

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 74
EMPC 116/2018**

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| IN THE MATTER OF | a proceeding under the Employment Relations Act 2000, the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960 |
| AND IN THE MATTER | of an objection to closing submissions and an application to call further evidence |
| BETWEEN | NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION INCORPORATED First Plaintiff |
| AND | LISA KIRSTEN HARGREAVES Second Plaintiff |
| AND | PAMELA SHERYL FOYLE Third Plaintiff |
| AND | LEANNE MARGUERITA DONOVAN Fourth Plaintiff |
| AND | DEBRA LEE ENO Fifth Plaintiff |
| AND | SECRETARY FOR EDUCATION First Defendant |
| AND | HAVELOCK NORTH HIGH SCHOOL Second Defendant |
| AND | TAURANGA GIRLS' COLLEGE Third Defendant |
| AND | THAMES HIGH SCHOOL Fourth Defendant |
| AND | TAITA COLLEGE Fifth Defendant |

Hearing: 19 March 2020
(Heard at Wellington)

Court: Chief Judge Christina Inglis
Judge Kerry Smith

Appearances: A Butler and S Hayman, counsel for plaintiffs
V Casey QC and L Jackson, counsel for defendants

Judgment: 27 May 2020

**INTERLOCUTORY JUDGMENT OF THE FULL COURT
(Objection to closing submissions and related application)**

[1] On the last day of the hearing, during Mr Butler’s closing submissions for the plaintiffs, Ms Casey QC objected to the case being advanced for them. Her objection was that the plaintiffs’ submissions invited the Court to adopt a new legal framework that would impose a reverse onus of proof on the defendants to their prejudice.

[2] The timing and nature of the objection meant it could not be dealt with immediately but necessitated further argument. An interlocutory hearing was scheduled but later vacated, at the request of counsel, who were content to rely on submissions they had filed. Despite counsels’ confidence in their submissions, it was necessary for the Court to convene a hearing to fully understand what orders were being sought and why. Regrettably that hearing could not take place for some time because of counsels’ commitments.

[3] Before explaining the objection, and the response to it, a brief description of the proceeding is needed.

The proceeding

[4] The New Zealand Post Primary Teachers’ Association (NZPPTA) is a registered union and is the professional association for secondary school teachers in New Zealand. The NZPPTA issued proceedings against the Secretary for Education

alleging that there had been discrimination against part-time teachers based on sex. At the same time the other plaintiffs sued the Boards of Trustees of secondary schools that employed them making the same claim.

[5] The proceeding is confined to the discrete issue of the way the Secondary Teachers Collective Agreement (STCA) deals with time during the school week when teachers are not to be scheduled to teach classes but can instead deal with other teaching-related tasks; referred to as timetabled non-contact time. Since 2002, the STCA has guaranteed full-time teachers one hour of timetabled non-contact time for every four hours of contact time.

[6] While full-time teachers are allocated timetabled non-contact time, the STCA does not provide a contractual entitlement to this non-contact time for any teacher employed for less than 0.48 of a full-time equivalent position. For part-time teachers employed for between 0.48 and 0.89 of a full-time equivalent position the employer is to endeavour to provide a pro rata allocation.

[7] At the heart of the litigation is the plaintiffs' claim that these differences between part-time and full-time teachers in the STCA gives rise to unlawful discrimination. In the proceeding the claim was that part-time teachers in secondary schools are paid less than full-time teachers even though they perform essentially the same work. The plaintiffs' third amended statement of claim alleged that the STCA was therefore discriminatory and breached the Equal Pay Act 1972 (EPA), the Government Service Equal Pay Act 1960 (GSEPA) and/or the Employment Relations Act 2000 (the Act).

[8] The plaintiffs' issues were summarised in their pleadings as:

- (a) there is a failure to provide part-time teachers with non-contact time at a prorated rate to the non-contact time provided to full-time teachers; and
- (b) as a consequence, part-time teachers (being members of a category of workers that is predominantly female) receive a lower pay rate than that which would be paid to a male performing work of equal value.

[9] That alleged failure and its consequence was said to lead to a material difference in pay, because of the way full-time teachers' pay was calculated. Full time

teachers pay takes into account the timetabled non-contact time which was not the case for part-time teachers.

