

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 237
5349843**

BETWEEN	BRUCE NEWMARK Applicant
AND	BOARD OF TRUSTEES, WAIKOWHAI INTERMEDIATE SCHOOL First Respondent STATE SERVICES COMMISSIONER Second Respondent SECRETARY FOR EDUCATION Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Simon Buckingham, Counsel for Applicant Howard Perry, Advocate for First Respondent Trish McKinnon, Counsel for Second & Third Respondents
Investigation Meeting:	On the papers
Submissions	23 February & 15 March 2012 from Applicant 9 March 2012 (Amended statement in reply) from Second and Third Respondents
Determination:	13 July 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Issue

[1] The Applicant, Mr Bruce Newmark is claiming non-payment of an increment of wages following a wage increase pursuant to the terms of a collective agreement.

[2] This determination addresses the preliminary issue of whether the Second and Third Respondents, the State Services Commissioner (the Commissioner) and the Secretary of Education (the Secretary), have been correctly joined as co-respondents in the claim of Mr Newmark against the First Respondent, the Board of Trustees, Waikowhai Intermediate School (the Board).

[3] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on the written submissions from the parties.

Background Facts

[4] Mr Newmark commenced employment as a permanent full-time teacher working in the state sector at Waikowhai Intermediate School on or about 3 October 2001.

[5] Mr Newmark chose not to become a member of New Zealand Educational Institute Te Riu Roa Inc (NZEI), the union which represents teachers, and therefore he was employed by the Board in accordance with the terms of an individual employment agreement (IEA).

[6] The State Sector Act 1988 (SSA) sets out, *inter alia*, the statutory framework for the employment of teachers in the state education services. Pursuant to s2 of the SSA, the employer is the relevant board of trustees, and the employee is an employee in any part of the State services, whether paid by salary, wages or otherwise.

Terms and conditions of employment of teachers who are members of NZEI

[7] In respect of teachers who are members of NZEI, their conditions of employment, in the form of a collective agreement, are negotiated by the Commissioner, in accordance with s74 of the SSA. In accordance with s 23 of the SSA the Commissioner may delegate his or her authority, and does so to the Secretary for Education (the Secretary) in respect of the negotiations for the Primary Teachers’ Collective Agreement (PTCA).

[8] The PTCA covers the terms and conditions of employment of primary and intermediate school teachers who are members of the NZEI. Clause 1.2 of the PTCA states:

The agreement shall be binding on:

a. Each employee who comes within the coverage clause and who is or becomes a member of NZEI Te Riu Roa.

[9] The current PTCA covers the period 26 November 2010 to 15 August 2012 (PTCA 2010-2012). The terms of settlement were signed on 26 November 2010 by NZEI and the Secretary following ratification by the members of the NZEI.

[10] The application of the revised pay rates for members of the NZEI coming within the coverage provisions of the PTCA 2010-2012 was agreed by NZEI and the Secretary to take

effect 4 days after the signing of the Terms of Settlement, i.e. from 1 December 2010, subject to ratification of the PTCA.

[11] Chairpersons of boards of trustees and principals of all state and integrated primary schools are advised of the outcome of collective bargaining by means of Circulars which are posted on the MoE website under the authority of the Secretary.

[12] The Education Circular (Circular 2011/03) stated:

The new rates will be paid on 9 March and will be paid back to 1 December 2010 for NZEI members who were members as at 29 November 2010. Primary principals on Individual Employment Agreement (IEAs) will get the base salary rate increase from the date of signing the new IEA.

Terms and conditions of employment of teachers who are not members of NZEI

[13] In respect of Mr Newmark and those primary and intermediate teachers who are not members of the NZEI, their terms and conditions of employment are determined by agreement between the individual employee and the board of trustees which employs them pursuant to s 75 (2) of the SSA which states:

The conditions of employment of employees in the education service ... who are not bound by any collective agreement shall be determined in each case by agreement between the employer and the individual employee, but the employer shall obtain the written concurrence of the Commissioner to the conditions of employment with that individual employee.

[14] The board of trustees (the employer) therefore requires the written concurrence of the Commissioner to the conditions of employment with the individual employee

[15] Pursuant to s 75 (3) SSA the Secretary may promulgate in writing to boards of trustees the conditions of employment for non-NZEI teachers. The promulgation is actioned by way of a template for IEAs which are made available to boards of trustees and are posted on the Ministry of Education (MoE)'s public website for downloading and subsequent usage.

