autonomously, establishing priorities and effective routines for meeting key tasks in a rigorous time efficient manner” and to be “responsible in carrying out tasks such as purchasing, ordering and maintenance of resources and records”. Performance requirements include supporting science teachers by getting equipment together each day, maintaining stock levels of equipment and chemicals, ordering equipment and chemicals as instructed by the head of department (“HOD”), maintaining registers and inventories (including textbooks and dangerous goods), maintaining equipment in an ordered storage system, feeding laboratory animals (previously cockroaches but now axolotls), and changing hand towels and organising their laundering.

[32] The elements of the job description have been used, at least since 2002, as part of an annual evaluation process undertaken at the school. In 2002 Mrs Blackler refused to sign her evaluation form on the grounds that the job description process did not reflect her current tasks.

[33] On Mrs Blackler's 2004 appraisal form, the assistant head of department for Science wrote the following comment:

The job description above is no longer complete as Mrs Blacker also manages science equipment and resources to allow efficient delivery of the Science curriculum, including the repair of specialist equipment such as microscopes.

[34] On her 2005 form, the present Head of Department for Science made this note:

The job description and grade for the work of Laboratory Technician at Waiuku College is currently being investigated.

[35] In the week of the investigation meeting Mrs Blackler submitted to the school a proposal for a revised job description. Without reproducing the two pages of her draft, I note simply that the wording was clearly designed to meet the criteria for Grade C.

[36] Mrs Blackler's evidence on her present daily work emphasised her role in organising equipment and materials needed for the school's science classes. She maintains a suite of computer laptops. She helps students set up equipment for physics experiments, including ramps and a beam she made herself. She prepares individual sets of chemical solutions used for experiments. She makes up agar plates. She maintains and does some on-site repairs of 20 microscopes used in biology. She orders and unpacks chemicals needed in the laboratories, listing them in a computerised inventory and storing them in properly separated zones. She checks the components and replaces the fuses of power packs. Each year she does an inventory of the text books and dismantles the school's Van der Graff generator to replace its belt and fuses.

[37] Her evidence was that the complexity of her work had increased with the phased implementation of the NCEA assessment system over recent years. She said this now required more individual sets of materials to be prepared for the students, with a greater emphasis on the precision required as all students needed to have the same material in order to be assessed fairly in their internal assessment and practical examinations.

[38] Mr North's evidence confirmed the range of materials and equipment needed in the science laboratories and that Mrs Blackler largely worked without supervision. He described her as "in charge" of the separate chemical storage area that was part of a new laboratory building added to the school around three years ago. He described himself as responsible for that area but Mrs Blackler as organising it. Chemicals were now usually delivered labelled with its hazard status and appropriate storage area. He accepted Mrs Blackler would order "regular items" of material when required but that he was responsible for the budget. He did not accept the three levels of NCEA had significantly changed the type of work required but agreed that practical exams now required more material to be prepared at any one time. He described Mrs Blackler's responsibility for the laptop computers as running a booking system for their use.

How the Board dealt with classification of the position

[39] Following the 2001 change in the SSSCA wording for the classification of Grade C, Mrs Blackler raised the issue of her grading with her union representatives. During 2002 Ms Simpson was involved in advocating a change of grading for Mrs Blackler and a librarian at the school. While the Board's representatives considered that the duties required for the position had not changed since Mrs Blackler accepted it was a Grade B position in 1998, it offered to move her to the top step of the scale at her next annual increment date. The top step of Grade B provided the same hourly rate as the first step of Grade C but no further annual steps on the scale.

[40] While the Board considered this was the end of the matter, Mrs Blackler and her representatives continued to press for regrading. In June 2004 a meeting between the parties agreed that the position would be reviewed. The Board chairperson Cathie Baker agreed to “*take the issue of grading back to the Board to discuss; and [r]eview the job of Laboratory Technician in line with the information that you have given me*”. Mrs Blackler had provided a copy of her survey of technicians at other schools.

[41] The Board subsequently appointed a sub-committee of three. Ms Baker described its role as being to measure or evaluate Mrs Blackler’s work against the criteria for Grade C. Ms Simpson’s evidence was that Ms Baker also said that the sub-committee would talk with Mrs Blackler and the Science Department head Mr North about the Laboratory Technician’s job.

[42] I established from the evidence of Ms Thompson – one of the Board sub-committee members – that the sub-committee did meet and conduct what she called a line-by-line review of Mrs Blackler’s job description in comparison with the criteria for Grades B and C in the SSSCA. The members spent more than two hours on the exercise but Ms Thompson says she was not aware at that time that Mrs Blackler disputed the accuracy of the job description or that Mrs Blackler believed she would have the opportunity to talk to the sub-committee during its review.

[43] Ms Thompson also believed that Ms Baker had spoken with Mr North about the content of Mrs Blackler’s job. She recalled Ms Baker referring to notes which she indicated were information from Mr North. However I established from Mr North that he was not asked to provide information about the Laboratory Technician’s job to the Board sub-committee and he did not speak separately to Ms Baker about it. He told me that he was not asked about the grading of Mrs Blackler’s job in 2004 or at any time prior to a week before the Authority’s investigation meeting.

[44] The outcome of the Board sub-committee’s deliberations was an oral report by Ms Baker to an in-committee section of a Board meeting and a Board resolution to refuse Mrs Blackler’s request for her job to be regraded to Grade C.

[45] A letter from Ms Baker to Mrs Blackler dated 7 October 2004 stated that “[a]s per the agreement reached at the meeting of 11th June, the board has carried out a review of your job description and we also undertook a review of the work actually carried out and a job evaluation of such tasks as associated with the position.” She advised that the Board’s view was that Mrs Blackler’s “*position and work undertaken are correctly graded*”.

