

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 43
3014598

BETWEEN THE NEW ZEALAND POST
PRIMARY TEACHERS
ASSOCIATION
INCORPORATED
First Applicant

A N D LISA KIRSTEN
HARGREAVES
Second Applicant

A N D PAMELA SHERYL FOYLES
Third Applicant

A N D LEANNE MARGURITA
DONOVAN
Fourth Applicant

A N D DEBRA LEE ENO
Fifth Applicant

A N D THE SECRETARY FOR
EDUCATION OF THE
MINISTRY OF EDUCATION
First Respondent

A N D HAVELOCK NORTH HIGH
SCHOOL
Second Respondent

A N D TAURANGA GIRLS
COLLEGE
Third Respondent

A N D THAMES HIGH SCHOOL
Fourth Respondent

A N D TAITA COLLEGE
Fifth Respondent

Member of Authority: T G Tetitaha

Representatives: A S Butler and K Dunn, Counsel for Applicant
V Casey/K Hutchinson, Counsel for Respondent
R Gold, Counsel for Second to Fifth Respondents

Investigation Meeting: On the papers
Submissions Received: Joint Memorandum dated 8 May 2018 from all parties
Date of Determination: 16 May 2018

DETERMINATION OF THE AUTHORITY

A. I remove this application in its entirety under s178(2)(a) and (c) of the Employment Relations Act 2000.

Employment relationship problem

[1] This is an application under the Employment Relations Act 2000 (ERA), The Equal Pay Act 1972 (EPA), the Government Service Equal Pay Act 1960 (GSEPA) and the State Sector Act 1988 (SSA). The female employee applicants allege they have various causes of action arising under each of the above Acts that essentially seek the application of equal pay principles to their respective collective contracts.

EPA and collective contracts

[2] All parties were made aware of a previous Authority decision about actions brought in respect of collective contracts under the EPA. The Authority does not have jurisdiction to investigate those matters because¹:

...applicants cannot bring an action before the Authority seeking a determination about remuneration provisions in a collective employment agreement meeting the requirements of s 3 of the Equal Pay Act 1972. It must be filed in the Employment Court.

[3] The parties were also aware of a subsequent decision of the Authority refusing removal to the Court of an EPA application involving collective contracts where it was held:²

I am not satisfied the Authority has jurisdiction to determine the applicant's substantive claims. It follows that the Authority is incapable of exercising its discretionary power to order or

¹ *Alo & Ors v Emerge Aotearoa Limited and Ors* [2017] NZERA Wellington 121 at [25].

² *NZEI Te Riu Roa & Ors v Chief Executive of the Ministry of Education* [2018] NZERA Wellington 24 at [14].

decline removal of these matters to the Court. Any orders would be unenforceable where the Authority has no jurisdiction in respect of the claims and any disposition.

Removal to Employment Court

[4] On becoming aware of the above determinations, the applicants have now filed a statement of claim before the Employment Court replicating in part the claims before the Authority. There are now two similar applications before two different bodies.

[5] To remedy a potential abuse of process, the parties have taken a pragmatic route and now seek removal of all claims to the Employment Court by consent. They have filed a joint Memorandum with the following grounds for removal:

- (a) it is appropriate for all of the claims raised before the Authority to be heard before the Court, rather than the Authority;
- (b) insofar as the EPA and GSEPA claims are concerned, these are now before the Court by way of the statement of claim dated 17 April 2018 in relation to the same fact scenario; and
- (c) all parties accept that the plaintiffs' claims under the ERA and SSA raise important, novel points of law that have not been raised in the Authority in the past. It is therefore appropriate, as per s 178(2)(a) of the ERA, for the ERA and SSA claims to also be heard by the Court.

Determination

[6] The Authority may on its own motion or on the application of a party to a matter order removal of the matter or any part of it to the Court without the Authority investigating it.³ The Authority may order removal of a matter if:⁴

- a) An important question of law is likely to rise 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

³ Section 178(1) ERA.

⁴ Section 178(2) ERA.

d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[7] The two applications regarding the ERA and SSA fall within the Authority's jurisdiction. These are:

(c) A determination that the failure to provide pro-rata non-contact time to part-time teachers amounts to personal grievance for unlawful discrimination under the Employment Relations Act 2000, with compensation under section 123

(d) A determination that the respondents have failed to comply with their "good employer" obligations pursuant to section 77A(2)(g) of the State Sector Act 1988 and clause 3.1(b)(vi) of the Secondary Teachers' Collective Agreement 2015-2018 ("STCA")

[8] The first application raises important questions of law including:

a) Does s104(1)(a) and 105(1)(a) ERA prohibit discrimination in respect of the failure to provide pro-rata non-contact time to these part-time female applicant teachers?

b) If yes, what principles should be applied to determine discrimination of this nature?

[9] The second application seeks determination of "good employer" obligations for the "recognition of the employment requirements of women" under s77A(2)(g) SSA and STCA. There has not been any previous judicial consideration of this section, especially in the context of the pay parity issues raised here.

[10] The Authority's jurisdiction to determine (and hence remove) the remaining claims is less clear. The application seeks "a determination of equal pay under the Government Service Equal Pay Act 1960." The Authority is a creature of statute. There is no express jurisdiction in the ERA or the GSEPA for the Authority (and possibly the Court) to make the determination sought. However this is an important question of jurisdiction that the Court should determine under s178(2)(a) ERA.

[11] Finally the applicants seek "a determination of pay equity under the Equal Pay Act 1972." The Authority's jurisdiction to determine collective contract disputes under the EPA has

already been determined. However given there are existing similar proceedings before the Court (which was not the case in the previous Authority decision declining jurisdiction) and the likely removal of all other issues before me there is discretion for me to remove this matter under s178(2)(c) ERA.

[12] In any event, the same factual narrative is relied upon for all claims. To avoid repetition, cost and to ensure consistency of outcome, the entirety of the application ought to be determined by one body with jurisdiction across all claims in the first instance.

[13] Therefore I remove this application in its entirety under s178(2)(a) and (c) of the Employment Relations Act 2000.

[14] Given the importance of this application generally to employment law and the fact this matter has been managed to determination by consent and in a low level and cost effective manner, costs should lie where they fall.

T G Tetitaha
Member of the Employment Relations Authority