IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 95
5390740

	BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION Applicant
	A N D	SECRETARY FOR EDUCATION First Respondent
	A N D	NEW ZEALAND SCHOOL TRUSTEES ASSOCIATION Second Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Tanya Kennedy, counsel for applicant Antoinette Russell, counsel for first respondent Denis Asher, advocate for second respondent
Submissions Received	15 and 17 August 2012
Date of Determination:	20 August 2012

DETERMINATION OF THE AUTHORITY

A. The application by the PPTA for removal of a matter from the Authority to the Employment Court is declined.

B. Costs are reserved.

Application for removal

[1] The Authority has considered an application by the New Zealand Post Primary Teachers' Association (the PPTA) to have a matter removed in its entirety to the Employment Court, for hearing and determination without the Authority investigating it.

[2] The application, made under s 178 of the Employment Relations Act 2000, is opposed by the two respondent parties, the Secretary for Education (the Secretary) and the New Zealand School Trustees Association (STA). They do not accept that any of the grounds argued in support of removal have been made out and they wish to have this matter determined at first instance by the Authority as an investigative body.

[3] The matter presently before the Authority is an application by the PPTA for declarations as to the rights and obligations of the parties to the Secondary Teachers Collective Agreement, expressed to be the PPTA and the Secretary. The matter before the Authority is also application for compliance orders and penalties against both the Secretary and STA for breach of good faith and for aiding and abetting a breach of an employment agreement.

[4] At the heart of the employment relationship problem in this case is a dispute about the interpretation, application or operation of an employment agreement. The issue is an important one about the way, under the collective agreement, study awards are to be allocated to teacher employees, many of whom are members of the PPTA. The collective agreement provides that awards are to be made by a panel composed of equal numbers of "employer representatives" and representatives of the PPTA. Guidelines have been developed for awarding study leave and they specify nine factors which are to be considered by the panel when assessing applications. The weight to be given one particular factor, support from the Board and Principal of a teacher's school, is the major issue in this dispute.

Grounds for removal

[5] In support of the removal application and with reference to s 178 of the Act, three grounds have been put forward by the PPTA;

- Bias;
- Important questions of law are likely to arise; and
- Urgency and public interest.

Bias

[6] Although it is contended that the Authority will appear to be biased if it investigates and determines the substantive application for declarations, compliance

orders and penalties, no objection has been taken by the PPTA to the Authority determining the application for removal.

[7] For the PPTA counsel Ms Kennedy submits that the union's members' concerns in relation to bias have arisen because the advocate for the second respondent STA once was a member of the Employment Relations Authority. It is submitted that union members are also concerned because another member of the Authority until very recently was a legal advisor employed by the first respondent, the Secretary for Education, or her Ministry, and may become a witness if factual matters are disputed in this case. It is contended that the Authority may appear to be biased when resolving issues of credibility that may arise from the evidence given by a witness who is also an Authority member, if her testimony conflicts with that of any other witnesses who are not members.

[8] The Authority is a creature of statute, established as an investigative body under the Employment Relations Act 2000. The statute provides that the Authority consists of a single member whenever it exercises its jurisdiction. Seventeen members are currently appointed to the Authority. Of those several were appointed in 2000 when the Authority was established, others have commenced in the years since then and five more members have been appointed only in the last few months of this year.

[9] Members do not have tenure of office under the Act but may be appointed for terms up to four years, and they may be reappointed from time to time.

[10] STA's advocate or representative before the Authority is Mr Denis Asher who was an Authority member for 11 years until October 2011. The Secretary's former legal advisor is Ms Trish MacKinnon who was appointed to the Authority only a few weeks ago in July 2012. She has not yet been sworn in and is therefore unavailable to investigate and determine this case or any other. Putting Ms MacKinnon to one side then, the bias ground for removal has not been raised in relation to any particular current member or his or her circumstances. On that basis the claim by the PPTA seems to be one of institutional bias (or appearance thereof).

[11] Ms Kennedy referred in her submissions to the legal test appropriate to the circumstances of this case, where the claim is not one of actual bias but appearance of bias. The Supreme Court in *Saxmere Company Ltd v. Wallboard Disestablishment*

Co Ltd [2009] NZSC 72 held that the governing principle in such cases is whether a fair-minded lay-observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[12] Under that objective test the question is one of "possibility (real and not remote) not probability".

[13] In *Muir v. Commissioner of Inland Revenue* [2007] NZCA 334, the Court of Appeal proposed that a two stage inquiry into bias should be made, in the following way:

> *First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the 'bias' ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct.*

[14] The Court of Appeal expressed agreement with the observation made in an Australian case (referred to at para [96] of the judgment) that as an observer "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." Further the Court considered that the informed observer will not lightly accept that a judge has put aside his or her professional oath, or his or her professional training given to the skill of sifting and weighing "facts" in evidence.

