IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 139
WRC 28/12

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	NZ POST PRIMARY TEACHERS' ASSOCIATION First Plaintiff
AND	ROBERT GRAY Second Plaintiff
AND	SECRETARY FOR EDUCATION First Defendant
AND	CAMBRIDGE HIGH SCHOOL Second Defendant

Hearing:	6, 7, 8, 25, 26 March 2013, 1, 2, 6, 8, 16, 20 May 2013, 11 and 14 June 2013
Appearances:	Tanya Kennedy, counsel for the plaintiffs Antoinette Russell and Tessa Bromwich, counsel for the defendants
Judgment:	23 July 2013

INTERIM JUDGMENT OF JUDGE A D FORD

Introduction

[1] The most challenging aspect of this proceeding has been to ascertain the real issue or issues between the parties. In their statement of claim dated 12 November 2012 the plaintiffs stated that they sought from the Court "a determination of the dispute over the interpretation, application or operation of clause 4.1 of the Secondary Teachers Collective Agreement". The principal relief sought in the prayer for relief was stated in cl 45 to be: (i) a declaration that the respondents had "failed to comply with clauses 4.1 and 4.1.1" of the collective

agreement; and (ii) five supplementary declarations (listed as (a) to (e) inclusive) relating to "the correct interpretation, application and operation of the base salary scales" in cl 4.1 of the collective.

[2] By the conclusion of the evidence, however, it had become apparent that several of the declarations sought were no longer in dispute. Counsel for the defendants' claimed that they had never been in dispute but there was no pleading to that effect. The Court, therefore, invited the plaintiffs' counsel, Ms Kennedy, to file an amended prayer for relief (in the expectation that the amendment would narrow the issues to be resolved) as well as a joint memorandum signed by both counsel identifying the specific interpretation issues which were no longer in dispute.

[3] The requested documents were filed after the evidence had been heard and shortly before the day scheduled for the presentation of closing submissions. The joint memorandum signed by both counsel listed six matters of interpretation upon which there was no dispute and so it posed no problems. However, the amended prayer for relief filed by counsel for the plaintiffs' contained significant changes to what had been sought in the original statement of claim. None of the six declarations originally applied for remained intact. The declaration sought in cl 45(i) had been amended and the supplementary declarations sought in cl 45(ii) (a), (b), (c), (d) and (e) had all been deleted and replaced by a request for 15 new declarations listed as (a) to (o). (In a subsequent memorandum the number was reduced to 14 declarations listed as (a) to (n)). In other words, whereas the principal relief sought in the original statement of claim had consisted of a total of six declarations, the principal relief sought in the amended prayer for relief comprised a total of 15 declarations. In addition an order was sought relating to the second plaintiff.

[4] Counsel for the defendants, Ms Russell, took strong exception to the amended prayer for relief. She claimed that the new allegations "would have required further discovery and cross-examination of the plaintiffs' witnesses". She also claimed that some of the allegations were unclear and that others could impact on the New Zealand Qualifications Authority (the NZQA) which was not a party to the proceeding.

[5] The Court ruled that counsel for the plaintiffs' would need to make formal application for leave to amend the plaintiffs' prayer for relief and the appropriate documentation was duly filed. After receiving the application for leave to amend and written submissions from both parties, the Court determined that, given the extensive nature of the amendments, it wished to hear oral argument from the parties. Counsel were informed that the Court would, therefore, hear submissions and rule on the application to amend as part of its substantive judgment. Counsel confirmed that they had no objection to the matter being dealt with in that way.

[6] There is another preliminary matter I need to refer to. This case first came before the Employment Relations Authority (the Authority) in May 2012. Initially the parties were the New Zealand Post Primary Teachers' Association and the Secretary for Education. On 18 June 2012, the Secretary for Education filed a memorandum claiming that she should not be cited as the respondent, or at least not the sole respondent, because teachers affected by the dispute were employed not by the Secretary but by boards of trustees. On 8 August 2012, an amended statement of problem was filed which included as parties Mr Robert Gray and the Board of Trustees of Cambridge High School. However, in the recent decision of *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*,[1] the Court of Appeal confirmed that the Secretary is both a party to and bound by a collective agreement applicable to employees of the education service. It had not been necessary, therefore, to have the Board of Trustees of Cambridge High School joined in the proceedings.

[7] In a determination[2] dated 23 October 2012 the Authority, of its own motion, ordered the removal of the matter to the Court without investigation, pursuant to s 178(2)(b) of the Employment Relations Act 2000 (the Act). Section 178(2)(b) provides that the Authority may order removal to the Court if:

> **178 Removal to Court**
>
> ...
>
> (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

[1] [2013] NZCA 272.
[2] [2012] NZERA Wellington 130.

...

The Authority noted that the parties had undertaken mediation but had been unable to resolve the dispute between them. It recorded that it was not in dispute that the matter was complex in nature; that almost 2,000 secondary school teachers could potentially be directly affected; and that there was a potential liability of $6.6 million in salary payments. The Authority also noted that the ongoing dispute could impede bargaining for a new collective employment agreement and therefore the matter should be dealt with urgently. Against that background it concluded that it was an appropriate case for removal.

[8] Whilst I can understand the Authority's approach to the matter, I can only opine that the Court, and no doubt the parties, would have benefited immensely from having a considered determination from the Authority on the merits of the case. For one thing, I am confident that a determination from the Authority would have required the parties to focus on the real issues in dispute at an early stage, thus avoiding the last minute application for substantial amendment to the pleadings which I have described above. As it turned out, the urgency factor identified by the Authority was not an issue because the parties were able to negotiate a new collective employment agreement without resolution of the dispute.

[9] After the matter was referred to the Court a number of interlocutory issues arose. First, the statement of claim filed by the plaintiffs in this Court added details that the defendants claimed had not been in the original statement of problem and, therefore, were not encompassed within "the matter" that had been removed by the Authority to the Court for decision. That issue was dealt with in an interlocutory judgment[3] dated 14 December 2012 in which it was held that the added details complained about were properly part of the matter which had been before the Authority and which had been removed to the Court. Further issues then subsequently arose over the disclosure of relevant documentation. Argument on that matter was heard on 1 February 2013 and dealt with in an interlocutory judgment[4] dated 13 February 2013. Another dispute developed in relation to a late application by the defendants to file an amended statement of defence and a challenge by the

[3] [2012] NZEmpC 214.
[4] [2013] NZEmpC 13.

plaintiff to the admissibility of one of the defendants' briefs of evidence. These matters were determined in an interlocutory judgment dated 22 February 2013.[5]

Background

[10] It is necessary to explain more about the relevant background to the dispute. The first plaintiff union, who for ease of reference I will refer to as "the PPTA", and the first defendant, the Secretary for Education, are parties to the relevant Secondary Teachers' Collective Agreement which covered the period 16 March 2011 to 15 January 2013 (the collective agreement). There were earlier secondary teachers' collective agreements which I shall refer to as necessary. Although school teachers are employed by boards of trustees, it is the Secretary for Education who has delegated powers under s 74 of the State Sector Act 1988 to negotiate collective agreements with unions relating to employees in the education service and the terms negotiated are then binding on boards of trustees as the employers. The Court was informed in one of the interlocutory hearings that the PPTA has a membership of approximately 18,000 teachers and potentially 1,957 teachers could be affected by the outcome of this particular litigation.

[11] The second plaintiff, Mr Gray, is a member of the PPTA. He is employed by the second defendant as a teacher of mathematics. Between March 1974 and January 1998, Mr Gray was an aircraft technician in the Royal Air Force in the United Kingdom. In 1997 he commenced study at Sheffield Hallam University for a Bachelor of Science (Honours) in Mathematics with Education and Qualified Teacher Status. He completed his degree in June 1999. Mr Gray has over 12 years' teaching experience. In July 2006, he and his family moved to New Zealand where he began teaching at Cambridge High School. In 2012 he was appointed teacher-in-charge of Year 11 Mathematics. Mr Gray was added as a party to this proceeding as a "representative plaintiff". He seeks a "determination" that he is entitled to be positioned on a higher pay scale than currently placed and he claims to have been underpaid since 13 April 2011 as a consequence of the first defendant's failure to comply with the terms of the collective agreement. I will need to return to Mr Gray's situation.

[5] [2013] NZEmpC 20.

[12] The dispute giving rise to the proceeding relates to the interpretation of certain provisions, referred to by counsel for the plaintiffs' in her opening submissions as "salary clauses", contained in a variation made to the collective agreement in September 2011 (the variation). The variation records that the parties agreed to the variation of the collective agreement "to give effect to an agreement reached to resolve a number of ongoing issues with the treatment of teachers who have overseas qualifications". The variation was signed by the parties on 27 September 2011 and subsequently ratified by the PPTA membership. It was said to have taken effect from 13 April 2011.

[13] Before examining the relevant provisions of the variation, I should explain more about the context in which the variation itself came into existence. This in turn requires an appreciation of the interrelationship between teachers' qualifications and their salary entitlements. This was something which, at least in part, the variation was intended to clarify. The position was explained to the Court by one of the witnesses called on behalf of the defendant, Ms Amy Miller, Senior Adviser in the Education Service Payroll team at the Ministry of Education (the Ministry). Ms Miller told the Court:

> 4. A teacher's salary is based on two factors: their qualifications and their experience. The qualifications held will place them into a qualification group. Each qualification group has an entry step and a maximum step on the salary scale. ...
>
> 5. People who train to be teachers now typically fall into two categories. They either hold a subject/specialist qualification such as an undergraduate degree, and are studying towards a Graduate Diploma of Teaching, or they are studying towards a Bachelor of Education (Teaching). There are many different combinations of qualifications that are held by teachers, but these are probably the most common combinations today. About half of primary school teachers and almost all secondary teachers do the undergraduate degree followed by a graduate diploma of teaching.

[14] In relation to overseas-trained teachers, Ms Miller stated:

> 7. Teachers with qualifications gained overseas need to provide a New Zealand Qualifications Authority (NZQA) report on those qualifications so that the Ministry can assess their starting salary. The report advises what New Zealand qualifications the overseas qualifications are comparable to. Without a NZQA report, overseas qualifications cannot be taken into account.

[15] Ms Miller also described the salary assessment process:

> 15. The Ministry of Education provides a centralised payroll service to state and state-integrated schools. That service is contracted to a payroll provider, and the Education Service Payroll team oversees the payroll.
>
> 16. The Education Service Payroll team also implements collective agreements, variations, policies and legislation.
>
> 17. Once employed by a Board of Trustees, a teacher applies to the Ministry's Salary Assessment Unit (SAU) based in Christchurch to have his or her salary assessed. The SAU applies the collective agreements to place teachers in the correct qualification group according to the qualifications held, and applies salary credit to previous teaching or relevant work experience.

Events leading up to the variation

[16] As noted in [12] above, the variation to the collective agreement was signed in September 2011. The collective agreement itself was dated 11 April 2011. The signatories to the collective agreement were Ms Marion Norton on behalf of the PPTA (Ms Norton was the PPTA's long-serving industrial advocate) and, on behalf of the Secretary for Education, advocate, Mr Nick Kyrke-Smith.

[17] The events leading up to the variation agreement were covered in evidence, commencing with a letter dated 15 April 2011 from Ms Bronwyn Cross, Deputy General Secretary of the PPTA, to the Secretary for Education. Ms Cross stated that as the collective agreement had been settled, she was seeking a meeting of the Issues Committee to discuss four different issues. The Issues Committee is a committee established under the collective agreement, made up of representatives of the NZQA, the New Zealand Teachers' Council (the Teachers Council), the Ministry of Education (the Ministry), the New Zealand School Trustees Association and the PPTA, to "meet from time to time, upon request of any of the named organisations, to consider and resolve any outstanding or new issues about teachers' qualifications in relation to salary." The committee is empowered to deal with, "either individual cases or more general qualification or teaching qualification issues".

[18] Of the four issues raised by Ms Cross in her letter, it is only the first two that have direct relevance to the present case. They were:

1. Who determines what a "recognised teaching qualification" is?

2. Should a holder of a Level 7 teaching qualification be categorised as G2 (Level 6)?

[19] Ms Norton explained in her evidence the catalyst for the PPTA's letter of 15 April 2011. In the March 2011 settlement of the collective agreement, the salary scale for secondary school teachers had, for the first time, been split into two. Base Scale A was for trained teachers and Base Scale B for untrained teachers. Untrained teachers were defined as those who did not have a recognised teacher education qualification and trained teachers were those who did. After the collective agreement had been ratified the PPTA started receiving queries from field staff and union members about why some registered teachers were being paid on the untrained scale. Ms Norton said that she had been unable to clarify the matter with the Ministry and for this reason the PPTA wanted matters relating to teachers' qualifications referred to the Issues Committee for clarification. As the witness put it: "And we just thought this can't be. We can't have registered teachers on the untrained scale."

[20] The Issues Committee met on either 15 or 16 June 2011 (there was a conflict of evidence as to the date) to consider the PPTA letter of 15 April 2011. The Committee ended up deciding to task Ms Norton and Ms Sarah Borrell with resolving the matters that had been referred to it. Since 2009 Ms Borrell has been employed as Senior Industrial Relations Manager at the Ministry. Evidence was given about meetings and extensive email exchanges which then followed between Ms Norton and Ms Borrell and others, all of which culminated in an agreement formalised in a memorandum to the Issues Committee (the memorandum) dated 11 August 2011. The memorandum listed nine recommendations to the Issues Committee and concluded:

> Based on the above, it is recommended that the parties are requested to negotiate a variation to the STCA 2011-2013, with no parts of the variation having an effect earlier than 13 April 2011 (being the introduction of the trained and untrained scales into the STCA). However it is also recommended that these changes are actioned as soon as possible after agreement to this memo by the parties.

The variation

[21] Ms Norton was on leave between 12 August 2011 and 1 November 2011 but she told the Court that she fully briefed Ms Cross on the position and Ms Cross took over the task on behalf of the PPTA of negotiating a formal variation to the collective agreement based on what had been agreed to in the memorandum. Ms Borrell confirmed in evidence that the variation was negotiated between Ms Cross and herself and agreement to its terms was reached on 27 September 2011. Ms Borrell drafted the variation, which consisted of draft clauses for inclusion in the collective agreement, and emailed them to Ms Cross. Ms Cross, in turn, made some minor comments on the draft which were actioned before the variation was signed off and ratified.

[22] The variation related to Part Four of the collective agreement which deals with remuneration. Part Four sets out the two tables of base scale salaries referred to in [19] above. Relevantly, for the purposes of this case, I need only refer to table A, which sets out the salary rates payable to trained teachers. It states:

A: Base Scale - Trained Teachers

Step	Qual Group	Rates effective 1 July 2009	Step	Qual Group	Rates effective 13 April 2011
1		$30,000			Not applicable
2		$31,305			Not applicable
3	G1E	$33,914	S1	G1E	$36,523
4	G2E	$36,523	S2	G2E	$40,434
5		$40,434			
6	G3E	$44,348	S3	G3E	$44,348
			S4		$45,600
7	G3+E	$45,653	S5	G3+E	$47,023
8	G4E	$47,610	S6	G4E	$49,038
9	G5E	$50,217	S7	G5E	$51,724
10	G1M	$54,132	S8	G1M	$55,621
11	G2M	$58,044	S9	G2M	$59,500
12		$63,392	S10		$64,500
13	G3M	$65,609	S11	G3M	$67,400
14	G3+M	$68,980	S12	G3+M	$71,000

[23] The plaintiffs' statement of claim set out the original wording of Part Four of the collective agreement with the wording of the variation shown as a tracked change. However, as the issues still in dispute relate principally to the wording of the variation, it may simplify matters if I set out the wording of the variation only. It

made no changes to cl 4.1 but it did make substantial changes to what is referred to in the collective agreement as the "Key to table", namely, the key to the tables containing the relevant salary rates. The "Key to table" actually appears in cl 4.1.1 of the collective agreement but it is incorrectly noted in the variation as cl 4.1. The variation also added two new clauses to Appendix A of the collective agreement specifically dealing with overseas teachers who have gained New Zealand registration. The variation is reproduced in full:

Secondary Teachers' Collective Agreement Variation

Dated 27 September 2011

The parties agree to the following variation to the Secondary Teachers' Collective Agreement 2011 - 2013.

4.1 Remuneration (Key to table and Notes)

Replace the existing Key to table and Notes for clause 4.1 with:

Key to table

The Base Scale - Trained Teachers shall apply to all teachers who are registered (including Provisionally Registered Teachers and Subject To Confirmation categories but not Limited Authority to Teach) by the New Zealand Teachers' Council as they are considered, for the purposes of this clause, to be trained and qualified as teachers to teach in NZ.

The Base Scale - Untrained Teachers shall apply to teachers who are employed with a Limited Authority to Teach status.

The entry point for teachers who are employed with a Limited Authority to Teach and lack a subject/specialist qualification shall be step one of the Base Scale - Untrained Teachers.

The maximum step for teachers who are employed with a Limited Authority to Teach and lack a subject/specialist qualification shall be step four of the Base Scale - Untrained Teachers.

E= Entry step for qualification group

M= Maximum step for qualification group

The 'G' notations relate to the entry points and qualifications maxima for teachers who have a qualification defined below. The qualification groups (subject to the operation of clause 4.2.2) for salary purposes are:

G1 Level 5 qualification

G2 Level 6 qualification

G3 Level 7 qualification

G3+ Level 7 subject/specialist qualification and recognised teaching qualification (G3+ includes conjoint subject/specialist and teaching qualifications). See notes 2 and 3 below.

G4 Level 8 qualification (or 2 level 7 subject/specialist qualifications)

G5 Level 9 and 10 qualifications - Masters or PhD

Note 1: The level 7 qualifications must contain at least 72 credits at level 7 and the level 8 qualifications must contain at least 72 credits at level 8.

Note 2: From 13 April 2011, for NZ trained teachers the measure for G3+ is a teacher education qualification that is recognised through the NZTC's registration process and a L7 subject/specialist qualification (with 72 credits at L7), which may be a conjoint subject/specialist and teacher qualification.

Note 3: From 13 April 2011, for overseas trained teachers the measure for G3+ is registration (as defined in note 2) and graduate level study in a subject/specialist area. NZQA assessment regarding the L7 subject/specialist requirement shall state that either it is a comparable subject qualification or shall include words to that effect in the letter to the applicant.

Note 4: Teachers with primary teaching qualifications only are placed as follows:
G1 = Diploma of Teaching;
G2 = Higher Diploma of Teaching; and
G3 = Advanced Diploma of Teaching or Bachelor of Teaching.

Note 5: From 13 April 2011, teachers registered without a level 7 or higher specific subject/specialist qualification enter on step 3 as G3. Currently, for New Zealand trained teachers these could only be primary trained teachers with an Advance Diploma of Teaching or a Bachelor of Teaching. Overseas trained teachers who become registered but who hold no subject/specialist qualification will also enter on step 3 as G3.

Retain, but renumber, existing note 5, 6 and 7.

Appendix A

Add a new clause 1.3.3 and 1.3.4

1.3.3 From 13 April 2011, overseas teachers who gain registration through either the NZTC's comparable qualifications or core components pathways will be deemed to have met the requirements for registration from the date they completed that/those qualification(s). This means that for the purposes of Appendix A clause 1.3.2, overseas teaching service will count from the date the NZQA deems those qualification(s) to have been completed. Relevant work experience (including overseas teaching service completed prior to that date) will be determined under Appendix A clause 1.4.

1.3.4 From 13 April 2011, overseas teachers who gained registration through the NZTC's discretionary pathway (previously called Track Two) will be deemed to have met the registration requirements from the date registration is granted in NZ. This means that overseas teaching service completed after the date registration is granted in NZ will be determined under Appendix A clause 1.3.2 and relevant work experience (including overseas teaching experience completed prior to the date registration is granted in NZ) will be determined under Appendix A clause 1.4.

Terms of Settlement

Add:

Variation to 2011-13 Secondary Teachers Collective Agreement.

On [date this variation was signed], the parties agreed to a variation to this collective agreement to give effect to an agreement reached to resolve a number of ongoing issues with the treatment of teachers who have overseas qualifications.

This resulted in changes to clause 4.1 and Appendix A. The parties agree that these changes will not have any effect prior to 13 April 2011 (being the introduction of the trained and untrained scales into the STCA).

Signed at Wellington on 27 September 2011

.....	.....
Sarah Borrell	Bronwyn Cross
Industrial Relations Manager	Deputy Secretary
Ministry of Education	Post Primary Teachers Association

Events post the variation

[24] Ms Norton told the Court that normally after settlement of a collective employment agreement or variation, the Ministry will produce its own explanatory circular which is made available on its website but on this occasion there was agreement between Ms Cross and Ms Borrell that a joint circular would be issued informing boards of trustees, payroll, school principals and teachers of what had been agreed to. There was evidence about meetings and email exchanges between the Ministry, NZQA, the Teachers Council and the PPTA during the period December 2011 to February 2012 where attempts were made to reach common ground on the agreed wording of a joint circular reporting on the variation but those efforts proved unsuccessful.

[25] The primary issue which precluded the parties from reaching a consensus on a joint circular related to the definition in the variation of the G3+ qualification group. The G3+ category is one of the qualification groups listed in the secondary teachers' base salary scales in the collective agreement. As can be seen from the salary scales in [22] above (under column "rates effective 13 April 2011"), if a teacher met the criteria for G3+ then, depending on the length of service, he or she would be paid on step 5 (G3+ entry step) through to step 12 which at the relevant time was the maximum step under the secondary teachers' collective agreement. In the latest agreement settled in November 2012 the base salary scales were renumbered as steps 3 to 10.

[26] The G3+ qualification group had been created in response to a recommendation contained in a report, dated 19 August 2002, of an independent disputes resolution panel led by Dame Margaret Bazley. The panel had been established to make recommendations as to the terms of settlement of a protracted dispute which had arisen over the re-negotiation of the then current collective agreement. The new G3+ category distinguished secondary teachers from primary teachers. It was first written into the collectives in the 2004-2007 secondary teachers' collective agreement. G3+ was to be the recognised category for secondary teachers teaching in secondary schools while G3 remained the salary range for teachers who had only teacher training. Traditionally most secondary teachers had four years' of tertiary study involving teachers' training and a subject specialist qualification whereas primary teachers had only teachers' training.

[27] Prior to the variation, the PPTA's understanding of the collective agreement was that in order to have access to the new G3+ qualification group, the Ministry required a teacher to hold both a level 7 subject/specialist qualification (including conjoint subject/specialist and teaching qualifications) and a separate teaching qualification recognised by NZQA with no specific framework level. The PPTA was of the view that the variation in September 2011 changed the second limb of that requirement so that once a teacher had been granted registration by the Teachers Council, he or she was deemed or seen to have the equivalent of a recognised teacher education qualification.

[28] The evidence established, however, that following the variation the Ministry continued to maintain that both of the original requirements still needed to be satisfied. From the PPTA's perspective, that was the most contentious interpretation issue to arise out of the variation. The PPTA disagreed with the Ministry's stance and contended that following the variation there was no longer a requirement for a G3+ teacher to have a separate teaching qualification. All that was required, in their view, was teacher registration by the Teachers Council without the need for any inquiry or investigation as to how the Teachers Council had come to its decision. In other words, the PPTA's position was that, from the date the variation became operative, registration alone was sufficient to satisfy the requirement for a separate teaching qualification.

[29] It was clear from the evidence that the dispute between the Ministry and the PPTA over this quite fundamental interpretation issue made it difficult, if not impossible, for a consensus to be reached on the wording of a joint circular describing the effects of the variation. An element of mistrust developed. The PPTA sought legal advice and the parties attended mediation in April 2012 without resolution. At the hearing before me, it was alleged on behalf of the PPTA that from around February 2012 the Ministry and the NZQA started to have their own separate discussions which affected and appeared to involve a reinterpretation of what had been agreed to between the Ministry and the PPTA in the variation. Ms Norton spoke about being "alarmed" by this development. She claimed that work on interpretation issues arising from the variation "seemed to go underground between just the Ministry and NZQA" without any input from the PPTA. These allegations were strongly denied by the Ministry. The situation did not improve, however, and on 1 June 2012, the PPTA commenced proceedings against the Secretary by filing its statement of problem in the Authority.

[30] Another significant development came in August 2012. Mr Colin Tarr, an experienced "Team Leader Evaluator" with NZQA's Qualification Recognition Services business unit, was called as a witness by the defendant. Mr Tarr had been involved in several of the meetings held in mid-2011 between the parties which had culminated in the agreed memorandum dated 11 August 2011. His role had been to act as an advisor on the assessment of overseas teacher qualifications. The last

meeting he attended had been in August 2011 and in evidence he explained how, on 6 December 2011, he had emailed Ms Norton (cc'd to Ms Jenny Thomas of the Teachers Council) querying whether there had been any conclusion to the discussions. As Mr Tarr expressed it, "I knew NZQA would have some process development work to do if there had been changes to requirements." Ms Norton responded by email on the same day suggesting a meeting and she forwarded Mr Tarr a copy of the agreed joint memorandum and the variation.

[31] There were meetings in December 2011 which Mr Tarr and Ms Norton attended and there were further email exchanges but these ceased without anything being resolved and, as noted in [29] above, Ms Norton alleged that from around February 2012 the Ministry and NZQA started to have their own separate discussions without any PPTA involvement.

[32] On 9 August 2012, Mr Tarr advised the PPTA and the Teachers Council of an agreement NZQA had reached with the Ministry over what Mr Tarr described as, "some additional evaluative lenses to be applied to overseas secondary teaching qualifications that may require this". Mr Tarr's paper was six pages long. It was headed:

> Review processes, additional wording and additional evaluative lenses for the evaluation of overseas SECONDARY teaching qualifications carried out by NZQA for the purposes of teacher salary setting by the Ministry of Education.

[33] Ms Norton told the Court that she viewed that development "with significant concern". In her email in reply to Mr Tarr, Ms Norton stated that she needed to look closer at the evaluative lens paper which she noted, "appears to have been agreed between the MoE and NZQA without our input - and this will be taken up appropriately with the MoE as the other party to the agreement." Ms Norton added:

> Moreover the STCA does have a mechanism for working on qualification matters, outstanding and new, and that is the Issues Committee which the MoE appear to have sidestepped. We note that in doing this not only has PPTA been omitted but NZTC also.

[34] Ms Norton said in evidence that it was "concerning on a number of levels that this work was done without the knowledge of NZPPTA ..." She alleged that the evaluative lens paper included a new definition of the term "subject/specialist"

qualification which was inconsistent with the collective agreement and past practice. She explained that while the PPTA recognised and accepted that NZQA and the Teachers Council each had roles in respect of qualification assessments and teacher registration respectively, it was only the parties to the collective agreement (the Ministry and the PPTA) who could come to agreement over how those assessments related to the placement of teachers on the salary scale.

[35] The developments I have outlined above which occurred between February and August 2012 have been included in this judgment to complete the narrative. Ms Norton maintained in her examination-in-chief that the issues and concerns arising out of the evaluative lens paper had not been resolved; that they still needed to be worked through and that they were not part of the issues currently before the Court. This is another matter which I will need to return to.

The pleadings

[36] In its first statement of problem filed in the Authority on 1 June 2012, the PPTA listed three problems or matters it wished the Authority to resolve. It sought determinations that:

> (i) If a teacher has teacher registration (and therefore a recognised teaching qualification) and a Level 7 subject/specialist qualification (which includes conjoint subject/specialist qualifications) the teacher's qualification group for salary purposes is G3+; and
>
> (ii) The changes to the salary scale effective 13 April 2011 applied to existing teachers as well as teachers employed or registered by the Teachers Council after 13 April 2011; and
>
> (iii) Teachers registered after 13 April 2011 without a Level 7 or higher subject/specialist qualification enter on step 3 as G3.

[37] In her statement in reply the Secretary for Education did not accept propositions (i) and (ii) but did agree with proposition (iii) and stated that there was never any dispute over that particular issue.

[38] In an amended statement of problem filed on 8 August 2012, Mr Gray and Cambridge High School were added as parties to the proceeding as second applicant and second respondent respectively. The principal relief sought continued to include the determinations listed in [36] above, including (rather surprisingly, because it was

not in dispute) proposition (iii). In respect of Mr Gray, it was alleged that he is a New Zealand registered teacher holding a number of qualifications, including for the purposes of qualification group G3+ on the salary scale, a qualification which NZQA had assessed as a level 7 subject/specialist qualification (namely a Bachelor of Science with Second Class Honours (First Division)). It was pleaded that Mr Gray was on step 11 of the salary scale (being the maximum for the G3 qualification group) but that he should be paid on step 12 of the salary scale (qualification group G3+ maximum).

[39] In a second amended statement in reply filed on 15 October 2012, the respondents accepted, in a rather lengthy explanatory statement, the PPTA's first proposition that registration satisfied the requirement in the G3+ notation to have a "recognised teaching qualification" but the pleading was qualified and there was reference to the Ministry still needing to ascertain the qualifications relied on by the Teachers Council for the purposes of determining that a teacher is "satisfactorily trained to teach". The respondents also modified their response to proposition (ii) in that they accepted that teachers employed or registered prior to 13 April 2011 could apply to have their qualifications reassessed so as to ascertain whether they met the new requirements for G3+. Those who did meet the required criteria would qualify for G3+ from 13 April 2011. The respondents did not resile from the Secretary for Education's earlier acceptance of proposition (iii). In relation to the relief sought in respect of Mr Gray, the respondents claimed that there was insufficient information to assess whether Mr Gray was entitled to be in qualification group G3+.

[40] Given the concessions made in the respondents' second amended statement in reply, it would seem that at least by the end of October 2012 it ought to have been possible for the parties at that point in time to have resolved their remaining differences and, in hindsight, it is perhaps unfortunate that the matter was not again referred to mediation but that did not happen.

[41] The plaintiffs filed their statement of claim in this Court on 12 November 2012 and the proceeding was allocated a priority fixture. As noted in [9] above, the statement of claim added details and raised certain issues that had not been included in the original statement of problem. The relief sought by the plaintiffs at that point was:

Relief sought

45. ...

(i) A declaration that the Respondents have failed to comply with clause 4.1 and 4.1.1 of the Secondary Teachers Collective Agreement 2011-2013 ("the 2001-13 STCA").

(ii) A declaration that the correct interpretation, application, and operation of the base salary scales in the 2011 - 2013 STCA is that:

(a) If a teacher has New Zealand Teachers Council ("NZTC") registration the teacher is paid on the Trained Teachers Base Scale with effect from 13 April 2011 or from the date they are first registered by NZTC (if registration by NZTC occurs after 13 April 2011);

(b) A teacher with NZTC registration and a Level 7 subject/specialist qualification (which includes conjoint subject/specialist qualifications) is to be paid on the G3+ qualifications group of the Trained Teachers Base Scale with effect from 13 April 2011 or from the date they are first registered by NZTC (if registration by NZTC occurs after 13 April 2011); and

(c) The salary scales rates in the 2011 - 2013 STCA effective 13 April 2011 apply to all teachers employed as at 13 April 2011 and teachers employed after 13 April 2011; and

(d) A teacher without a Level 7 or higher subject/specialist qualification who becomes registered from 13 April 2011 enters the salary scale as G3 teachers in the G3 salary group on step 3; and

(e) A teacher with NZTC 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.

(iii) A determination that [Mr Gray] has been underpaid and is entitled to be paid on Step 12 ($71,000) per year with effect from 13 April 2011 with salary arrears plus interest.

[42] The defendants filed an initial statement of defence on 26 November 2012, a first amended statement of defence on 21 December 2012 and a second amended statement of defence on 4 February 2013. In the latter document the defendants denied that the plaintiffs were entitled to the remedies sought but they did not dispute the interpretation of the base salary scales as pleaded by the plaintiffs in (ii) (a), (c), (d) and (e) above.

[43] As the pleadings then stood, the two remaining issues in dispute arising out of the plaintiffs' pleadings were the claim for a declaration in terms of (ii)(b) and the claim in (iii) made on behalf of Mr Gray.

[44] In their initial statement of defence the defendants also proceeded for the first time to plead what they referred to as an affirmative defence which raised matters beyond the two issues arising out of the statement of claim identified in [43] above which still remained to be resolved. In their affirmative defence, the defendants outlined the history of the G3+ qualification group and then turned to the respective functions of the Teachers Council and NZQA. The affirmative defence was based on the new reassessment processes which had been developed by NZQA in its evaluative lens paper and implemented from 31 August 2012. As noted in [34] and [35] above, Ms Norton claimed that the evaluative lens paper had been developed without the knowledge of the PPTA; that it was inconsistent with the provisions of the collective agreement and its contents were not part of the issues before the Court. In all events, the "affirmative defence" did not seek any specific relief or remedy from the Court and was more akin to a submission than a pleading.

Level 7 subject/specialist qualification

[45] Before considering further the plaintiffs' application for leave to amend their prayer for relief, it is necessary to explain briefly the background to the first limb in the definition of the G3+ qualification group, namely the requirement for the teacher to have a level 7 subject/specialist qualification. The second limb of the definition, namely, the requirement for the teacher to hold a recognised teaching qualification, is referred to in [27] - [29] above.

[46] Historically, qualifications were grouped by level of academic study. Prior to October 2007 each qualification group under the G notations referred to in the relevant salary scale, now represented by the base scale reproduced in [22] above, related to the type of qualification held by a teacher. The 2002-2004 collective agreement, for example, described the categories as follows:

> G1 = recognised teacher education qualification not at degree level.
> G2 = G1 qualification plus two-thirds of a bachelor's degree (other than where the G1 qualification has resulted in the granting of a partial

bachelor's degree by cross-crediting) or completed qualification recognised in Group 2 on the Qualifications Chart or subsequent lists.

G3 = 3 year bachelor's degree or recognised equivalent.
G4 = 4 year honours degree or recognised equivalent.
G5 = 5 year master's degree or PhD or recognised equivalent.

[47] A change was made in the 2007 - 2010 and subsequent collective agreements so that the qualification groups for salary purposes were defined in terms of their level on the New Zealand Qualifications Framework (NZQF). As shown in [23] above, the current qualification groups are listed as:

G1 Level 5 qualification

G2 Level 6 qualification

G3 Level 7 qualification

G3+ Level 7 subject/specialist qualification and recognised teaching qualification (G3+ includes conjoint subject/specialist and teaching qualifications)

G4 Level 8 qualification (or 2 Level 7 subject/specialist qualifications)

G5 Level 9 and 10 qualifications - Masters or PhD

[48] Mr Tarr explained in evidence that all qualifications listed on the New Zealand Qualifications Framework fit into a qualification type such as a certificate, diploma or degree and each qualification type is defined by a set of criteria which includes the level at which the qualification is listed and the number of credits required at each level. The levels run from 1 to 10 and are based on complexity, with level 1 the least complex (e.g. NCEA level 1) and level 10 (e.g. PhD) the most complex. Levels 1 to 4 are Certificates; levels 5, 6 and 7 are Diplomas; Graduate Certificates, Graduate Diplomas and Bachelor degrees are level 7; Post Graduate Certificates, Post Graduate Diplomas and Bachelor degrees with Honours are level 8; Masters degrees are level 9; and Doctoral degrees are level 10.

[49] All qualifications on the NZQF have a credit value. The credit value relates to the amount of learning in the qualification. This involves a qualification developer estimating how long it would typically take a person to achieve the stated outcomes in the context specified and to demonstrate that achievement through assessment. That exercise determines the credit value for a qualification. One credit is equal to 10 notional hours of learning.

[50] Mr Tarr explained that a New Zealand Bachelor degree requires a minimum of 360 credits from levels 5 to 7. Of those 360 credits, a minimum of 72 credits must be at level 7 or higher. A Graduate Diploma requires a minimum of 120 credits of which 72 credits must be at NZQF level 7 or above and the remaining 48 credits cannot be lower than NZQF level 6.

[51] Each level has descriptors of learning outcomes that use the common domains of knowledge, skill and application. The knowledge, skill and application outcomes describe what a graduate of a particular level is expected to know, do and be. For example, the knowledge descriptor for level 1 is stated as: "Basic general and/or foundation knowledge" which can be compared with the level 7 knowledge descriptor: "Specialised technical or theoretical knowledge with depth in one or more fields of work or study".

The amended prayer for relief

[52] The plaintiffs' application for leave to amend the prayer for relief in their statement of claim falls to be considered against the background of both limbs of the definition of the G3+ qualification group, i.e. the level 7 subject/specialist qualification and the recognised teaching qualification, bearing in mind that G3+ includes conjoint subject/specialist and teaching qualifications. The amendments sought can be compared with the relief claimed in the plaintiffs' original pleadings as detailed in [41] above.

[53] I record that three different versions of the amended pleadings were filed within a five-week period, namely, the original application for amendment dated 17 May 2013, the more formal application for leave dated 22 May 2013 and the final version included in counsel's closing submission dated 11 June 2013. There are subtle, unexplained differences in each version which is unsatisfactory. I set out below, however the relief sought in the final version together with a summary of the grounds relied upon for the amendments and the defendants' response (taken from the second version). I have retained the paragraph numbering in the original statement of claim.

45. ...

(i) Leave is sought, should it become necessary, to seek compliance with clauses 4.1 and 4.1.1, 4.2.1 (a) and 4.2.2 of the Secondary Teachers Collective Agreement 2011-2013.

The defendants do not object to this amendment.

(ii) A declaration that in terms of the base salary scales in the 2011 - 2013 STCA (and 2013 - 2015 STCA):

(a) "Recognised teaching qualification" and "teacher education qualification that is recognised through the NZTC's registration process" in clause 4.1.1 and "recognised teaching qualification" in clause 4.2.1 and "recognised teacher education qualification" and "completed a recognised course of teacher education" in clause 4.2.2 mean New Zealand Teachers Council ("NZTC") registration.

Ms Kennedy submitted that as the Ministry had conceded that the "recognised teaching qualification" for G3+ is registration by the Teachers Council, it was appropriate to ensure that all variations of the phrase "recognised teaching qualification" used in the collective agreement were included in the one interpretation. Ms Russell acknowledged that the Ministry had conceded that registration satisfied the requirement to have a recognised teaching qualification but stated that it did not understand the significance of the change sought from "satisfies the requirement" to "means". Ms Russell submitted: "In the absence of information about the significance of the change, the first defendant must assume he is prejudiced by the amendment because he does not know the case he is expected to answer." Ms Russell also made the point that, as the extended definition had not been pleaded, she had not cross-examined or led evidence on the matter.

(b) An overseas teacher with NZTC registration and who is on G3 because they satisfy the Level 7 subject/specialist qualification requirement (i.e. without a primary teaching qualification covered by Note 4 or without Note 5 of the STCA applying) moves to the applicable step on G3+ with effect from 13 April 2011 or from the date they are first registered by NZTC or employed (if registration or employment occurs after 13 April 2011).

This amendment relates to evidence given in relation to Mr Gray. The pleading did not appear in the relief claimed in the statement of claim but Ms Kennedy has identified paragraphs in the body of the statement of claim which effectively make

the same allegation. The thrust of Ms Russell's submission in response was that the Ministry would have no objection to a declaration in the terms sought provided that after the words, "level 7 subject/specialist qualification" the words "with at least 72 credits at level 7" were inserted. Ms Russell expressed concern that while the pleading is based on paragraphs in the body of the statement of claim relating to Mr Gray, the wording in (b) is not confined to Mr Gray's situation and appears to relate to all overseas teachers. Ms Russell submitted that leave to include this pleading would be opposed if the plaintiffs were seeking to argue that every teacher who is currently in G3 does have a subject/specialist qualification with at least 72 credits at level 7.

> (c) An overseas teacher with NZTC registration and a Level 7 subject/specialist qualification or a comparable subject/specialist qualification or conjoint subject/specialist and teaching qualification(s) is to be paid on the applicable step of G3+ qualifications group of the Trained Teachers Base Scale with effect from 13 April 2011 or from the date they are first registered by NZTC (if registration occurs after 13 April 2011).

Ms Kennedy submitted that this was an issue that still needed to be resolved and in support of her submission she referred to some passages in the evidence and a paragraph in the second amended statement of defence. In response, Ms Russell took issue with the reference to "comparable subject/specialist qualification" and said that the Ministry did not know what the plaintiffs meant by the term as it did not appear anywhere in the statement of claim or the plaintiffs' opening submissions. Ms Russell gave a possible meaning of the term but submitted that if the plaintiffs were "trying to say something else, then in the absence of further information as to what that is the defendant must assume he is prejudiced by the amendment because he does not know the case he is expected to answer."

> (d) A conjoint subject/specialist and teaching qualification(s) in G3+ means a qualification where the teacher has either a conjoint or combined teaching and subject/specialist qualification which is not a qualification covered by Note 4 of the STCA.

Ms Kennedy accepted that the definition of the term "conjoint" was not an issue that had been raised in the pleadings but she submitted that Mr Tarr had attributed a definition to the term in his evidence which had been rejected by Ms Norton in cross-examination. No reference was made to the passage in the notes of evidence

relied upon for the meaning attributed to the term by Mr Tarr. Ms Russell reiterated the submission she made in respect of (b) above, namely that the reference to "Note 4" appeared to be an alternative way of pleading that all teachers currently in G3 (unless covered by Note 4) have a subject/specialist qualification with at least 72 credits at level 7 and she submitted that if that is the intention of the amendment sought then it would be opposed as it would cause "significant prejudice" to the Ministry.

> (e) The Level 7 subject/specialist qualification or conjoint subject/specialist and teaching qualification(s) does not have to have 72 credits of subject/specialist study at Level 7.

It appears that the basis for this new pleading was the evidence given about the evaluative lens paper (see [32] above) which Ms Kennedy submitted introduced the concept of the 72 credits having to be in subject/specialist study at level 7. Ms Kennedy referred to Mr Tarr's evidence in relation to the evaluative lens paper which she was critical of because it failed, as counsel put it, to make the point that there are qualifications which would be level 7 subject/specialist qualifications or conjoint subject/specialist and teaching qualifications but that do not have 72 credits. In this regard reference was made to a letter dated 27 September 2011 from NZQA to the Ministry which the plaintiff obtained under the Official Information Act 1982 which gave an example of Initial Teacher Education ("ITE") or education "overlay" papers which provided only 62.5 credits of subject/specialist study at level 7.

In response, Ms Russell submitted that the letter in question had been disclosed under the Official Information Act in mid April 2013 but the plaintiffs had not given any indication that they took issue with the proposition that a level 7 subject/specialist qualification had to have 72 credits of subject/specialist study at level 7. Ms Russell submitted that had the first defendant received notice that that issue was in dispute then further discovery would have been sought and she would have explored the matter further through her own witnesses and in cross-examination.

> (f) The subject/specialist qualification (or conjoint/combined teaching and subject/specialist qualification) does not need to be separate from any qualification(s) relied on by the NZTC in determining that they would register the teacher.

Ms Kennedy stated that this pleading responded to statements made by the defendants in their second amended statement of defence to the effect that the qualification relied upon by the Teachers Council registration needed to be separate to the level 7 subject/specialist qualification. Ms Russell responded by conceding that, apart from the inclusion of the word "combined", the first defendant is not prejudiced by this pleading.

> (g) The NZQA and/or Ministry of Education cannot seek to exclude or limit a subject/specialist qualification (or conjoint/combined teaching and subject/specialist qualification) on the basis that they consider that it "double-counts" any qualification(s) or parts of qualification(s) which may (or may not) have been relied on by teachers when applying to the NZTC for registration.

The basis for the inclusion of this particular paragraph in the amended prayer for relief is said to be an allegation in paragraph 61 of the second amended statement of defence that teachers cannot have their qualifications double counted and that any qualification used by the Teachers Council for registration purposes cannot also be used to meet the requirement to hold a level 7 subject/specialist qualification. In response, Ms Russell again objected to the inclusion of the word "combined" but with that exception she acknowledged that the first defendant was not prejudiced by this pleading but she submitted that it would be inappropriate for the Court to make any order binding on an organisation that was not a party to the proceedings such as NZQA.

> (h) The NZQA and/or Ministry of Education cannot relook or unpick a qualification on the basis of the NZTC's approach or decision to register the teacher.

For this pleading, Ms Kennedy relied upon admissions made by the defendants' witnesses' in cross-examination. Ms Russell accepted that the defendants were not prejudiced by this pleading but again objected to the inclusion of any reference to NZQA which was not a party to the proceedings.

> (i) The variation in September 2011 to the STCA does not require overseas teachers to have their overseas qualification reassessed by NZQA.

In support of the inclusion of this paragraph in the amended pleadings, Ms Kennedy again referred to evidence arising in relation to the evaluative lens paper "to which

the plaintiffs strenuously object" and also to a statement made in the defendants' second amended statement of defence to the effect that NZQA had devised a reassessment process available to teachers already registered. In response, Ms Russell claimed that the meaning of the pleading was unclear and she made the point that the plaintiffs had had the opportunity to challenge the evaluative lens paper issued in August 2012 in their original statement of claim dated 12 November 2012 but had failed to do so.

> (j) "Subject/specialist" qualification means non-teaching qualifications except where the qualification is a conjoint or combined teaching and subject/specialist qualification or:
>
> - Diploma in Education of Students with Special Teaching Needs (level 7) - Christchurch College of Education
> - Diploma of Teaching and Supporting People with Disabilities (level 7) - Christchurch College of Education
> - Graduate Diploma in Language Teaching (level 7) - Unitec New Zealand.

The wording of this pleading is based on a provision in a document dated 14 March 2005, which was produced in evidence. The document recorded an interim agreement reached between the Ministry and the PPTA in relation to level 7 qualifications. It was said to apply for a transition period between February 2003 and June 2007. Ms Russell submitted that the allegation was not pleaded in the statement of claim or raised in the plaintiffs' opening submissions and had she known that the matter was going to be in issue she would have covered it in evidence and cross-examination. Counsel confirmed that the first defendant was not prejudiced by the initial words, i.e. that a "subject/specialist" qualification means a non-teaching qualifications.

> (k) It is inconsistent with "subject/specialist" in the STCA to define "subject/specialist" as:
>
> - *The subject/specialist study to be "applicable to a subject/specialist area for secondary school teaching".*
>
> - *Evidence of graduate level studies in the subject/specialist studies that are substantially similar in academic level and quantum to those commonly required in the final year of a Level 7 (+) qualification (of 120 credits) in New Zealand.*
>
> - *Sufficient evidence of graduate level studies in a subject/specialist qualification(s) that are substantially similar in*

academic level or quantum to those commonly required in the final year of a Level 7 qualification in New Zealand.

- *In addition to at least one year of teacher education studies, at least 72 credits (720 notional learning hours) of studies at NZQF Level 7 (final year bachelor degree level) in a subject specialist area relevant to the New Zealand Curriculum.*

In explanation, Ms Kennedy again referred to the provision in the second amended statement of defence which made reference to matters included in the evaluative lens paper produced by NZQA. Ms Kennedy also referred to passages in the evidence where witnesses for the defendants accepted that there were parts of the evaluative lens paper which were inconsistent with the provisions of the collective agreement. Ms Russell objected to (ii) and (iii) and submitted that the first defendant did not know what was intended by the words in (iii). Ms Russell also repeated her concern about the Court making any order that might impact on NZQA's ability to carry out its statutory functions.

> (l) The wording and process to be adopted by NZQA in relation to NZQA's assessment regarding the Level 7 subject/specialist requirement for G3+ for overseas teachers and the wording in the letter to the applicant must be agreed between the PPTA, NZQA and Education Services Payroll. Leave be reserved to refer this matter back to the Court if agreement not reached within 28 days.

Again, the basis for the inclusion of this new pleading is said to be the paragraph in the second statement of defence which refers to the contents of the evaluative lens paper produced by NZQA. One passage of the evidence Ms Kennedy relied on in support for the inclusion of this pleading appeared in her cross-examination of Ms Borrell. Ms Kennedy had put it to Ms Borrell that in the memorandum she and Ms Norton had issued in August 2011, upon which the variation was based, they had specifically agreed that the final choice of words for NZQA assessments of overseas teachers was to be determined by agreement between the PPTA, NZQA and the Ministry. In response, Ms Borrell made the following significant statements:

> Yes. No dispute in that. That was the intent. No dispute. I don't think that we set out to try and do that and failed in doing that. That, that opportunity to do that, if we can resolve these issues still remain and we still look forward to that day.

And, a short time later:

> ... Do I agree the intent was that PPTA, NZQA and, and education services payroll being part of the Ministry would work tougher (sic) to do the final choice of words? Absolutely I do. Between that memo and Colin Tarr's efforts later the next year we had attempted to. We'd had several meetings. They had been difficult at times. They had led to a long amount of email traffic and had led to, to the situation we're in now of, of legal action being placed. It was an entirely different environment and one where I think it's quite natural for all parties to be treading carefully. There is nothing that precludes us still getting to words that we can action that if we can, can resolve the differences between us. It's still a better state of being than we're currently in.

In response, Ms Russell correctly highlighted the fact that in her evidence, Ms Norton had stated that the evaluative lens paper was not in issue before the Court (see [35] above). Ms Russell also made the other significant observation that the concerns raised by the PPTA regarding the contents of the evaluative lens paper, "should be discussed by the Issues Committee".

> (m) The four agencies (NZQA, PPTA, NZTC and MoE) must discuss and agree "when and how teachers previously registered can apply to be reassessed" by NZQA if the teacher decides to be reassessed. Leave be reserved to refer this matter back to the Court if agreement not reached within 28 days.

The basis for this pleading is again the evidence relating to the evaluative lens paper. Ms Russell submitted that the first defendant was prejudiced by this pleading because it had not been included in the statement of claim nor had it featured in Ms Kennedy's opening submissions. Ms Russell also repeated her objection to the Court making any decision that impacted upon organisations not before the Court such as, NZQA and NZTC.

> (n) The MoE and/or NZQA shall not and do not need to ascertain, in relation to teachers who gain registration through the discretionary pathway, what (if any) qualification(s), or parts of qualification(s), were relied on by the NZTC for the purposes of granting registration.

Ms Russell confirmed that the first defendant had no objection to a declaration being granted in such terms save that, in counsel's submission, it would be inappropriate for the Court to make such an order given that NZQA is not a party to the proceeding.

Discussion

[54] One of the remarkable features of this case has been the way in which new areas of dispute between the parties, some quite significant, appeared to simply evolve as the hearing progressed. It is unsatisfactory, for whatever reason, for the Court and the parties to be faced with such a far-reaching application for amendment of the pleadings after the conclusion of all the evidence. The plaintiffs blame the changing position of the defendants and developments in the defendants' case and, while there is some substance in that allegation, it is not the whole story.

[55] There is no dispute over the principles applicable to applications to amend pleadings. Among the authorities relied upon, both parties referred to the following passage from the judgment of Tompkins J in *Marr v Arabco Traders Ltd (No 8)*:[6]

> The general approach therefore, is that even at this late stage the Court should make the amendments sought if they are necessary for the purpose of determining the real controversy between the parties, but even if that may appear to be so, the application should still be declined if making it at this stage, is likely to result in an injustice to one or more of the defendants.

That statement of principle was subsequently endorsed by the Court of Appeal in *Elders Pastoral Ltd v Marr*.[7]

[56] In this jurisdiction, the Court has an overriding obligation, which is particularly relevant to the facts of this case, to endeavour to achieve justice between the parties according to the equity and merits of the case. Section 189(1) of the Act provides:

> **189 Equity and good conscience**
>
> (1) In all matters before it, the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

[57] On several occasions during the course of the hearing when new matters appeared to arise, I expressed the view to the witness and counsel that the

---

[6] HC Auckland, A1195/77, 12 March 1987 at 11.
[7] (1987) 2 PRNZ 383 (CA) at 384.

appropriate course would appear to be to have the matter referred to the Issues Committee (described in [17] above). Invariably the parties agreed. The provision in the collective agreement creating the Issues Committee gives that body specific authorisation, "to consider and resolve any outstanding or new issues about teachers' qualifications in relation to salary" whether in individual cases or more generally. In essence, that is what this case is all about. When parties to a collective employment agreement take the commendable initiative of setting up a particular entity to deal with a potential area of dispute then, in my view, this Court should give them every encouragement and incentive to have the matter resolved through that agreed channel.

[58] There is some force in the submission Ms Russell makes about her inability to lead evidence and cross-examine on matters which she did not appreciate were going to be in issue until the plaintiffs filed their application for leave to amend their prayer for relief. Whether that unsatisfactory situation resulted in actual prejudice to the defendants is another issue. Moreover, it is unsatisfactory to find that some of the declaratory orders now sought by the plaintiffs in their amended pleadings relate to different aspects of the evaluative lens paper issued in August 2012 when (as noted in [35] above) Ms Norton, the principal witness for the PPTA, said in her evidence in relation to the same document: "This is not however the issue currently before the Court and still needs to be worked through".

[59] Having made these observations, the reality is that all the issues raised by the plaintiffs in their draft amended prayer for relief and their nuances are matters which need to be resolved in a considered way sooner rather than later in order to make the variation to the collective agreement work. To disallow any one of the declarations sought in the amended pleadings is not going to assist the parties in reaching a consensus as to how the provisions of the variation, still in dispute, are going to be implemented; nor would it do anything in terms of s 189(1) of the Act to support the ongoing successful employment relationship between the parties.

[60] Against that background, instead of ruling on the application for amendment of the pleadings at this stage, I have decided to adjourn the proceeding so as to allow time for the matters still in dispute to be referred to and, hopefully, resolved by the Issues Committee. I would expect the PPTA to identify and submit the particular

issues to be determined by the Issues Committee and I would expect the first defendant to cooperate fully in all aspects of the exercise. As Ms Cross rather colourfully opined at one point when she was asked by the Court about the Issues Committee, "... we need to bring a problem-solving mindset to it ... it's wanting to fix it rather than wanting to draw a line and say, well this is it, you know this is like the Berlin Wall of qualifications and you're not going through."

[61] At the same time, I intend to make some observations at this point which I would hope might assist the Issues Committee in its task. The matters I am about to refer to will not come as a surprise to counsel because I flagged most of them in the course of the hearing. First, I would not encourage the Issues Committee to waste time on recriminations over the events leading up to the unsatisfactory situation that exists at the present time. I am satisfied that the effective impasse between the parties has its origins in the failure of the Ministry to acknowledge from the outset that, after the variation, registration by the Teachers Council was all that was required to satisfy the second limb of the definition of the G3+ qualification group namely, a "recognised teaching qualification". Post variation, the qualification(s) the Teachers Council relied upon in making the decision to register a teacher were irrelevant and of no concern to the parties to the collective agreement. Registration was paramount and that is all that was required. In hindsight, it was unfortunate that this requirement was not better spelt out in the variation. It would have been easier and less confusing if the variation and collective agreement had simply referred to NZTC registration instead of phrases such as: "recognised teaching qualification", "teacher education qualification that is recognised through the NZTC's registration process", "recognised teacher education qualification" and "recognised course of teacher education".

[62] Why it was that the Ministry made this fundamental error in its interpretation of the variation is not something that was explored before me. The Ministry did attempt to right the situation in its second amended statement in reply dated 15 October 2012 but, as noted in [39] above, its position was still qualified to some extent and even during the course of the hearing, as Ms Kennedy picked up in her closing submissions, some of the witnesses for the first defendant made statements indicating that the Ministry was still concerned about the teaching qualification

relied upon by the Teachers Council for registration purposes. To her credit, Ms Russell in her closing submissions frankly acknowledged that the misunderstanding on the part of the Ministry was the basis of the dispute in the first place and the reason why it was necessary for the PPTA to file the proceedings. At another point of counsel's submissions, the following exchange is recorded:

> **THE COURT**: So do you concede that Ms Norton was entitled to be concerned when she found out in about December 2011 that the Ministry was taking the view that two separate qualifications were needed?
>
> **MS RUSSELL**: Yes Sir. You can actually see in the correspondence between the parties where it all starts to go pear-shaped and they start talking past each other. Positions get entrenched and the Ministry takes the wrong view.

[63] I consider that this concession by counsel for the defendants' was properly made. Perhaps Ms Norton, as the key negotiator for the PPTA, could have taken a more active interest in the events leading up to the distribution of the NZQA evaluative lens paper in August 2012. She admitted as much in cross-examination by Ms Russell when she said: "Well, in hindsight, that was a serious omission that I made." But by then, of course, the mistrust resulting from the Ministry's wrong stance had crystallised - the parties had unsuccessfully attempted mediation and proceedings had been issued in the Authority.

[64] Another observation I make for the benefit of the Issues Committee relates to the second plaintiff, Mr Gray. As noted in [11] above, Mr Gray was added to the proceeding as a representative plaintiff. There were different aspects to Mr Gray's case but at this stage I simply wish to refer briefly to one of them. An issue arose over whether Mr Gray, as an overseas trained teacher, did hold a comparable qualification to at least 72 credits at level 7 of subject/specialist study, which would place him in the G3+ qualification group for salary purposes. The plaintiffs maintained that he did; the first defendant, in reliance on advice from NZQA, denied the allegation.

[65] In explanation of NZQA's position, Mr Tarr told the Court that NZQA's 2006 assessment of Mr Gray's qualifications concluded that his BSc (Hons) Mathematics with Education and Qualified Teacher Status awarded by Sheffield Hallam University in 1999 was not comparable to a NZQA level 7 subject qualification in

mathematics (e.g. a New Zealand BSc majoring in mathematics). Mr Tarr, however, then went on to say that in preparation for appearing as a witness in this case he had a "re-look" at Mr Gray's qualifications which involved him having an email exchange with Sheffield Hallam University (SHU). The person Mr Tarr made contact with referred his inquiry on to Ms Rosemary Cartledge, the Student Administrator. The first query Mr Tarr had raised with SHU asked: "Would the credit points used in 1998/99 mean 1 credit = 10 notional learning hours?" Ms Cartledge responded: "Each 20 credit point unit = 150 hrs". In other words, the advice from Ms Cartledge in relation to the SHU programme in question was that one credit equated to 7.5 learning hours.

[66] The significance of the response from Ms Cartledge was explained to the Court by Mr Tarr. The records from SHU which Mr Gray had produced to NZQA at the time he was seeking to come to New Zealand showed that he had completed four mathematics papers, each worth 20 credits making a total of 80 credits. If the 80 credits is multiplied by 7.5 hours it equals 600 learning hours or 60 NZQA credits (one credit = 10 notional learning hours) which is short of the minimum 720 learning hours (72 credits) at NZQA level 7 required in a New Zealand Bachelor Degree majoring in mathematics or a Graduate Diploma in mathematical sciences.

[67] Mr Tarr was cross-examined at length by Ms Kennedy on this aspect of his evidence. The witness agreed that his analysis had been based on the assumption that the information he had received from Ms Cartledge had been correct.

[68] Ms Cartledge did not give evidence in the case and I have no means of assessing her credibility. The plaintiffs, however, did produce detailed affidavit evidence from Ms Elizabeth Winders, the Secretary and Registrar at SHU. The first defendant required Ms Winders to be available for cross-examination on her affidavit and it was arranged for her evidence to be given by way of a video link-up. Although Ms Winders had held her present position at SHU only since July 2004, she explained to the Court that she had had over 32 years' experience in university administration.

[69] For present purposes, the crucial part of Ms Winder's evidence was her assertion that the documentation Ms Cartledge had based her answer to Mr Tarr's

first question on did not represent the position at SHU. Ms Winders explained that in 1996 SHU adopted for all courses the 1 credit = 10 notional study hours or 20 credits = 200 notional study hours. The witness continued:

> Mr Tarr is therefore wrong to equate 1 SHU credit to 7.5 notional study hours in Mr Gray's case rather than 1 credit = 10 notional study hours. The correct position is that since 1996 1 credit = 10 notional study hours for all SHU courses.

[70] The Issues Committee will have no knowledge of Ms Winders but to assist the committee in its consideration of Mr Gray's case, I can indicate now that I found Ms Winders to be a completely credible witness and I accept her evidence.

[71] The final observation I make for the assistance of the Issues Committee relates to the evaluative lens paper described in [32] above. As indicated by my frequent references elsewhere to this document, it assumed more and more significance as the hearing progressed. The background to the evaluative lens paper is summarised in [32] - [34] above. Essentially it is a six-page document developed by NZQA which, in the words of an accompanying letter, details "some process, wording and evaluative lens changes for secondary teacher salary setting purposes". The evidence is that it became operative from 31 August 2012. The opening paragraph of the document states:

> These process, wording and evaluative lens changes occur as a result of the ratified variation to the STCA dated 27 September 2011.

[72] The problem with the evaluative lens paper was that it had the potential to affect teachers' salaries and it contained additional terms and conditions over and above those provided for in the collective agreement between the Secretary and the PPTA but it had never been agreed to by the PPTA. Moreover, some of the first defendant's own witnesses conceded in cross-examination that parts of the evaluative lens paper were inconsistent with the provisions of the collective agreement.

[73] The status of the evaluative lens paper falls to be considered in terms of s 61(1) of the Act which provides:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**

> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are –
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.

[74] The issue of inconsistency has been considered in several recent judgments in this Court and, based on the authoritative judgment of the Court of Appeal in *New Zealand Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd*,[8] the relevant principles were summarised in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*.[9] Applying those principles in the present case, it appears to me that the evaluative lens paper fails the test under both limbs of s 61(1) and is therefore unlawful. How the effect of the variation is conveyed in any explanatory circular to interested parties is something that the Issues Committee will need to address.

[75] I hasten to add that I intend no criticism of NZQA or Mr Tarr for their commendable efforts in endeavouring to give practical effect to the terms of the variation. I accept that Mr Tarr did his best to advance the situation but he, understandably, probably did not appreciate the level of animosity that had been created between the two parties to the collective agreement as a result of the Ministry's mistaken interpretation of the variation and I suspect that he may have been unaware of the provisions of s 61 of the Act.

Conclusions

[76] For the reasons explained above, those issues identified by the plaintiffs in their draft amended prayer for relief which are still in dispute are to be submitted to the Issues Committee, established under cl 4.1.1, Note 7 of the collective agreement, for resolution.

[77] In her closing submissions, Ms Kennedy suggested a timeline of 28 days to allow for the referral of certain specified matters to various agencies for resolution.

---

[8] [1991] 1 NZLR 143; (1990) ERNZ Sel Cas 834 (CA).
[9] [2010] ERNZ 139.

While 28 days appears reasonable, I am prepared to allow the Issues Committee until 5 September 2013 to resolve the matters to be referred to it pursuant to this judgment but if further time is necessary then leave is reserved to approach the Court.

[78] Finally, while I would expect the representatives of the first plaintiff and first defendant to act in good faith throughout, I would exhort all members of the Issues Committee to adopt a responsible and constructive approach to the challenge before it so as to ensure a practical and sensible resolution is reached in relation to the various issues referred to it. If any matters do arise, however, on which further directions are sought then leave is reserved to the parties to approach the Court.

A D Ford
Judge

Judgment signed 3.30 pm on 23 July 2013