

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 68
5521937

BETWEEN THE NEW ZEALAND POST
PRIMARY TEACHERS
ASSOCIATION
Applicant

AND THE SECRETARY FOR EDUCATION
First Respondent

VICE CHANCELLOR OF THE
UNIVERSITY OF AUCKLAND
Second Respondent

TEACH FIRST NZ TRUST
Third Respondent

Member of Authority: James Crichton

Representatives: Tanya Kennedy, Counsel for Applicant
Antoinette Russell, Counsel for First Respondent
Philippa Muir, Counsel for Second Respondent
Marie Wisker, Counsel for Third Respondent

Investigation Meeting: On the papers

Determination: 22 July 2015

FIRST DETERMINATION OF THE AUTHORITY

History

[1] The applicant's statement of problem was filed in the Authority on 9 October 2014 together with a memorandum seeking urgency.

[2] Urgency was opposed by the third respondent on the basis that the grounds identified in the application did not avail the applicant and on the further ground that there were jurisdictional issues which the Authority ought to determine first before the substantive matter could proceed.

[3] The Authority issued a Minute dated 15 October 2014 declining to grant urgency and directing the parties to mediation by consent.

[4] Statements in reply were filed in the Authority between 28 October 2014 and 30 October 2014. The statement in reply from the first respondent *inter alia* resists urgency and suggests that the Authority may wish to give relevant Boards of Trustees the right to be heard.

[5] The statement in reply from the second respondent repeats the protest to jurisdiction as does the statement in reply from the third respondent.

[6] A further memorandum seeking urgency was filed by the applicant on 13 November 2014 and this was again opposed by memoranda filed and served on 19 November 2014. The grounds for opposition repeated the grounds previously advanced in opposition, noting that the Authority had already rejected urgency but all that had changed was that the parties had had an unsuccessful mediation.

[7] A further telephone conference with the Authority was scheduled for 3 December 2014 at which the presiding Member proposed hearing dates of 2, 3 and 4 February 2015 and identified a number of options foreshadowing the decision I have made to deal with the preliminary jurisdiction issue first.

[8] The matter did not proceed on the dates proposed by the Authority in February and a further telephone conference was scheduled for 6 March 2015 by which date the matter had come on to my list by direction of the late Rosemary Monaghan, then Chief of the Authority.

[9] Contemporaneously with that March telephone conference, further memoranda were filed by the parties concerning the conduct of the proceedings and then on 23 March 2015, the applicant filed a memorandum seeking joinder of two representative Boards of Trustees, namely Onehunga High School Board of Trustees and One Tree Hill College Board of Trustees in terms of s.221 of the Employment Relations Act 2000 (the Act). On the same date a third amended statement of problem was filed.

[10] Then on 2 April 2015, a joint memorandum of the respondents was filed opposing the application for joinder and in a statement in reply from the second respondent filed on 9 April 2015, counsel for the Vice Chancellor of the University of

Auckland repeated that party's view about the Authority's want of jurisdiction to hear any claim against the Vice Chancellor of the University of Auckland. Again, and consistent with that party's original statement in reply, the request was made that the Authority dispose of the jurisdiction question as a preliminary matter first before the substantive issue is investigated. Those views were broadly supported and accepted by the third respondent in its statement in reply to the applicant's third amended statement of problem.

[11] In the teleconference that I convened on 19 May 2015, after hearing counsel, I determined that certain preliminary issues (principally the application for joinder filed by the applicant) would be dealt with in a first determination *on the papers* and that is the focus of this present determination.

[12] For the avoidance of doubt, the investigation meeting set down for 29 July 2015 will determine whether or not there have been breaches of the Secondary Teachers Collective Agreement (the collective agreement) and potentially by implication the State Sector Act 1986 (in relation to certain appointments made to positions at some secondary schools including One Tree Hill College and Onehunga High School).

[13] Because some of the bases on which that 29 July 2015 investigation meeting was to proceed were still not agreed, I convened a further telephone conference on 17 July 2015 wherein the basis of how the investigation meeting on 29 July 2015 was to proceed was agreed.

[14] Moreover, it is apparent from that helpful discussion with counsel and the useful formulation of the question for the Authority to answer by the applicant, that the preliminary question of jurisdiction which has especially troubled the second and third respondents will be addressed and disposed of by the 29 July 2015 investigation meeting and not by this present determination.

[15] To facilitate that disposition, it has been agreed *inter alia* that the applicant will file and serve legal submissions on the basis that it contends that there has been a breach of the collective agreement in order to, open the door for allegations of *aiding and abetting* to be raised against the second and third respondents.

[16] The importance of this issue is straightforward; without a breach of the collective agreement, the question whether any party has aided or abetted falls away because the one is a precondition of the other.

Issue

[17] The only issue for decision in the present determination then is the question whether the Authority should grant the application for joinder of the two representative Boards of Trustees proposed by the applicant, or not.

[18] For completeness, I note that while the applicant plainly supports the joinder application (it is the applicant's application) the application for joinder is resisted by all three respondents and for similar reasons.

[19] Also for completeness, I note that the Authority has received a memorandum from counsel acting for the proposed joinder parties . The Boards of Trustees themselves oppose being joined into this proceeding but helpfully proposed to the Authority that they will gladly cooperate with the Authority's investigation by providing evidence from one or more secondary schools who have participated in the programme that is the centrepiece of the applicant's complaint to the Authority.

Determination

[20] I have not been persuaded by the applicant's argument that representative secondary schools ought to be joined into this proceeding. I reach this conclusion principally because I am unable to see how joinder will assist me in addressing the question which the applicant itself identifies which simply put requires me to identify if there have been breaches of the collective agreement.

[21] This is a question of interpretation and application of the relevant collective agreement and it is difficult to see how representative Boards of Trustees of schools who have done nothing more than participate in a programme which gives rise to the issues of complaint can assist me to reach the conclusion about whether or not there has been a breach of the operative collective agreement.

[22] Whatever else is true, as counsel for the Boards of Trustees correctly asserts, the Boards are not parties to the collective agreement and on any rational basis are

even further removed from the questions in issue here than are the second and third respondents who themselves are grumbling about being drawn into this proceeding.

[23] Moreover, there is no need for the representative Board of Trustees to be joined in order for the matters in dispute to be dealt with appropriately by the Authority. The parties to the collective agreement are before the Authority already as are two other parties who appear protesting the Authority's jurisdiction to deal with the matter at all, but have at least helpfully agreed to engage in the Authority's investigation insofar as that is necessary so as to facilitate disposition.

[24] Section 221 of the Employment Relations Act 2000 (the Act) gives the Authority the discretionary power to join a party to any proceedings in order to *more effectually dispose of any matter... according to the substantial merits and equities of the case.*

[25] Looked at in an entirely practical and common sense way, I am not persuaded that the joining of the two representative Boards of Trustees will assist me to dispose of the matter before me. I already have access to the two parties to the collective agreement and to two additional parties. All have helpfully engaged with the Authority in its process to date and I have no reason to think that that helpful cooperation will suddenly cease.

[26] Furthermore, it is a truism that the inquisitorial nature of the Authority's proceeding allows the Authority to call for evidence from any party or person who in the Authority's judgment can materially assist the Authority in its inquiry. That power must be considered wide enough to allow the Authority to engage with, and seek evidence from, persons or parties who are not, in a legal sense, a party to the proceedings. It follows from the foregoing that if I am persuaded that I need to hear from representative Boards of Trustees, I can seek that evidence. This is so whether or not those Boards of Trustees are joined to this proceeding or not.

[27] As I have already made clear, counsel for the representative Boards has already helpfully conceded that evidence will be provided to the Authority by one or more secondary school principals to assist the Authority in its inquiries. That offer is a valuable one and is welcomed by the Authority and seems to me to preclude absolutely any need to join Boards of Trustees to this proceeding.

[28] If I were to join Boards of Trustees to this proceeding, the effect would simply be to slow down and make more cumbersome still a proceeding which has already dragged on for many more months than it should have. Indeed I go so far as to say that the effect of granting the application to join representative Boards of Trustees would be to do violence to the central plank of the applicant's pleading that this matter needs to be dealt with urgently. This is because by introducing yet another party to already complex proceedings, further delays, with the best will in the world, can be expected, in getting matters brought on for hearing.

[29] That additional complication will also sound in costs not just for the representative Boards of Trustees, who quite properly make the point in their submissions that they have scarce resources to cover this sort of proceeding and by implication one can take it that legal costs could not be funded other than from the schools' operations grant, but as well as that there would be a costs impost on the other parties to the proceeding as well.

[30] It follows from the foregoing analysis that I am not persuaded that the joinder of representative Boards of Trustees to this proceeding is necessary to more effectually dispose of the matter and that were I to make the decision requested, it would have precisely the opposite effect to the one desired and would in fact make the disposition of this matter more difficult, more expensive, and require more extensive use of time. The application is accordingly rejected.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority