IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 119
5642789

BETWEEN	NEW ZEALAND EDUCATION INSTITUTE TE RIU ROA Applicant
AND	SECRETARY FOR EDUCATION Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for Applicant Racheal Schmidt-McCleave, Counsel for Respondent
Investigation Meeting:	On the papers
Determination:	29 September 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The Applicant, New Zealand Educational Institute Te Riu Roa (the Union), seeks an order a dispute between it and the Secretary for Education (the Secretary) be removed to the Employment Court. The matter is considered urgent.

[2] The Secretary consents.

Background

[3] The parties previously had a dispute about how a clause in the Support Staff in School's Collective Agreement regulating a pay process known as *annualisation* should be applied over the 2016/2017 pay period.

[4] Earlier this year the Authority[1] found in favour of the Union's interpretation as did the Employment Court when it considered the subsequent challenge.[2]

[5] During the Court hearing Mr Cranney intimated there may be resulting issues with the 2017/2018 pay year and this is noted in the judgment.[3] The Court did, however, raise the possibility there may be a question about whether it could properly consider the issue within the context of a challenge. It did not express a definitive view but reserved leave for either party to seek further directions.[4]

[6] On 21 September the Union advised the Court there was disagreement over how the judgement affected the 2017/2018 pay year and sought further directions. The memorandum noted:

> *... [the] matter will require only short argument and can be determined on the current documents before the Court and the factual findings already contained in the 18 August 2016 judgement.*

[7] The Secretary responded on 26 September 2016 advising it thought the jurisdictional issue live given the Authority had not, in its determination, considered the 2017/2018 year. It could not therefore have been subject to challenge so there must be doubt about the Court's ability to consider the issue. The Secretary closed by advising she:

> *... reserves her position on whether the Court has proper jurisdiction and, if the Court is minded to hear the matter, wishes first to be heard on the jurisdictional point.*

[8] The Employment Court issued a subsequent minute that day. It noted the matter was urgent and instructed the Registrar liaise with Counsel with a view to scheduling a short fixture in the near future. The Court also stated:

> *For the avoidance of doubt, the parties should note that the Court will not be making any determination of the question regarding the 2017/2018 annualisation year, unless it has first found that the Court currently has jurisdiction to do so.*

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[1] *NZEI Te Riu Roa v Secretary for Education* [2016] NZERA Wellington 50
[2] *Secretary for Education v NZEI Te Riu Roa* [2016] NZEmpC 100
[3] n.2 at [79]
[4] n.2 at [80]

[9] The Union formally lodged the substantive dispute in the Authority yesterday (28 September). The application was accompanied by a request the dispute be removed to the Court and both be considered with urgency.

[10] Today the parties filed a joint memorandum in which both advise they want the proceedings removed to the Employment Court.

Determination

[11] The fact both parties seek removal does not mean it will necessarily happen. First one or more of the criteria in s 178(2) of the Employment Relations Act 2000 need be met.

[12] Section 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.*

[13] The removal application relies on sections 178(2)(b), (c) and (d). It is argued there is urgency and the matter is in the public interest. It is noted the matter is already before the Court in that the Court has reserved leave to seek directions and the preliminary issue, jurisdiction, is already there.

[14] Finally it is argued I should exercise my discretion as:

a. the issue is contained and discreet;

b. the Court has is already familiar with the issues having considered and dealt with then and nothing will be gained by making a determination which will inevitably be subject to challenge;

c. Removal will render the current jurisdictional dispute moot thus saving both time and money.

[15] That the matter is urgent is accepted given the Court has both stated so[5] and acted on that by commencing the process of scheduling. I cannot, however, say I am swayed by the argument the matter is in the public interest given the lack of an explanation from the parties as to why this is so.

[16] Neither am I convinced the matter is already before the Court. The Court has acknowledged there is a jurisdictional argument but has avoided comment on which way it may go. That means there currently remains a possibility the Court does not have jurisdiction and if that is the case it follows there is nothing before the Court.

[17] Turning to the discretion bestowed by s 178(2)(d). There are two parts to this argument – expediency and a view any Authority determination will inevitably be challenged.

[18] With respect to the challenge argument I note the Court's view such claims should be treated with considerable caution though there are rare instances where it is the case.[6] In this case the history suggests the prospect of challenge is real – there is a lot at stake neither party has been shy to try and assert its rights.

[19] There is then the expediency argument. As noted in the documentation the Court has possession of, and is already familiar with, all relevant information and documents. Add the Court's acceptance the matter is urgent (and the attendant compliance with the grounds for removal in s 178(2)(b)) and the likelihood of challenge which would lead to delay there appears to be a strong argument for removal.

[20] Indeed, and as Mr Cranney points out, removal assists in that it nullifies the need for a consideration of the jurisdiction argument thus further expediting the matter. That, however, gives rise to one reservation. By consenting to removal it appears the Secretary has waived its right to pursue the jurisdictional argument as it earlier indicted it wished to do. That gave me cause confirm whether that was the case. It is.

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[5] Judge Corkill's minute of 26 September 2016 at [3]

[6] *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at para [40]

[21] Having considered the issues and arguments I conclude this dispute should be removed to the Employment Court and so order. There is urgency (s 178(2)(b)) and I am further convinced it is a situation in which I should exercise the discretion bestowed by s 178(2)(d).

Costs

[22] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority