IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 214
WRC 28/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION INC First Plaintiff
AND	ROBERT GRAY Second Plaintiff
AND	SECRETARY FOR EDUCATION First Defendant
AND	BOARD OF TRUSTEES OF CAMBRIDGE HIGH SCHOOL Second Defendant

Hearing: By memoranda of submissions filed on 7 and 13 December 2012

Appearances: Tanya Kennedy, counsel for plaintiffs
Antoinette Russell and Tessa Bromwich, counsel for defendants

Judgment: 14 December 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] An issue about the justiciability of some of the plaintiffs' claims has arisen in this case which has a priority fixture in early March 2013. This needs to be resolved promptly both because of the impending legal vacation and so that the parties are aware of the nature and scope of the case for which they have to prepare.

[2] The proceeding involves the interpretation and application of provisions of a collective agreement covering secondary school teachers. Collective negotiations for a replacement collective agreement are under way and a decision about controversial issues in the operative collective agreement will affect the parties' negotiations for a

replacement. The case concerns the pay of a substantial number of teachers who have provisional professional registration.

[3] The case began in the Employment Relations Authority but was removed by it to the Court.[1] The plaintiffs' claims were commenced by the filing of a statement of problem in the Authority which outlined the nature of their claims. The plaintiffs' statement of claim filed in this Court after the removal adds detail that is said not to have been in the original statement of problem, to put it neutrally. The defendants say that these are new issues which were not encompassed within "the matter" removed by the Authority and so are not properly before the Court for decision. The defendants say that the plaintiffs are obliged, in these circumstances, to commence further proceedings in the Employment Relations Authority covering those additional issues and to seek their removal to the Court (which the defendants say they will not oppose), at which time the defendants agree that the new issues can be heard at the same time as the other issues.

[4] Impugned are paras 1(e), 30(ii) and 30(iii) of the plaintiffs' statement of claim dated 12 November 2012. Paragraph 1(e) seeks a declaration from the Court that the correct interpretation, application and operation of the base salary scales in the 2011-2013 Secondary Teachers Collective Agreement (STCA) is that "A teacher with NZTC [New Zealand Teachers Council] registration and a qualification in the G3+, G4, or G5 qualification group can be paid the maximum on the trained teachers base scale, namely step 12 ($71,000 per annum) from 13 April 2011."

[5] Paragraph 30(ii) of the plaintiffs' statement of claim sets out the plaintiffs' preferred interpretation of a variation to the STCA so that "if a teacher has teacher registration and a Level 8 qualification the teacher can be step 12, the top of the trained base scale, depending on service".

[6] Finally, paragraph 30(iii) provides similarly for the plaintiffs' preferred interpretation of the variation that "if a teacher has teacher registration and a Level 9 qualification the teacher can be step 12, the top of the trained base scale, depending on service."

[1] [2012] NZERA Wellington 130.

[7] The defendants' point is that although very similar issues affecting other secondary school teachers were contained in the plaintiffs' statement of problem in the Authority, the references to so-called top of scale employees in the statement of claim (as set out above) are new and therefore excluded from the current proceeding.

[8] The following are the relevant statutory provisions. First, s 161 of the Employment Relations Act 2000 (the Act) gives the Authority "exclusive jurisdiction to make determinations about employment relationship problems generally, including— (a) disputes about the interpretation, application, or operation of an employment agreement" ...and... (r) any other action...arising from or related to the employment relationship...(other than an action founded on tort)."

[9] Section 178 provides that the Authority may "order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it." What is "the matter" referred to in s 178? This has been the subject of decision by case law (although in most cases by reference to the same phrase in s 179 dealing with challenges) which has interpreted the phrase broadly as the plaintiffs argue for and not narrowly as the defendants contend.

[10] Although not in issue in this case because it does not concern a personal grievance or grievances, s 122 of the Act is illustrative of the way in which the Court and the Authority should deal with such issues. It provides, in effect, that irrespective of how a personal grievance may be categorised (under s 103 of the Act), the Authority or the Court may find it to be of another type but so doing will not mean either that there is an absence of jurisdiction or that the grievant must recommence his or her grievance claim appropriately.

Defendants' submissions

[11] These are essentially for a narrow, literal and technical interpretation of the phrase "the matter" in s 178. So, the defendants say, the issue of the top salary step to which teachers in the G4 and G5 qualification groups can progress was not before the Authority because the plaintiffs' amended statement of problem of 8 August 2012

did not refer to these qualification groups but, rather, only to what is known as the G3 group.

Plaintiffs' submissions

[12] Summarised as succinctly as the defendants', these are that the G4 and G5 (top of the scale) issues were part of the matter before the Authority so that the Court is now seized of them properly. The plaintiffs emphasise the objectives of the legislation including prompt resolution of employment relationship problems, flexibility, and certainty of forum. They say that the impugned issues are within the exclusive jurisdiction of the Court and were so formerly before the Authority. The G4 and G5 issues have not arisen since the proceeding was removed from the Authority.

Case law

[13] As already noted, although not in respect of a s 178 removal, the materially identical phrase "the matter" (that was before the Authority) has been examined on several occasions in relation to challenges under s 179 of the Act. In *Sibly v Christchurch City Council*[2] the Court stated:

> [47] We therefore agree … that a broad approach to the meaning of "a matter" in s 179(1) is to be taken. If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[14] This was confirmed by the full Court in the subsequent judgment in *Abernethy v Dynea New Zealand Ltd (No 1)*[3] although excluding the Court's reference in *Sibly* to "any other matter within the Authority's jurisdiction". This approach has been followed recently in *Newick v Working In Ltd*[4] and affirmed even more recently in *Maritime Union of New Zealand v Ports of Auckland Ltd.*[5]

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[2] [2002] 1 ERNZ 476.
[3] [2007] ERNZ 271.
[4] [2012] NZEmpC 156 at [25]-[27].
[5] [2012] NZEmpC 197.

[15] The defendants' argument runs contrary to this interpretative approach and the plaintiffs' position is in accordance with it.

Decision

[16] I conclude that "the matter" that was before the Employment Relations Authority and has been removed to this Court under s 178, is the disputed interpretation of the collective agreement's provisions affecting the pay of provisionally registered secondary school teachers. Even although the plaintiffs' original statement of problem in the Authority may not have included expressly all potential categories of such teachers, the expansion of the claims in this Court nevertheless extends only to including another or other categories of provisionally registered teachers. In all other respects, the issues are the same or at least very similar and are linked integrally to the questions that were before the Authority.

[17] I have concluded that the contents of paras 1(e), 30(ii) and 30(iii) of the plaintiffs' statement of claim are justiciable in this Court without the need to institute fresh proceedings in the Employment Relations Authority. They are part of "the matter" which was before the Authority and which has been removed to the Court for hearing at first instance under s 178 of the Act. "The matter" is the interpretation, application or operation of the collective agreement affecting the pay scales of provisionally registered secondary school teachers.

[18] If the defendants consider it necessary to re-plead their statement of defence, they may have until 4 pm on Friday 18 January 2013 to file and serve an amended statement of defence.

[19] The plaintiffs are entitled to costs on this interlocutory issue although the amount of these is reserved, to be dealt with along with costs on the substantive issues.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 14 December 2012