IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 24
5587742

	BETWEEN	NZEI TE RIU ROA First Applicant
		DENISE TETZLAFF Second Applicant
		KATHLEEN POWER Third Applicant
		MARY JONES Fourth Applicant
	A N D	CHIEF EXECUTIVE OF THE MINISTRY OF EDUCATION Respondent

Member of Authority:	Michele Ryan
Representatives:	Peter Cranney, Counsel for the Applicants Kate Hutchinson, Counsel for the Respondents
Investigation Meeting:	On the papers
Submissions and information	20 February and 22 March 2018 from the applicants 21 March 2018 from the respondent
Determination:	26 March 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants' statement of problem was initially lodged with the Authority on 14 October 2015. Their claims were not advanced until 22 December 2017 when the Authority received an application to have the substantive claims removed to the Court. In reply, the Chief Executive of the Ministry of Education, consented to the application.

[2] The applicants' claims are made pursuant to the Equal Pay Act 1972. The second, third and fourth applicants are employed as support workers by the respondent. They, and their union, NZEI Te Rui Roa, say the work performed by them is work exclusively or predominantly performed by women within the meaning of the s 3(1)(b) of the Equal Pay Act.

[3] The applicants' claim the wage rates in the collective agreement covering their positions do not comply with the Equal Pay Act. They seek a determination on that matter and a determination that the rate of pay must comply with the Equal Pay Act.

Background

[4] The Authority's power to remove a matter to the Court is subject to s 178(2) of the Employment Relations Act. The subsection sets out four separate grounds for the removal.

[5] Counsel for the applicants points to s 178(2)(a). He says important questions of law are likely to arise in the matter other than incidentally, including "whether the Authority or the Court has jurisdiction to address the claim".

[6] Reference is made to a recent determination of the Authority, *Alo & Ors v Emerge Aotearoa Limited & Ors.*[1] I shall return to that matter.

[7] As a second ground for removal it is said that the claim is "likely to be the first substantive one to be determined by the [Employment] Court following *Terranova Homes and Care Ltd v Service and Food Worker Union Nga Ringa Tota and Bartlett*,[2] and in these circumstances the [Employment] Court should determine the matter". In later submissions counsel noted other important questions of law are likely to arise in the disposal of the claim. These include; "whether and to what extent comparator evidence is necessary on the resolution of such claims and how they should be used; and the extent and nature of the Authority's or Courts powers to award remedies."

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1 *Alo & Ors v Emerge Aotearoa Limited & Ors* [2017] NZERA Wellington 121

2 Court of Appeal judgement: *Terranova Homes and Care Ltd v Service and Food Worker Union Nga Ringa Tota and Bartlett* [2014] NZCA 516

[8] During a case management conference I raised with counsel the possibility that the Authority may not have jurisdiction to exercise a discretionary power to remove the matter. Both parties provided submissions on that matter.

Determination

[9] There is no real dispute that the applicants' claims are likely to raise important questions of law other than incidentally. However, resolution of the substantive claims will necessarily require an examination of the support workers' pay rates. As noted these are contained in the collective agreement between the first applicant and the respondent.

[10] Section 10(3) of the Equal Pay Act states:

> Despite anything in any other Act or in any rule of law, the Employment Relations Authority may, of its own motion or on the application of an Inspector, examine the provisions of any instrument or proposed instrument (not being a collective agreement under the Employment Relations Act 2000)* in order to determine whether the provision of the instrument or proposed instrument fixing any rate of remuneration for employees meet such of the requirements of sections 3 to 7 as they are applicable.
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> * emphasis is mine

[11] The Court has not yet been required to decisively determine the meaning and application of s 10 of the Equal Pay Act. Although I note in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Home and Care Ltd*[3] Judge Inglis (as she was then) observed, in passing, the content of s 10, including a prohibition placed on the Authority to examine a collective agreement at ss (3).[4]

[12] In *Alo*[5] the Authority examined relevant provisions of the Equal Pay Act including s 10(3). The Member found the Authority did not have jurisdiction to determine whether wage provisions in a collective agreement met the requirements of s 3 of the Equal Pay Act.

[13] The Authority is not bound by its previous determinations but I have no reason to conclude the finding in *Alo* is incorrect.

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3 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157

4 Ibid at [114]

5 At [5]

[14] I am not satisfied the Authority has jurisdiction to determine the applicants' substantive claims. It follows that the Authority is incapable of exercising its discretionary power to order or decline removal of those matters to the Court. Any orders would be unenforceable where the Authority has no jurisdiction in respect to the claims and their disposition. It is therefore not necessary for the applicants to establish grounds or obtain orders before proceeding to have their claims heard before the Court. They are free to file their matters with the Court at first instance.

[15] The application for removal is declined.

Michele Ryan
Member of the Employment Relations Authority