

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 76/09  
File Number: 5146131

BETWEEN                      NZ Educational Institute (Inc)  
Applicant

AND                              Secretary for Education,  
Ministry of Education  
Respondent

Member of Authority:        Denis Asher

Representatives:             Peter Cranny for the NZEI  
Trish MacKinnon for the Secretary

Investigation Meeting        Wellington, 21 May 2009

Submissions Received        By 29 May 2009

Determination:                2 June 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The NZEI says the Ministry breached representations made to it during collective employment agreement negotiations that back pay would not be paid to non union member specialist and support staff (non-union members) employed by The Correspondence School (TCS).

[2]     The Ministry denies the allegation.

- [3] Mediation did not resolve this problem.

## **Background**

- [4] The NZEI represents, amongst others, the industrial and professional interests of its members who are employed in TCS as specialist and support staff.
- [5] The Ministry negotiates collective agreements on behalf of non tertiary employers in the Education Service, including the TCS, under delegated authority from the State Services Commission.
- [6] Section 75 of the State Sector Act 1988 provides that the conditions of employment of employees in the Education Service (other than those at tertiary institutions) who are not bound by any collective agreement are to be determined by agreement between the employer (the Board of Trustees) and the individual employee.
- [7] Written concurrence from the Ministry (under delegated authority) is required to those conditions of employment but the concurrence will be deemed to have been given where the conditions of employment comply with those which have been promulgated.
- [8] One method by which conditions of employees not bound by a collective agreement are promulgated by the Ministry is for it to issue a new model individual employment agreement following the settlement of the relevant collective employment agreement.
- [9] The NZEI initiated bargaining for a collective agreement for its TCS members and presented its claim to the Ministry on 22 May 2008. A bargaining process agreement was entered into.
- [10] On 6 August the Ministry telephoned an offer to the NZEI. The applicant's representative kept a record of the conversation. Part of it reads as follows:

*Discussed intent of offer around non members ... letter of offer will include usual para used in (the Specialist Staff Collective Agreement) – IEA will be promulgated after ratification of CA.*

*Checked that intention was that non members would not get back pay – MoE confirmed. (Ministry's representative) said school would probably eventually give them percentage increases and likely to be same as those for members but there is no intention that non members should get back pay.*

(doc B, agreed bundle).

- [11] By letter dated 8 August the Ministry made a written offer to the NZEI to settle the collective agreement. It did not record *there was no intention that non members should get back pay*. It did say, amongst other things, that:

*Individual employment agreements will be promulgated after the date of ratification of the collective agreement and **will be effective from** the date of signing an individual employment agreement.*

(doc A, emphasis added)

- [12] The NZEI understood that term to mean that only those prospective provisions of the terms of settlement of the collective agreement ratified by its members would apply to non union members.

- [13] In particular, the NZEI expected that any retrospective benefits would apply only to union member employees.

- [14] In its ratification recommendation to its members the NZEI advised that agreement had been reached whereby, amongst other things:

*... the pay increase is not payable to non union members until their new individual agreement is promulgated and signed and no back dating for non union members.*

(doc D)

- [15] On 6 November TCS made various offers to its employees on IEAs including backdating a proposed pay increase.

- [16] By letter dated 13 November the NZEI raised a problem with the Ministry.

## Summary of Parties' Positions

### NZEI's Position

- [17] The NZEI says this case concerns one of the most important provisions in the Employment Relations Act 2000, namely ss 4 (b) (i) 7 (ii) which prohibit actions and/or conduct that misleads or are likely to mislead.
- [18] Written and oral statements were made in bargaining which misled and were likely to mislead the applicant and its members.
- [19] The misleading statements led to the settlement of a collective agreement on the basis of factual communication which was untrue, i.e. the letter of 8 August 2008 (doc C) which was taken to mean that non-union members would not receive back pay.
- [20] This case is not about the merits of back pay for non-union members but rather about the NZEI being misled.
- [21] Regrettably the matter has come to a hearing when the Ministry should have accepted it plainly misled and apologised.
- [22] This litigation is important because of its significant ramifications for the conduct of future collective bargaining.
- [23] This is the first case of its type in this area of law.
- [24] The core representation at issue is the letter of 8 August 2008 (doc C) and not the actual content of the call between the parties' representatives on 6 August 2008. However, in respect of the latter, the NZEI's representative's evidence is to be preferred to that of the Ministry's as the former was clear, concise and focussed whereas the latter was vague and uncertain. In the few areas of disagreement the applicant's representative's evidence is to be preferred.

- [25] The Ministry's representative conceded that the words "*effective date*" (doc C) means no back pay will be paid.
- [26] The "*effective date*" approach was also promulgated in the individual employment agreements after the settlement (refer doc N, second page).
- [27] TCS reneged on the Ministry's commitment. Nonetheless, the respondent also claims its letter and statements do not bear the meaning the NZEI took from them.
- [28] The plain and ordinary meaning of the 8 August letter (doc C) is that no back pay would be paid to non-union members.
- [29] The NZEI therefore seeks a determination that s. 4 was breached and asks also that ordinary tariff costs be awarded to it.

### **Ministry's Position**

- [30] The Ministry says it bargained in good faith with the NZEI and denies breaching any representations made to the applicant.
- [31] The respondent's position was set out in its written offer of 8 August 2008 (doc C) including advice that an individual employment agreement applicable to non union members would be promulgated after the collective agreement was settled, effective from the date of signing of the individual agreement.
- [32] The phrase in dispute as set out in the 8 August offer is:
- Subject to your acceptance of this offer, and ratification by members, an individual employment agreement applicable to non-union members potentially covered by the agreement would be promulgated, after ratification, effective from its date of signing.*
- [33] The phrase is not misleading nor is it likely to mislead.
- [34] That advice was the same as past advice given by the Ministry to the NZEI in previous collective bargaining.

- [35] That advice could not form part of the offer: it was information concerning what would have happened if the NZEI accepted, and its members ratified, the offer.
- [36] The offer otherwise comprised four elements (being the term, 2 successive pay increases and a name change) which met in full the original claim made by the NZEI, as ratified by its members in March 2008.
- [37] The NZEI did not put the Ministry's offer as set out in the 8 August letter to its members but put out its own version (doc D) which differed from the respondent's offer. In particular it claimed there would be no backdating of pay increases to non-union members. That claim was never checked with the Ministry so as to ensure the applicant was accurately conveying the respondent's offer. The claim did not constitute part of the offer but was instead a construction taken from the information that an individual agreement would be promulgated after ratification, effective from its date of signing.
- [38] While the construction may have been valid in terms of the Ministry's intention for the effect of the individual agreement it was not valid to refer to it as a component of the respondent's offer to settle the collective agreement.
- [39] The NZEI's original claim (doc JK) contained no claim relating to non-union members and any restriction of back pay.
- [40] The promulgation of an individual agreement "*effective from its date of signing*" can not be taken as a representation that the employing school would not provide an equivalent benefit to non-union staff. That does not make the advice that an individual agreement would be promulgated effective from its date of signing misleading or likely to mislead. The Ministry is not the employer of staff of TCS and is not responsible for any offers made by TCS to its union specialist and support staff. The Ministry negotiates collective agreements and promulgates individual agreements for non union members: s. 74 of the State Sector Act 1988. Schools wishing to offer employees terms and conditions that are different from those of a promulgated individual agreement are required to obtain concurrence for doing so: ss. 75 (2) of the State Sector Act 1988, and delegated authority from State Services Commissioner to Secretary for Education. Where the terms and conditions comply with an individual agreement promulgated by the Ministry it is not

necessary for an employer to obtain concurrence as it will be deemed to have been given.

- [41] No agreement was otherwise reached by the parties about the application of the ratified collective agreement to subsequent individual agreements: the Ministry was not responsible for the NZEI's advice to its members about backdating for non members.
- [42] The Ministry was not aware of the 6 November 2008 offer by TCS (doc E) to its non union employees until that offer was drawn to its attention by the NZEI, i.e. two-months after the parties had signed the new collective agreement. The Ministry's response was, amongst other things, to suggest to the NZEI that it resolve the matter with TCS.
- [43] The Ministry does not accept that the words *effective from its date of signing* have the meaning given to them by the NZEI, i.e. that they preclude retrospective benefits. The words are plain and their meaning is clear. An intention to guarantee that no employee would receive back pay or equivalent remunerative benefit may not be reasonably inferred from those words.

## **Discussion and Findings**

- [44] I agree with the respondent's position. That is because I am satisfied that regardless of the Ministry's representative's intention (refer to doc B), the respondent's letter of 8 August 2008 (doc C) is its formal offer (matching as it does the applicant's original claim – doc JK): neither refer to back pay to non-union members. The NZEI's representations to its members (doc D) go beyond the actual offer made to it by the Ministry as well as its originating claim.
- [45] I also do not accept the words contained therein – *effective from its date of signing* – require the Ministry to stop TCS from passing on back pay to its non union member staff; scrutiny of the relevant legislation makes clear that even if the Ministry expressly committed itself to such a position (which it did not) it had no legal basis to enter into any such contractual undertaking. The applicant could not enforce an illegal contract (leaving aside the reality that TCS was not a party to that contract).

[46] Furthermore, *effective from its date of signing*, while capable of the meaning urged on my by the applicant, also lends itself to another meaning, one that does not preclude retrospective benefits: many employment agreements effective from a signing date provide both retrospective and prospective benefits.

[47] While understandably encouraged by the comments of the Ministry's representative, and notwithstanding an intention apparently shared by the parties' negotiating representatives at that time, the NZEI is attempting to go beyond legal principles in this instance: whatever that understanding might have been it was not reflective of the express provisions detailed in the NZEI's claim and the written offer that its members ultimately ratified. The understanding was not part of the settlement and therefore cannot be said, in this instance, to have misled the applicant. Despite or because of the deep frustration experienced by unions as a result of putting in the effort but not always reaping the reward, and without any disrespect intended, the genesis of this problem might be described as a case of a party misleading itself.

### **Determination**

[48] The application is declined.

[49] While costs are reserved I note here that, subject to the parties' views, there is a significant test case element to this problem and it may be appropriate that no costs are awarded

**Denis Asher**

**Member of the Employment Relations Authority**