

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2012] NZEmpC 53
WRC 14/11**

BETWEEN NEW ZEALAND EDUCATIONAL
INSTITUTE (INC)
Plaintiff

AND THE BOARDS OF TRUSTEES OF TE
MATA, PARKVALE AND FRIMLEY
SCHOOLS
First Defendant

AND THE SECRETARY FOR EDUCATION,
MINISTRY OF EDUCATION
Second Defendant

Hearing: 21-25 November 2011
and further submissions filed on 5 December 2012
(Heard at Wellington)

Counsel: David Martin, advocate for plaintiff
Trish MacKinnon, counsel for second and third defendants

Judgment: 28 March 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] This proceeding relates to a dispute about the interpretation, application, and operation of the 2007-2010 Primary Teachers' (Including Deputy and Assistant Principals and other Unit Holders) Collective Employment Agreement and an associated allegation of breach of good faith. The dispute focuses on provisions relating to a longer term work programme and, in particular, the requirements relating to a pilot programme for practice based attestation (PBA).

[2] The matter was removed to the Court by the Employment Relations Authority under s 178(1) of the Employment Relations Act 2000.¹

¹ [2011] NZERA Wellington 73.

[3] It is common ground that the collective agreement provided that any national roll out of PBA was subject to a successful pilot. It is the success or otherwise of the pilot programme, and the second defendant's position in relation to implementation of PBA, that is at issue in these proceedings.

Summary of parties' positions

[4] In essence, the plaintiff union, the (New Zealand Educational Institute (NZEI)) contends that the pilot was successful and accordingly the programme, and the wage steps contained within it, ought to have been implemented. The failure to do so is said to amount to non-compliance with the collective agreement. It is further argued that, if a variation to the collective agreement was required to progress PBA, then the Secretary was required to bargain co-operatively and in good faith, and failed to do so.

[5] The Secretary of Education appeared on behalf of the defendants. She contends that while there was an agreement to collaborate with NZEI to achieve the longer term work programme goals set out in the collective agreement, and an agreement to engage in a longer term work programme for the duration of the 2007-2010 collective agreement, the pilot was not a success. Success, it was argued, was to be determined by a tripartite Strategic Coordinating Group. In the absence of consensus agreement within the Group, the pilot was not a success and no obligations arose in relation to it. In relation to the alleged breach of good faith, the second defendant says that she was not obliged to bargain to address the implementation of the practice based attestation system given that the pilot had not been a success. It is accepted that if it had been a success, she would have been under an obligation to engage in bargaining.

The key issues

[6] How was the success or otherwise of the pilot to be measured? If the pilot was successful, what obligations did that give rise to?

Background

[7] Over time, pay gaps have developed between teachers with degrees and those without. The Ministry and NZEI took steps to address this issue in the context of the 2004 collective agreement, in particular, by way of a longer term work programme.

[8] The parties devised a concept known as the Advanced Skills Teacher model (AST), designed to allow teachers to move through a process demonstrating the quality of their practice against a prescribed set of knowledge, skills and attributes, and enabling them to progress to the top step of the salary scale.

[9] The AST model formed part of the negotiations for the 2007 collective agreement. The plaintiff's claims included a claim for increased remuneration; full roll out of the AST model by July 2008 (and of the other career pathways models of mentor and middle senior leader in 2009); together with a claim for additional units for middle and senior management (costed by the plaintiff at around \$54 million per year).

[10] Negotiations subsequently took place, with the second defendant putting forward a without prejudice offer in August 2007 for the roll out of the first phase of the AST model during the term of the 2007 collective agreement. That offer was rejected by NZEI, as was a subsequent offer made in September 2007. The September offer included an offer on units within the term of the 2007 collective agreement, although at a much lower rate than that sought by NZEI. Again, the offer was made on a without prejudice basis, as part of a package for settlement. It too was rejected.

[11] Bargaining for the 2007 collective agreement concluded when the second defendant obtained amended bargaining parameters from Cabinet, to allow her to meet the plaintiff's claim on units. Mr Quin (senior adviser within the Ministry's Industrial Relations Unit) gave evidence that the package for settlement had to be substantially reshaped to meet NZEI's unit claim and that, in meeting that claim, there was insufficient resource to proceed with the AST model originally envisaged.

[12] The parties agreed to a “modified model”, which would provide a mechanism for teachers from step 10 (without formal academic qualifications and no less than three years’ current continuous service as a primary teacher) to progress up the pay scale. This model was known as the Practice Based Attestation Model or PBA.

[13] Ms Porter (an executive officer of NZEI) accepted that PBA was a scaled down version of AST, that it had been introduced following negotiations for the 2007 collective agreement, and constituted a compromise reached between the parties (that NZEI would accept a reduced version of AST to gain 10,000 additional units). And Ms Nelson (NZEI National President) also accepted that the agreements relating to the longer term work programme that had previously been reached had been subject to the outcome of the 2007 bargaining round.

[14] The 2007 collective agreement provided for the further development of career pathways through the parties’ continued engagement in a longer term work programme. It was agreed that the work programme for the next three years would explore professional development and career and qualification opportunities for teachers, which would underpin the agreed career pathway framework for teachers. This was to be done by way of a sequenced work programme over the period 2008 to 2010. That sequence was detailed in a matrix annexed to the collective agreement.

[15] The matrix set out a number of matters relevant to the programme, namely focus areas, workstreams, and short term (2008), medium term (2009) and long term (2010 and beyond) tasks. Included in the programme was the development of career pathways for teachers in the primary sector, by way of reference to the PBA process. In terms of short term tasks, it was recorded that a project coordinator would be appointed for the careers pathways project, resource material for PBA would be developed, a PBA pilot would be conducted and there would be evaluation and development of a quality feedback framework (amongst other things). Under the heading “mid-term 2009”, the matrix provided: “Implementation of PBA subject to successful pilot”.

[16] Between late 2008 and late 2009, a PBA process was designed. A means for trialling it through a pilot programme was also developed. The pilot programme was

to run in the Hawke's Bay, within a number of schools that had agreed to participate. The pilot was originally intended to run over term four 2008 and term one 2009. This proved to be an overly optimistic assessment of the applicable timeframes.

[17] Progression of the longer term work programme (including the PBA process) took place under the auspices of the Strategic Coordinating Group. This group was to be responsible for overseeing and coordinating the development of the work programme and making recommendations on agreed outcomes.

[18] The Strategic Coordinating Group was made up of representatives from the Ministry, NZEI and the New Zealand School Trustees Association (NZSTA). At its meeting of 23 July 2008, the Strategic Coordinating Group agreed that there would be ongoing evaluation of the PBA process, and that a project coordinator (Ms Corbett) would be engaged at Ministry expense to set up and initiate it. The minutes of the meeting record that the project coordinator was to report to the group in its role as the governance body overseeing the pilot.

[19] Much of the substantive work was completed by a working group, set up by the Strategic Coordinating Group, and which also comprised members from the Ministry of Education, NZEI and NZSTA (the PBA working group). An independent company – Atelier Learning Solutions (Atelier) – was contracted to conduct an evaluation of the pilot and to report to the Strategic Coordinating Group.

[20] The Strategic Coordinating Group prepared a report for the Minister in September 2008 (the Milestone Report of the Primary Longer Term Work Programme). The report reiterated that the implementation of the PBA process was “subject to a successful pilot”,² and set out in some detail how the pilot was to run.³

[21] A project plan was developed. Version one (dated 15 September 2008) provided for three phases. Phase one involved further development of PBA processes and resources with the participant schools; phase two, the implementation of various models in the participating schools and an external evaluation of the pilot;

² At [4].

³ At [16]-[22].

phase three, an analysis of external evaluation findings to: “inform judgments about the success of the pilot and to make changes to the PBA process including resources/tools before full implementation.” The report emphasised that the PBA process would be implemented across the primary sector in 2009 “subject to a successful pilot.”

[22] It was perhaps prescient that the project plan identified as a risk, a lack of shared understanding of what defined a “successful pilot”. A strategy was identified to mitigate that risk, namely the development of a “set of agreed criteria that define a successful pilot”. The importance of agreeing criteria for a successful pilot was reflected in the “Key Milestones” part of the Milestone Report, which provided that the project coordinator would take responsibility for drafting a discussion paper for the Strategic Coordinating Group’s meeting of 28 August 2008. It was noted that the agreed criteria would likely inform the scoping of the external evaluation of the pilot.

[23] The parties came to an agreement about aspects of the pilot, including that it would adopt a research, development and evaluation approach to identify opportunities that would support successful implementation subject to a successful pilot, and possible barriers to implementation and teacher participation.

[24] A discussion document (entitled “What Constitutes a Successful Practice Based Attestation (PBA) Pilot – possible success criteria”) was prepared for discussion at the Strategic Coordinating Group’s meeting of 28 August 2008. The document set out a number of possible criteria for measuring the success of the pilot, and proposed that the level of success of the pilot was to be determined by the Strategic Coordinating Group on receipt of the final evaluation report, and with reference to the proposed criteria as “guidelines for that judgment.”

[25] It is apparent that the development of a set of criteria against which to assess the pilot had been resolved as at 31 October 2008. Discussion document seven (“Towards a Successful Practice Based Attestation (PBA) Pilot”) refers (under the heading “Background”) to a set of criteria having been “agreed” at the Strategic Coordinating Group’s September meeting.

[26] Atelier prepared an initial report in December 2008. The report identified a number of shortcomings with the pilot.

[27] A FAQ (frequently asked questions) sheet was prepared by the Strategic Coordinating Group on 19 December 2008 in relation to the pilot. The document recorded that the final evaluation of whether the pilot was successful or not was likely to have one of three possible outcomes for teachers who had been involved in the process:

The evaluation indicates that the PBA process is robust/sound and is ready to be implemented across the primary sector. Teachers would have their attestation recognised.

The evaluation indicates that overall the PBA process is generally sound/robust but still requires some further work/"tweaking". The teachers would have their attestations recognised.

The evaluation indicates that the PBA process is inherently flawed and requires significant redesign.

[28] Atelier produced its final report "Evaluation of the Practice Based Attestation Pilot" in November 2009. It noted that the evaluation:

indicates considerable success for the pilot and of the PBA process itself. From the evidence, and within the caveats presented, there is strong support to rollout the process to New Zealand schools more broadly.

However, Atelier also identified a number of issues that would need to be addressed in the context of any proposed roll out, including the development of resource materials, the provision of support (including through the provision of mentors and training) and moderation processes.

[29] On 11 December 2009, the Strategic Coordinating Group considered Atelier's report and determined that:

the parties agreed that overall the PBA process within the pilot was found to be sound/robust but *further work is required in order to determine whether a PBA process can be rolled out nationally.*

(Emphasis Added)

[30] The further work that the Strategic Coordinating Group considered necessary was set out, including identification of issues and strengths from the evaluation

reports, resource implications, and a scoping plan. It confirmed that it would make a decision on whether roll out would occur based on the scoping plan.

[31] The PBA working group duly prepared a draft scoping paper for the further work required by the Strategic Coordinating Group on 26 January 2010, recommending that further work be done.

[32] Based on Atelier's report, and the reference by the Strategic Coordinating Group to the PBA being found to be "sound/robust", the plaintiff concluded that the collective agreement's requirement of a "successful pilot" had been met and that in order to prepare both for the implementation of PBA and the attestation status of the pilot programme participants, it was necessary to make variations to the collective agreement.

[33] On 9 February 2010, the plaintiff formally claimed the variations which it considered necessary at that time to give effect to PBA. The Ministry of Education responded by way of letter dated 19 February 2010 recording its surprise that a claim had been made for variation, "as it pre-empts the clear process agreed by the Strategic Coordinating Group (SCG) for the Primary Long Term Work Programme at its meeting on 11 December 2009." Ms Borrell, Industrial Relations Manager for the Ministry, concluded by advising that: "As far as the Ministry is concerned, the agreed SCG scoping process for PBA is still required before any decision on a national PBA implementation can be taken While the variation claim is on the table, however, we are assuming that NZEI does not intend to continue with the SCG PBA work." She sought urgent clarification of the plaintiff's position.

[34] Ms Porter responded on behalf of NZEI, advising that it did intend to continue with the agreed process. She confirmed NZEI's position formally on 24 February 2010, stating that NZEI did not consider that the variation pre-empted the process agreed to by the Strategic Coordinating Group, "rather it compliments it." Ms Porter stated that the variation did "not signal NZEI's intention to discontinue the work of SCG in relation to PBA." It was, she said, a clear signal of NZEI's position that the PBA process *should* be implemented nationally. Mr Hammond, Campaign

Director at the NZEI, wrote to Ms Borrell on 24 February reiterating NZEI's position.

[35] Ms Borrell emailed a response on 25 February 2010, saying that the Ministry was “very unclear how we can possibly have an effective meeting to discuss whether an agreed position can be reached by the three parties to the SCG when one party has already claimed for a national roll-out.” She wrote again on 1 March 2010 formally responding to Ms Porter’s 12 February letter. She advised that, after careful consideration, the claim for variation was being declined and annexed a document setting out the background to that decision, saying that:

The Ministry is not in a position to agree to a national roll-out as it is clear from the December meeting of the SCG, that a significant amount of work and considerable investment is required to allow any national roll-out of a PBA.

We are happy to continue to engage in the LTWP and SCG process, including continuing to seek your engagement in scoping the work that would be required to occur.

[36] NZEI responded by way of letter dated 8 March 2010, objecting to the Ministry’s rejection of their claim for variation and stating that:

In 2008, it must have been the intention of the parties signing the new teachers’ collective agreement, to vary it during its currency in order to accommodate outcomes of the Longer Term Work Programme. The matrix accompanying Appendix 6 of PTCA indicates a goal of achieving PBA by 2009 – when the document was not due to expire until mid-2010. By implication, the parties to the collective knew that it would require variation during its term because it is an “actual rate” document by operation of section 75 *State Sector Act 1988*. Any new grounds for advancement of members through the salary scale other than through the current qualification-based system would obviously require express variations.

[37] The PBA working group reported to the Strategic Coordinating Group on 24 March 2010, setting out the proposed scoping work for possible implementation. The Strategic Coordinating Group agreed that the PBA working group should conduct the remaining scoping work as a matter of urgency and report back to it for its next meeting on 21 April.

[38] The PBA working group reported, as required, on 20 April 2010. Its report set out a proposed timeline, implications and a number of general comments,

including that the required resources would take a “considerable time to develop” and that resources would be required to support the projected training/facilitation needs.

[39] On 13 May 2010, Ms Borrell wrote to Ms Porter setting out the Ministry’s position on PBA, and advising that the pilot had not been a success in terms of demonstrating that such attestation (as it had been piloted) could be rolled-out on a national basis. In particular, she noted the difference between the original proposal (which had been to provide a low resource-intensity approach based on a simple paper based resource) and the more sophisticated model that appeared to be required, following evaluation, to achieve a consistent and rigorous result.

[40] Ms Borrell noted that the Strategic Coordinating Group had agreed to disagree about the success of the pilot, and referred to earlier discussions, at meetings of both the PBA working group and the Strategic Coordinating Group, acknowledging that national implementation of PBA would require unanimity of views about the success of the pilot. She concluded by saying that the Ministry did not consider the pilot had been a success. Ms Borrell advised that the PBA process was accordingly at an end and recorded that an ex gratia payment had been made to teachers involved in the pilot to recognise their efforts.

[41] NZEI presented a claim for the renewal of the collective agreement on 21 May 2010. The claim did not contain any reference to PBA, although it did include a claim for the development of the AST qualification.

[42] Agreement was subsequently reached and was recorded in terms of settlement dated 26 November 2010. Under the settlement, the parties agreed to delete Appendix 6 Longer Term Work Programme from the collective agreement.

Interpretation of collective agreements

[43] The Court is obliged to adopt a principled approach to the interpretation of employment agreements and disputes as to meanings are to be objectively determined: *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade*

*Unions Inc.*⁴ In *Vector Gas Ltd v Bay of Plenty Energy Ltd*⁵ the Supreme Court highlighted the significance of an awareness of context as a necessary ingredient in ascertaining the meaning of contractual words, emphasising commercial substance and purpose over semantics and the syntactical analysis of words.⁶

[44] In *Vector*, McGrath J summarised and adopted the five principles of interpretation identified by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁷ as follows:⁸

...interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[45] Also in *Vector*, Tipping J observed that:⁹

The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what the negotiating stance was at any particular time.

⁴ [2010] NZCA 317, [2010] ERNZ 317 citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

⁵ *Ibid.*

⁶ See *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Amcor Packaging (New Zealand) Ltd* [2011] NZEmpC 135 at [12].

⁷ [1998] 1 WLR 896 (HL) at 912-913.

⁸ At [61].

⁹ At [19].

[46] In considering the use of extrinsic evidence, Tipping J went on to state that:¹⁰

The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. Extrinsic evidence is also admissible if it tends to establish an estoppel or an agreement as to meaning.

[47] And further that:¹¹

There is no logic in ascribing a meaning to the parties if it is objectively apparent they have agreed what that meaning should be.

The collective agreement

[48] The agreement was signed on 1 May 2008. Its term was stated to be from 12 December 2007 to 30 June 2010.

[49] Part 3 of the agreement relates to teachers' remuneration. Clause 3.1.8 sets out a 14 step salary scale. Teachers progress through the scale by way of annual movements. There is a maximum number of steps, beyond which they cannot go – regardless of merit or subsequent years of service.

[50] The parties agreed to the further development of career pathways for such teachers. This was to be by way of “continued engagement in a Longer Term Work Programme.” The stated objective was to have a high quality, appropriately qualified primary teaching workforce in state and integrated schools which would raise achievement and reduce disparity among all students.

[51] Clause 4 of Appendix 6 of the collective agreement states that:

it is agreed that the work programme for the next three years will explore professional development and career and qualification opportunities for teachers which underpin the agreed career pathway framework for teachers.

[52] Clause 6 of Appendix 6 states that:

In the period 2008-2010 the Strategic Coordinating Group will be responsible for the following –

¹⁰ At [31].

¹¹ At [32].

- Ensuring that the sequencing of work in developing the agreed career pathways over the short and medium term is followed;
- Establishing, where appropriate, the terms of reference for the work streams;
- Recommendations on the implementation of agreed outcomes.

Note: The matrix on the following pages outlines the intention of the parties for the sequencing of the LTWP work over the period 2008-2010.

[53] The matrix, which is attached to Appendix 6, refers to the “strategy” of the parties to implement PBA during 2009. The implementation of the strategy was expressly stated to be “subject to successful pilot.”

Discussion

[54] The collective employment agreement clearly provides that the PBA process will only be implemented if there has been a successful pilot. That is reflected in Appendix 6, which provides that the implementation of the strategy is “subject to” successful pilot.

Who determines success?

[55] The plaintiff submitted that, as the collective agreement did not specify who was to determine the success or otherwise of the pilot, success was to be determined on an objective basis by the Court. In particular, Mr Martin (advocate for the plaintiff) argued that it was not a function of the Strategic Coordinating Group to determine whether or not the pilot had been successful.

[56] The collective agreement does not expressly state who will bear responsibility for determining whether or not the pilot has been a success. What is however clear, is that the parties conferred a governance role on the Strategic Coordinating Group. That role included ensuring that the sequencing of work in developing the agreed career pathways was followed, establishing terms of reference for the work streams, and ultimately making recommendations on the implementation of agreed outcomes. This suggests that it was the Strategic

Coordinating Group (which comprised representatives from NZEI, the Ministry and NZSTA) that was to determine whether the pilot had been a success, and whether to make a recommendation as to implementation of the next stage of the sequence (roll out).

[57] The steps taken by NZEI and the Ministry after the date on which the collective agreement was signed are consistent with such an interpretation. Mr Martin submitted that care ought to be taken in relying on any post contractual conduct, unless it was clear and unequivocal. In this case, the evidence on this issue was clear and unequivocal, and is referred to below.

[58] As Tipping J observed in *Gibbons Holdings Ltd v Wholesale Distributors Ltd*:¹²

... if the parties have together conducted themselves in the performance of their contract in a way that is relevant to the meaning of the disputed provision, the court should be able to take that into account.

[59] In *Vector*, Anderson J observed that:¹³

A party seeking to rely on post-contract conduct would have to show conduct on the part of all the contracting parties in order to demonstrate a shared and not merely an individually held meaning.

[60] The evidence clearly reflects a shared understanding that the Strategic Coordinating Group was tasked with responsibility for determining whether or not the pilot had been successful. The minutes of the Strategic Coordinating Group's meeting of 23 July 2008 emphasise the evaluation role the Group had, noting that: "there will be an ongoing evaluation of the pilot during its currency" and that the evaluation role was to be coordinated by a project coordinator who would report to the Strategic Coordinating Group in its "governance" role.¹⁴

¹² [2007] NZSC 37, [2008] 1 NZLR 277 at [60].

¹³ At [73]. The requirement for a shared meaning was later doubted by Wilson J in *Vector* at [122].

¹⁴ See too the Group's Milestone Report to the Minister, emphasising that the pilot would be conducted under the governance of the Group.

[61] Discussion Document 3, entitled “What constitutes a successful Practice Based Attestation (PBA) pilot – possible success criteria” reflects the role of the Strategic Coordinating Group. It states that:

This paper outlines possible criteria of what constitutes a successful PBA pilot *to inform SCG decision-making at the conclusion of the pilot.*

(Emphasis added)

And that:

The SCG will take all practical steps to ensure the success of the pilot and will have the ability to make any necessary adjustments...*The level of success of the pilot will be determined by the SCG upon receipt of the final evaluation report and with reference to the criteria identified above as guidelines for that judgment.*

(Emphasis added)

[62] While Discussion Document 3 was prepared for discussion purposes, Discussion Document 7 records the agreement reached at the Strategic Coordinating Group’s September meeting (which Document 3 related to) in respect of the success criteria to be applied. Discussion Document 7 also records that the success of the pilot is to be determined by the Group.

[63] The role of the Strategic Coordinating Group is also reflected in an external document dated 19 December 2008 (discussed and agreed by the Ministry, NZEI and NZSTA representatives of the Strategic Coordinating Group). That document records that the final report of the external evaluators is to go to the Strategic Coordinating Group, and that it is that Group that oversees the long term work programme, “including the development, piloting and if the pilot is successful implementation of the Practice Based Attestation.” The paper refers to the pilot enabling “us” [the Strategic Coordinating Group] to assess how the process will work and to identify any elements that might require modification or further development prior to national roll out.

[64] Minutes of a meeting of the Strategic Coordinating Group on 11 December 2009 recorded a decision that the pilot required further work to “determine whether a

PBA process can be rolled out nationally,” and that “SCG to make a decision about roll out of PBA based on scoping plan.”

[65] Finally, on 11 December 2009, the Strategic Coordinating Group considered Atelier’s evaluation report and determined that:

the parties agreed that overall the PBA process within the pilot was found to be sound/robust but further work is required in order to determine whether a PBA process can be rolled out nationally.

[66] The post contractual documentation reinforces the role of the tripartite Strategic Coordinating Group in determining the success of the pilot. Not only is the documentation following the collective agreement consistent with this, but so was the evidence of the witnesses. Importantly, Ms Porter (who was a NZEI representative on both the Strategic Coordinating Group and the PBA working group) accepted in evidence that the decision over the success or otherwise of the pilot was a decision for the Strategic Coordinating Group to make. She also accepted that the Group had agreed that it must be a consensus decision.

[67] Ms Porter’s evidence on these two points was consistent with the evidence of Ms Borrell and Mr Quin, who were both members of the Strategic Coordinating Group (as Ministry representatives). It is also consistent with the contents of Ms Borrell’s letter to Ms Porter dated 13 May 2010, referring to earlier acknowledgments by the Strategic Coordinating Group and the PBA working group, that national implementation of PBA would require a unanimity of view about the success of the pilot.

[68] I do not accept Mr Martin’s submission that it would be contrary to commercial common sense to interpret the collective agreement as conferring the decision-making role on the Strategic Coordinating Group. It is logical that the parties, in agreeing to work on a long term work programme that included a number of contingencies, would reserve to such a group (comprising members from each party, and a third party) the gate-keeper role of moving to the next (implementation) phase. That is consistent with the Strategic Coordinating Group’s governance role in overseeing the work programme generally.

[69] The post contractual conduct of the parties was consistent with the fact that the collective agreement conferred on the Strategic Coordinating Group a governance and decision-making role. I conclude that the decision as to whether the pilot had been a success was conferred on the Strategic Coordinating Group by the collective agreement.

Did the Strategic Coordinating Group conclude that the pilot had been a success?

[70] The collective agreement does not set out the criteria by which the success or otherwise of the pilot was to be assessed. Ms Harwood (a Ministry manager) gave evidence that Discussion Document 7 (Towards a Successful Practice Based Attestation (PBA) pilot) and the criteria incorporated by way of reference as set out in the earlier discussion document, entitled “What constitutes a successful Practice Based Attestation (PBA) pilot – possible success criteria,” guided discussion on the issue of success. The criteria set out in the earlier discussion document had been agreed by the Strategic Coordinating Group at its September meeting.

[71] While the parties had agreed that the Strategic Coordinating Group would determine whether the pilot had been a success, there is no evidence that it did so at any point. Ms Porter accepted that there had never been an agreement within the Group as to the success or otherwise of the pilot. This was confirmed by others involved in the process, including Ms Borrell and Mr Quinn, and is consistent with the relevant documentation and the way in which events unfolded.

[72] Ms Porter’s evidence was that she read the Atelier report as indicating that the pilot had been a success, however it is clear that if that was her view, it was not one that was shared by the Group. The Strategic Coordinating Group considered the Atelier report at its meeting on 11 December 2009 and decided that the pilot required further work to: “determine whether a PBA process can be rolled out nationally.” Mr Quin’s evidence was that while there was some frustration and disappointment expressed by NZEI at the meeting at which the Atelier report was discussed, there was also a reluctant acknowledgment of issues raised by Atelier and the questions it raised for further consideration as to whether roll out was viable. There was, he said, a grudging acceptance that additional work was necessary.

[73] Ms Porter said that there had been no agreement within the Group about where the pilot sat in terms of the possible scenarios that had been identified in the externally published FAQ document dated April 2009. Mr Quin took issue with what Ms Porter had to say. His evidence was that he had a clear recollection of the Group's 11 December meeting and that there was a general consensus that the pilot fell between the second and third bullet points, namely that the evaluation had indicated that the PBA process was generally sound/robust but required some further work/tweaking and the evaluation had indicated that the process was inherently flawed and required significant redesign. He said that this general consensus amongst the Group's members was reflected in the carefully worded 11 December meeting notes, which stated that the pilot was found to be sound/robust but that further work was required to determine whether a PBA process could be rolled out nationally. Mr Quin's recollection of the discussion that took place at the Strategic Coordinating Group's meeting was clear and detailed, and consistent with the documentation that followed. I accept his evidence on this issue.

[74] In the event, Ms Porter accepted that the Strategic Coordinating Group deferred the decision on the success or otherwise of the pilot to enable it to look at what would need to be done to make the pilot work if it was to be rolled out.

[75] The PBA working group carried out the additional scoping work required by the Strategic Coordinating Group, which it presented to the Group for its meeting on 21 April 2010. It was following consideration of this report that the second defendant members of the Group concluded that the pilot had not been a success in light of the significant differences between what had been originally envisaged and what would be required for a national roll out.

[76] The evidence established that the Strategic Coordinating Group had decided that any decision as to whether the pilot had been a success was to be reached by it on a consensus basis. Ms Porter accepted that this was so in cross-examination. There was no consensus at the time the Group met to discuss the Atelier report and nor was there any consensus following consideration of the PBA working group's report. The Ministry subsequently advised that it did not believe, after considering matters, that the pilot had been a success. NZEI may have wished for further work

to be done, with a view to an eventual national roll out, but there is no evidence that the pilot had been judged a success by the Group whose task it was to assess that issue. In these circumstances, the pilot was not a success for the purposes of Appendix 6 of the collective agreement.

Requirement to keep piloting?

[77] The plaintiff developed a submission that there was an obligation to continue to pilot until success had been achieved. This submission was supported by Ms Porter's evidence that her understanding of the basis on which the pilot programme was undertaken was that the parties had agreed to continue to work on the pilot until such time as it succeeded. Such a proposition not only defies common sense, but is also at odds with the wording of the collective agreement, which refers to the obligation to carry out a pilot, and (*if* successful) to roll the PBA process out. The collective agreement does not provide that the pilot will continue until such time as it is judged a success. Ms Porter's understanding conflicted with the evidence of other witnesses who were members of the Strategic Coordinating Group, including Mr Quin and Ms Harwood, and stood in contrast to the agreed wording of the external FAQ document put out by the Group (of which Ms Porter was a member), and which specifically referred to likely scenarios if the pilot was *not* a success.

[78] I do not accept that there was an agreement to continue piloting until success was achieved.

A success in any event?

[79] Even if Mr Martin was correct, and success was not to be determined by the Strategic Coordinating Group, I would not have found that the pilot was a success. While the Atelier report and the subsequent PBA working group report had some positive things to say about the pilot, they also identified a number of significant issues that would need to be addressed.

