ATTENTION IS DRAWN TO THE
ORDER PROHIBITING PUBLICATION
OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY

WELLINGTON

[2011] NZERA Wellington 73

File Number: 5301491

	BETWEEN	New Zealand Educational Institute (Inc) Applicant
	AND	The Boards of Trustees of Te Mata, Parkvale and Frimley Schools First Respondents
	AND	The Secretary for Education, Ministry of Education Second Respondent
Member of Authority:	Denis Asher	
Representatives:	David Martin for the NZEI Trish McKinnon for the respondents	
Investigation Meeting	Wellington, 14 & 15 April 2011	
Submissions Received	21 April 2011	
Determination:	5 May 2011	

DETERMINATION OF THE AUTHORITY: Removal to the Employment Court and Prohibition of Publication

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The Problem

[1] This is a dispute as to the interpretation of Appendix 6 of the Primary Teachers' (Including Deputy and Assistant Principals and other Unit Holders) Collective Agreement 2007-2010 (the collective agreement) and an allegation the second respondent (the Ministry) breached its good faith obligations in respect of matters arising out of the same collective.

[2] The parties have undertaken mediation in respect of this employment relationship problem but the matter was not resolved.

[3] The Secretary for Education has exercised her prerogative under delegated authority under ss 23 & 69 (b) of the State Sector Act 1988 to require the first respondents to act together with her in this matter: the Secretary has also determined to take the lead in these matters.

The Investigation

[4] The applicant (the NZEI) first filed their statement of problem on 6 April 2010.

[5] Two amended statements of problem followed as well as the parties unsuccessfully undertaking mediation.

[6] The parties agreed to an investigation commencing on Thursday 14 April 2011, and extending if necessary into 15 April, as well as a timetable for filing witness statement. All references to document numbers in this determination are in respect of the 5 volume agreed bundle.

[7] During the investigation I raised with the parties the question, should this problem be removed to the Employment Court per s. 178 of the Employment

Relations Act 2000 (the Act)? I also sought and obtained submissions from them as to this inquiry.

Background

[8] In 2007 the NZEI and the Ministry settled the collective agreement referred to above. Appendix 6 of the collective agreement provides as follows:

> ***Longer Term Work Programme***
>
> 1. *NZEI Te Riu Roa and the Secretary for Education agree to the further development of the career pathways through the continued engagement in a Longer Term Work Programme.*
>
> 2. *The objective is to have a high quality, appropriately qualified primary teaching workforce in state and integrated schools who will raise achievement and reduce disparity among all students. The Longer Term Work Programme enables a collaborative working environment that is conducive to the delivery of these objectives and provides a mechanism that allows long term planning and improvements in the primary sector based on cooperation between the NZEI and the Ministry.*
>
> 3. *Central to the Work Programme is improving student learning outcomes through recognition and promotion of effective teaching practice and strong professional leadership.*
>
> 4. *It is agreed that the work programme for the next three years will explore professional development and career and qualification opportunities for teachers which underpin the agreed career pathway framework for teachers.*
>
> 5. *It is agreed that underpinning the career pathways development is consideration of the impact on the workload of teachers.*
>
> 6. *In the period 2008-2010 the Strategic Coordinating Group will be responsible for the following:*
>
>   - *Ensuring that the sequencing of work in developing the agreed career pathways over the short and medium term is followed;*

- *Establishing, where appropriate, the terms of reference for the work streams;*
- *Recommendations on the implementation of agreed outcomes.*

Note: The matrix on the following pages outlines the intention of the parties for the sequencing of the LTWP work over the period 2008-2010.

(pg 78, doc 37 of the agreed bundle)

[9] As indicated by the note set out above, appendix 6 also includes a flow chart entitled *"20 December 2007 Primary Teachers Collective Agreement Longer Term Work Programme Strategy 2007-2010"* (pgs 79 & 80 inclusive, above).

[10] Under the 4th heading of the matrix, *"Medium Term 2009"*, are the words, *"Implementation of PBA subject to successful pilot"* (pg 79, above). *"PBA"* are initials or an acronym for Practice Based Attestation.

[11] What is at issue between the parties is whether the pilot was successful or not. The NZEI says the pilot was successful, and PBA should now be rolled out nation-wide; the Ministry says it was not and even if it were the Minister of Education's approval is required to roll the scheme out nationally.

[12] Consistent with Appendix 6, and between 2008 and 2009 the NZEI and the Ministry, through a working party process, piloted a new PBA system in a number of Hawkes Bay Schools.

[13] In saying the pilot was a success, the NZEI relies in particular on an evaluation report submitted to the Ministry in respect of the PBA pilot (doc 85), dated July 2009, and on a minute of a meeting of the Strategic Coordinating Group (SCG), meeting on 11 December 2009 (doc 112). The SCG was set up by the parties to oversee the pilot.

[14] The Ministry does not agree that the pilot was a success; it also relies on the evaluation report and the minute in coming to its conclusion. As a result, the Ministry declined the NZEI's proposal to role out the PBA nationally and to vary the collective agreement.

[15] The Ministry also says that no agreement existed that, had the pilot been successful, it would have been rolled out nationally; instead, as was appreciated by the parties, the agreement of the Minister of Education was required for any such development.

[16] During the investigation the Ministry advised that the spending required to roll out the PBA nationally was in the order of millions of dollars, possibly in excess of $30 million p.a., but, because of insufficient scoping, it could be no more accurate.

[17] In submissions received by the Authority on 19 April the Ministry says *"this matter would have significant fiscal implications (approximately $40,000,000 over three years) if a finding were to be made against it"* (par 5).

[18] The NZEI seeks, amongst other things, a declaration that the collective provides that in the event of a successful pilot of PBA the Ministry would negotiate a suitable variation to the collective to incorporate the same.

[19] The Ministry rejects the allegation it has breached any obligations it has under the collective relating to PBA. It says it funded an extensive PBA pilot, devised in conjunction with the NZEI and the New Zealand School Trustees Association, and participated in the SCG but its members of the latter did not reach agreement over the success or otherwise of the pilot.

[20] The Ministry says it has conducted itself throughout in good faith.

Removal to the Employment Court

NZEI's Position Summarised

[21] The NZEI is opposed to removal to the court for the following reasons:

[22] It says the choice of words in s. 178 (1) of the Act is important, in particular that the Authority can remove a matter to the Employment Court on its own initiative *"without the Authority investigating it"*. Section 178 therefore empowers the Authority

to initiate removal before an investigation is commenced but not during an investigation. That distinction informs the grounds provided under s. 178 (2).

[23] Subsections 2 (a), (b) & (c) of s. 178 clearly do not apply: there is no important question of law, the matter is not urgent and no similar case is before the court. The Authority should be slow to use s.s. 178 (2) (d) because it is in the nature of a residual discretion, and should therefore be reserved for rare and exceptional cases.

[24] No detailed calculations exist in respect of the Ministry's costings of the implication of a finding in favour of the applicants.

[25] While the underlying issues may be serious the Employment Court has said of the Authority that it is perfectly competent to resolve serious and complicated matters: *Vice Chancellor of Lincoln University* v *Stewart* [2008] ERNZ 249. The threat or likelihood of a challenge to its determination should be treated with *"considerable caution"* by the Authority: par 40, *Stewart* (above).

[26] As observed by the Authority, the real solution to this problem will lie in collective bargaining, and the collective agreement is not due for renewal until 2012.

Respondents' Position Summarised

[27] In submissions received by the Authority on 19 April the Ministry says *"this matter would have significant fiscal implications (approximately $40,000,000 over three years) if a finding were to be made against it"* (par 5). And, it would be almost inevitable that a finding against the Ministry would be challenged in the Employment Court.

[28] Accordingly, the Ministry neither opposes nor supports the removal of this matter to the Employment Court on the Authority's motion but will accept the Authority's determination.

Discussion and Findings

[29] By way of the 1 April 2011 amendments to the Act, the Authority is now empowered to order the removal of a matter, or any part of it, to the Employment Court, without the Authority investigating it: s. 170 (1) of the Act.

[30] The grounds are set out under ss. 178 (2). The Authority may order removal if:

a. An important question of law is likely to arise other than incidentally; or

b. The case is of such a nature and of such urgency that it is in the public interest it be removed immediately; or

c. The court already has before it proceedings between the same parties and which involve the same or similar or related issues; or

d. The Authority is of the opinion that in all the circumstances the court should determine the matter.

[31] I do not accept it is too late to order removal as the Authority's investigation is incomplete: final submissions have not been received and no determination has been issued. The Authority cannot be described as *functus officio* hence the removal discretion remains available for exercise.

[32] No important question of law arises in this matter other than incidentally. However, the issue are clearly important to the parties to the extent that the Ministry, if unsuccessful, has said that a challenge to the court was almost inevitable; the NZEI has yet to consider this possibility.

[33] While of such a nature that it is, I believe, in the public interest that it be removed to the court (because of the likely cost of implementing the PBA and the parties' shared commitment to a longer term work programme including an agreement to explore the professional development and career and qualification opportunities for teachers), the case cannot be said to be *"**and** of such urgency"* (emphasis added; above) that it be removed immediately.

[34] I do not understand the court to have before it proceedings between the same parties and which involve the same or similar or related issues.

[35] However, I am of the opinion that in all the circumstances the court should determine the matter. I reach my conclusion for the following reasons:

a. The issue is important to the parties;

b. Because of the important of the issue to the parties, there is a strong likelihood of a challenge to any Authority determination;

c. The number of teachers who might wish to avail themselves of a PBA process, were it to be rolled out, totals in the region of 7000;

d. The issue extends, via the collective employment agreement, to potentially every primary, composite, correspondence and special school and other teaching establishments in New Zealand;

e. The cost of the PBA, were it to be rolled out nationally, is in the millions of dollars; and, finally,

f. The public interest in this matter arising as it does out of the importance to the community of professional development and career and qualification opportunities for teachers and the impact on that on the education of New Zealand's primary school aged populations.

Prohibition of Publication

[36] During the investigation the Ministry confirmed that, for reasons of commercial sensitivity, it was seeking a prohibition of publication order from the Authority in respect of docs 56, 57, 69 & 139. That application was not opposed by the applicant and was granted by me: Clause 10 (1) of Schedule 2 of the Act applied.

Determination

[37] I direct that this problem be removed to the Employment Court: ss. 178 (1) & (2) (d) applied.

[38] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority