

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2026] NZERA 378  
3376343

BETWEEN	NZEI TE RIU ROA INCORPORATED Applicants
AND	SECRETARY FOR EDUCATION Respondent

Member of Authority:	Marija Urlich
Representatives:	Peter Cranney, counsel for the Applicants Megan Vant, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further information received:	7 April 2026, from the Applicant 17 April 2026, from the Respondent
Determination:	15 June 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination issued earlier this year the Authority declined the Secretary for Education's (the Secretary) challenge to jurisdiction – that the Authority was unable to determine the question raised by NZEI Te Tiu Roa Inc (NZEI) because there is no effective remedy available.<sup>1</sup> The determination is under challenge to the Court. The Secretary applies for referral of a question of law and that the Authority's investigation is delayed pending receipt of the Court's opinion on that question.<sup>2</sup> The Secretary has done so because they consider it appropriate to refer the question of law to the Court in

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<sup>1</sup> *NZEI Te Riu Roa Inc v Secretary for Education* [2026] NZERA 7.

<sup>2</sup> Employment Relations Act 2000, s 177.

advance of the challenge being determined so the Court can consider whether it should be heard at the same time as the challenge (but subject to it).

[2] NZEI submits it does not object to the “removal” sought and asks the Authority to remove the entire matter.<sup>3</sup> It submits this is appropriate given s 177 applies only when a question of law arises during an investigation and no such investigation has occurred.

### **The Authority investigation**

[3] By consent this application is determined on the papers. As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all information received.

### **Why does the Secretary seek referral of a question of law?**

[4] The Secretary says the following question of law should be referred to the Court:

- (i) Subject to exceptional circumstances, where a pay equity claim settlement has been entered into, has an employer met its obligation under 2AAC(b) for a period of 10 years from the date of that settlement, such that there can be no actionable/enforceable breach of that obligation during that period?<sup>4</sup>
- (ii) If no, how would a breach be determined?

[5] The Secretary submits it is appropriate and necessary to seek the opinion of the Court to assist the Authority for the following reasons:

- (a) The question of law is fundamental to, and determination of, the matter currently before the Authority.
- (b) The question of law is novel, involving a new statutory framework that has not previously been considered by the Authority or the Court.
- (c) The question of law is legally complex in nature and involves a significant issue of the interpretation which the Court is best suited to provide its opinion on.

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<sup>3</sup> Employment Relations Act 2000, s 178(1).

<sup>4</sup> Pay Equity Act 1972, s 2AAC(b) and s 3(1)(b).

(d) Once the Court has provided its opinion on the question of law, the Authority will likely be able to apply that opinion to the fact situation currently before it, as well as to future claims. Having a clear precedent on this point of law will likely reduce the need for future litigation.

### **How can a question of law be referred?**

[6] Section 177 sets out the Authority's ability to refer a question of law to the Court. Regulations set out what must be stated by the Authority to the Court if a reference is made.<sup>5</sup> Section 177 referrals are seldom applied for or used by the Authority of its own motion. It is fair to say most matters of this type are dealt under s 178.

[7] As with a s 178 removal application, implicit in any consideration of referral of a question of law is that the matter is properly before the Authority because the Authority has jurisdiction to determine the employment relationship problem between the parties. This is true for this matter. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.<sup>6</sup> In addition the Authority can deal with any question related to the employment relationship including any question connected with the construction of the employment agreement, the Employment Relations Act or any other Act which arises during the course of any investigation.<sup>7</sup>

[8] Section 177 does not require the question for reference to be an "important question" as in s 178 but it must be a "question of law". A mixed question of law and fact, which, for example, may be encountered in assessing intention in the construction of an employment agreement, may not be appropriate for reference.

[9] I accept the Secretary's submission that the Authority investigation into this employment relationship problem is underway. This is apparent given one preliminary issue has been determined. Guidance on application and operation of s 93 of the Employment Contracts Act 1991, a provision similar to s 177, that referral may be apposite where the issue arises before or early on in the hearing rather than after it has taken place.<sup>8</sup>

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<sup>5</sup> Employment Relations Authority Regulations 2000, reg 11.

<sup>6</sup> Employment Relations Act 2000, s 161(1).

<sup>7</sup> Employment Relations Act 2000, schedule 2, clause 1.

<sup>8</sup> *Nelson v Porirua Community Law Research Centre Inc* [1993], 2 ERNA 1109 at 1118.

## **Discussion**

[10] At this stage in the investigation of this employment relationship problem the key issue for consideration is whether the questions posed by NZEI have any effective remedy. The challenge to jurisdiction was declined by the Authority because the factual matters in dispute were yet to be investigated. That determination is under challenge. I am satisfied this is an appropriate place in the investigation of the employment relationship problem for a question to be referred to the Court for its opinion – a preliminary matter has been determined, that determination has been challenged and it is likely the question for reference overlaps with the challenge before the Court.

[11] The question posed by the Secretary is a question of law because it involves a new statutory framework and stands outside any factual matters between the parties. I am satisfied the question posed by the Secretary may assist the Court in its consideration of the challenge because the question and the matter on challenge canvas overlapping ground and if the Court decides to hear them in tandem may ensure efficiency including when the Authority investigation resumes.

### **Should the question of law be referred?**

[12] There is a legal question to be answered. The objects of the Employment Relations Act 2000 are by referral of the question set out at [5] above.

[13] The background facts to which the question of law relates are before the Court by way of challenge.

[14] The Authority investigation of the application is suspended until the opinion of the Court is received.

Marija Urlich  
Member of the Employment Relations Authority