

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 11
5399819

BETWEEN NEW ZEALAND POST
 PRIMARY TEACHERS
 ASSOCIATION
 Applicant

A N D BOARD OF TRUSTEES FOR
 RODNEY COLLEGE
 First Respondent

A N D THE SECRETARY FOR
 EDUCATION
 Second Respondent

Member of Authority: T G Tetitaha

Representatives: D King/G Kaye, Counsel and Advocate for Applicant
 P Hall, Advocate for First Respondent
 R Chan, Counsel for Second Respondent

Investigation Meeting: 12 December 2013 and 23 August 2016 at Auckland

Submissions Received: 12 December 2013, 5 and 23 August 2016 from all
 parties
 17 September 2017 from Applicant
 30 June and 2 October 2017 from First Respondent
 29 September and 15 and 22 December 2017 from
 Second Respondent

Date of Determination: 12 January 2018

DETERMINATION OF THE AUTHORITY

A. Under clause 5.4 a school is “not open for instruction” outside of the school terms prescribed by the Minister for Education under the Education Act 1989. Clause 5.4 does not apply during the prescribed school terms.

B. Costs are reserved.

Employment relationship problem

[1] This is a dispute about the interpretation and application of the Secondary Teachers' collective agreement effective 16 March 2011 to 15 January 2013 (the agreement).

[2] Clause 5.4 of the agreement allows teachers to be reimbursed for any actual and reasonable costs incurred when required to attend school or elsewhere when the school is not open for instruction.

Parties

[3] The applicant is a Union representing several teacher employee members of Rodney College. The first respondent is a Board of Trustees responsible for the management of a Rodney college. The college is a co-educational years 9 to 13 secondary school located in Wellsford. The second respondent has been joined to represent the wider public interests in the outcome of this matter.

Relevant Facts

[4] In 2012 a group of Rodney College secondary teachers applied for payment of travel, meals and childcare expenses. These expenses were incurred when they were required to attend school after 3 pm during term time for parent/teacher meetings, prize giving and open school evenings.

[5] Payment was refused on the basis this was part of a teacher's normal workload during term time and the provisions of clause 5.4 do not apply. The Union now brings an action seeking payment of those expenses.

Progress of matter

[6] This matter was set down for hearing on 12 December 2013. Following the completion of evidence the parties sought an adjournment to resume collective bargaining with the intention of resolving this matter. Unfortunately this matter remained unresolved. The applicant sought to bring the matter back on for hearing in October 2014.

[7] Due to unforeseen delays the matter was unable to be set down for further hearing until 23 August 2016. Further information and submissions were sought and provided subsequently. The matter is now ready for determination.

Issues

[8] This matter largely relies upon the interpretation of parts of clause 5.4 of the agreement. In particular:

- (a) When is a school “not open for instruction”?
- (b) What are the “actual and reasonable costs” a teacher may claim?

Parties positions

[9] The applicant claims activities during school term time such as parent-teacher evenings, prizegivings and open evenings that occur after 3 pm are during time the school “is not open for instruction” and teachers should be compensated under clause 5.4 of the agreement.

[10] The respondents allege a school is “not open for instruction” only during school holidays. Therefore clause 5.4 does not apply any activities during school term time.

Contractual interpretation

[11] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended the words in dispute to bear.¹ This requires an objective approach to ascertain:²

“... the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

² *Affco New Zealand Limited v New Zealand Meat Workers And Related Trades Union Incorporated* [2017] NZSC 135 at [39] citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

[12] The starting point is the provision itself and an assessment of the ordinary and natural meaning of the language used.³ A cross-check against the contractual context is required.⁴ If the words are ambiguous the inquiry will move to an assessment of relevant facts and circumstance.⁵

[13] The next stage of the interpretative exercise asks whether the meaning would lead to a result that defies commercial, common sense or otherwise.⁶ In exceptional circumstances, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.⁷

[14] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.⁸

[15] The parties provided significant information around the genesis of clause 5.4. This evidence is relevant to the intentions of the parties at that time. However in the case here of a clause whose genesis was pre-1996, it is appropriate to take an “updating” approach provided it does not undermine the overall meaning and purpose of the collective agreement.⁹

When is a school “not open for instruction” under clause 5.4 of the agreement?

[16] The starting point for analysis of this agreement is the clause at the centre of the dispute itself. Clause 5.4 of the agreement is set out below:

³ *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131at [40].

⁴ *New Zealand Airline Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33] citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [40].

⁵ See above n 4 citing *Vector Gas* at [59] per McGrath J.

⁶ See above n 4 citing *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [18], [29].