[80] Ms Porter considered that Atelier's report represented a "pass". However, that was clearly not the view of the Strategic Coordinating Group, given that it

required further scoping work be carried out following consideration of the report and before it could make a decision on the pilot's success.

[81] Ms Porter's evidence was that, while Atelier had identified a number of caveats, there was nothing that could not be addressed or had not been predicted. She reiterated during the course of her evidence that while the Atelier report identified the need for moderation, training, and resources, these had always been anticipated. While I find that she was inclined to minimise the extent of what would be required in terms of any roll out, she accepted under cross examination that the extent of the resourcing required to implement PBA nationally using the preferred model¹⁵ as scoped by the PBA working group (of which she was a member) was "significant." However, Ms Porter appeared to dismiss suggestions that the costs associated with implementing the pilot were relevant, saying that this issue had never been the subject of discussion.

[82] I do not consider that the costs associated with rolling out a robust model that addressed the issues that had been identified with the original pilot model could properly be regarded as irrelevant to a decision as to the success or otherwise of the pilot. Nor would such a position be consistent with NZEI's agreement to a scaled down version of AST in the context of the 2007 collective agreement.

[83] I accept Ms Porter's evidence that some modifications to the original proposal could reasonably have been expected following the pilot, and that this had been anticipated by the parties. This, however, becomes a question of degree. I do not accept that there was agreement for roll out no matter what the cost or how extensive any modification to the pilot might be.

[84] The focus of the Ministry's evidence was on the scope of what would be required. Ms Borrell's evidence was that the Ministry became concerned about the expanded nature of the model. She said that it was beginning to resemble the AST model that had originally been proposed but which had been scaled down following

¹⁵ Appended to the PBA working group's paper of 20 April 2010, and which proposed national coordination, a project manager, a national coordinator, regional facilitators, and moderation.

negotiation of the 2007 collective agreement, and NZEI's successful negotiation of 10,000 extra units.

[85] Ms Borrell readily accepted that the Ministry had always expected that some minor modification might be required to enable the pilot to be rolled out but said that the scale of what would be needed in terms of change came as a surprise to the Strategic Coordinating Group and to herself personally. Her growing concerns, which I accept were valid and genuinely held, related to the level of assistance and outside support required to ensure that there was a robust process that could be replicated nationally. The concern was that any national roll out would need to replicate the level of support that had been provided in the context of the pilot, and that this would have significant cost and resource implications, and require further development work prior to any implementation.

[86] The concerns that the Ministry held are illustrated in the timeline of work contemplated following the additional work undertaken by the PBA working group, at the Strategic Coordinating Group's request. That highlights the extent of work that would be required with anticipated national implementation in early 2012, with further "fine tuning" throughout 2012 well outside the term of the collective agreement. This stands in contrast to the single collective agreement term originally predicted for PBA roll out, and clearly reflects the significant differences between what was originally envisaged and what would be required if PBA was rolled out following the pilot.

[87] Ms Borrell summarised the position by concluding that, while what was proposed remained a vehicle, it was not the car that had originally been anticipated – rather it was a truck. Ms Borrell pointed to the significant amount of support and ongoing resource, including for teachers and principals, that had not been anticipated. She did not accept that these were minor matters, requiring simple "tweaking" or adjustment. This was consistent with the evidence of both Ms Harwood and Mr Quin, both of whom expressed significant concern about the resources that would need to be applied to ensure a robust and consistent process (which had, from the outset, been the accepted aim of both parties).

[88] It is clear that Atelier had concluded, following its evaluation, that the pilot could be rolled out but would require the application of additional resource and support. The additional support that was recommended within the report highlighted the need for a developed resource package, training, moderation, attester groups and clusters, and learning groups. The position is reinforced by the PBA working group's report, and the proposal contained within it designed to address the issues identified by Atelier. I accept Ms Borrell's evidence that what was ultimately proposed represented a significant departure from the low resource, scaled down, process that the pilot had originally assumed. I do not consider that in this context the pilot was a success.

Ongoing agreement?

[89] Counsel for the plaintiff submitted that there was an ongoing accord between the parties that the AST model would be developed, and that this accord survived the 2007 negotiations. That submission is at odds with the concession made by Ms Nelson and Ms Porter in cross examination that agreements reached in relation to the AST model were subject to bargaining for the 2007 collective agreement. The 2007 collective agreement makes it clear that a reduced model (PBA) was agreed between the parties. Ms Porter accepted this was so, saying that it was a "lesser process" than the original model proposed, and a scaled down model. Ms Nelson confirmed in cross examination that the PBA model was "really all that was salvageable out of the bargaining." And while the parties agreed to a strategy for implementing PBA, that was expressly subject to a successful pilot.¹⁶

Position of pilot teachers

[90] The collective agreement makes it clear that implementation and access to step 13 for non-degreed primary teachers on successful attestation would only occur if the PBA pilot was a success. It was not a success. Such teachers received an ex

¹⁶ The Milestone Report to the Minister dated April 2007 notes that the parties are committed to the continuation of the long term work programme, the main focus of which is the ongoing development of career pathways for teachers covered by the collective agreement, but that this is "subject to the bargaining for the renewal for the [collective agreement]".

gratia payment, and confirmation (by way of a certificate) that if PBA was introduced at a later date they would have this recognised.

Ministry commitment to PBA?

[91] There was a suggestion during the course of some of the evidence for the plaintiff that the Ministry may not have been committed to the PBA process. Having had the advantage of seeing and hearing the Ministry witnesses give evidence, that is not a suggestion that I accept.

[92] Ms Borrell gave evidence that the Ministry was committed to the programme and invested a considerable amount of time, money and effort into it. The documentation (including the steps taken by the Strategic Coordinating Group to seek further reports) makes it clear that the Ministry engaged, and continued to engage, constructively in the PBA process. The fact that the Ministry was prepared to fund a further contract with Atelier, to enable it to undertake additional work following its initial evaluation, reflected its efforts to support the pilot, and Ms Porter accepted this was so.

Bargaining for variation required/good faith

[93] The plaintiff submitted that Appendix 6 amounted to mutual promises to negotiate an appropriate variation to the 2007 agreement to provide for PBA in the event that the pilot was a success, and that such an “agreement to agree” was enforceable as a matter of good faith. The first point is that, as I have found, the pilot was not a success.

[94] Ms Porter wrote to Ms Borrell claiming a variation on 9 February 2010. Ms Borrell formally declined the claim by way of letter dated 1 March 2010. Ms Borrell’s evidence (which was not challenged on this point) was that she carefully considered the position, and sought clarification from the plaintiff over its position in relation to the Strategic Coordinating Group scoping work that the parties had agreed ought to be undertaken before a decision was made on the success or otherwise of

the pilot. That scoping work was in train, and had not been concluded, at the time the variation claim was made.

[95] Ms Porter said in evidence in chief that the further scoping work was about how to roll out, rather than the success of the pilot. That is at odds with the carefully worded statement contained within the minutes of the Strategic Coordinating Group's meeting of 11 December 2010, which specifically stated that further scoping work by the PBA working group was required to determine whether a PBA process *could* be rolled out nationally. Ms Porter also said that NZEI considered that the pilot would be found to be a success and that the claim for variation could speed up the process, if agreement was reached. However, she accepted in cross examination that the plaintiff's claim for a variation was "possibly" inconsistent with its agreement (as part of the Strategic Coordinating Group) that further scoping work was required before a decision on implementation could be reached. I regard Ms Porter's evidence on this point as an understatement. While NZEI responded to the Ministry's rejection of the claim by way of letter dated 8 March 2010 in strong terms, it was putting the cart firmly before the horse given that the Strategic Coordinating Group had not yet made a decision about whether the pilot had been a success (a condition precedent to any implementation and the steps required to achieve it), and while further work was being undertaken by the PBA working group.

[96] While NZEI may have considered that the Strategic Coordinating Group might have reached agreement if the process had continued, there was (as I have found) no obligation to continue piloting.

[97] The second defendant was faced with a claim for a variation that would only be necessary if the pilot was judged a success. I accept that the claim for variation was carefully considered. It was not immediately rejected. Rather, the Ministry went through a process of seeking clarification from NZEI and engaging with it, through an exchange of correspondence and telephone communications. The claim was considered in good faith but the view was formed that the variation could not be advanced in the circumstances. The second defendant cannot reasonably be criticised for declining the request for variation given the stage of the process at which it was pursued.

[98] The scoping work of the PBA working group continued and it reported to the Strategic Coordinating Group on 21 April 2010. It was following further discussions and consideration of the report, that the Ministry advised that it did not consider that the pilot had been a success. However, Ms Borrell's letter noted that "valuable learnings" had been gained through the process that would help the parties move forward.

[99] As it transpired, NZEI initiated bargaining for the new collective agreement shortly afterwards (on 3 May 2010), but advanced no claim in relation to PBA.

Result

[100] The parties agreed that the Strategic Coordinating Group had oversight responsibility in terms of the PBA pilot and that it would determine whether the pilot had been a success. A consensus view was required. The Group did not reach a consensus view that the pilot had been a success. The collective agreement made it clear that national roll out of the PBA process was subject to a successful pilot. The pilot had not been judged a success, and accordingly there was no trigger for the next stage of the work programme sequence. The claim for variation was premature, in the absence of a successful pilot having been completed. There was no breach of good faith.

[101] I decline to make either of the declarations sought by the plaintiff.

[102] Given the nature of the proceedings, I anticipate that costs may be able to be resolved between the parties. If they cannot, they may be the subject of an exchange of memoranda. The defendants are to file a memorandum within 60 days of the date of this judgment. The plaintiff is to file within a further 30 days.

Christina Inglis
Judge

Judgment signed at 11am on 28 March 2012