[10] To support the pleading of an alleged breach of the EPA, the plaintiffs pleaded that work performed by part-time teachers is predominantly performed by women, has historically been undervalued, and continues to be undervalued. The rate of pay for part-time teachers was pleaded as not constituting equal pay, because it is less than the rate that would be paid to male employees:

- (a) with the same, or substantially similar, skills, responsibilities and service;
- (b) performing work under the same, or substantially similar, conditions; and
- (c) performing work that involves the same, or substantially similar, degrees of effort.

[11] The pleaded comparator was full-time teachers who, until 1998, were predominantly male.

[12] As an alternative, the plaintiffs pleaded a breach of the GSEPA. Essentially, this was a claim that the second to fifth plaintiffs (the part-time school teacher plaintiffs who work for the Boards of Trustees that are the second to fifth defendants) are not paid the same salary as full-time teachers and that difference is based on sex.

[13] Personal grievances for the second to fifth plaintiffs were also pleaded. The claim was based on discrimination in breach of s 104 of the Act on the broad basis that the Boards of Trustees that employed them refused or omitted to provide the same terms and conditions of employment as those available to other employees with the same, or essentially similar, qualifications, experience or skills.

[14] All of these claims were said to be forward-looking; that is, the plaintiffs seek to obtain from the Court declarations as to breach to inform a revision of the STCA. Specifically, compensation was not pursued.

[15] The Secretary for Education, and the Boards of Trustees, deny that the STCA discriminates against part-time teachers or that any of the statutes have been breached.

[16] A feature of the pleadings is that the comparator relied on by the plaintiffs was full-time teachers.

The plaintiffs' closing submissions

[17] Mr Butler's closing submissions included four areas where the Court was asked to make findings of fact. Summarised, those areas were:

- (a) Comparability: on the basis that part-time teachers and full-time teachers do the same or substantially similar work.
- (b) Differential treatment: part-time teachers and full-time teachers are treated differently over timetabled non-contact time, and this means part-time teachers are paid proportionately less than full-time teachers.
- (c) Gender: the differential treatment is indirectly on the basis of, or for the reason of, or on the grounds of, sex.
- (d) Detriment: that differential treatment leads to detriment/disadvantage for part-time teachers.

[18] The Court was invited to conclude that part-time and full-time teachers are comparable for the purposes of the EPA, GSEPA and the Act.

[19] Mr Butler said that the parties had agreed on the following:

- (a) Part-time and full-time teachers must have the same level of qualifications to practice.
- (b) Part-time and full-time teachers are assessed against the same professional standards. Those standards set out the core skills and attributes required of both part-time and full-time teachers.

- (c) All teachers are professionals and would do whatever is required to get the job done to the appropriate standard.
- (d) The work of a teacher during timetabled contact hours (that is class-contact time) is not different as between part-time and full-time teachers.
- (e) The work (and workload) of a teacher outside of their contact hours which relates to those hours (broadly, their curriculum-related non-contact work) is not different as between part-time and full-time teachers.
- (f) The bulk of a teacher's work derives from curriculum-delivery.
- (g) The STCA does not specify the total number of hours any full-time or part-time teacher is required to work.
- (h) The STCA contains a base salary scale under which any individual teacher's pay is determined by qualifications, credit for recognised work experience other than teaching and length of teaching service.
- (i) Full-time and part-time teachers with the equivalent qualifications, work credits and service, at the same step of the relevant salary scale, have the same annualised base salary rates. Full-time teachers receive the full annualised salary rate for the salary step while part-time teachers receive a proportionate share.
- (j) There are a number of factors that can vary among teachers which can affect workload not linked to part-time or full-time status (such as class size, nature of the students, the subject area and year level).

[20] The differential treatment on which the plaintiffs' case was based was said to constitute indirect gender discrimination. The Court was invited to make findings about:

- (a) the gender composition of the secondary teaching workforce over time;
- (b) the gendered nature of part-time teaching;
- (c) the existence of a common practice, prior to 2002, of schools providing full-time teachers with around two to three non-contact hours, and the absence of any corresponding practice for part-time teachers;
- (d) the relevance of that common practice to the adoption into the STCA in 2002 of guaranteed minimum timetabled non-contact time for full-time teachers;
- (e) the 2008/2009 Pay and Employment Equity Review – Compulsory Schooling Sector Report as the historical account of the treatment of female teachers, and of part-time teachers; and
- (f) the evidence of the expert witnesses.

[21] Mr Butler explained the distinction between direct and indirect discrimination with the latter as occurring when a law, rule or practice appeared to be neutral but, in effect, had a disproportionate impact on a group or person on a prohibited ground of discrimination. The proposition was expressed as:

Put simply – everyone is treated the same, but this disadvantages a particular (protected) group.

[22] Part of the plaintiffs' case was that motivations and intentions were irrelevant. The selection of full-time teachers as a comparator was said to be appropriate, regardless of the gender makeup of that group, because they benefited from a rate of pay not subject to discrimination. This submission drew on the history of full-time teaching which was described as of male gender incumbency and was one of preferential treatment towards males and full-time teachers. It was only in recent times that the gender composition of the profession had changed. The tipping point in the gender composition of the profession, as it became female dominated, was said to not have removed this legacy.

[23] In developing submissions about indirect discrimination the plaintiffs' argument identified s 65 of the Human Rights Act 1993. They relied, at least partly, on the High Court decision in *Northern Regional Health Authority v Human Rights Commission* where Cartwright J identified three issues arising from s 65 as follows:¹

- (a) Is there a neutral conduct, practice, requirement or condition?
- (b) Does it have the effect of treating the person or group of persons differently on one of the prohibited grounds of discrimination? (This will involve a comparison between two groups to identify whether there is differential treatment on a prohibited ground).
- (c) Is there good reason for it?

[24] A point was made that the defendants had accepted from the outset that any differential treatment because of gender discrimination could not be excused; a comment relevant to the third issue in *Northern Regional Health Authority*. In this context support was drawn from European jurisprudence about indirect discrimination.

The objection and its basis

[25] Against that brief overview, Ms Casey objected to what she considered to be the belated introduction by the plaintiffs of a new or novel legal analysis that amounted to a reverse onus of proof. Her concern was about the proposition, attributed to the plaintiffs, that if they establish differential treatment, it was up to the defendants to justify that treatment on objective grounds having nothing to do with sex.

[26] The objection was that as a matter of fairness the plaintiffs should not be able to rely on the proposed legal framework. Ms Casey's subsequent memorandum argued that such a shift should not be allowed because:

¹ *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 238.

- (a) The allocation of the burden of proof has a significant effect on the evidence before the Court.
- (b) The defendants conducted the litigation on the basis of the present law, which was that the plaintiffs bear the onus of establishing all of the elements of the pleaded causes of action.
- (c) The adoption of a different legal approach should have been raised in advance before evidence was prepared.
- (d) A proposal for the Court to depart from the orthodox position would potentially have resulted in the determination of preliminary point of law, given its impact on the evidence.
- (e) The defendants addressed the orthodox framework and focussed on the reasons for any difference in treatment so that the Court understood the context of the claim and to refute any argument that causation could be inferred. Ms Casey added that the defendants considered the plaintiffs had not established there was differential treatment in fact.

[27] The defendants submitted that, had they been under a positive onus to disprove causation, the nature and the scope of the evidence would have been quite different. Anticipating a response from the plaintiffs dismissing this concern, Ms Casey identified two leaps of reasoning that made the plaintiffs' position untenable, and supported her objection; namely:

- (a) The proposed comparator group was full-time teachers so that the defendants were supposed, by intuition, to have appreciated this was a case of indirect discrimination.
- (b) The defendants should have appreciated, also by intuition, that in a case of indirect discrimination, the plaintiffs' position was that it had no onus to establish causation and the defendants bear the onus of proving good reasons for differential treatment.

[28] Part of this criticism was that the pleadings did not mention indirect discrimination except fleetingly. Ms Casey pointed out the phrase was used in them only once and was confined to a quote from s 104 of the Act. Her argument was, therefore, that it was far from obvious that using full-time teachers as the comparator group imported the concept of indirect discrimination, or that the concept was not synonymous with there being no requirement on the plaintiffs to establish causation with the onus falling on the defendants.

[29] During Mr Butler's opening he described two approaches the plaintiffs invited the Court to consider. The first one was where more women than men were affected and the second was by a comparison to a male group. As to the first approach, the evidence was said to show that part-time secondary teachers are and have always been a workforce predominantly composed of female teachers. The percentage of females who teach in secondary schools as part-time teachers is, and always has been, significantly higher than the percentage of males who teach as part-time teachers. On the basis of this first approach, the plaintiffs opened their case by saying that the differential treatment between part-time and full-time teachers constituted indirect discrimination on the basis of sex.

[30] Ms Casey's criticism of the plaintiffs' submissions focussed on these approaches. The first approach was said to require no comparator analysis and was novel. It was criticised because the concept of the defendants having an option of establishing justification had not been mentioned.

[31] More problematic, however, was what she said was a change of focus when it came to causation. Comparing the remarks in Mr Butler's opening with those in his closing submissions Ms Casey argued that a significant shift occurred. She said that between them the need for the plaintiffs to establish causation was lost from their argument. A further shift was said to be evident in Mr Butler's submissions in response to the objection, filed on 12 November 2019.

[32] In summary, Ms Casey said the plaintiffs' opening introduced conceptual building blocks for its claim, and foreshadowed the evidence to be heard, by describing three necessary steps; differential treatment, that treatment being between comparable

groups and on the basis of sex. However, in the next iteration of the plaintiffs' building blocks, they were said to have become the distinction between direct and indirect discrimination, the "neutral practice" which treats two (comparable) groups differently, and the disproportionate effects of that neutral practice on females.

[33] The third iteration of the building blocks was said to represent a further shift, identified in Mr Butler's memorandum of 12 November 2019 in response to the defendants' submissions. In that memorandum the plaintiffs said they would establish their claims if:

- (a) there is differential treatment between part-time and full-time teachers which is to the detriment of part-time teachers;
- (b) in circumstances where part-time teachers do sufficiently comparable work;
- (c) in circumstances where part-time teachers are and always have been predominantly women and the percentage of females who teach part-time has already been significantly higher than the percentage of men who do so; unless
- (d) the differential treatment is objectively justified on grounds that are not, in themselves, tainted by gender.

[34] The claimed shift was at the last step (unless the differential treatment was objectively justified) which was said to be new. Ms Casey argued that this last step amounted to a form of rebuttable presumption or an attempt to place an onus on the defendants.

[35] Against the background of these claimed shifts in the plaintiffs' position, the Court was invited to prevent them from closing their case as Mr Butler had done. Presumably, if successful, that objection would require Mr Butler to modify what he said by identifying what should be excised. As a possible alternative, Ms Casey

initially requested that the defendants be able to call further evidence, although it was not clear what that evidence would be.

[36] The defendants' position about calling further evidence underwent a transformation during the hearing in March 2020. At the outset, Ms Casey said it was not practical to contemplate calling further evidence to attempt to address the problems she had identified. Her initial view was that remedial steps like that would be so extensive it would be better to start the trial again, which was impracticable. Eventually she relented, in response to questions from the Court, and accepted that if her objection failed further evidence could be called including, if necessary, recalling witnesses.

Mr Butler's response

[37] Not surprisingly, Mr Butler rejected any suggestion that there had been an unacceptable shift by the plaintiffs by comparing the pleadings, their opening, the closing submissions and his responses to the objection. The plaintiffs opposed any restriction on their closing submissions or the defendants being granted leave to call further evidence. His response was that if the defendants faced any difficulty that was because they had made a mistake about the case, something not caused by the plaintiffs, who should not have to bear the consequences of it.

[38] The mistake attributed to the defendants was over assuming the plaintiffs were attempting to impose a reverse onus of proof as to causation. Mr Butler said the plaintiffs' case never required the defendants, if they were to succeed, to prove that the cause of differential treatment was not sex. He accepted that the burden of proof remained with the plaintiffs. What the defendants could, however, do was seek to justify any differential treatment established by the plaintiffs by reference to objective factors unrelated to gender. On Mr Butler's argument, given that the defendants had made a mistake, it followed the objection was groundless and the defendants were not prejudiced in any way.

[39] The defendants were said to have misunderstood the law, by wrongly seeking to apply the test used where the claim is about alleged direct discrimination. The case, Mr Butler said, had never been about direct discrimination and the defendants could

not reasonably have thought that it was, including having regard to relevant caselaw, the pleadings, the evidence that was called, and the plaintiffs' opening. There was, therefore, no reason to prevent the plaintiffs from closing their case as they had done. Nor was there a basis for allowing the defendants an opportunity to call more evidence.

Analysis

[40] It is regrettable that this issue has arisen at such a late stage. This is significant litigation that has the potential to impact all secondary school teachers in New Zealand, the Boards of Trustees employing them, and to have wider employment ramifications for other cases where a claim of discrimination is made.

[41] Mr Butler's closing submissions were consistent with the plaintiffs' opening and the pleadings. While the third amended statement of claim did not expressly plead indirect discrimination, by using those words to describe the claim, we accept his submission that the plaintiffs were not required to plead their case in that way. The position may have been different if, for example, the statement of claim had pleaded "direct discrimination". It did not.

[42] Regulation 11 of the Employment Court Regulations 2000 requires every statement of claim to specify its general nature, the facts upon which the claim is based, the relief sought, and the grounds of the claim. In that respect the regulation is consistent with the High Court Rules 2016. It is trite that the reference point for all litigation is the pleadings, because they identify what needs to be proved, set the parameters of disclosure, direct the briefing of evidence, the preparation of the case and the conduct of the litigation generally.² A cause of action is the factual situation that enables one party to obtain a remedy from the Court against another party.³ The pleading has to be sufficient to provide information to the other party to be able to respond, but there is nothing in the regulations, or in the High Court Rules, requiring the pleading to state propositions of law or matters like the burden of proof.

² See *Hoyle v Hoyle* [2016] NZHC 3120 at [59]-[60]. This case was partially overturned on appeal, but not on this point: *Hoyle v Hoyle* [2017] NZCA 516.

³ *Letang v Cooper* [1965] 1 QB 232 (CA) at 242-243.

[43] There was sufficient information in the pleadings to alert the defendants to the nature of the case to be answered. For example, the third amended statement of claim contained a summary succinctly describing the plaintiffs' claim as a failure to provide part-time teachers with non-contact time at a pro-rated rate to the non-contact time provided to full-time teachers and, as a consequence, that they received a lower pay rate than would be paid to a male performing work of equal value.

[44] In relation to the first cause of action, involving the EPA, there was a pleading that work performed by part-time teachers is predominantly performed by women. That pleading was followed by particulars of the percentage of the workforce of teachers who are female and by another that alleged the work had been historically undervalued and continues to be undervalued. The supporting particulars referred to the historic gender makeup of the teaching profession. At paragraph 57 the statement of claim pleaded:

The appropriate comparator for the purpose of demonstrating the proposition in paragraph 56 [relating to the rate of pay of part-time teachers not constituting equal pay] above is full-time teachers. There is no relevant distinction in terms of the work performed by, the functions of, or the requirements for, teachers on the basis of whether they are working full-time or part-time.

[45] That pleading was indicative of the details in the balance of this statement of claim. We consider the pleading adequately identified what the plaintiffs intended to establish and the case the defendants needed to meet. The third amended statement of claim complied with reg 11.

[46] We reject Ms Casey's submission that, in some way, the claim was insufficiently clear from the pleadings, so that the defendants were deprived of an opportunity to adequately understand the plaintiffs' case and to present their defence to it.

[47] Ordinarily we would have little sympathy for the objection and the fall-back position that more evidence might be required. However, we are concerned that the issues are so significant that it is important, in the interests of justice, to make reasonable efforts to ensure that the real controversy is before the Court. It is tolerably clear that the defendants have more relevant evidence to present. To decline the

defendants an opportunity to call more evidence, even though the application has been advanced at a late stage, would not be consistent with the Court's equity and good conscience jurisdiction and the broader interests of justice. To ensure the real controversy is addressed, and for that reason alone, we are prepared to grant leave for further evidence to be called by the defendants. We accept the plaintiffs may need to be able to call evidence in reply, and that the parties will need to be provided with an opportunity to provide the Court with further legal submissions on any points which emerge.

[48] We are concerned that without this step being taken there would be no finality to the litigation in any real sense and that could lead to a further round of otherwise unnecessary litigation.

[49] We are also satisfied that this step is just because, if necessary, the position can be addressed by costs. We are, however, conscious that there must be realistic limits to this further evidence. The leave granted is not intended to result in a situation where, in effect, the whole case is relitigated. The further evidence will be limited to dealing with:

- (a) the defendants' explanation for any differential treatment to show that it is not based on gender; and
- (b) to recall witnesses for the purposes of putting to them any matters arising from the further evidence referred to in [49](a).

[50] Specific directions for this further evidence and supplementary submissions will be addressed by a Judge at a directions conference to be arranged by the Registrar.

[51] Costs are reserved.

K G Smith
Judge
(for the full Court)

Judgment signed at 1.55 pm on 27 May 2020