[15] Although an Authority member's appointment is not to the office of Judge, he or she must take an oath to faithfully and impartially perform his or her duties as a member, and undoubtedly members bring to the Authority, or acquire from working here, considerable experience in sifting and weighing facts in evidence, particularly given the investigative role of this institution.

[16] In making the two stage inquiry proposed by the Court of Appeal, it is necessary to establish the factual circumstances which have a direct bearing on a suggestion that there may be bias. Those circumstances may include a particular current Authority member's acquaintanceship or association, if any, with a former member such as Mr Asher. There is a range of situations from those of several current members who worked closely with Mr Asher as a colleague in the same

office, from the inception of the Authority in 2000 (and even before that when he was a member of the Employment Tribunal) until his term of office expired in 2011 and he then became employed or engaged by the second respondent STA. At the other end of the range are members who have been appointed to the Authority only since Mr Asher left and have had no significant association or connection with him. They may know very little about him except that he was once a member of the Authority.

[17] Whatever the observer might apprehend in relation to the first category of longer serving members who once worked with Mr Asher and know him well, I do not consider the observer could reasonably think that members in the second category of recently appointed members, whose only link to Mr Asher is through membership of the same institution he too once served, although in a separate period, might not bring an impartial mind to the investigation and disposal of the claims now before the Authority.

[18] The circumstances relied upon in this case are not those personal to any member but appear to be largely legal and institutional. The Authority has been in existence for nearly 12 years and the Act provides that its membership may change from time to time, as appointments are for fixed terms and members may resign. There is no bar to any former member of the Authority working as a professional advocate or counsel in the employment law jurisdiction after leaving the Authority.

[19] STA had a statutory right to choose its representative before the Authority, whether that was Mr Asher or anyone else. As well as Mr Asher, currently there are several other members who are employed, engaged or retained in advocacy work which may bring them before the Authority as the representative of an applicant or respondent party. If cases such as this do give rise to a removal situation there could be a regular flow of them to the Court as former members accept instructions to come to the Authority as party representatives.

[20] I consider that the bias ground for removal can be addressed by the Chief of the Authority invoking s 166A(2)(b) of the Act to require a particular member of the Authority to investigate a particular matter. There are several members who are not based in Wellington where Mr Asher served and who have been appointed to the Authority only recently and since he left last year. Removal as a response to Mr Asher's involvement in the case is therefore declined.

[21] The ground of apparent bias insofar as it is addressed to the circumstances of Ms MacKinnon having recently become an Authority member has no reasonable foundation, I find, as the core issue is in the nature of a dispute and therefore likely to turn on legal principles rather than on factual matters, whether disputed or agreed. Resolution of the dispute is likely to precede any consideration of enforcement by compliance and penalties.

[22] From the information given in the statement of problem, it seems unlikely that compliance orders would immediately be given at the same time as any declarations are made in the terms sought by the PPTA, if that is eventually the determination of the Authority. Compliance being a discretionary remedy, an opportunity to observe the determination is usually given to parties before deciding whether it is necessary to enforce the ruling by compliance.

[23] As was said by the Employment Court in *NZ Educational Institute v Secretary for Education* [2012] NZEmpC 84, a case involving the same respondent Secretary as the present;

> *Compliance is a coercive remedy which is not either appropriate or awarded in some cases: generally the Authority……will allow parties the opportunity to comply non-coercively and, given the Secretary's public role, it would be surprising if she did not accept the verdict of the Authority or otherwise on appeal or appeals therefrom.*

[24] In any event it remains an unresolved issue raised by the Court in deciding the case above whether compliance under s 137 of the Employment Relations Act is available at all against the Secretary.

[25] In relation to the penalty claims, the information given in the statement of problem is inadequate for an investigation of them. No particulars have been given as to when there was a breach of the collective agreement or good faith provisions of the Act (claims for penalties must be commenced within 12 months of the breach), and the individuals whose actions, whether carried out on behalf of the Secretary for Education or STA, caused the breach or caused those parties, as alleged, to aid and abet a party to the breach, are not identified.

[26] It is unsurprising that some of those details have not been given because the heart of the problem is really the issue as to interpretation, operation or application of an employment agreement rather than the way the application for study leave of any particular teacher, employed by any particular school Board, was treated by a study

leave panel constituted in any particular way on any particular occasion. Although there is no reference in the claim to any particular Board of Trustees as an employer of any particular teacher, that may not be necessary when the issue is one of the weighting to be given to any of the various factors by a study leave panel when considering any application for that leave.

[27] Therefore I consider the possibility that Ms MacKinnon will become a witness in this case to be quite remote, as the determination of a dispute usually turns on the legal matter of construction rather than any factual matters that may become the subject of formal evidence. If she does give evidence it may be subject to a claim of privilege. It is also hard to see how, as a matter of fact, the way the parties may have attempted to resolve this dispute by having a settlement meeting, which Ms MacKinnon attended, might have a bearing on the legal question of what the relevant provisions of the collective agreement and guidelines mean

[28] I do not think there could be any reasonable perception by a fair-minded lay-observer of institutional bias arising because Ms MacKinnon was recently a legal advisor to the Secretary and now is a member of the Authority (although not the member investigating this case). Ms MacKinnon is now a Wellington located Authority member and the member requested to investigate this matter will be a recently appointed member from either Christchurch or Auckland.

Important questions of law are likely to arise

[29] No important question of law is pointed to as arising from the core issue, the interpretation, application or operation of the study leave provisions of the collective agreement and the guidelines.

[30] The questions of law that are relied on are incidental and, if *questions* at all, are matters of mixed fact and procedure. The submissions for the PPTA in support of removal on this ground refer to observations made by the Authority during a telephone conference about the appropriate parties to this claim. The Authority questioned whether STA was properly a respondent and also whether a Board of Trustees needed to be cited in addition to the Secretary.

[31] Having considered those matters more fully since the telephone conference, it seems to me that the Secretary is an appropriate respondent to the applications made, because under the State Sector Act 1988 or the relevant collective agreement, or both,

the Secretary may for some purposes become the employer or may be treated as if she were an employer.

[32] My view now is that determination of the interpretational issue at the heart of this problem does not require that a Board of Trustees should become a party to the claim. The Secretary, who is a party to it, is accountable for observing the collective agreement or taking steps to ensure that "employer representatives" comply with it. Resolution of the dispute may depend on a finding as to the way the employers' representatives on the study leave panel are lawfully required to act when determining any leave application. The Secretary, as an employer, may reasonably give instructions about that matter to those representatives as her delegates, wherever they might come from. It seems to me that the constitution of the panel so far as employer representative goes is the Secretary's responsibility. The PPTA in its claim refers to the Ministry of Education as having undertaken the administration role in relation to study awards and allocation of those by the panel.

[33] The Authority also questioned whether STA could be a respondent party if it was not an employer party to the dispute. It appears that on some or all occasions persons employed or engaged by STA have been employer representatives on the panel, although there is no reference in the collective agreement to that as being a requirement. The issue is not so much where the employers' representatives have been drawn from by the Secretary but how they have acted once appointed to the panel.

[34] The identity of appropriate parties to a claim is a matter that arises in many cases and is partly a matter of fact and partly a matter of procedure. I do not see any important issue of law arising in this case. In any event, the PPTA chose to include STA as a respondent party and STA has advised that it wishes to remain a party. For a penalty to be claimed against it (as a party to a breach) it must be a party. The Authority therefore now has no issue about STA's party status and has indicated that an opportunity is to be offered to STA and NZEI to be heard as interested parties, if not as parties directly involved in the matter. There is therefore no *question* that needs to be resolved either by the Authority or the Court.

Urgency and public interest

[35] I accept as submitted by Ms Kennedy that there is a degree of public interest in this matter because of the large number of employee teachers who may be affected by a determination of it. However, insofar as urgency must be present as well under this particular ground, if the next batch of applications is being considered on 20 and 21 August there is no possibility that removing the matter to the Court now will bring an urgent resolution which may be usefully had by the parties before 20 August, the date of this determination.

[36] The issue raised in this case is not of recent origin, having been formally taken up by the PPTA with the Secretary over a year ago in June 2011. Also, if applications are declined by the panel in the latest round and subsequently the Authority (or the Court) determines that the panel did not act correctly or failed to comply with the requirements of the collective agreement, remedies may be available to affected employees to, as far as possible, have their lawful rights or entitlements restored. Remedies of mandatory injunction, compensation for loss of expected benefits or reinstatement, even in a disadvantage grievance, may go some way to meeting any harm or loss caused by decisions which may be made by the panel and which may later be found to be contrary to the provisions of the collective agreement disputed in this case.

[37] Urgency is also raised as a matter going to the Authority's residual discretion to remove, as Ms Kennedy has advised that the Court may possibly be able to hear this matter in the week of 18 or 24 September 2012. It is intended however, as explained above, that a recently appointed member in either Christchurch or Auckland will hear the matter. As those members are still building up a case load I expect one of them will have capacity to investigate and determine the PPTA's substantive dispute before the Court is able to hear the matter and issue a judgment.

[38] As to the likelihood of a challenge to the Court, that is ever present and is not a strong ground for exercising discretion. The same applies to the fact that the parties were not able to resolve this matter in mediation. As usual in that situation, it is the reason why the matter has to be determined by the Authority as the next in line problem solving institution under the Act. As to providing an agreed statement of facts, the Authority will be just as assisted by that as the Court will be.

Determination

[39] For the above reasons, I do not consider any of the grounds are present for removal. Neither is the matter one that the Authority considers should in its discretion be removed in all the circumstances.

[40] The removal application is declined.

[41] The parties will be contacted shortly about arrangements for an investigation meeting to proceed before a different member.

Costs

[42] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority