

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 23  
5360593

BETWEEN            NZEI TE RIU ROA  
                                 Applicant  
  
AND                    SECRETARY FOR  
                                 EDUCATION  
                                 Respondent

Member of Authority:     Michele Ryan  
  
Representatives:           Peter Cranney for Applicant  
                                 Trish MacKinnon for Respondent  
  
Submissions received:     On the papers: 16 November 2011 for Applicant  
                                 6 December 2011 for Respondent, and via telephone  
                                 conference on 10 February  
  
Determination:             28 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Pursuant to s.178(2)(a) of the Employment Relations Act (“the Act”), applicant organisation NZEI Te Riu Roa (“NZEI”) seeks an order to have a part of the matter between it and the respondent, the Secretary for Education, removed to the Employment Court for hearing and determination.

[2] The Secretary for Education neither supports nor opposes the application. She says she will accept the determination of the Employment Relations Authority on this matter.

## **Background**

[3] On 18 October 2011 NZEI initiated proceedings in the Employment Relations Authority against the Secretary for Education and requested the Authority to resolve a dispute between the parties.

[4] On 3 November 2011 the Secretary for Education lodged a Statement of Reply. She advised by letter of the same date that there was a jurisdictional issue which may impinge on the Authority's ability to determine the matters between the parties.

[5] On 16 November 2011 NZEI filed an application to have the jurisdictional issue removed from the Authority and determined by the Employment Court.

[6] The parties have not yet attended mediation on the basis that it would be preferable to each of them to have the jurisdictional issue addressed prior to mediation.

[7] The Authority has not directed the parties to mediation as it is not likely to constructively resolve the matter. The Authority has not commenced an investigation into the alleged dispute.

## **The Issues**

[8] Removal to the Court is sought in the following circumstances: The Secretary for Education under delegated authority from the State Services Commissioner, is responsible for negotiating and bargaining a number<sup>1</sup> of collective employment agreements within the Education service (with the exception of those relating to the tertiary education sector).

[9] The Secretary for Education is an identified party to the 'Primary Teachers (including Deputy and Assistant Principals and other Unit Holders) Collective Agreement, 26 November 2010 – 15 August 2012', ("the collective agreement").

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<sup>1</sup> Including, but not limited to, Secondary Teachers', Area School Teachers' , and the Primary Teachers Collective Agreements

[10] The Secretary is not included in the ‘Applications’ clause (1.1) of the collective agreement as being an entity who is bound by the collective agreement. However NZEI allege that express obligations assumed by the Secretary of Education contained in the collective agreement have been breached. It is these alleged breaches which give rise to the dispute raised by NZEI.

[11] In the Education Service, collective employment agreements are binding on the employing (school) Boards of Trustees and unions to whom the collective agreement is applicable. Section 74A of the State Sector Act provides that in the Education Service, Boards of Trustees, for the purposes of personal grievances and employment relationship problems are the employers. The Boards of Trustees are also deemed as employers with regards to disputes, although the Secretary for Education may require Boards of Trustees to act in consultation with her in a dispute.

[12] Section 161(1) of the Employment Relations Act provides:

*The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally,...*

[13] Section 5 of the Act provides the following definitions:

***employment relationship** means any of the employment relationships specified in section 4(2).*

***employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of any new terms and conditions of employment.*

...

[14] As defined at s.4(2) of the Act, the Secretary for Education is not in an ‘employment relationship’ with NZEI, nor is she an employer of the primary teachers and others covered by the collective agreement. As a consequence the Secretary for Education contends that the Authority may not have jurisdiction to determine the dispute between her and NZEI.

## Discussion

[15] Section 178(2) of the Act provides that the Authority may on its own motion or on the application of any party to a matter, order removal to the Court. The grounds for making such an order are set out in four subsections, one of which is relied upon by NZEI:

- (a) *an important question of law, is likely to arise in the matter other than incidentally,*

[16] Chief Judge Goddard in *New Zealand Baking Trades etc Union (inc) v Food town Supermarkets Ltd*<sup>2</sup> discussed in relation to the corresponding provision in the Employment Contracts Act 1991 the issue of what constituted an important question of law. He stated:

*The importance of a question of law is to be ascertained by having regard to its nature and to its consequences, either in the instant case or in the generality of cases. A question which could be decisive of a particular case but which is likely to arise only most infrequently might not qualify for the epithet important. On the other hand, a question of law could involve a matter of great principle and it could therefore be important, notwithstanding that it might not foreseeably arise very often in the future. One of the likely consequences of an authoritative ruling on the subject by the Court might well be to ensure that the point would never arise again. Thirdly a question of law could be important because of the frequency of its incidence.*

[17] The Secretary for Education asserts that the Authority does not have jurisdiction to determine the matters of dispute between her and NZEI on the grounds she is not in an employment relationship with it or its members.

[18] I consider that assertion raises the following: if the Secretary for Education is not in an employment relationship with NZEI and/or its members, what is the nature of the relationship between the Secretary for Education and NZEI as parties to an employment agreement? Following from that inquiry a further question arises: to what extent is the collective agreement enforceable against the Secretary for Education if found to have been breached?

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<sup>2</sup> [1992] 3 ERNZ 305 at 308

[19] I consider these questions are important that arise other than incidentally, and should be removed to the Employment Court to be heard and determined.

### **Determination**

[20] I have found there are important questions of law to be decided in relation to the matter between the parties. I direct the application for part of the matter between the parties be removed under s.178(2)(a) to the Employment Court for determination without the Authority investigating it.

**Michele Ryan**  
**Member of the Employment Relations Authority**