[16] In accordance with s 75(3) SSA:

Where the conditions of employment agreed between the employer and the person to be appointed comply with the conditions of employment promulgated by the Commissioner, the employer shall, without any further action, be deemed to have obtained the written concurrence of the Commissioner to these conditions of employment.

[17] A board of trustees that wishes to offer different conditions of employment to a teacher must obtain written concurrence from the Commissioner. The procedure for obtaining concurrence involves a board of trustees writing to or emailing the MoE's Industrial Relations Unit setting out the matter on which it is seeking concurrence and the reasons for the request. Each application for concurrence is considered on its merits and concurrence may be granted where deemed to be appropriate.

Year 2008

[18] In the Circular 2008/03 dated 17 March 2008 which provided information to boards of trustees about the 2007-2010 PTCA it stated.

Teachers not bound by the Collective Agreement will need to sign the new promulgated IEA to access the new terms and condition of the PTCA, as applicable.

Normally any payments cannot be backdated to prior to the date of signing an IEA, however any IEA signed before 31 March will be backdated in the following conditions:

- *Any notification of a signed IEA for a primary teacher received at the Payroll Service Centre prior to 5 pm on 31 March 2008 will have the four percent increase on the base scale salary rates and an increase in the value of units to \$3,650 shall be back-dated to 28 January 2008.*
- *Any notification of a signed IEA for a primary teacher received after 31 March 2008 will not be eligible for this back-dating of pay.*

[19] On 27 March 2008 Mr Newmark signed a new IEA and received pay arrears for the period 28 January 2008 to 25 March 2008.

Year 2010

[20] In the Circular 2011/03 issued on 25 January 2011 it stated:

Primary teachers' base salary rates increase by 2.75%. The new rates will be paid on 9 March and will be paid back to 1 December 2010 for NZEI members who were members as at 26 November 2010. Primary teachers on Individual Employment Agreement (IEAs) will get the base salary rate increase from the date of signing the new IEA.

Teachers who are covered by the PTCA but are not members of NZEI may be offered the newly promulgated IEA to access the applicable terms and conditions of the PTCA 2010-2012. IEAs are only effective from the date of signing and cannot be effective before the date they are promulgated by the Secretary for Education.

Template individual employment agreement

[21] The individual employment agreement template for primary and intermediate teachers for the 2010-2012 period was promulgated by the Secretary on 25 January 2011, approximately one week before the start of the 2011 school year. It provided that salary rates were to be paid in accordance with the PTCA.

[22] The individual employment agreement template further provided that any relevant term or condition in that collective agreement, including increases in remuneration which had an implementation date prior to the date of the individual employment agreement being signed, were to apply from the date of signing:

Any relevant term or condition in the collective agreement, including increases in remuneration, that has an implementation date prior to the date of the Individual Employment Agreement being signed shall apply from the date of signing.

Mr Newmark's IEA

[23] The IEA which the Board issued to Mr Newmark was not the template IEA posted on the MoE website. The IEA issued to Mr Newmark stated:

The Board continues the employment of the Employee as a permanent Scale A teacher working at Waikowhai Intermediate School, working times specified in the Primary Teachers' Collective Agreement (PTCA) 2010-2012, working full-time.

Salary rates are paid in accordance with the PTCA 2010-2012.

The terms and conditions of employment under this agreement are those terms and conditions of the Primary Teachers' Collective Agreement 2010-2012 which, with all necessary modifications, are applicable to an individual employment agreement for teachers employed in Primary Schools.

The terms and conditions of employment set out in this agreement replace any previous arrangements and understandings.

A copy of the Primary Teachers' Collective Agreement 2010-2012 is available on the Ministry of Education website.

[24] The IEA was signed by Mr Newmark, and Mr Howard Perry on behalf of the Board, on 29 March 2011.

Submissions for the Applicant

[25] Mr Buckingham, on behalf of Mr Newmark, submits that Mr Newmark's increase taking place from the date of his signing the IEA rather than being backdated to December

2010 as has been the case for members of NZEI, represents a breach of the Human Rights Act 1993 and the Employment Relations Act 2000 (the Act).

[26] Mr Buckingham states that although s 75(2) SSA states that conditions of employment are to be negotiated between the employer and the employee, the employer must get the concurrence of the Commissioner.

[27] Noting that the Board does not maintain payroll or pay scales, and has no ability under s 75(1) SSA to vary the rate of pay without specific approval of the Commissioner, Mr Buckingham submits that notwithstanding the SSA definition of employer, the Board is simply an agent for the Commissioner, who makes the actual decisions through the Secretary.