⁷ See above n 5 citing *Vector Gas* at [25], [34] per Tipping J.

⁸ See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

⁹ *Secretary for Education v New Zealand Educational Institute Te Riu Roa (Inc)* [2007] ERNZ 755.

5.4 Duties when schools are not open for instruction

- 5.4.1 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days or equivalent per annum and provided also that the needs of the individual teacher are taken into account and that the teacher's own initiatives in undertaking professional development during time when the school is not open for instruction are considered.
- 5.4.2 The employer may require teachers to attend school or elsewhere when the school is not open for instruction for up to five days or equivalent per annum for all or any of the following purposes – school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that teachers' individual needs are taken into account. Teachers' own initiatives in undertaking work for the above purposes shall be counted when applying this clause.
- 5.4.3 Where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to 5.4.1 and 5.4.2 above, they shall be reimbursed for any actual and reasonable costs incurred.

[17] There is no express definition in the agreement of “when the school is not open for instruction”. However contractual context of the agreement and relevant legislation assist in defining this phrase.

Education Act 1989

[18] The Education Act 1989 (EA) sets out the statutory process for when a school must be open for instruction. By inference a school is not open for instruction on the dates a school is not required to be open.

[19] Section 65A and 65B of the EA allow the Minister for Education to prescribe the terms schools must observe during the year. Boards of trustees must then ensure the schools are in each year “open for instruction on every day during the terms prescribed”¹⁰ and “on the number of half days required by the Minister for Education under ss(1)”.¹¹

[20] The Minister prescribes the number of half days and the dates by which the four school terms must start and finish. In 2012 secondary schools were required to

¹⁰ Section 65B(2) EA.

¹¹ Section 65A EA.

be open for instruction for 380 half days, with term 1 starting and finishing between 30 January and 5 April; term 2 starting and finishing between 23 April and 29 June; term 3 starting and finishing between 16 July and 28 September; and term 4 starting and finishing between 14 October to 14 December.¹² By inference the periods between those dates are times a school is not open for instruction or what is usually referred to as school holidays. The school holidays generally equate to 12 weeks when a school is not open for instruction.

[21] It is accepted that a “*half-day, in relation to a school, means a period of 2 hours or more during which the school is open for instruction.*”¹³ A school is not open for instruction “*if it is not in fact open for instruction for two hours or more before noon and for two hours or more after noon.*” (s65B(3)(b)). There is no statutory limitation on the maximum number of hours a school may be open for instruction within a school half day.

[22] The above statutory scheme indicates schools are required to be open for the prescribed numbers of half days for two or more hours per half day. Schools may only be opened or closed for fewer or more half days with Ministerial approval.¹⁴

Hours of work and length of a school day

[23] The applicant submits clause 5.4 should be read in conjunction with clause 5.2 of the agreement because this places limits upon the number of hours a teacher can be timetabled to work. It further submits full time teachers hours are limited to 30 hours per week. I understand the applicants’ argument is that it can be inferred that a teacher works only a maximum of 6 hours per day 5 days per week, and therefore schools are usually open each half day from 9 am until 12 pm then 12 pm until they “close” after 3 pm and are closed on weekends because students and teachers are generally not available to provide instruction.

[24] Clause 5.2 does not specify the opening and closing of schools. Rather it provides for teachers non-contact time:

¹² Ministry of Education Website [education.govt.nz](https://www.education.govt.nz) <https://webcache.googleusercontent.com/search?q=cache:HeVtFCahVzkJ:https://www.education.govt.nz/ministry-of-education/school-terms-and-holidays/school-terms-and-holidays-archive/+&cd=1&hl=en&ct=clnk&gl=nz>

¹³ Section 60 EA amended on 29 October 2016. The agreement does state a “half day” shall have meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957. These regulations were repealed by the Education Amendment Act 2006 and the definition of “half day” was incorporated into s60 EA.

¹⁴ Section 65D EA.

5.2 **Non-contact time**

5.2.1 The non-contact time allocations for secondary teachers are an acknowledgment of the importance to quality education of the duties other than classroom teaching (such as those referred to in 5.1.1(a)-(c) above) which teachers are required to undertake while schools are open for instruction.

5.2.2 For the purposes of 5.2, non-contact time is based on individual teachers' timetabled hours comprising a total of 25 hours or a combination of periods of time equivalent to 25 hours per week.

5.2.3 (a) The employer shall provide five timetabled non-contact hours within each school week to each full-time teacher subject to 5.1A above. The non-contact time may be a combination of differing periods of time which total no less than the equivalent of five non-contact hours.

[25] Clause 5.1.1(a)-(c) refers to amongst other things:

- the need to report on the progress of individual students (cl 5.1.1(a))
- counselling and pastoral needs of students (cl 5.1.1(b))
- administrative responsibilities of teachers (cl 5.1.1(c))

[26] Clause 5.5 of the agreement that sets out the length of a school day:

5.5 Length of School Day

5.5.1 For each school the length of the "school day" shall be determined according to the requirement that students are normally required to be in attendance for two half days, one before noon, the other after noon.

5.5.2 The normal teaching load in respect of any one day is therefore related to that requirement and takes account of the normal timetabling practices of each school.

[27] The hours an individual school may open or close each half day are determined by statute and "normal timetabling practices of each school". It is not determined by teachers contracted hours of work leading to alleged start and finish times. There was no evidence to support the suggested hours of 9am to 3 pm were a "normal timetabling practice" at Rodney College or elsewhere.

[28] The teaching hours provided in the agreement and the numbers of teachers available to meet student needs is a staff management issue for Rodney College. If a teachers contracted hours of work are being exceeded during term time, they have contractual remedies for breach of contract.

Timetabling Policy

[29] Clause 5.1.A of the agreement requires employers have a policy on timetabling:

5.1A Timetabling Policy

5.1A.1 Each employer must have a policy on timetabling, developed in consultation with its teaching staff. This policy shall incorporate:

- (a) The non-contact entitlements of 5.2.3 to 5.2.6 below as relevant for the type of school;
- (b) Class size matters, including the class size provisions of clause 5.9 below;
- (c) Reference to other matters, including hours of duty outside of timetabled hours, which impact on timetabling practices;
- (d) A process providing for circumstances where, for genuine reason during timetabling or at short notice, it is not possible to provide the non-contact time entitlements described in 5.2.3(a), 5.2.4(a), 5.2.5(a) and 5.2.6(b) and where the employer has used reasonable endeavour and is unable to achieve the class size provision in 5.9.2.

[30] I directed the respondent to file a copy of Rodney College's 2012 timetabling policy. It was illuminating insofar as it provided a process for determining teachers hours of work, the "normal teaching timetable", activities that were to occur within that timetable and specific activities that could occur outside of the teaching timetable but were part of a teachers workload. It also provided for compensation for teaching outside of the teaching timetable and losses of non-contact time.

[31] The policy sets the schools teaching timetable of 30 hours teaching time over a 6 day cycle equating to 25 hours teaching time per week:

Length of the timetable cycle and the number of teaching periods per day

13. The timetable cycle consists of 6 days and 5 teaching periods per day with Tuesday being a fixed day (due to Year 7 and 8 technology).

[32] Teachers are required to attend whanau assemblies outside of the above teaching timetable and may be allocated "other duties" within the teaching timetable:

Whanau and assembly

14. Whanau time and assemblies do not constitute part of the formal timetable cycle.
15. However, withdrawal from Whanau or assembly duties may be used as a compensatory mechanism for a situation described under points 35, 36 and 38.

Other Duties

16. Any teacher may be allocated some pastoral responsibility as Whanau teacher, except when timetable constraints do not permit this.
17. Part time teachers will have pro rata pastoral responsibility.
18. All full time teachers will be scheduled for duty.
19. Part time teachers will be scheduled for duty on a pro rata basis
20. All teaching staff shall attend morning briefing meetings and staff, faculty and professional development meetings according to the meeting cycle, except as negotiated with the Principal.

[33] Other parts of the timetabling policy deal with compensation for duties outside of the teaching timetable and when teachers have agreed to forgo their minimum entitlement to “non-contact time”:

Compensation for Teachers teaching outside the normal timetable

31. Where there is a need for classes to be taught outside the normal timetabled hours compensation shall be negotiated. ...

PART 2 “Genuine Reason” Clarification

34. Teachers may only be asked to temporarily forgo their minimum entitlement to non-contact when:

- all reasonable options have been investigated and no alternative to a reduction in entitlement non-contact can be found.
- the request is made on an individual basis, and a blanket request for agreement to reduction in non-contact entitlements shall indicate a need to review timetable structures and operation.
- there is a sudden emergency that requires supervision of a class for its ongoing safety. All efforts will be made to find a day reliever.
- no day reliever can be found after timely and appropriate efforts have been made.
- teachers holding more than the minimum non-contacts have first been asked to forgo one or more of those additional non-contacts.
- On a longer term basis, and after all reasonable endeavours have been exhausted, the timetable can only be made to operate if one or two teachers teach for a term, semester, module or a year, at a higher level of contact than their minimum non-contact indicates. Intense pressure on non-contacts could imply that there is a structural change required in the timetable, or in the administration practices, or a need to reorganize resources to deliver the STCA entitlement.

35. Where by virtue of demonstrated timetable or other constraints the allocation identified of non-contact hours for any individual teacher cannot be implemented the teacher will be offered the opportunity to review the timetable and make suggestions that would allow the allocation of their non-contact entitlement. If after consultation it is found that there is genuine reason why it is not possible to provide the non-contact entitlement within the timetable then the Principal and the teacher may mutually agree to compensate the teacher with:

- a. an equivalent period of relief cover for the teacher during that school term either as single periods, half days or full days; or
- b. an equivalent reduction in non-teaching or supervisory duties outside the school’s timetabled teaching periods in the same term (*examples: whanau, assemblies, duty, meetings*); or
- c. a reduction of one class in the teacher’s timetable (the extra non-contacts gained to be used to provide cover for other teachers); or
- d. sharing a class with another teacher in the same faculty
- e. some combination of the above or as negotiated

36. Where by virtue of genuine and demonstrated temporary constraints the allocation of non-contact hours to which an individual teacher is entitled cannot be met within any week then the Principal and the teacher may, on each occasion, mutually agree to compensate the teacher with:

- a. an equivalent relief cover for the teacher later in that school week or as soon as possible after that week; or
- b. an equivalent temporary reduction in non-teaching or supervisory duties outside the school’s timetabled teaching periods during that week; or

- c. some combination of the above or as negotiated

37. Teachers should only be asked to exceed an average class size of 26 or less when:

- All reasonable options have been investigated and no alternative to an increase in the average class size can be found after all reasonable endeavours have been exhausted, the timetable can only be made to operate if a teacher teaches for a term, semester, module or a year, at a higher level of average class size than 26.
- The request is made on an individual basis, and a blanket request for agreement to average class sizes of over 26 shall indicate a need to review timetable structures and operation.

38. Where by virtue of demonstrated timetable or other constraints the allocation of classes would generate an average of greater than 26 students for an individual teacher the teacher will be offered the opportunity to review the timetable and make suggestions that would allow the average to be achieved. If after consultation it is found that there is genuine reason why it is not possible to provide an average class size of no more than 26 within the timetable then the principal and the teacher may mutually agree to compensate the teacher with:

- a. an increase in the allocation of time for non-contact teaching duties; or
- b. an increase in the allocation of time for non-contact teaching duties in the following school year; or
- c. an equivalent reduction in non-teaching or supervisory duties outside the school's timetabled teaching periods; or
- d. a period of relief cover for the teacher later in that school year; or
- e. some combination of the above or as negotiated.

[34] The schools timetabling policy clearly provides for the matters at issue between the parties. The policy was set in consultation with the teachers. Parties appear to have agreed what matters teachers must attend (teaching timetable and whanau assemblies). Matters they teach or attend to outside of those are to be compensated in accordance with the timetabling policy.

[35] The provision for non-contact time within a teacher's work hours means there are periods a teacher is not teaching but remains at school undertaking various duties required by the agreement. Therefore whether a school is open for instruction is not contingent upon students being available for or teachers actually teaching.

[36] The non-contact time in the agreement expressly includes some of the duties sought to be remunerated here. Clause 5.2 links the use of non-contact time with the matters set out in clause 5.1.1(a) to (c). Clause 5.1.1(a) refers the need to report on an individual student's progress. This must include parent teacher interviews. I understand "open evenings" refers to opportunities for prospective students parents to meet teachers. This must fall under clause 5.1.1(b) that refers to the counselling and pastoral needs of students. The timetable refers to how "pastoral responsibility" is allocated and remunerated.

[37] The timetabling policy states whanau assemblies outside of the teaching timetable are part of teachers' duties. This infers they are compensated for by their salary. This must include prizegivings and the like.

[38] The agreement and policy show that during term time a school may remain open for instruction outside of the teaching timetable which may end at 3 pm.

Commonsense

[39] The timetabling policy recognises the reality of modern schools. From my own knowledge schools do teach outside of the teaching timetable for example during class camps or trips away that take place on weekends or afterhours and require teaching to occur after 3 pm. A finding this or any school "closes" at 3 pm or on weekends is nonsensical and would create too much uncertainty for the parties in terms of their employment rights and responsibilities.

[40] Further the timetabling policy provides for compensation "for classes to be taught outside the normal timetabled hours". This clearly shows instruction does not end at 3 pm. Rather this policy envisages teachers shall be compensated in various ways.

Outcome

[41] Under clause 5.4 a school is only "not open for instruction" outside of the school terms prescribed by the Minister for Education under the Education Act 1989. Clause 5.4 does not apply during school term time.

[42] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority