IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 84
WRC 4/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND EDUCATIONAL INSTITUTE TE RIU ROA INC Plaintiff
AND	SECRETARY FOR EDUCATION Defendant

Hearing: By memoranda of submissions filed on 26 March and 7 and 21 May 2012

Appearances: Peter Cranney, counsel for plaintiff
Trish MacKinnon, counsel for defendant

Judgment: 24 May 2012

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This judgment addresses part of a proceeding before the Employment Relations Authority (the Authority), removed[1] by it to the Court for decision under s 178 of the Employment Relations Act 2000 (the Act). It deals with the Authority's power in law to investigate claims by NZEI Te Riu Roa Inc (the NZEI) for declaratory and compliance orders against the Secretary for Education (the Secretary).

[2] The case arises out of the unique circumstances of collective bargaining for collective agreements governing the employment of public school teachers in New Zealand. The employers of those teachers are, by statute, the boards of trustees of the schools at which they work. But the boards of trustees, as employers, are not involved in the collective bargaining for collective agreements by which they are,

[1] [2012] NZERA Wellington 23.

nevertheless, bound. Collective agreements in the public school sector are bargained for, and settled by, the Secretary under powers expressly delegated for that purpose by the State Services Commissioner.

[3] In this case, it is alleged by the NZEI that the Secretary has failed to comply with specific obligations imposed upon her in a collective agreement about an equalisation provision which, very generally, addresses parity of terms and conditions of employment between primary and secondary school teachers. The merits of the NZEI's claim are not for decision in this judgment. Those matters remain with the Authority for investigation by it if the NZEI is entitled to have those proceedings before it.

Relevant collective agreement provisions

[4] These include:

> **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.

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.

[5] I simply observe in relation to the "Note" to cl 1.6.4 above that it addresses what must happen to "the employer" (ie a board of trustees) in the event of a dispute about the interpretation, application or operation of the collective agreement. The "Note" does not require an employer to be a party to any dispute about the collective agreement. Rather, it provides that where an employer (a board of trustees) is a party to such a dispute, and if the Secretary so requires, the employer must act in the matter of the dispute either with, or at least in consultation with, the Secretary. That reflects a legislative requirement referred to later in this judgment.

[6] Clause 3.1.3 of the collective agreement is not the only provision which imposes obligations on the Secretary but not on boards of trustees as employers. Clause 3.10.2 requires the Secretary to review what is known as the qualifications chart and to add any additional qualifications but no more frequently than annually and following consultation with the NZEI. The clause contains a prescription of steps leading to this which also includes obligations on the Secretary which are clearly not applicable to boards of trustees as employers.

[7] Another example is cl 3.1 of Appendix 4 to the collective agreement which imposes on the Secretary the obligation to notify the NZEI of an intended school reorganisation process. At cl 5.1 of Appendix 4, the collective agreement obliges the Secretary to announce, at the conclusion of a school reorganisation project, the final class, designation or structure for the schools involved. There may be other similar unilateral requirements upon the Secretary in the collective agreement.

Relevant statutory provisions

[8] Part 7 ("Education Service") of the State Sector Act 1988 includes s 74 ("Negotiation of conditions of employment") subs (1) of which is as follows:

> (1) Except as provided in section 74C, the [State Services] Commissioner is responsible for negotiating under the Employment Relations Act 2000 every collective agreement applicable to employees of the education service as if the Commissioner were the employer.

[9] Also relevant is s 74A(b) of the State Sector Act which is as follows:

> (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; …

[10] Section 74(6) and (7) of the State Sector Act provide as follows:

> (6) Every collective agreement entered into between the Commissioner and any union and relating to employees in the education service is binding on—
>
> (a) the employers of the employees to whom the collective agreement is applicable; and
>
> (b) the employees in the education service who are, or who become, members of the union.
>
> (7) Except as provided in this section, an employer who is bound by a collective agreement under subsection (6) has the rights, obligations, and duties that that employer would have, in respect of that collective agreement, under the Employment Relations Act 2000 as if that employer were a party to that agreement.

[11] The reference to "the Commissioner" above needs to be read in practice as the Secretary of Education pursuant to the delegation by the Commissioner of his functions under s 23 of the State Sector Act.

[12] Whether a proceeding is justiciable by the Authority starts with its statutory jurisdiction and powers. Because this is a dispute, s 129 of the Act defines the persons who may raise a dispute (and therefore bring it to the Authority for resolution) as "any person bound by [an employment agreement] or any party to the agreement". The NZEI and the Secretary are both parties to the collective agreement: see cl 1.1 above.

[13] Section 161 of the Act is also relevant. It sets out the Authority's statutory jurisdiction within which any proceedings before it must fall. That is because the Authority is a creature of statute without inherent jurisdiction. Section 161(1)(f), (n) and (r) provides materially:

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
>
> …

(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

…

(n) compliance orders under section 137:

…

(r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[14] The phrase in s 161(1) "employment relationship problems generally" is not defined as such but "employment relationship problems":

> … 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 new terms and conditions of employment.

[15] "[E]mployment relationship" under s 5 "means any of the employment relationships specified in section 4(2)". These include materially at (b) the relationship between "a union and an employer".

[16] The remedies sought by the NZEI in two causes of action which, for present purposes, are materially identical, include declarations and compliance orders. Unlike a declaration of legal position, which has moral authority in the sense that it is, almost inevitably acknowledged and abided by, a compliance order is a remedy that bites. To obtain a compliance order, an applicant must satisfy the statutory preconditions set out in s 137 of the Act. This section provides as follows:

> **137 Power of Authority to order compliance**
>
> *(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
>
> (iiia) an enforceable undertaking that section 223C(1) provides may be enforced by compliance order; or
>
> (iiib) an improvement notice that section 223D(6) provides may be enforced by compliance order; or
>
> (iv) a demand notice that section 225(4) provides may be enforced by compliance order; or

(v) sections 56, 58, 77A, and 77D of the State Sector Act 1988; or
(vi) Parts 6 and 7 of the State Sector Act 1988; or
(vii) section 11(3)(c) of the Health and Disability Services Act 1993; or
(viii) clauses 5 and 6 of Schedule 1 of the Broadcasting Act 1989; or
(ix) sections 83, 83A, and 83B of the Fire Service Act 1975; or
(x) clauses 18, 19, and 21 of Schedule 5 of the Accident Compensation Act 2001; or
(xi) Part 2A (other than section 19G) and Schedule 1A of the Health and Safety in Employment Act 1992; or

(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) a health and safety inspector appointed under section 29 of the Health and Safety in Employment Act 1992 who alleges that there has been non-observance or non-compliance of the kind described in subsection (1)(a)(xi).

(Emphasis added)

[17] An "employment agreement", as defined in s 5 of the Act:

(a) means a contract of service; and
(b) includes a contract for services between an employer and a homeworker; and
(c) includes an employee's terms and conditions of employment in—
(i) a collective agreement; or
(ii) a collective agreement together with any additional terms and conditions of employment; or
(iii) an individual employment agreement.

(Emphasis added

The NZEI's position

[18] This is summarised succinctly in Mr Cranney's submissions which run to 12 paragraphs over two pages. Counsel submits that the following relevant details are agreed or otherwise clearly established:

- The Secretary was responsible for negotiating the collective agreement "as if [she] were the employer": State Sector Act 1988 s 74(1).

- In that capacity the Secretary assumed, agreed to, and recorded certain ongoing obligations to the Union.

- The Secretary accepts that, while conducting the collective negotiations, she was in an "employment relationship" with the Union as defined by s 4(2) of the Act.

- The Secretary accepts that the obligations in the collective agreement were intended to be enforceable legally.

[19] In these circumstances, the NZEI says that the issue for decision is whether what the Secretary agreed to in the collective negotiations and as is recorded in the resulting collective agreement, are enforceable after the "employment relationship" described above ceased, that is after the collective agreement was settled.

[20] The NZEI's case is that the collective agreement at issue in this case records a longstanding agreement between the Secretary and the Union which has been updated from time to time by its renewal when negotiating collective agreements. In the NZEI's case, the Secretary has done so at those times "as if [she] were the employer" pursuant to s 74(1) of the State Sector Act. Mr Cranney submits that as a matter of good faith, the Secretary is bound to honour the obligations she assumed and that such obligations were not extinguished when the statutory good faith obligations attaching to the parties being in an employment relationship ceased.

[21] Mr Cranney submits that the Secretary is not sued as a current employer but, rather, invoking s 74(1) of the State Sector Act, as one who gave an undertaking for herself while negotiating a collective agreement as if she were the employer. Counsel points out that the collective agreement contains a larger number of such obligations than simply the one at issue in this case, relating to the Unified Pay System (UPS).

[22] The NZEI criticises the Secretary's proposed mechanism for examining and, if appropriate, enforcing these obligations (summarised below) as "a convoluted mechanism of suing an innocent board of trustees" followed by subsequent intervention by the Secretary and an assumption of "some kind of defendant status".

[23] Mr Cranney's submissions urge on the Court an approach which examines the time at which the Secretary's obligations were entered into, that is when these parties were in an employment relationship because they were engaged in collective bargaining and their agreement was recorded in a collective agreement. To uphold the NZEI's case, it is also necessary to conclude that those parties then intended that their agreement would endure after the end of the employment relationship between the Secretary and the Union, that is upon settling the collective agreement. In this way, Mr Cranney argues, the action at issue is one "arising from or related to" an employment relationship and, therefore, the power to consider and determine the proceeding arises under s 161(1)(r) of the Act. Alternatively, counsel submits that in any event, s 161(1)(f) confers jurisdiction on the Authority.

The defendant's position

[24] The Secretary accepts that during bargaining for a collective agreement in the education sector, she has the same rights and obligations under the Act as if she were an employer. The Secretary says, however, that it is the employers who are bound by the collective agreement after it is settled and, by implication, the Secretary is herself and alone, immune from suit for things said or done during the bargaining process.

[25] The Secretary accepts that the Union can raise this dispute but says that s 74A(b) of the State Sector Act prevents the NZEI from doing so against the Secretary. She says that a named employer party or parties to a dispute must be a board or boards of trustees bound by the collective agreement.

[26] Clause 1.1 of the collective agreement provides that the parties to it are the NZEI and the Secretary. Clause 1.2 provides that the collective agreement is binding on employees who come within its coverage clause and who are members of the NZEI and each board of a state or integrated school that employs NZEI members. It is notable that cl 1.2 (which makes the agreement binding on boards of trustees as employers and employees) does not include within its scope either the NZEI or the Secretary.

[27] Ms McKinnon acknowledges in her submissions that the issue arises in this case because the UPS, and a particular clause from cl 3.1.3 of the collective agreement, imposes obligations on the Secretary but not on boards of trustees.

[28] The Secretary says that, interpreted literally and in the current circumstances of the NZEI and the Secretary, the relationship between the NZEI and the Secretary is not one of those employment relationships defined in s 4(2). Specifically, the Secretary is not "an employer" but is, rather, the delegate of the State Services Commissioner who is not an employer, or the employer of teachers who are members of the NZEI.

[29] The defendant's broad proposition is that the statutory employment regime in the education service is unique and an exception to the usual arrangements by which employers negotiate terms and conditions of employment with their employees, both collectively (by negotiations with unions) and individually. That unique regime is set out in Part 7 of the State Sector Act 1988. The broad scheme of those provisions is that whilst employers of teachers in the education service are the relevant boards of trustees, the State Services Commissioner remains responsible for negotiating collective agreements as if the Commissioner is the employer.

[30] As already noted, the Commissioner may and does delegate this function to the Secretary pursuant to s 23 of the State Sector Act. Pursuant to s 74(5), such a collective agreement is entered into between the Secretary and the NZEI covering the employees to whom the collective agreement is applicable. In bargaining for a collective agreement, the Secretary has the same obligations, and is entitled to the same benefits, of good faith as are employers in collective bargaining generally and has the same rights, duties and obligations under the Act as if she were the employer. However, under s 74(6) the relevant Boards of Trustees and the employees themselves are bound by the collective agreement. To the extent that it imposes obligations on the NZEI also, the plaintiff is likewise bound by the collective agreement. So, as the defendant submits, once collective agreements in this sector have been ratified, the Secretary steps back and Boards of Trustees assume the employer obligations under the agreement.

[31] Pursuant to s 74A(b) (added to the State Sector Act in 1991 by s 9 of the State Sector Amendment Act 1991 (1991 No 31), the Secretary may continue to have a role in the performance of the collective agreement but this is limited to requiring Boards of Trustees as employers to act together or in consultation with the Secretary. Ms McKinnon submits that the statutory framework does not allow for a dispute to be brought against the Secretary because she is not an employer but does allow her to play a limited role in disputes brought against Boards of Trustees as employers.

[32] The defendant submits that s 73 of the State Sector Act provides that the Act is to apply in relation to the education service "except as otherwise provided". However, the defendant submits that s 74A(b) of the State Sector Act prevents the NZEI from raising a dispute about any collective agreement against the Secretary.

[33] The defendant points out that this does not mean that the NZEI cannot bring the present dispute to the Authority and have it determined. It must, however, bring its dispute against a Board or Boards of Trustees bound by the collective agreement. The Secretary says that she can then, at her discretion, require such Boards to act together or in consultation with her in accordance with s 74A(b). If the Secretary requires a Board to act together with her in relation to a dispute, she accepts that she will become a party to any litigation to resolve the dispute but can only do so by her

agreement in this way. The Secretary accepts, also, that this will be achievable by naming her as a respondent to the dispute together with one or more Boards of Trustees. In such cases the Secretary will often take primary responsibility for arguing the case. In these circumstances, the Secretary acknowledged that the Authority may have recourse to s 221(a) of the Act.

[34] The Secretary appears to accept that if the dispute is justiciable as against her alone, she would be amenable to the remedy of compliance under s 137. Although it is not entirely clear, she appears to so conclude because of the reference in s 137 to the words "any person has not observed or complied with … any employment agreement …".

[35] If the Secretary assumes thereby that the collective agreement is an employment agreement, then I have reservations about the correctness of that concession. It illustrates, perhaps, the very common misconception that a collective agreement is an employment agreement: many people, for example, refer to a collective agreement erroneously as a 'collective employment agreement'. Although a collective agreement may, and usually will, contain some of the terms and conditions of individual employees' employment agreements, it is not itself an employment agreement. That is not only because of the definition of those two phrases ("employment agreement" and "collective agreement") in the Act, but also because, for example, individual employees are not parties to collective agreements as they must be to employment agreements with their employers.

[36] So it is perhaps not surprising in these circumstances that the NZEI has not addressed the question of whether a compliance order may be available against the Secretary if proceedings against the Secretary alone are properly before the Authority. The matter not having been argued comprehensively, therefore, I will not decide whether an order under s 137 will be available. I nevertheless must and will express serious reservations about whether it is.

Reasons for decision

[37] The fundamental problem with the Secretary's position is that the parts of the collective agreement at issue relating to UPS are not boards of trustees' duties or obligations. That is obviously so from the face of the relevant clauses set out above. Boards of trustees of primary, intermediate and other (but not secondary) schools, individually and collectively, cannot themselves do anything about the UPS which deals with the unification of pay scales across different collective agreements and education sectors. As would be expected, those parts of the collective agreement relating to UPS refer to the Secretary (and the Union) but not to boards of trustees, whether individually or collectively.

[38] It is, therefore, unrealistic to say, as the Secretary does in her submissions: "Thus, once the Collective Agreement has been ratified, the Secretary steps back and it is the Boards who have the rights and obligations under the Agreement." This begs two rhetorical questions. The first is what rights and obligations do school boards of trustees have under the collective agreement in relation to UPS? The second is whether the legislation should be interpreted to allow for an obligation but without a remedy for its non-performance?

[39] The current issue arises because the part of the collective agreement in dispute (the UPS and, in particular, cl 3.13) imposes obligations directly on the Secretary but not on Boards of Trustees. The Secretary says that she has complied with these terms but, more importantly in view of the NZEI's contention that she has not, that she will not seek to avoid having those matters examined by the Authority or the Court if the proper parties are cited. The Secretary's position in short is that because of the statutory framework, the Authority is not able to investigate and determine a dispute against the Secretary alone.

[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.

[41] I accept Mr Cranney's submissions summarised above to the effect that obligations entered into by the Secretary, as if she was the employer, in collective bargaining that are recorded in the resultant collective agreement, survive the end of the bargaining relationship and are justiciable as a dispute.

[42] There is no doubt that statutory obligations between parties to an employment relationship may survive the end of that relationship. Perhaps the most obvious and prevalent example is the obligation on an employer to be active and constructive in establishing and maintaining a productive employment relationship in which the employer is responsive and communicative: s 4(1A)(b). Although an employer, which has dismissed an employee in breach of that statutory obligation, is no longer in an employment relationship with the employee under s 4(2)(a) because of the termination of the employment relationship, the employee is not precluded from issuing proceedings against the former employer to determine its compliance with those former obligations. That the currency of the obligation may die with the end of the relationship does not mean that the obligation which is intended to survive the ending of the relationship is not able to be the subject of a personal grievance and there is no logical distinction in the case of a dispute.

[43] I agree with Mr Cranney for NZEI that because the obligation at issue is one borne entirely by the employer's representative, it is artificial and might, in some cases, be counter-productive to good employment relations to have to sue a disinterested representative employer in order to trigger the representative's engagement in the proceeding to enable it to be dealt with on its merits. I am, of course, putting this on a hypothetical basis but, despite what the NZEI and the Court both accept to be the genuineness of the Secretary's stated intention to engage with the issue in this way, the legislation must be interpreted for all possible circumstances and, potentially, for a less well intentioned defendant.

[44] The somewhat awkward and artificially practical solution proposed by the Secretary may not be appropriate in some cases, including this. It would involve

issuing proceedings against an entity (a board of trustees) to enforce an obligation which has never rested on that, or any other, board of trustees. That is because the obligation at issue in this case was one specifically relating to the Secretary and not one that was either shared with boards of trustees or negotiated on behalf of boards of trustees.

[45] I conclude that the employment relationship that existed between the NZEI and the Secretary (as if she were an employer) during bargaining and until execution of the collective agreement, means that the Union is entitled to have its dispute about the Secretary's obligations under the collective agreement dealt with in proceedings in which she is the sole respondent.

[46] That does not, however in my view, mean necessarily that the NZEI may be entitled to the remedy of a compliance order against the Secretary in that case. That is because of the definition of the phrase "in the employment agreement" in s 137(1(a)(i) of the Act set out at [16].

[47] Where any person (which would include the Secretary) has not observed or complied with any provision of any employment agreement, the Authority is empowered to issue a compliance order at the suit of any person (being "… [a] union …") who alleges that that person has been affected by non-observance or non-compliance of the kind described in subs (1). So far, so good.

[48] "Employment agreement" is, however, not defined to include a collective agreement per se but only, pursuant to its definition in s 5, an employee's terms and conditions of employment in a collective agreement.

[49] What is sought to be enforced in this case is an obligation that is not an employee's term or condition of employment. A collective agreement may only be able to be enforced by compliance order, therefore, if the relevant provision of it amounts to a term or condition of employment of an employee.

[50] So even although Mr Cranney is right that the Employment Relations Authority can consider and make a determination about the Secretary's obligations in relation to UPS under the collective agreement, the remedy of compliance order might not be available to the Union in the event of the Secretary's non-compliance with whatever determination of rights and obligations the Authority makes.

[51] This may not be a problem in this particular case if the Secretary agrees to comply with the Authority's determination of her liability under the collective agreement. Compliance is a coercive remedy which is not either appropriate or awarded in some cases: generally, the Authority (and the Court) will allow parties the opportunity to comply non-coercively and, given the Secretary's public role, it would be surprising if she did not accept the verdict of the Authority or otherwise on appeal or appeals therefrom. There is no suggestion of which I am aware that the Secretary would do otherwise.

[52] If, as a result of this judgment, there is a perception that s 137 might be inadequate to enforce collective agreements in these particular circumstances, then that is a matter for Parliament to address. The plain words of a coercive legislative provision should not be misinterpreted to produce what might be perceived as a logical result in a particular case or cases generally.

Result

[53] The parties' dispute is properly before the Authority as is the Union's claim to a declaration by the Authority as to how the dispute must be settled. The Union's claim to a compliance order under s 137 is questionable but, for the reasons given, I do not determine this issue.

[54] The proceeding in the Authority can now be determined.

[55] Each party has been successful in part and, together with the test case nature of the points removed, this means that there will not any orders for costs on the removal in this Court.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Thursday 24 May 2012