[28] Mr Buckingham submits that as remuneration (hire or reward) is an intrinsic part of the definition of an employment agreement, an employment contract cannot exist without remuneration. Consequently as the Commissioner is in sole control of remuneration, and has the ultimate responsibility and decision in regards to pay, the Commissioner is also an employer and a correct respondent in this matter.

Position of the First Respondent

[29] Mr Perry stated that the commencement of a new PTCA renders any IEA in force at that time outdated as the terms and conditions are no longer operative. And accordingly the MoE requires any IEA entered into by teachers and subject to the expired PTCA to be renewed to import the terms of the current PTCA.

[30] Mr Perry explained that the Board was made aware by the payroll provider for Waikowhai Intermediate School that Mr Newmark's IEA needed to be renewed to bring it within the coverage of the PTCA 2010 – 2012.

[31] Mr Perry stated the Board's position was that the renewed IEA when signed would cover all the terms and conditions of the PTCA 2010-2012, this had been the intention of the parties to the IEA. The intention had been that this would include any increase in salary from the commencement of the PTCA 2010-2012.

[32] This had been the case in respect of IEAs previously issued to Mr Newmark which had taken effect from the beginning of the New Year. Mr Perry stated that the IEA which applied to Mr Newmark's employment during the 2008-2011 periods had been signed by Mr Newmark on 27 March 2008, and Mr Newmark had received a back-dated payment in respect of the period 28 January 2008 to 25 March 2008.

[33] Mr Perry stated that when Mr Newmark raised with the Board the fact that he had not been paid any back-dated component of his salary, the Board had attempted to seek redress of this situation by approaching the MoE, but had not been successful.

[34] Mr Perry submits that as the Board was not involved in negotiations of the PTCA 2010-2012, or in the process of making payments to employees, the MoE should be responsible for paying Mr Newmark the amount of salary that has not been paid to him in accordance with the PTCA 2010-2012 from the date of its coming into force.

Submissions for the Second and Third Respondents

[35] Ms McKinnon submits for the Second and Third Respondents that since the Education Act 1989 implemented *Tomorrow's Schools*, boards of trustees have had complete discretion to control the management of their schools as they see fit, within the provisions of applicable and general law.

[36] Ms McKinnon submits that this discretion allows them to financially recognise the contribution made in the workplace by particular teachers by allocating additional remuneration to them by way of salary units and 3R payments (for Recruitment, Retention & Responsibility).

[37] Ms McKinnon submits that the Secretary cannot make offers of employment to non-union teachers as that is the prerogative of the boards of trustees which employ them. In the situation whereby a board of trustees wishes to offer different conditions of employment, it must make written application for a concurrence from the Secretary. Ms McKinnon states that hundreds of applications for concurrence are granted annually.

[38] Ms McKinnon further submits that in electing the date that non-union employees sign their individual employment agreements as the effective date for the application of new conditions to those individuals, the Secretary is mindful of her various obligations under employment, and other applicable, legislation. These obligations include her good faith obligations to NZEI, which may be breached if she elects to "pass on" to non-union teachers the conditions of the collective agreement from the date they apply to union members.

Determination

[39] Mr Newmark's personal grievance claim is in respect of a breach of his employment agreement through the non-payment of wages, on the basis that he is entitled to have the increase in his salary rate paid effective from the beginning of the school year 2011. As such the claim is properly against the First Respondent as the designated employer in accordance with s2(a)(i) SSA.

[40] However the element of the increased salary rate due in respect of the period from the start of the school year 2011 until 29 March 2011 had not been paid to Mr Newmark. The Board claims that when it had been made aware of this fact by Mr Newmark and sought redress of the situation from the MoE, it had been denied it

[41] The issue which this determination addresses is the preliminary issue of whether the Second and Third Respondents, the State Services Commissioner and the Secretary of State for Education, have been correctly joined as co-respondents in the claim of Mr Newmark against the First Respondent, The Board of Trustees, Waikowhai Intermediate School, and on what basis.

The PTCA

[42] The parties to the PTCA 2010-2012 are stated to be the Secretary of State for Education: *acting under delegated authority from the State Services Commissioner pursuant to s 23 of the SSA and acting in accordance with section 74(5) of the State Sector Act 1988 (as amended by the Employment Relations Act 2000)*, and NZEI.

