IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 114
5377597

	BETWEEN	TERTIARY EDUCATION UNION (TEU) Applicant
	A N D	VICE CHANCELLOR, UNIVERSITY OF CANTERBURY Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for the Applicant Helen Gilbert, Counsel for the Respondent
Investigation meeting:	On the papers (by agreement of the parties)
Submissions Received	30 May 2012 from the Applicant 18 May and 6 June 2012 from the Respondent
Date of Determination:	11 June 2012

DETERMINATION OF THE AUTHORITY

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[1] This is an application seeking the removal of proceedings currently before the Authority to the Employment Court.

[2] It is made by the respondent, the University of Canterbury, and relates to proceedings concerning its ability to restructure its business. Central to the argument is a dispute over whether or not certain regulations, instructions and resolutions of the University are enforceable as terms and conditions of employment thereby impacting upon, or otherwise limiting, the University's ability to restructure. Particular reference is made to a document known as the "Blue Book".

[3] The Tertiary Education Union does not oppose the application. It simply states it is will abide this decision, whatever it may be.

[4] The relevant section of the Act, s.178(2), provides that:

> *The Authority may order the removal of the matter, or any part of it, to the court if—*
>
> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
>
> *(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or*
>
> *(c) the court already has before it proceedings which are 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.*

[5] The application relies on sections 178(2)(a) and (b), along with an invitation that I exercise the discretion granted under s.178(2)(d).

[6] Upon receipt of the application there was a telephone conference during which I expressed a view that given the submissions then before me, removal as a question of law (s.178(1)(a)) was unlikely. I invited the University to add to its submission in that respect. The response was:

a. Reference to the fact that only one of the four grounds need be successful (*Auckland DHB v X (No 2)* [2005] ERNZ 551);

b. Advice that the University had nothing to add to its submission in respect to removal as a question of law; and

c. Elaboration of the arguments tendered in support of removal under s.178(2)(b).

[7] While this could be interested as an acceptance that the first ground was unlikely to succeed, I shall deal with it for the sake of completeness. The University concedes that the issue of whether or not the Blue Book's content applies is a question of fact but argues that if the answer is yes, consequential questions of law will arise. They include whether or not the obligations apply to both parties (either expressly of impliedly) and if they do, the extent of compliance that may be ordered.

[8] The argument fails to convince me that a question of law warranting removal arises. As the University concedes in paragraph 1.6 of its submission, the Court has

previously visited the issue of the enforceability of ancillary policies and documents. The extent of that applicability will depend on an interpretation of the relevant contractual provisions. I conclude those are issues of fact to which reasonably well established legal principles can then be applied.

[9] To be removed under s.178(2)(b) three criteria must be met. The issue must be of such a nature and sufficiently urgent that removal is warranted in the public interest. Public interest refers to public welfare as opposed to public curiosity (*Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at para 35).

[10] The argument tendered in support of removal under s.178(2)(b) is that:

a. The University is under extreme financial pressure, a significant portion of which can be attributed to Christchurch's earthquakes and the effects there-of;

b. There is extreme urgency, in that the outcome will affect the content, and therefore production, of the university calendar;

c. The calendar plays a significant part in attracting and retaining students and that, in turn, impacts directly and significantly on the University's financial situation;

d. Next years calendar must be produced by the end of July;

e. A negative outcome in the Authority would constrain the University's ability to address it financial state to such an extent that a challenge would be inevitable.

[11] I am convinced in respect to urgency. First, the Union agrees and the behaviour of the parties is consistent with that common view. Second, I conclude the argument in respect to the calendar is strong.

[12] The issue of nature and public interest are, in my view, intertwined. The University of Canterbury is a significant institution in Christchurch being both a major employer and source of regional income generated by the spending of the students it attracts. That its current tribulations, and particularly those about the continuation of various courses, is of public importance is, in my view, reflected by the press currently being generated on the issue.

[13] Lastly I note the claim that the University would inevitably challenge a negative outcome. I also note the Courts view that such claims should be treated with considerable caution but there are rare instances where it is the case (*Vice-Chancellor of Lincoln University v Stewart (No 2)* at para 40). I am, however, of the opinion this is a case where it is an issue. This is not a personal grievance as was the *Stewart* case - it is a dispute with significant financial implications. From the University's perspective, the consequences of a negative outcome appear incomprehendable, and would severely limit its ability to address a fraught financial situation. I accept, as submitted, that challenge would be inevitable should the decision favour the union. Similarly the posturing (by both parties) over course changes as recently (indeed currently) reflected in The Press would strongly suggest the Union is equally wedded to its position.

[14] Having considered the submissions I conclude this is a matter that should be removed to the Court. The substantive dispute may materially affect the University's ability to conclude its course offering for 2013. Its interests in this respect are, for reasons discussed in 12 above, those of the wider public and there is a high level of urgency. For these reasons I conclude the grounds required by s.178(2)(b) have been made out.

[15] Finally I note the grounds of removal contemplated by s.178(2)(d). Whilst not decisive, the issue discussed in 13 above would appear to add weight to the conclusion. The parties are entitled to, and indeed require, certainty. They do so urgently and these issues would lead me to opine that will be more likely delivered by the Court.

[16] Removal is therefore ordered.

Costs

[17] Cost are reserved though I note for the parties benefit, and given costs can be revisited, a preliminary view that costs should, at least in respect to this application, lie where they fall.

M B Loftus
Member of the Employment Relations Authority