[46] The Board’s position remained unchanged at the time of the Authority’s investigation.

Determination

[47] On the basis of the evidence I heard from Ms Thompson and Mr North, I find that the Board did not undertake a review of the type described by Ms Baker in her letter of 7 October 2004 to Mrs Blackler. There was no information provided by Mr North at that time as to the current work of Ms Blackler. Rather than being a review of “work actually carried out”, it compared a 14-year old job description with the Associate grade criteria in the SSSCA.

[48] The Board did not ask itself the proper question. It should have considered whether the requirements of the Laboratory Technician position had altered substantially from those which resulted in a grading of B in 1998. This trigger need not be a single event or additional duty. It may be a number of factors amounting to a substantial alteration.

[49] From the evidence of Mrs Blackler, Mr North and Mr Harrison I am satisfied that there were several factors which at least warranted proper assessment by the Board of whether the position was correctly graded. These included responsibilities for maintenance of an increased number of microscopes and the suite of laptop computers; the establishment of a new chemical storage facility compliant with the requirement of the Hazardous Substances and New Organisms Act 1996 (“HASNO”); and the phased introduction of NCEA Levels 1, 2 and 3 from 2002 onwards.

[50] The Board sub-committee and the full Board did not have the benefit of that information when it made the decision communicated to Mrs Blackler by the 7 October 2004 letter. The problem is not that the Board restricted itself to what the respondent’s submission call “a contextual analysis of the job description”. It is that the Board’s letter was misleading as to the extent of information actually gathered and considered. These actions breached the Board’s obligation to act in good faith and the implied term of trust, confidence and fair dealing required of the employer under the employment agreement. Its actions did not match the standard which the 7 October 2004 letter implicitly acknowledged was necessary to meet the terms of clauses 3.3.4 and 3.3.1 of the SSSCA.

[51] I do not accept the respondent’s submission that a claim for a penalty for these events is out of time as the cause of action arose when Mrs Blackler was informed on 7 October 2004 that her application for regarding was refused. The misleading nature of the 7 October 2004 letter and the breach of the requirement for fair dealing were only revealed through evidence heard at the Authority’s investigation.

[52] In relation to the breach of the implied term of fair dealing I am satisfied that a penalty under s134 of the Act is warranted. I set the amount of the penalty at \$1000 and direct under s136 of the Act that the whole of that penalty be paid by the respondent to Mrs Blackler within 28 days of this determination.

[53] Beyond that I am not satisfied that the Authority should make the declaration sought by NZEI regarding the correct grading of the Laboratory Technician position at Waiuku College. To do so would be to do what this determination criticises the Board for doing – making a decision without a properly established factual basis. The evidence from witnesses for both parties was neither sufficiently precise nor extensive for the Authority to be able to determine whether Mrs Blackler’s job is correctly graded as Associate Grade B or should be regarded to Associate Grade C.

[54] For example, the parties had different opinions on the suggestion that the phased implementation of the three levels of NCEA assessment has changed the requirements of the job, but were not able to provide sufficiently conclusive supporting information for their views. Mr Harrison argued that the Laboratory Technician simply had the same duty of preparing precise chemical solutions for Chemistry classes, albeit in greater volumes on particular days and arranged in individual sets for use in student assessments. The application of knowledge had not changed. Alternatively Mrs Blackler said the responsibility was increased to a high level because of the importance of ensuring all students had the same material at the same time.

[55] The issue of the correct grading of the position now requires proper assessment by the Board, with input from Mrs Blackler and her Head of Department, Mr North. They must confirm the requirements of the position and its actual job content, which may conveniently be recorded in an up-dated job description.

[56] The Board would benefit from a detailed report from Mrs Blackler and Mr North on the day to day work of the Laboratory Technician – with sufficient detail for it to be able to consider the weight and time given to particular duties and their level of responsibility and specialist knowledge.

This may require some time to prepare and record but both Mr North and Mrs Blackler are no doubt steeped in the scientific discipline of the careful recording and analysis of observed phenomena. It would not be a task beyond their respective skills.

[57] The first stage of the assessment is then whether the current requirements of the position amount to a substantial alteration from those at the time of the grading decision made in 1998. Another issue may then arise which was not really addressed by either party – whether the mix of duties required of the Laboratory Technician are similar across both grades. If so, the Board must assess whether the duties appropriately graded at the higher level are the substantive part of job and consequently the position should be graded at that level. For example, the respondent concedes that the present role in the ordering and storing of chemicals to comply with HASNO requirements is “a responsible position” but there needs to more precision on what is required to determine whether this amounts to a high level of responsibility which would justify a grading at Associate C level.

[58] This is the exercise that the Board should have undertaken in August 2004. While it may now take some time for it to call for, receive and consider the level of information needed to make a proper decision, that decision should be regarded as effective from late 2004. If it is a decision to change the grade from B to C, that would likely have applied from Mrs Blackler’s anniversary date at the beginning of 2005.

[59] The respondent’s submissions suggested that if the Authority reached the conclusion that a change in grading was appropriate, the Authority should set out its view but not make any orders on the basis that the parties should then be able to resolve the issue. This determination has not reached that point but there is now an opportunity for the parties to resolve the grading issue within the terms of the SSSCA. Both parties have good faith obligations to be active and constructive, responsive and communicative in doing so. Mediation assistance is available if that would assist. I also reserve leave for either party to apply for further direction or orders in relation to this determination.

Costs

[60] The parties are encouraged to resolve the matter of costs between themselves. If they are unable to do so, either party may apply for a determination as to costs and the other party will be provided with an opportunity to respond before a decision is made.

Robin Arthur
Member of Employment Relations Authority