[43] Although the Secretary enters into obligations in collective bargaining that are recorded in the resultant collective agreement as if the Secretary was the employer, the Board and Mr Newmark are not parties to the PTCA 2010-2012.

[44] Notwithstanding that the Board and Mr Newmark are not parties to the PTCA 2010-2012; there is no dispute about the interpretation, application or operation of this collective agreement.

Circular 2011/03 and the IEA issued to Mr Newmark

[45] Circular 2011/03 provided information to boards of trustees covering the settlement of the PTCA 2010-2012 and the action needed to be taken by them to note its contents, and to complete the requirements relating to IEAs.

[46] Circular 2011/03 contained advice to the effect that primary teachers on IEAs would receive the base salary rate increase, as set out in the PTCA 2010-2012, with effect from the date of signing the new IEA, and provided a link to the webpage containing the template IEA, which was promulgated on 25 January 2012.

[47] Circular 2011/03 is issued by the MoE, under the authority of the Secretary. Section 75 of the SSA makes it clear that if a board of trustees wants to issue an IEA the terms of which do not comply with the terms and conditions in the promulgated IEA, it must obtain written concurrence from the MoE acting on behalf of the Secretary.

[48] In accordance with s 2 of the SSA, the Board is Mr Newmark's employer, and in its capacity as the employer, the Board issued the IEA to Mr Newmark. I do not find that the Secretary was a party to Mr Newmark's IEA.

[49] The IEA issued to Mr Newmark was not compliant with the template IEA promulgated by the Secretary as it omitted the clause which stated:

Any relevant term or condition in the collective agreement, including increases in remuneration, that has an implementation date prior to the date of the Individual Employment Agreement being signed shall apply from the date of signing.

[50] The omission had the effect of making the statement in Mr Newmark's IEA that 'Salary rates are paid in accordance with the PTCA 2010-2012' effective without limitation to the date of signing the IEA.

[51] The signing of Mr Newmark's IEA on 29 March 2011 and the non-provision of a written concurrence in respect of the non-compliant terms and conditions resulted in Mr Newmark's change in remuneration being implemented by Datacom, the MoE's agent for the education service payroll, with effect from 29 March 2011. It is reasonable to assume that this was in accordance with the instructions contained in Circular 2011/03 in the absence of a written concurrence stating otherwise, i.e. the new rate commenced with effect from the date of signing the IEA, in this instance 29 March 2011,.

[52] As such I find that whilst the only parties to the IEA are the Board and Mr Newmark, the Secretary exercised some degree of influence on the ability of the Board to comply with the terms of the IEA it had issued to Mr Newmark.

[53] Section 274A of the SSA is applicable to Personal Grievances and disputes states:

- (a) *In relation to a personal grievance, the employer is the employer as defined in section 2*
- (b) *In relation to a dispute about the interpretation, application, or operation of any collective agreement, the employer is the employer as defined in section 2, acting, if the commissioner so requires, together or in consultation with the Commissioner; and*
- (c) *In relation to any other employment relationship problem (within the meaning of the Employment Relations Act 2000), the employer is the employer as defined in section 2.*

[54] There is no dispute about the interpretation, application or operation of this collective agreement and therefore s74A(b) SSA is not applicable and the Board has not acted together or in consultation with the Commissioner.

[55] On this basis of a 74A(a) and (c) SSA I find that the Commissioner or the Secretary cannot be joined as respondents to Mr Newmark's personal grievance on the basis of any employment relationship.

[56] The Board has stated that it was its intention that the renewed IEA issued to Mr Newmark would cover all the terms and conditions of the PTCA 2010-2012, including any increase in salary from the commencement of the PTCA 2010-2012. However this intention had not been implemented by Datacom.

[57] I determine that the Second Respondent, the Commissioner, having delegated authority to the Secretary to act in respect of the PTCA 2010-2012 collective bargaining and subsequently in the promulgation of the conditions of employment for non-NZEI employees, it is not appropriate that the Commissioner be cited as a respondent to Mr Newmark's personal grievance

[58] I have found that the Secretary exercised a degree of influence on the ability of the Board to comply with the terms of the IEA it issued to Mr Newmark. Accordingly I determine that the Secretary could be joined as a respondent to Mr Newmark's personal grievance pursuant to s 134(2) of the Employment Relations Act 2000 which states:

Section 134 Penalties for breach of employment agreement

(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

Next Steps

[59] The Authority will shortly consult the parties about their availability and the time table for an investigation meeting to be held at a time and date to be established at the case conference.

[60] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority