IN THE COURT OF APPEAL OF NEW ZEALAND

CA522/2012
[2013] NZCA 272

BETWEEN	THE SECRETARY FOR EDUCATION Appellant
AND	NEW ZEALAND EDUCATIONAL INSTITUTE TE RIU ROA INC Respondent

Hearing: 4 June 2013

Court: O'Regan P, Arnold and Harrison JJ

Counsel: J C Holden and T M Bromwich for Appellant
P Cranney for Respondent

Judgment: 1 July 2013 at 12 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs on a standard band A basis together with usual and reasonable disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The Secretary for Education appeals with leave against a decision of the Employment Court[1] on this question of law:

[1] Employment Relations Act 2000, s 214; *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* [2012] NZCA 365.

> Whether the Secretary for Education is properly named as the sole respondent when the Employment Relations Authority investigates claims of the NZEI for declaratory and compliance orders for alleged breaches by the Secretary of the Primary Teachers' Collective Agreement.

[2] Counsel advise that our answer to the question will not in the present case be of any practical importance. Nevertheless, we are informed that the issue is an ongoing source of dispute between the parties in litigation before the Employment Court, and that the Secretary seeks its resolution as a matter of principle.

Background

[3] The New Zealand Educational Institute Te Riu Roa (NZEI) is a union representing over 50,000 teachers and support staff in primary and secondary schools and early childhood centres. School boards of trustees are in law the employers of public school teachers even though the employment relationships are governed by collective agreements which are negotiated directly between the NZEI and the Secretary, acting on an express delegation from the State Services Commissioner. Boards of trustees do not participate in the process of bargaining or settling the agreed terms.

[4] This proceeding was commenced by the NZEI before the Employment Relations Authority (the Authority), claiming that the Secretary has failed to fulfil her ongoing obligations under the then current Primary Teachers Collective Agreement. The NZEI seeks declaratory and compliance orders against the Secretary for alleged breaches. In reply the Secretary has challenged the Authority's jurisdiction to determine the proceeding on the ground that individual boards of trustees, not herself, are the correct respondents.

Collective agreement

[5] The Primary Teachers' (including Deputy and Assistant Principals and other Unit Holders) Collective Agreement 26 November 2010 – 15 August 2012 contains these introductory provisions:

> **Part 1 Coverage**
>
> **1.1 Parties**

The parties to this agreement shall be:

(a) The Secretary for Education acting under delegation from the State Services Commissioner made pursuant to section 23 of the State Sector Act 1988 and acting in accordance with section 74(5) of the State Sector Act 1988 (as amended by the Employment Relations Act 2000); and

(b) The New Zealand Educational Institute Te Riu Roa (NZEI).

1.2 Application

The agreement shall be binding on:

(a) Each employee who comes within the coverage clause and who is or becomes a member of NZEI Te Riu Roa.

(b) Each employer, as defined in 1.6.4 below.

…

1.6 Definitions

…

1.6.4 'Employer' shall mean a Board of Trustees constituted pursuant to the Education Acts 1964 and 1989 (or where a Commissioner has been appointed under Part 9 of the Education Act 1989 to act in place of the Board of Trustees, that Commissioner) of a state or integrated school that employs employees falling within the coverage as set out in 1.3.

(Note: In relation to a dispute about the interpretation, application or operation of this collective agreement, the employer shall act, if the Secretary for Education acting under delegation from the State Services Commissioner made pursuant to section 23 of the State Sector Act 1988 so requires, together with or in consultation with the Secretary for Education acting pursuant to section 74A (b) of the State Sector Act 1988.)

…

1.7 Declaration Pursuant to the State Sector Act

Pursuant to section 75 of the State Sector Act 1988 the Secretary for Education acting pursuant to the delegated authority of the State Services Commissioner has declared that all of the conditions contained in this collective agreement are actual conditions of employment provided that the Secretary for Education may from time to time give approval to the salary rates or allowances being treated as minimum rates where there is agreement to this between the employer and any of its employees.

[6] The dispute between the parties arises from cl 3 of the collective agreement. It provides for what is known as a Unified Pay System, a framework for applying specified changes to the pay scale of other teachers in the state education sector to those in the state primary sector: its purpose and effect is that, wherever the Secretary makes another collective agreement, she must follow a process to ensure that the NZEI's agreement is varied if necessary to ensure parity.

[7] The full terms of cl 3 are as follows:

> **Part 3 Remuneration**
>
> **3.1 Unified Pay System**
>
> 3.1.1 The purpose of this clause is to maintain a Unified Pay System applicable to all teachers in the state and state integrated compulsory education sector.
>
> 3.1.2 The intention of this clause is to enable changes to the rates in the base salary scale and the value of units and payments made across-the-board, together with the attached conditions, in any collective agreement applicable to other teachers in the state and state integrated school sector to apply to teachers in the state and state integrated primary school sector.
>
> **Mechanism**
>
> 3.1.3 The Secretary for Education shall, within one month of ratification of any collective agreement (or variation thereof) applicable to other teachers in the state and integrated school sector:
>
> (a) notify the NZEI Te Riu Roa National Secretary of any new or changed base scale salary rates and unit values and payments across the board (but excluding payments made to individual teachers who meet specific criteria, such as allowances) in the other collective agreement.
>
> (b) consult the National Secretary of NZEI Te Riu Roa regarding the applicable terms and conditions that the Secretary for Education should include in the offer referred to in (c) below, including terms and conditions reflective of the agreement of the parties that the Secretary for Education is not obliged to offer terms and conditions that would result in primary teachers, during the term of this agreement, receiving a remuneration advantage over teachers covered by the other collective agreement referred to in (a) above; and
>
> (c) offer by way of a variation to this collective agreement:

(i) any such changed salary rates and unit values that are in excess of rates/values in this agreement;

(ii) any across the board payments;

(iii) any terms and conditions made in accordance with (b) above.

3.1.4 The National Secretary of NZEI Te Riu Roa shall, within one month of receipt of the offer described in clause 3.1.3, advise the Secretary for Education whether NZEI Te Riu Roa wishes to accept such offer. The parties agree that upon receipt of NZEI's acceptance of the offer the PTCA shall be deemed to be varied pursuant to clause 1.5 in the terms outlined in the offer as advised by the Secretary for Education.

3.1.5 The employees and Boards of Trustees will be notified of any changes in the PTCA made pursuant to clause 3.1.3.

Relevant statutory provisions

(a) Employment Relations Act 2000

[8] The statutory framework is central to resolution of this dispute. Two statutes are particularly relevant. One is the Employment Relations Act 2000 (the ERA). The Authority is a creature of that statute and is without inherent jurisdiction. By s 161 of the ERA, the Authority is vested with "... exclusive jurisdiction to make determinations about employment relationship problems generally". Included within those problems are "... disputes about the interpretation, application or operation of an employment agreement" and "compliance orders under s 137".

[9] In order to invoke this jurisdiction, there must be an "employment relationship problem", defined by s 5 as including:

> A personal grievance, a dispute, and any other problem *relating to or arising out of* an employment relationship ...
>
> (Our emphasis.)

[10] Employment relationships are those specified in s 4(2). Included within that definition are:

> (2) The employment relationships are those between—
>
> (a) an employer and an employee employed by the employer:
>
> (b) a union and an employer:

(c) a union and a member of the union:

(d) a union and another union that are parties bargaining for the same collective agreement:

(e) a union and another union that are parties to the same collective agreement: ...

[11] By s 129(1), any person may pursue a dispute before the Authority:

> ... about the interpretation, application or operation of an employment agreement, [if he or she] bound by the agreement ...

It is common ground that s 129 does not specify the identity of the respondent in such a dispute.

[12] By s 5, an "employment agreement" means "the contract of service" and includes "... an employee's terms and conditions of employment in ... a collective agreement".

[13] The Authority's power to grant a compliance order is described by s 137 as follows:

> **137 Power of Authority to order compliance**
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> (1) This section applies where any person has not observed or complied with—
>
> (a) any provision of—
>
> (i) any employment agreement; or
>
> (ii) Parts 1, 3 to 6, 6A (except subpart 2), 6B, 6C, 6D, 7, and 9; or
>
> (iii) any terms of settlement or decision that section 151 provides may be enforced by compliance order; or
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> (iiia) an enforceable undertaking that section 223C(1) provides may be enforced by compliance order; ...
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> (v) sections 56, 58, 77A, and 77D of the State Sector Act 1988; or
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> (vi) Parts 6 and 7 of the State Sector Act 1988; ...
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> (b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

(3) The Authority must specify a time within which the order is to be obeyed.

(4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):

(a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1): ...

(b) State Sector Act 1988

[14] The State Sector Act 1988 (the SSA) is the other relevant statute. Section 74 provides modifications to the ERA in the context of collective bargaining. By s 74(1), the Secretary is responsible for negotiating every collective agreement applicable to employees of the education service "as if the [Secretary] were the employer". By s 74(2)(a), the Secretary has the same rights, duties and obligations under the ERA for the purposes of bargaining as she would have if she were the employer. By s 74(4), every collective agreement negotiated in this manner must be entered into between the Secretary and the relevant union. But by s 74(6), once the collective agreement between the Secretary and the union has been ratified, it is binding between the employer – the board of trustees – and the employee. Ms Holden for the Secretary places particular weight on s 74A, which we will recite and consider later in this judgment.

[15] Finally, s 2 defines an "employer" in relation to any institution that is subject to Part 9 of the Education Act 1989 – concerning school boards of trustees – as meaning "the Board of Trustees".

Employment Court

[16] The Authority determined that NZEI's originating application for relief should be removed into the Employment Court for determination of the preliminary issue of whether the Secretary was the properly named respondent.[2] Chief Judge Colgan concluded that the Secretary was properly named as the sole respondent.[3]

[17] In particular the Chief Judge found that:

(a) The provisions of the collective agreement at issue under cl 3 were obligations imposed on the Secretary, not boards of trustees, and boards themselves were powerless to deal with the unification of pay scales across different collective agreements and education sectors.[4]

(b) In this respect:

> [40] It is counter-intuitive to contend that an agreement entered into in collective bargaining between a union and an employer's representative, which is incorporated in the resulting collective agreement, cannot be interpreted and enforced in proceedings brought by the Union against the employer's representative in respect of obligations that lie upon the representative or alter ego alone and not on the employers so represented.

(c) The obligations accepted by the Secretary under the agreement survived the end of the bargaining relationship and are justiciable as a dispute. Accordingly, an "employment relationship" within the meaning of s 4(2) of the ERA exists between the Secretary and the NZEI during the period when the negotiations are ongoing. The fact that the relationship ends when the negotiations are completed is not fatal to NZEI's claim.[5]

(d) In view of the fact that the obligation arising under cl 3 is borne entirely by the board as the Secretary's representative, it might be

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2 *NZEI Te Riu Roa v Secretary for Education* [2012] NZERA Wellington 23.
3 *New Zealand Educational Institute Te Riu Roa Inc v Secretary for Education* [2012] NZEmpC 84.
4 At [37]–[39].
5 At [41]–[42].

> counter-productive to good employment relations for NZEI to have to sue a disinterested representative employer solely for the purpose of triggering the representative's engagement in the proceeding to enable the issue to be determined on its merits.[6] This point was exemplified by the Secretary's solution – described as "somewhat awkward and artificially practical" – which would involve issuing proceedings against a randomly identified board of trustees to enforce an obligation which was never imposed on that or any other board of trustees.[7]

[18] The Chief Judge observed without deciding that the NZEI might not be entitled to the benefit of a compliance order if it proved the Secretary's breach of her obligations. That was because compliance is a coercive remedy which may not be appropriate against the Secretary.[8]

Decision

[19] Ms Holden submits that the Chief Judge erred on two principal grounds. We shall consider each sequentially.

(a) Employment relationship problem

[20] First, Ms Holden submits that the Authority does not have jurisdiction over the proceeding as pleaded because it does not constitute an "employment relationship problem". In her submission the agreement is not binding on the Secretary and the scheme of the ERA is that employment relationship problems are assumed to arise only between parties in one of the "employment relationships" listed in s 4(2). In this case the NZEI and the Secretary are not in an "employment relationship". Instead it is a board, not the Secretary, which is the employer. In order to establish jurisdiction, the proceeding needs to be repleaded with a representative or nominal board of trustees named as respondent.

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6 At [43].
7 At [44].
8 At [50]–[51].

[21] We do not accept this submission. An "employment relationship problem" is not confined to disputes between parties to an "employment relationship". It has a more expansive application, including "... a *dispute*, and any other problem *relating to* or *arising out* of an employment relationship" (emphasis added).[9] By s 129(1) of the ERA, where there is a "dispute about the interpretation ... of an employment agreement, *any person bound by the agreement* or any party to the agreement may pursue that dispute ...". By s 5, an "employment agreement" is defined to include "... a collective agreement".

[22] Nor do we accept that the collective agreement is not binding on the Secretary. The parties named in cl 1.1 of the agreement are the Secretary and NZEI. By cl 1.2 the agreement is expressed to be binding, in accordance with the provisions of the SSA, on teachers and boards. But that provision has effect solely as an extension and does not operate to relieve the Secretary and the NZEI from performance of their primary obligations under the agreement. And those obligations did not end when the agreement was signed. As the Chief Judge found, cl 3 imposed continuing duties on the Secretary for the full term of the agreement.

[23] Section 129 envisages that a person entitled to pursue a dispute before the Authority may be either bound by an agreement or a party to it. It recognises two distinct classes of potential claimants. In many cases the claimant will be the same entity. The Secretary, for example, is both a party to and bound by the collective agreement whereas a board of trustees falls into the latter category alone. However, this provision, consistently with its omission to limit the respondent's identity in such a dispute to the employer, supports a construction of "an employment relationship problem" which is not confined to the parties to the employment relationship itself and extends to a person whose obligations relate to or arise out of the employment relationship.

[24] The ERA confers jurisdiction on the Authority to determine any dispute relating to or arising out of an employment relationship. The underlying dispute about the Secretary's compliance with cl 3 of the collective agreement relates to or

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[9] Employment Relations Act, s 5.

arises out of the employment relationship between boards and teachers. In our judgment that is sufficient to vest the Authority with jurisdiction to hear this dispute.

(b) Section 74A of the SSA

[25] Second, Ms Holden submits that the requirement on the NZEI to nominate a board of trustees as respondent follows logically from the provisions of the SSA, in particular s 74A, which defines an employer in these terms:

> **74A Personal grievances and disputes**
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> Despite the provisions of section 74,—
>
> (a) in relation to a personal grievance, the employer is the employer as defined in section 2; and
>
> (b) in relation to a dispute about the interpretation, application, or operation of any collective agreement, the employer is the employer as defined in section 2, acting, if the Commissioner so requires, together or in consultation with the Commissioner; and
>
> (c) in relation to any other employment relationship problem (within the meaning of the Employment Relations Act 2000), the employer is the employer as defined in section 2.

[26] While s 74A does not stipulate that the employer must be a party to a dispute, Ms Holden submits that must be the meaning the legislature intended to convey. In particular Ms Holden submits that:

(a) The heading to s 74A, "Personal grievances and disputes", suggests that the provision is intended to address the manner in which the employment framework set out in s 74 relates to the scheme of the ERA.

(b) Each of the subsections in s 74A starts with the phrase "... in relation to a [type of problem], the employer is ..." – indicating a legislative intention that it is the employer (the board) which must perform the role generally performed by an employer in respect of employment relationship problems.

(c) Such an allocation of responsibility is consistent with the fact that it is boards of trustees, not the Secretary, which are bound by the collective agreement.

(d) If s 74 is not interpreted as requiring the employer to be a party to the proceeding, then the key phrase "the employer is the employer as defined in s 2" is meaningless – it could only have meaning if it is interpreted as providing that the employer (the board) is to perform a role performed by other employers in the adjudication of employment relationship problems – namely as a party to a proceeding.

(e) Whereas s 74A(a) and (c) – relating to personal grievances and other employment relationship problems – provide that the employer is "the employer defined in s 2", s 74A(b) – relating to the employer's role in disputes – provides that the employer is "... the employer as defined in s 2, acting if the [Secretary] so requires, together or in consultation with the [Secretary]". The condition in s 74A(b) would have no meaning were it not intended that the notion of acting as an "employer" in this context involves being a party to a proceeding. Were that not the case, there would be no activity or enterprise in respect of which the Secretary could require coordination.

(f) The role s 74A provides for the Secretary relating to the adjudication of disputes, but not personal grievances and other employment relationship problems, is consistent with the extent of the Secretary's allocated responsibility under s 74 (that is, solely in respect of collective agreements).

[27] In support, Ms Holden also refers to the relevant legislative history and what she says is the unique framework for employment relationships and collective bargaining in the state education service. In particular, s 74 addresses an unorthodox division of labour between boards and the Secretary. Even though the former are constituted as employers by law, the Secretary steps into the employer's shoes for the purpose of negotiating collective agreements which must be entered into between the

Secretary and the relevant union. However, once a collective agreement has been ratified, the Secretary steps back and the boards, as employers, assume full responsibilities in that capacity.

[28] Despite the detail of Ms Holden's analysis, we do not accept it. Her concluding proposition is that in terms of the statutory framework s 74A of the SSA excludes any rights of enforcement of a collective agreement against the Secretary once it has been negotiated. Ms Holden's submission can be reduced to a proposition that s 74A constitutes a board of trustees, the employer constituted by law, to be the employer in any employment relationship in relation to an "employment relationship problem" within the purview of the ERA. However, that conclusion does not affect our construction of the relevant provisions of the ERA as vesting the Authority with power to hear and determine disputes relating to or arising out of the employment relationship between any parties affected by it.

[29] Acceptance of Ms Holden's argument would require us to sanction a result that undermines settled principles of contract law. On her approach, as the Chief Judge found, the NZEI must sue a party which is powerless to rectify a breach of cl 3. In the event of finding a breach by one entity, the Authority would be required to grant a meaningless remedy against another entity. For example, a compliance order under s 137(2) of the ERA, that a board "do any specified thing ... for the purpose of preventing further ... non-compliance", would be empty. Parliament cannot have intended such a nonsensical result especially where the Secretary's compliance with an important contractual duty was in issue.

[30] It is no answer, as Ms Holden suggests, that in practice the Secretary would indemnify a particular board sued as a respondent in the Authority. The Secretary is acting inconsistently in asking this Court for a principled construction of the relevant statutory provisions while assuring us that an admittedly artificial result would be ameliorated by a practical solution. On Ms Holden's approach, a board would be no more than a nominal or representative respondent because the Secretary would control the defence. We are satisfied that that result would be contrary to the statutory and contractual framework.

[31] We add that it is not necessary for us to determine whether the Chief Judge's provisional views on the availability of the remedy of a compliance order are correct.[10] Mr Cranney advised that NZEI was not seeking an answer on this issue because it was problematic whether that remedy would ultimately be pursued.

Result

[32] Accordingly, we are satisfied that the Secretary is properly named as the sole respondent in proceedings before the Authority alleging breaches of cl 3 of the collective agreement. To that extent, we answer the question identified in [1] above in the affirmative. Consequently the appeal is dismissed.

[33] The Secretary must pay costs to NZEI on a standard band A basis together with usual and reasonable disbursements.

Solicitors:
Crown Law Office, Wellington for Appellant
Oakley Moran, Wellington for Respondent

[10] At [18] above.