

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2013] NZEmpC 20
WRC 28/12**

IN THE MATTER OF proceedings removed from Employment
Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN NEW ZEALAND POST PRIMARY
TEACHERS' ASSOCIATION
First Plaintiff

AND ROBERT GRAY
Second Plaintiff

AND SECRETARY FOR EDUCATION
First Defendant

AND CAMBRIDGE HIGH SCHOOL
Second Defendant

Hearing: 22 February 2013
(on the papers and by way of telephone conference)

Counsel: Tanya Kennedy, counsel for plaintiffs
Antoinette Russell, counsel for defendants

Judgment: 22 February 2013

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] There have been two previous interlocutory judgments delivered in this proceeding. The first by Chief Judge Colgan dated 14 December 2012¹ and the second by myself dated 13 February 2013.² The new matters before the Court relate to a late application by the defendant for leave to file an amended statement of defence, which is objected to by the plaintiff, and a challenge by the plaintiff to the

¹ [2012] NZEmpC 214.

² [2013] NZEmpC 13.

admissibility of a brief of evidence of Mr Colin Tarr. The parties have agreed that both matters can be dealt with on the papers. I heard additional oral submissions this morning. There is a degree of urgency in resolving these issues because the case is set down for a three-day hearing commencing on 6 March 2013.

[2] By way of brief background, the substantive proceeding involves the interpretation and application of certain provisions in a collective agreement affecting the pay of provisionally registered secondary school teachers. There is a dispute between the parties as to the interpretation of the relevant provisions which purported to take effect from 13 April 2011. For convenience, I will refer to the defendant as “the Ministry”. The Ministry has estimated that up to 1,957 teachers could be affected by this litigation.

[3] The issues involved in this particular interlocutory proceeding relate to the second plaintiff, Mr Robert Gray. Ms Kennedy, counsel for the plaintiffs, described Mr Gray as a representative plaintiff. It is pleaded in the statement of claim that Mr Gray is a mathematics teacher with over 12 years’ teaching experience. He arrived in New Zealand from the United Kingdom in July 2006 and is a New Zealand registered teacher. His qualifications are fully particularised in the statement of claim. Relevantly, it is pleaded:

36. Mr Gray holds a number of qualifications, including for the purposes of qualification group G3+ on the salary scale, he holds a qualification which NZQA has assessed as a Level 7 subject/specialist qualification (namely a Bachelor of Science with Second Class Honours (First Division).
37. Accordingly, it is claimed that Mr Gray should be paid on step 12 of the salary scale (qualification group G3+ maximum) and is entitled to salary arrears since 11 April 2011 plus interest.

[4] In its statement of defence filed on 26 November 2012, the Ministry admitted, in response to paragraph 36 of the statement of claim, that Mr Gray, “holds a number of qualifications and that NZQA has assessed Mr Gray as holding a qualification with learning outcomes comparable to those of a qualification at Level 7, as registered on the New Zealand Register of Quality Assured Qualifications.” In response to paragraph 37 of the statement of claim, the Ministry denied that paragraph and alleged that, “the NZQA assessment did not state whether or not

Mr Gray's qualifications were sufficient to meet separately the G3+ criteria." It also raised another query which is not relevant to the present case.

[5] It appears that in preparation for the hearing, Ms Russell, counsel for the defendants, or someone on her behalf, briefed evidence from Mr Colin Tarr of the New Zealand Qualification Authority (NZQA) as a result of which the Ministry now seeks to formally deny that Mr Gray holds a qualification that NZQA has assessed as a Level 7 subject/specialist qualification.

[6] For the reasons stated in [5], the Ministry made an application on 4 February 2013 for leave to file a second amended statement of defence, amending its response to paragraphs 36 and 37 of the statement of claim, to reflect the information obtained from Mr Tarr. On 8 February 2013, Ms Kennedy, filed a memorandum objecting to the granting of leave and also the evidence of Mr Tarr. That memorandum was responded to by Ms Russell on 15 February 2013 and a further memorandum in reply was filed by Ms Kennedy on 20 February 2013.

[7] The first ground of Ms Kennedy's objection was that NZQA had recently reviewed and made a reassessment of Mr Gray's qualifications without his knowledge or consent. The next substantive objection was that NZQA's views on a teacher's qualifications were "irrelevant" at this stage because the plaintiffs have sought leave, if necessary, to refer individual cases back to the Court if the Court rules in their favour on the interpretation issue.

[8] In discussion during the conference call this morning, Ms Russell denied that NZQA had reassessed Mr Gray's qualifications but she claimed that Mr Tarr had simply reviewed the status of Mr Gray's existing qualifications during the relevant time period. In response, Ms Kennedy pointed out that Mr Gray had a right of review in respect of any changes in the assessment of his qualifications and she said that, given these most recent developments, it may be necessary for the plaintiffs to call expert evidence on Mr Gray's overseas qualifications. Counsel raised the possibility of requiring an adjournment.

[9] The Court has a broad discretion in accepting evidence and the principal criteria in each case is relevance. It is also important in the interests of justice that the parties should be able to present pleadings which accurately reflect their case.

While there is substance in Ms Kennedy's objection that qualifications will not become a real issue for affected teachers unless and until the Court finds in favour of the plaintiffs, that is not the situation in the case of Mr Gray who is a named party in the proceeding. If the Court does end up finding in the plaintiffs' favour then it is likely that numerous other teachers will be able to compare their own position with Mr Gray to ascertain whether the outcome affects their own situation. For that reason, it is important that the Court hears all relevant evidence in relation to Mr Gray's situation.

[10] This morning, Ms Kennedy again confirmed that it was likely the plaintiffs would be prejudiced by the late application to amend the statement of defence and to call evidence from Mr Tarr unless they were given full opportunity to call evidence in rebuttal. The Court accepts that submission but it does not see it as sufficient reason to exclude the evidence or to grant an adjournment of the substantive hearing.

[11] For the reasons stated, leave is granted to the defendants to file the second amended statement of defence which is already before the Court. It will not be necessary to re-file or re-serve the document.

[12] Leave is also granted to the defendants to call the proposed evidence of Mr Tarr.

[13] Leave is reserved to the plaintiffs, if necessary, to seek an extension of time at the conclusion of the allocated hearing in which to call evidence in rebuttal to Mr Tarr's evidence.

[14] Costs are reserved.

A D Ford
Judge

Judgment signed at 2.15 pm on 22 February 2013