

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 13/07
ARC 115/05**

IN THE MATTER OF de novo challenge to a determination of the
 Employment Relations Authority

BETWEEN THE RED BEACH SCHOOL BOARD OF
 TRUSTEES
 First Plaintiff

AND THE ATTORNEY-GENERAL IN
 RESPECT OF THE SECRETARY FOR
 EDUCATION
 Second Plaintiff

AND THE NEW ZEALAND EDUCATION
 INSTITUTE (INC)
 Defendant

Hearing: 26, 27 and 29 June 2006
 (Heard at Auckland)

Appearances: Christine Chilwell, counsel for the first and second plaintiff
 Simon Mitchell and David Martin, counsel for the defendant

Judgment: 20 March 2007

JUDGMENT OF JUDGE A A COUCH

Introduction

[1] This case concerns the grading of teacher aides employed to work with special needs children at Red Beach School. These children have intellectual disabilities and/or physical disabilities which significantly affect their ability to learn.

[2] The teacher aides in question were covered by a collective employment agreement (“CEA”) which provided for 3 grades: A, B and C. These teacher aides

were graded A. They believe they should properly have been graded B. The primary issue, therefore, is whether they should have been graded A or B.

[3] This issue involves the interpretation and application of parts of the applicable collective employment agreement. It is therefore a dispute as that term is used in s129 of the Employment Relations Act 2000.

[4] The Employment Relations Authority investigated the matter and determined that all of the teacher aides should have been graded B. It also determined that the school's action in grading the teacher aides A amounted to an unjustifiable action to their disadvantage so that they had valid personal grievances. The school has challenged those two aspects of the Authority's determination and, in respect of those issues, the matter came before the Court by way of a hearing de novo.

[5] One of the teacher aides, Ms Pratt was regraded from A to B in early 2006. It remained in issue, however, whether she should have been graded A or B previously.

The parties

[6] The dispute was brought before the Employment Relations Authority by the defendant, the New Zealand Educational Institute Incorporated ("NZEI"). It did so in its capacity as one of the union parties to the CEA and as the union to which the teacher aides in question belonged. The NZEI is now the defendant in these proceedings before the Court.

[7] The Attorney-General in respect of the Secretary for Education is a party to these proceedings because the Secretary for Education is effectively the employer party to the CEA on behalf of the State Services Commission.

[8] The Red Beach School Board of Trustees is the employer of the teacher aides to whom these proceedings relate. In this capacity, it is bound by the CEA.

[9] Although entitled to be parties, the teacher aides have chosen not to be. They are content that the NZEI will properly advance and protect their interests. As at the time of the hearing of this matter, six of the special needs teacher aides employed at Red Beach School were members of the NZEI and were therefore covered by the CEA. They were Patricia Pratt, Janet Maguiness, Lynette McFarlane, Leonie Behnke, Leanne Ward and Linda Sparks. I was told that the other 2 special needs teacher aides were not members of the NZEI but I was not informed whether or not

they were members of the other union party to the CEA. It is therefore uncertain whether they were covered by the CEA.

The collective employment agreement

[10] The CEA which is the subject of the dispute was concluded in November 2005. Its term was from 21 October 2005 to 1 September 2006. The CEA effectively sets the terms of employment for employees in what are described as “*the administrative class*” and “*the associate class*”. It was common ground that teacher aide positions fall within the associate class.

[11] Clause 3.3 of the CEA deals with the operation of grades for the associate and administrative classes. It includes:

3.3.1 Grading

Every position shall be classified as either administrative or associate and then graded by the employer according to the level of skill, qualifications, relevant experience and responsibility which are required according to the definitions set out in 3.4.1, 3.4.2, 3.4.3, 3.6.1, 3.6.2 and 3.6.3.

Any employee performing a mix of similar duties across two or more grades within one class shall be placed in the grade which reflects the substantive part of the job.

Any employee employed for two or more distinct positions shall be placed in the appropriate grade for each position.

...

[12] Clause 3.6 of the CEA defines the grades for the associate class. It provides:

3.6 Associate Class

An associate position primarily involves working either directly or indirectly with teachers and students to support the teaching and learning outcomes of students.

3.6.1 Grade A

(a) *The position is closely supervised. It involves duties and tasks which are specified and clear and are carried out in accordance with well defined procedures.*

(b) *Some examples of the duties required within this grade are:*

- *prepare and/or maintain resources;*
- *support teaching programmes and student learning;*
- *assist with routine needs of students.*

3.6.2 Grade B

(a) *The position involves a range of duties for which advanced knowledge, skills and experience are required. The position is likely to involve periods without supervision or may be sole charge.*

- (b) *Some examples of the duties or level of duties required within this grade are:*
- *support and contribution to teaching programmes and curriculum deliver, including work with students either individually or in groups which assists their learning;*
 - *contributing to and maintaining healthcare programmes for students;*
 - *management of equipment and resources.*

3.6.3 Grade C

- (a) *The position involves a high level of responsibility and specialist knowledge. It will include management and/or administrative and/or financial responsibilities. Where the position does not involve supervision of staff it will involve management of specialist equipment and resources which make a significant contribution to the delivery of the curriculum.*
- (b) *Some examples of duties or levels of duties required for this grade are:*
- *management of systems and/or specialist equipment and resources;*
 - *management of healthcare programmes.*

Issues

[13] The issues were succinctly summarised by Ms Chilwell in her opening submissions:

- (a) Were all the teacher aides correctly graded?
- (b) If they were not all correctly graded, were some correctly graded?
- (c) If some or all were incorrectly graded, did that constitute an unjustified action to their disadvantage?

Evidence

[14] I was provided with extensive and detailed evidence by both parties. For the plaintiff, evidence was given principally by two witnesses; Ms Tait who was the principal of Red Beach School and Ms Taute who was the head teacher of the special needs unit at Red Beach School. Ms Taute's evidence included material in reply to the evidence given by the teacher aides. In addition to those witnesses who appeared in person and who were cross-examined, I also received by consent on behalf of the plaintiff the briefs of evidence from Mr Le Marquand and Ms Zubcic, both of whom are principals of special schools at which teacher aides are employed to work with special needs children. On a similar basis, I was provided with briefs of evidence

from Mr Davies and Mr Kimble who were engaged in the negotiation of the CEA and its predecessors.

[15] On behalf of the defendant, I heard evidence from 4 of the teacher aides; Ms Behnke, Ms Maguiness, Ms Sparks and Ms Pratt. They all appeared in person and were cross-examined. Further briefs of evidence were submitted by consent from Mr Barratt, a principal of a school at which numerous teacher aides are employed, and from Ms Whibley and Mr Robson who were involved in the negotiation of the CEA and its predecessors on behalf of the defendant.

[16] This evidence fell into four broad categories:

- (a) The arrangements which exist for education of special needs children in New Zealand and the nature of the particular facilities at Red Beach School.
- (b) The pattern of activities of teachers and teacher aides involved with special needs children at Red Beach School.
- (c) The particular work done by each of the 4 teacher aides who gave evidence.
- (d) The history of the relevant provisions of the CEA and communications between the parties surrounding its negotiation.

Facilities and resources

[17] Special needs children are those with disabilities which significantly affect their ability to learn or the resources required to teach them. They are divided into two categories; those with “*very high needs*” and those with “*high needs*”. Children with very high needs are those who have significant educational needs that arise from either extreme or severe difficulty with learning, hearing, vision, mobility, language use, or social communication. Children who have moderate to high difficulty with learning combined with difficulty with any other one of these factors are regarded as high needs children.

[18] The Ministry of Education provides additional funding for the education of special needs children. This funding is used to purchase additional resources required to educate the child including teacher aide support. In addition, schools are

allocated additional teacher time for each special needs child. This is at the rate of 0.2 full time equivalent for a very high needs child and 0.1 full time equivalent for a high needs child.

[19] Red Beach School is located on the Hibiscus Coast, north of Auckland. It has a role of approximately 600 pupils in years 1 to 6. Attached to the school and forming part of it is a special needs education facility called the Motuora Unit. In 2006, there were 11 special needs children in the Motuora Unit. Four were classified as high needs and 7 as very high needs.

[20] The Motuora Unit itself comprises 9 rooms located close to the rest of the school. It has 2 classrooms, a sensory room, a quiet work room, an office, 2 bathrooms, a room for changing nappies and a computer room. The unit as a whole is wheel chair accessible and otherwise designed to meet the requirements of the special needs children.

[21] The special resources available to the school in 2006 for these special needs children included 1.9 full time equivalent teachers. Ms Taute was employed full time. Ms Bateman was employed on a 0.9 full time equivalent basis. Both Ms Taute and Ms Bateman devoted the whole of their time to the education of the special needs children. In addition to the teachers, the school employed 8 teacher aides to work with the special needs children. Of those, 6 were the persons named in paragraph [9].

[22] In addition to these staff who work solely at Red Beach School, services are provided at the school for special needs children from time to time by specialists such as physiotherapists, occupational therapists and speech language therapists. Other health professionals and parents also have significant input.

[23] There is an excellent working relationship between all of the people contributing to the education of the special needs children at Red Beach School. In particular, it was clear to me from the evidence that there is a mutually respectful, cooperative and supportive relationship between the teachers and the teacher aides. It was equally apparent that these people display an admirable level of commitment to caring for and educating the special needs children. All of the teacher aides who gave evidence said that they greatly enjoyed their work.

The special needs children at Red Beach School

[24] I was given a great deal of evidence about many of the special needs children at Red Beach School, including the particular nature of their disabilities, their behavioural issues and the treatment and care regimes they required. In reaching my decision, I have had careful regard to all of that evidence but, in the interests of maintaining the privacy and dignity of the children and their families, I do not record it in detail in this judgment. I will, however, refer to some characteristics of particular children when I discuss the application of the CEA to the work done by the teacher aides in working with those children.

[25] The nature of the disabilities experienced by the special needs children at the Red Beach School varied considerably. All of the very high needs children had one or more physical disabilities in addition to significant intellectual impairment. All were unable to speak and were incontinent, requiring regular toileting and nappy changing. Two had very little if any ability to move and were largely unresponsive to other people. Those with mobility had challenging behavioural issues. All required almost constant attention to keep them safe. The level at which these children operated varied between that of a 3 month old baby and that of a 3 year old child.

[26] In most cases, the high needs children at Red Beach School also experienced multiple disabilities and behavioural problems. Common issues with these children included a short attention span and obsessive or compulsive personality traits.

[27] All of the special needs children at Red Beach School had physiotherapy programmes which required particular exercises to be done with them during each day. For some children, this involved sessions devoted to physiotherapy. For others, it involved manipulation and guidance throughout the day in the course of other activities.

Pattern of activities

[28] The education of each special needs child at Red Beach School was conducted according to an individual plan. For those children under 5 years of age, this was known as an individual development plan (“IDP”). For those of school age, it was known as an individual education plan (“IEP”).

[29] Each IEP recorded the circumstances and special needs of the child and established long term educational aims. It then set out in considerable detail the specific learning objectives for the child under a series of headings. In an example provided to the Court, which related to a high needs child, the headings were behaviour, communication, self care/personal independence, maths, reading, writing, fitness, computer and inclusion opportunities.

[30] An example of a specific behaviour learning objective for this child was “*to raise hand to speak*”. An example of a maths objective was “*to order numbers to 20*”. For each specific learning objective, the IEP recorded who was to have responsibility for its achievement and specific resources, methods, activities and strategies which might be employed to achieve it. An example of a communication objective for this child was “*to be able to follow one and two step directions*”. This was recorded as the responsibility of the “*teacher/aide*”. Resources, methods, activity and strategies suggested were “*present tasks in small one or two step increments; use sequence pictures for oral discussion*”. An example of a maths objective was “*to instantly recognise without counting patterns to 5 and with 5 including finger patterns*”. Again, this was recorded as the responsibility of the “*teacher/aide*” with the method being “*daily inclusion in whole class teaching and group teaching sessions in mainstream*”.

[31] Although I was given no specific examples of IDPs, I infer from what was said about them that they were similar in outline to IEPs but that they focused more on personal living skills such as behaviour and communication rather than on academic skills such as maths, reading and writing. I also gained the impression that the only pre-school special needs children at Red Beach School were in the very high needs category for whom any specific learning objectives were necessarily at a basic level.

[32] IDPs and IEPs were prepared for each child twice a year following a meeting held to discuss the particular child’s needs and progress. Those involved in this meeting included the 2 teachers and the teacher aides who worked specifically with that child. Others involved in the meeting might also have included parents, physiotherapists, occupational therapists and other professionals involved with the child. There was some difference in the evidence about the extent and importance of the input into the IEPs by those attending the meeting and by teacher aides in

particular. I am left with no doubt, however, that teacher aides played a significant role in this process. This was effectively acknowledged by Ms Taute on behalf of the plaintiff when, in paragraph 3.33 of her brief of evidence in reply, she said of the IEP meeting process:

... We listen to our aides and value their input and feedback. However, Jo [Bateman] and I discuss the problem with each other, the principal, deputy principal, parents and any specialists involved, in order to come up with a solution or programme. It is a team effort guided by the teachers. ...

[33] I will refer to the extent of the contribution by the teacher aides to that “*team effort*” later in this judgment in my discussion of the application of the relevant provisions of the CEA.

[34] The daily and weekly routine for high needs children and very high needs children were distinctly different. In the mornings, the high needs children generally joined mainstream classes at the school from 9am to 10.30am and 11.30am to noon. During that time, they participated to the extent to which they were able in the activities of the class such as reading, writing and mathematics.

[35] Each special needs child was accompanied in the mainstream class by a teacher aide who worked with him or her throughout the time they were there. To assist the teacher aides in this work, they were provided with weekly “*goal sheets*”. These were prepared for each child by Ms Bateman and given to the teacher aide first thing on Monday morning. The goal sheets set out specific learning goals for the child in reading, writing and maths. They also identified other points of focus such as a colour of the week, a letter of the week and words for spelling. In addition to these specific goals, the sheets which were produced in evidence contained notes and reminders from Ms Bateman to the teacher aide about techniques and resources which might be used to work towards the goals. The goal sheets also contained space for comment by the teacher aide on how the child had performed.

[36] When in a mainstream class with a special needs child, the teacher aides were expected to involve the child in the work being done by the rest of the class as far as possible. Frequently, the special needs child would be unable to participate at the level of other children and sometimes unable to participate at all. It was the role of the teacher aide to assess the extent to which the child could participate in the class

activity and modify the activity to suit the ability of the child. This might involve reducing the amount of work the child does, simplifying the work or doing part of it for the child. Where the child was unable to do the class work, the teacher aide provided the child with alternative work from a “*basket*” of activities prepared by Ms Bateman. In that case, the teacher aide would chose the alternative activity to be done and work through it with the child.

[37] When in mainstream classes, the principal role of the teacher aide was to assist the child to learn reading, writing and mathematics. At the same time, the teacher aide was assisting the child to develop behavioural and communication skills and to interact appropriately with other children. An important part of this role was responsibility for ensuring that the special needs child did not disrupt the learning of the other children in the class.

[38] The role of the mainstream class teacher in this process was not entirely clear from the evidence. Ms Tait and Ms Taute suggested that the mainstream teacher played a significant role in supervising and directing the work done by the special needs child and the work of the teacher aide in assisting that child. They accepted, however, that the mainstream teacher was not provided with the weekly goal sheets for the special needs child and that, in practice, the decisions about the work done by the special needs child were made almost entirely by the teacher aide rather than the classroom teacher.

[39] During each week, or at the end of it, the teacher aides provided feedback to Ms Bateman about the progress of the special needs child in the mainstream class. Sometimes this was in the form of notes made on the goal sheets. Apparently more often, it was by way of informal discussion. This feedback from the teacher aides assisted Ms Bateman to set appropriate learning goals for each child for the following week.

[40] Ms Taute and Ms Bateman observed the special needs children in mainstream classes very infrequently. The teachers were therefore reliant to a substantial degree on the feedback from the teacher aides to inform them about the performance and behaviour of the special needs children in mainstream classes.

[41] In the course of the morning, the high needs children who were in mainstream classes returned to the Motuora unit for their morning break. This lasted

for about 40 minutes. At noon, they again returned to the unit for lunch. This took about an hour. During these times, the teacher aides shared responsibility for the special needs children with each other and with the teachers. They spent part of the time with the children assisting them to eat and drink and attending to other needs such as toileting and nappy changing. They also had some time to themselves to have their own morning tea and lunch.

[42] In the afternoons, the high needs children were based in the Motuora unit. During this time, they were involved in a range of activities. Some of these were specific learning activities such as using touch screen computers. Other activities include art, music and cooking. For some children it was also the time when they had intensive physiotherapy sessions. Whatever the activities were, the teacher aides continued to work closely with the children.

[43] One afternoon each week, the special needs children went swimming. Both the teachers and the teacher aides assisted the children with this. One morning each week, the special needs children went horse riding with the organisation Riding for the Disabled. Although the children were taken to and from that activity by the teachers and the teacher aides, staff of Riding for the Disabled actually assisted the children during the horse riding.

[44] Throughout the time they were with the high needs children, the teacher aides worked with them on specific learning objectives relating to non-academic focus areas such as behaviour, communication and self care/personal independence. Examples of such learning objectives from the particular IEP I referred to earlier were “*to stop pushing wheelchair tray off*” and “*to control dribbling and wipe chin independently with prompt*”. The teacher aide who worked with this child would assist him to learn these and other appropriate behaviours at every opportunity throughout the day.

[45] The routine for very high needs children was somewhat different. After they arrived at the school in the morning, they frequently required toileting and other attention to their physical needs. The first activity for the day was known as “*circle time*”. This was led by a teacher and involved conversation, singing and reading a story. The teacher aides worked with the individual children through this time to

help them participate as much as they were able and to help them learn as much as possible from the activities.

[46] After circle time, the children were involved in a range of different programmes throughout the week. Evidence was given about examples of two of these programmes called “*Take Note*” and “*Takpac*”. *Take Note* was aimed at improving the children’s motor skills through observing and copying the movements of adults. The teacher aides encouraged the children to focus on the examples and then assisted them by make the movements. *Takpac* was a relaxation programme involving quiet music and gentle sensory input. The teacher aides worked with the children, talking about what was happening and helping them to recognise different sensations.

[47] Later in the morning, the teacher aides carried out physiotherapy programmes with each of the children. In some cases, these were quite extensive.

[48] In the afternoon, the very high needs children were involved in similar activities to those of the high needs children including music, art and cooking. To the extent they were able, they also used the touch screen computers. Another afternoon activity was what are known as “*buddy*” classes where children from mainstream classes came into the Motuora unit to play and interact with the special needs children. Many of these activities were led by a teacher and the role of the teacher aides was to assist the children to take part in the activity and to maximise the benefit they got from it.

[49] The very high needs children were also involved in swimming and horse riding. In the swimming sessions, the role of the teacher aide was to physically help the child participate and to make the experience as meaningful as possible for the child. They also played a key role in keeping the child safe in the water.

[50] Throughout the day, the teacher aides attended to the toileting, nappy changing and other physical needs of the children. An important aspect of this was assisting the children to eat. Most of the children were unable to feed themselves and many did not chew or swallow their food properly. The teacher aides worked with these children at meal times teaching them how to handle food and to eat it.

[51] Many of the special needs children were prone to having seizures. Protocols were established at the school for handling such events. Although major events

would be handled by a teacher, the teacher aides handled the minor events. They also had to be able to handle the major events if a teacher was unavailable or until a teacher arrived.

[52] Particular children also had other medical conditions which required the teacher aides to be vigilant and able to conduct tests or administer medication.

[53] In addition to their work with the special needs children, each of the teacher aides attached to the Motuora Unit looked after a room in the unit, such as the changing room or the art room. This involved reporting any need for supplies to Ms Taute and cleaning the room once a term.

Work of particular teacher aides

[54] As recorded earlier, I received detailed evidence from 4 of the teacher aides at Red Beach School telling me of their individual circumstances and the work they did. In some cases, this included not only the work they were then doing with a particular special needs child but also the work they had done in the past with other special needs children at the school. This specific evidence assisted me greatly in gaining an understanding of the nature of their positions. As will be apparent from the reasons I give for my decision, it is not necessary for me to consider the roles of the teacher aides individually. It is therefore not necessary for me to record in detail the evidence given by the teacher aides about the specific work they did from day to day.

History of the CEA

[55] I was provided by consent with the briefs of 4 witnesses who were involved in the negotiation of the CEA or its predecessors. While that evidence put the CEA into an historical context, it did not assist me in interpreting the grading provisions of the CEA which are at the heart of the dispute. The words of the provisions in question are sufficiently clear that they can be interpreted without resort to extraneous material. In any event, the history of the document and the circumstances surrounding its negotiation do not suggest that the provisions which are in dispute should be given an interpretation other than that consistent with the ordinary meaning of the words used.

Evidence regarding other schools

[56] For the plaintiff, the principals of 2 other schools with special needs children gave evidence of the practice of grading at their schools. The effect of their evidence was to offer opinions on the issue of interpretation which is at the heart of the dispute in this matter. As such, it was evidence which did not assist me.

[57] For the defendant, I was also provided with evidence from the principal of another school regarding the type of work done by a grade A teacher aide not involved with special needs children. This evidence also assisted me little if at all. It is apparent from the CEA itself that the grading provisions relating to the associate class are intended to cover persons carrying out a wide number of tasks associated with the teaching of children and that working with special needs children as a teacher aide is but one of those roles.

Discussion and interpretation

[58] Clause 3.3.1 of the CEA requires grading to be carried out “*according to the level of skill, qualifications, relevant experience and responsibility which are required according to the definitions set out in... 3.6.1, 3.6.2 and 3.6.3*”. The first point which must be recognised and which is apparent from both clause 3.3.1 and clause 3.6 is that the relevant skill, qualifications, experience and responsibility are not those actually possessed by the employee in the position but rather those required for the position itself. In the course of the hearing, a job description for the position of special needs teacher aide at Red Beach School was produced but both the author, Ms Taute, and Ms Tait distanced themselves from aspects of it and it was eventually relied on by neither the plaintiff nor the defendant.

[59] In their evidence, both Ms Tait and Ms Taute sought to draw a distinction between what the teacher aides did in the course of their work and what was “*required*” of them. In particular, they suggested that certain knowledge and skills applied by teacher aides in the course of their work were not required by the school and therefore should not be taken into account in grading the positions. That was an unrealistic position. In the course of submissions, Mr Mitchell advanced the proposition that the personal attributes to be taken into account in grading the position are those reasonably required to carry out the duties of the position. On

behalf of the plaintiff, Ms Chilwell very properly accepted that proposition. I also agree with it and adopt it for the purposes of this decision.

[60] This approach is consistent with the wording of the relevant provisions of the CEA. Clause 3.3.1 requires that grading shall be carried out according to the level of skill, qualifications, relevant experience and responsibility which “*are required according to the definitions set out in clause 3.6.1, 3.6.2, 3.6.3*”. Those definitions are framed in terms of what the position “*involves*” rather than what may be required by the employer. The definitions therefore reflect what is required for the day to day performance of the job rather than what the employer anticipates will be required or chooses to stipulate for.

[61] In his submissions, Mr Mitchell made the preliminary point that the definitions in clause 3.6 of the CEA are intended to cover a wide range of positions and that any interpretation needs to allow for positions to fall within all 3 grades, A, B and C. I accept that submission.

[62] A further broad submission made by Mr Mitchell was that every position which falls within the opening words of clause 3.6 must also fall within one of the grades A to C. If the agreement as a whole is to have integrity, that must be so and I accept that submission.

[63] It was common ground that each of the positions occupied by the special needs teacher aides at Red Beach School is “*an associate position*” within the meaning of the opening words to clause 3.6 of the CEA. That was undoubtedly confirmed by the evidence. They work “*directly... with teachers and students to support the teaching and learning outcomes of students*”. It was also common ground that these positions did not fall within the definition of grade C in clause 3.6.3. Again, that position was supported by the evidence.

[64] It follows that the positions must fall either into grade A or B. In the event that the duties of the position are partly within each of the two grades, the matter is to be dealt with in accordance with the second paragraph of clause 3.3.1 which requires the employee to be “*placed in the grade which reflects the substantive part of the job*”.

[65] The definitions of grade A and B in clause 3.6.1 and 3.6.2 have a similar structure. Each contains an initial paragraph (a) setting out the definition and a subsequent paragraph (b) giving examples of the duties required within that grade. The operative part of each clause must be paragraph (a) and it is the words of this paragraph which must be interpreted and applied in each case. To the extent that the words of paragraph (a) are capable of a range of meanings, however, the examples in paragraph (b) provide a powerful aid to the construction of paragraph (a).

[66] Mr Mitchell submitted that it was not necessary for the duties of a position to fall within the scope of the examples in paragraph (b) of a grade for that position to be within the definition in paragraph (a) of that grade. That is undoubtedly so and I accept that submission. If, however, the duties of a position are within the scope of the examples in (b), that is a very strong indication that the definition in paragraph (a) should be construed to include that position.

[67] The definition of grade A in paragraph (a) of clause 3.6.1 contains 3 key elements.

- (a) The position must be “*closely supervised*”;
- (b) The position must involve duties and tasks which are “*specified and clear*”;
- (c) The duties and tasks of the position must be carried out in accordance with “*well defined procedures*”.

[68] All three of these requirements must be satisfied if a position is to fall within the definition of grade A. This follows from the mandatory nature of the wording used.

[69] Counsel were agreed that the requirement in the definition that the position be “*closely supervised*” related to the work rather than the person performing the work. As to the meaning of the term in that context, however, their submissions differed. Mr Mitchell submitted that, while “*close*” can have a meaning of physical proximity, a more appropriate meaning in the context of clause 3.6.1 was “*careful*”

and thorough". He referred me to the definition of "*close*" in the Concise Oxford Dictionary which includes:

(Of observation or examination) done in a careful and thorough way.

[70] Ms Chilwell accepted that this was a possible relevant meaning of "*close*" but submitted that an acceptable alternative meaning was that of physical proximity or, as she put it, "*being nearby, or adjacent*".

[71] I agree with counsel that what is to be "*closely supervised*" is the work not the person carrying out that work. In practical terms, however, it will often be necessary to supervise the person in order to supervise the work that person is doing. Similar considerations apply to the construction to be placed on the term "*closely supervised*". I accept Mr Mitchell's submission that the essential meaning of the expression "*closely supervised*" in this context is that the work must be supervised "*in a careful and thorough way*". It is very likely that such supervision will involve the supervisor being "*nearby or adjacent*" as Ms Chilwell submitted but I do not accept that mere physical proximity will satisfy the requirement that the position be "*closely supervised*". If a supervisor is usually in close proximity to the person carrying out the work, that may be evidence suggesting that the work is being closely supervised but it does not of itself meet the requirement.

[72] The second requirement of the definition of grade A is that the position involves duties and tasks which are "*specified and clear*". Construction of this expression is inevitably a matter of degree. How well specified and how clear must the duties and tasks be? The definition of the word "*specified*" in the Oxford English Dictionary (2nd ed 1989) is:

That is or has been definitely or specifically mentioned, determined, fixed, or settled.

[73] Further assistance is available from the definition in the same dictionary of "*specify*" which is:

To mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail. ...

[74] The relevant definition of the word "*clear*" from the same dictionary is:

Of words, statements, explanations, meaning: Easy to understand, fully intelligible, free from obscurity of sense, perspicuous.

[75] Having regard to these definitions and to everyday usage of these words, I find that the term “*specified and clear*” requires that the tasks and duties of a grade A position be defined in detail, be free from ambiguity and give relatively little scope for discretion. This construction is consistent with the other requirement that the work is carried out in accordance with “*well defined*” procedures. It is also consistent with the fact that the definition includes no particular requirement for knowledge, skills and experience.

[76] The third requirement of the definition for a grade A position is that the duties and tasks it involves must be carried out in accordance with “*well defined procedures*”. The clear implication of this expression in the context of the definition as a whole is that the employer must prescribe in detail not only the work to be done but how that work is to be done. Just as I have found that the definition requires there to be no ambiguity and little scope for discretion in the nature of the work done, so it also requires that there be certainty and little scope for discretion in the manner in which the work is to be done.

[77] The definition of grade B in clause 3.6.2 of the CEA has 3 elements:

- (a) The position must involve duties for which “*advanced knowledge, skills and experience*” are required;
- (b) The position is “*likely*” to involved “*periods without supervision*”;
- (c) The position “*may*” be “*sole charge*”.

[78] It is clear from the wording of this definition that there is only one essential requirement of the definition. It is that the position involves duties for which “*advanced knowledge, skills and experience*” are required. The key to the construction of this expression is the word “*advanced*”.

[79] Counsel were agreed in their submissions that the meaning of the term “*advanced*” in this context must mean by comparison with the requirements for grade A positions. While I accept that submission, it involves some difficulty because the definition of grade A does not require any particular level of knowledge,

skills and experience. It may properly be inferred, however, from the construction I have placed on the requirements of the definition that little if any knowledge, skills or experience are required over and above a basic education and everyday life skills.

[80] On this basis, I find that the position will require “*advanced*” knowledge, skills and experience if the level of knowledge, skills and experience necessary to carry out the duties is significantly greater than that possessed by a person with a basic education and everyday life skills. The required knowledge, skills and experience need not be the result of specific training and need not be evidenced by any formal qualification. In this regard, I specifically reject the implication in the evidence of the plaintiff’s witnesses that a teacher aide can only be graded B following extensive or high level training.

[81] I note that this construction is consistent with a relevant definition of the word “*advanced*” in the Oxford English Dictionary:

Of study: on a higher level than the elementary; ...

[82] The second aspect of the definition of grade B is that the position is “*likely*” to involve “*periods without supervision*”. This element of the definition is clearly in contrast with the requirement of the definition of grade A that the position be “*closely supervised*”. It suggests that grade B positions will usually involve a higher degree of responsibility and discretion than grade A positions. This is consistent with the requirement for a higher degree of knowledge, skills and experience than is required for a grade A position. The use of the word “*likely*”, however, does allow for the possibility that a position may be at a grade B level notwithstanding that it is constantly supervised. This confirms that the key aspect of the definition as a whole is the requirement for “*advanced knowledge, skills and experience*” rather than the degree of supervision of the work.

[83] The third component of the definition that the position “*may be sole charge*” can be interpreted in a similar way. If the position does involve periods without supervision or is sole charge, that will tend to indicate that the duties of the position require advanced knowledge, skills and experience but is not sufficient on its own to establish that essential requirement.

Application to the facts

[84] In applying the definitions to any particular position, the examples set out in paragraph (b) of each definition are of considerable assistance. As noted earlier, if the duties of the position fall within the scope of an example for a particular grade, it is very likely that the position will be within the scope of the definition of that grade. In approaching the matter this way, however, it must be recognised that some duties will be included in the examples given for more than one grade. For example, a position which required the management of specialist equipment and resources would be within the scope of the example given for grade C as well as the example given for grade B. Similarly, duties which involved support and contribution to teaching programmes and curriculum delivery would fall within the scope of the detailed example given for grade B and the broader example given for grade A which is to “*support teaching programmes and student learning*”. In such cases, the proper approach must be to regard this as an indication that the position meets the definition of the higher grade.

[85] Turning to the facts of this case, the examples given for grades A and B provide a strong indication that the appropriate grading for the positions of all of the teacher aides in question should have been grade B. That is so for a number of reasons.

[86] The first example given for grade B is “*support and contribution to teaching programmes and curriculum delivery, including work with students either individually or in groups which assists their learning*”. The teaching programmes for the special needs children at Red Beach School were largely contained in the IDPs and IEPs for each child. In the case of high needs children, this was supplemented by the weekly goal sheets. There was no evidence about the curriculum applicable to special needs children. In particular, I was not told whether the curriculum applicable to children of a particular age generally applies also to special needs children of that age. I infer that the documents I have referred to setting out the teaching programmes for each child were directed to delivery of the appropriate curriculum.

[87] There was overwhelming evidence that each of the teacher aides contributed to achieving the specific learning objectives for the special needs child or children with whom she worked. In the case of the high needs children, the teacher aides also contributed to achieving the learning goals set out in the weekly goal sheets. They contributed to these objectives and goals through their day to day work with the children. I am left in no doubt that, without the contribution of the teacher aides, the rate of learning and achievement by the special needs children would have been very much reduced.

[88] The case for the plaintiff, advanced in the evidence of Ms Tait and Ms Taute and in the submissions of Ms Chilwell, was that the work done by the teacher aides with the special needs children “*supported*” the teaching programmes and student learning and therefore fell within the scope of the example for grade A. On that basis, Ms Chilwell submitted that the positions of the teacher aides had properly been assessed as grade A. In an effort to persuade me that the work of the teacher aides did not also fall within the scope of the example to grade B, Ms Chilwell submitted that “*contribution*” to the teaching programmes and curriculum delivery required “*adding to or being partly responsible for programmes/curriculum delivery*”.

[89] That construction relies on too narrow a meaning of the term “*contribution*” and I reject the submission. In any event, I find as a fact that the teacher aides were regarded as partly responsible for the implementation of the teaching programme. It is specifically recorded in the IEPs that responsibility for the majority of the specific learning objectives lay with “*teacher/aide*”. I find also that the teacher aides discharged that responsibility through the extensive work they did with the special needs children in the absence of a teacher. This was effectively acknowledged by Ms Taute who, in answer to questions in cross examination, agreed that the teacher aides played a crucial part in the delivery of the academic learning programme to the special needs children and that the school would not be able to deliver the learning programme to those children without the teacher aides.

[90] The teacher aides contributed to the teaching programmes and curriculum delivery not only in the sense of assisting the special needs children to achieve the specific learning objectives set for them but also in the sense of providing valuable

input to the process of setting those learning objectives. As Ms Taute acknowledged in the passage from her evidence which I referred to earlier, the process of developing the IEPs was “*a team effort guided by the teachers*”. It was common ground that the teacher aides were important members of that “*team*” and, as Ms Taute also said in that same passage of her evidence “*we listen to our aides and value their input and feedback*”. In this regard, I also find as a fact that the teacher aides working with special needs children in mainstream classes contributed significantly to the learning goals set by Ms Bateman in the weekly goal sheets. The teacher aides provided essential feedback to her about the progress and behaviour of the children which she used to assist her in preparing subsequent goal sheets.

[91] It is notable that the first example in paragraph (b) for grade B regards the concept of “*support and contribution to teaching programmes and curriculum delivery*” as “*including work with students either individually or in groups which assists their learning*”. There can be no doubt that the teacher aides worked with children both individually and in groups. Indeed, this comprised the large majority of their work. It was also entirely clear to me from the evidence that this work “*assists*” the “*learning*” of the special needs children. In this context, the term “*learning*” should be given the same broad meaning as it was given in the term “*specific learning objective*” in the IEPs. Those learning objectives extended not only to what might be called academic subjects such as reading, writing and mathematics but also to behaviour, communication, self care/personal independence, fitness, computer skills and inclusion opportunities. To the extent that the teacher aides assisted the special needs children to achieve any of the specific learning objectives in the IEPs or the IDPs, I find that they assisted the learning of the children as that term is used in the example for grade B. For the reasons I have set out earlier, I find that all of the teacher aides did substantially assist the learning of the special needs children in that sense.

[92] The second example given for grade B is “*contributing to and maintaining healthcare programmes for students*”. It was common ground that the teacher aides devoted a significant part of their working time to assisting the special needs children with toileting, feeding, physiotherapy and occupational therapy programmes. The case for the plaintiff was that this work fell within the scope of the

example to grade A which is to “*assist with routine needs of students*”. In her submissions, Ms Chilwell attempted to distance this work of the teacher aides from the example in grade B by suggesting that specialised training and/or the use of specialist equipment was required to come within the scope of that example.

[93] I reject that submission. There can be no question that the physiotherapy programmes and occupational therapy programmes developed for each of the special needs children formed part of their “*healthcare programme*”. I find that toileting, nappy changing and assisting with feeding were also part of their healthcare programme in the sense that, had this work not been done, the health of the children would have been diminished or placed at risk. The same can properly be said for the work of the teacher aides in keeping such vulnerable children safe by preventing them from falling or hurting themselves or each other.

[94] On the evidence, there can be no doubt that the teacher aides “*contributed to and maintained*” these healthcare programmes as part of their work. It was they who conducted the physiotherapy, provided aspects of the occupational therapy, took the children to the toilet, changed their nappies, actively assisted with their feeding and had immediate responsibility for ensuring the children did not come to harm.

[95] On this basis, I find that the evidence very clearly establishes that the work done by the teacher aides falls within the scope of two of the examples for grade B. Given that clause 3.6.2 (b) describes these examples as being “*of the duties or level of duties required within this grade*”, it follows that the parties to the CEA must have intended that such duties required the “*advanced knowledge, skills and experience*” which forms part of the definition in paragraph (a). On this basis, it follows that the positions of the teacher aides ought properly to have been graded B.

[96] The evidence supports the same conclusion without reference to the examples. Applying the construction of the definition of grade B which I have set out earlier, I find that the work done by the teacher aides required knowledge, skills and experience significantly greater than those possessed by a person with basic education and everyday life skills. A consistent line of cross-examination of defendant’s witnesses was the suggestion that certain aspects of the work the teacher aides did with the special needs children was similar to what they might do with their

own children or that the decisions that they made in the course of their work were a matter of commonsense. In many cases, the witnesses agreed with these suggestions. On the basis of such evidence, Ms Chilwell submitted that the work done by the teacher aides did not require advanced knowledge, skills and experience. It was implicit in this submission that Ms Chilwell was suggesting that knowledge, skills and experience gained through extensive life experience, including parenthood, cannot constitute “*advanced knowledge, skills and experience*” for the purposes of the definition of grade B.

[97] I do not accept that submission. Based on the detailed evidence by the teacher aides of the challenges they faced in their work and of the skills, knowledge and experience they actually employed to meet those challenges and successfully carry out their work, I find that the level of knowledge, skills and experience required for their positions was very much greater than that possessed by most ordinary members of the community. This was graphically summarised by Ms Sparks in her oral evidence. In answer to questions in cross-examination, she described having been a “*parent help*” in year one classes attended by her own children. In re-examination, she was asked how she thought an experienced parent help from a main stream year one class would react if they were put into her job one morning. Ms Sparks replied:

I think they'd probably go and sit in the corner with their back to everybody and panic. Definitely.

[98] The conclusion that the positions of the teacher aides should have been graded B is also supported by the degree of supervision of them. It was clear from the evidence that the work of the teacher aides was unsupervised for extended periods. In her evidence, Ms Taute accepted that this was so for periods up to 30 minutes but I find that, in many cases, it was for significantly longer periods. This was particularly so in the case of teacher aides attending mainstream classes with high needs children. It was suggested on behalf of the plaintiff that the teacher aides were supervised at such times by the mainstream class teacher but, on the evidence, that suggestion was clearly unsustainable. A striking indicator of this was that the classroom teachers did not receive the weekly goal sheets for the special needs children who joined their mainstream classes. Without knowledge of the learning goals for that child, it would be effectively impossible for the mainstream teacher to

supervise the work of the teacher aide. In any event, the evidence was that the mainstream teachers left the teacher aides to their work and focussed on the rest of the children in the class. Teacher aides working with these high needs children were therefore unsupervised for periods of up to one and half hours.

[99] I find also that the teacher aides working with very high needs children were unsupervised for extended periods. The evidence was that, at times during the day, the 7 very high needs children were spread between 3 or 4 rooms in the Motuora unit and that the teachers often did not come into some of those rooms for half an hour or more.

[100] I find that the positions of all the teacher aides involved periods without supervision. This finding supports my conclusion that those positions should have been graded B. A further and obvious consequence of this finding is that the work of the teacher aides was not “*closely supervised*” as required by the definition for grade A. In addition to there being periods without supervision, I also find that the level of supervision of the teacher aides by the teachers was not “*careful and thorough*” as I have found is required to satisfy the requirement of the definition of grade A that the position be “*closely supervised*”.

[101] In reaching these conclusions about the level of supervision of the teacher aides by the teachers at the Motuora unit, I intend no criticism of those teachers. The nature of the positions held by the teacher aides and the quality of the staff employed in those positions was such that it was neither necessary nor appropriate for the teachers to supervise the work of the teacher aides constantly or closely.

[102] In the event that I found that some of the duties of the teacher aides’ positions should have been graded B, Ms Chilwell submitted that this did not reflect “*the substantive part of the job*” for the purposes of the second paragraph of clause 3.3.1. In support of this submission, she invited me to have particular regard to a schedule attached to the evidence of Ms Taute containing a detailed description of what she said was a typical day for a special needs teacher aide at Red Beach School in 2004. I have done so. I have also had regard to the evidence of Ms Taute in answer to questions in cross-examination and to the evidence of the teacher aides.

[103] I find that the large majority of the working time of the teacher aides involved duties which should properly have been graded B. Equally, I find that the

substantive part of the job done by the special needs teacher aides involved duties within the definition grade B. To the extent that the positions of the teacher aides required them to perform duties which were within the scope of the definition of grade A and not within the scope of the definition of grade B, they formed a small part of the job and were relatively incidental to it.

[104] In conclusion, I resolve the dispute in favour of the defendant insofar as it relates to the special needs teacher aides employed as Red Beach School. I find that the positions of all of those teacher aides covered by the CEA should have been graded B. This includes the position held by Ms Pratt prior to the beginning of 2006.

[105] It is important to recognise that, because this conclusion is based on an interpretation of the CEA, it can apply only to those teacher aides who are bound by the CEA or whose terms of employment are directly comparable. In paragraph [47] of its determination, the Authority purported to reach a conclusion about all of the teacher aides employed in the Motuora Unit. To the extent that any of those persons were not covered by the CEA or had terms of employment relating to grading which were directly comparable to those of the CEA, that conclusion cannot stand. For the avoidance of doubt, I set aside the conclusion of the Authority in its entirety and substitute the conclusion in paragraph [104] above.

Personal Grievances

[106] In its determination, the Authority included under the heading “*Did the respondent’s refusal in or about August 2004 to regrade the teacher aides amount to an unjustifiable disadvantage?*” the following paragraph:

*[48] The respondent has been unable to justify its decision to place the aides on Grade A. Remuneration is tied to grading so this action has clearly disadvantaged them. **Since there has been an unjustified action to their disadvantage the aides will have a personal grievance.** It is now over to them and their union to decide what if any further action they wish to take on this issue, although I suggest to the parties that mediation might be the next appropriate step.*

[107] The determination gives no indication that the Authority considered the significant jurisdictional issues associated with this conclusion. The first of these was that none of the teacher aides were parties to the proceedings. Thus, any

conclusions reached by the Authority about their personal rights were not binding on them or on the plaintiff with respect to them.

[108] The second and equally fundamental jurisdictional issue arises from s103(3) of the Employment Relations Act 2000:

(3) *In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of an employment agreement.*

[109] Before both the Authority and the Court, the position of Red Beach School was that the grading of the special needs teacher aides as Grade A was appropriate as a matter of interpretation and application of the CEA. On this basis, Ms Chilwell submitted that s103(3) precluded the conclusion reached by the Authority.

[110] Paragraph [48] of the determination of the Authority cannot stand and Mr Mitchell very properly conceded this. The issue then becomes whether it is appropriate for the Court to reach any conclusions on the same issues.

[111] Relying on s103(3), Ms Chilwell not only submitted that the Authority's conclusion should be set aside but also sought a declaration that the action of Red Beach School in grading the special needs teacher aides as Grade A did not constitute an unjustifiable action to their disadvantage and could not give rise to a personal grievance.

[112] There are two reasons why I decline to make such a declaration. The first is that the teacher aides in question are not parties to these proceedings either. It would be ineffective and therefore inappropriate to make a declaration purporting to affect their personal rights.

[113] Secondly, s103(3) only relates to actions of an employer deriving "solely" from the interpretation, application or operation of an employment agreement. Thus, if any of the teacher aides could establish by evidence that Red Beach School was motivated in its grading decisions by any other factor, there may be scope to pursue a personal grievance notwithstanding s103(3). I note in this regard that the correspondence between some of the teacher aides and the principal of the school in May 2003 is open to such an interpretation. I was provided, however, with only the bare correspondence and little or no evidence about other issues which would be the

focus of any personal grievance claims. It would be unjust to pre-judge or pre-empt such possible claims without the employees having had a proper opportunity to advance them.

[114] In conclusion on this issue, I set aside the conclusions reached by the Authority in paragraph [48] of its determination and observe only that it is up to the individual teacher aides whether they wish to pursue a personal grievance.

Conclusions

[115] In summary, I have reached the following conclusions:

- a) Those parts of the Authority's determination relating to grading of teacher aides and personal grievances are set aside.
- b) On a proper interpretation of the CEA, the six teacher aides named in paragraph [9] of this judgment were incorrectly graded A and should have been graded B.
- c) No declaration is made about the rights of the teacher aides to pursue personal grievances.

Consequences

[116] Although I have resolved the dispute in principle by deciding that the affected teacher aides should have been graded B rather than A, I was not provided with sufficient evidence to decide when that grading should have taken effect and what specific consequences, if any, should flow from that in terms of salary. It is to be hoped that the parties can agree on a resolution of those consequential issues but, if they are unable to do so, it may be that individual wage claims will need to be made. In that event, such proceedings will probably need to be commenced in the Authority. To the extent that the Court has jurisdiction to assist the parties further, however, leave is reserved to apply on 14 days notice.

Costs

[117] The amended statement of claim included a claim for costs but this was not addressed by counsel in their submissions. Given that these proceedings essentially comprised a dispute about the interpretation and application of key provisions of a

significant collective employment agreement, my preliminary view is that costs should lie where they fall. If the defendant wishes to seek costs, however, Mr Mitchell should file and serve a memorandum within 21 days of the date of this judgment. Ms Chilwell is then to have a further 14 days to file and serve a memorandum in reply.

AA Couch
Judge

Judgment signed at 9.15 am on Tuesday, 20 March 2007