

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 118  
EMPC 49/2018**

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

BETWEEN NEW ZEALAND POST PRIMARY  
TEACHERS' ASSOCIATION  
Plaintiff

AND BOARD OF TRUSTEES FOR RODNEY  
COLLEGE  
First Defendant

AND THE SECRETARY FOR EDUCATION  
Second Defendant

Hearing: 22–25 March 2021  
Further submissions filed on 26 July, 2 and 9 August 2021  
(Heard at Wellington)

Appearances: P Cranney, counsel for plaintiff  
No appearance for first defendant  
S Hornsby-Geluk and M Vant, counsel for second defendant

Judgment: 4 July 2022

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**JUDGMENT OF JUDGE KATHRYN BECK**

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[1] This challenge relates to a dispute about the interpretation and application of cl 5.4 of the Secondary Teachers' Collective Agreement 2019–2022 (the 2019 STCA).

[2] Clause 5.4.3 of the 2019 STCA provides that where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to cls 5.4.1 and 5.4.2, they should be reimbursed for any actual and reasonable costs incurred.

[3] The parties do not agree on what the words “when the school is not open for instruction” mean.

[4] The first iteration of the provision was negotiated into the 1996–1998 Secondary Teachers’ Collective Employment Contract in 1996 (the 1996 STCEC). In 1999 it was negotiated into its current form and has remained the same since, although the agreement has changed around it.<sup>1</sup>

[5] The dispute arose in 2012, 16 years after the first iteration of the provision appeared. This case was heard 25 years after the first iteration was negotiated and approximately 10 collective agreements later. Resolving interpretation issues in these circumstances is not uncommon in this Court but it brings with it its own unique issues including as to the ongoing nature of the relationship and the passage of time.

[6] The parties have quite different views on what the words “when the school is not open for instruction” mean.

[7] The New Zealand Post Primary Teachers’ Association (PPTA)<sup>2</sup> says it means periods other than the “half-day” periods of two hours or more as defined in s 60 of the Education Act 1989.

[8] The second defendant says “not open for instruction” means vacation or school holiday periods.

[9] The Employment Relations Authority found in the defendants’ favour.<sup>3</sup> The focus of the Authority was on the 2011–2013 collective agreement in the context of specific claims for reimbursement at Rodney College.

[10] The plaintiff has challenged the determination. The focus of this challenge is on the 2019 STCA and the correct interpretation of “not open for instruction” in that

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<sup>1</sup> Secondary Teachers’ Collective Employment Contract 1999–2001 (the 1999 STCEC).

<sup>2</sup> I refer to the plaintiff as the PPTA or the union interchangeably in this judgment.

<sup>3</sup> *New Zealand Post Primary Teachers Assoc v Board of Trustees for Rodney College* [2018] NZERA Auckland 11 (Member Tetitaha).

agreement. The first defendant now plays no part, and the matter is being pursued solely as a dispute as to interpretation.

[11] What does “not open for instruction” mean in cl 5.4 of the 2019 STCA?

[12] To determine that, it is necessary to consider:

- (a) the factual background;
- (b) the statutory context;
- (c) the principles of contractual interpretation; and
- (d) the application of these principles to the clause.

### **Factual background**

[13] The history of the clause is relevant to understanding its meaning. An extract from the 1994–1995 Secondary Teachers’ Collective Employment Contract (the 1994 STCEC) headed “Part Four – Hours of work” is attached as Appendix A to this judgment.<sup>4</sup>

#### *1996 STCEC*

[14] Bargaining for the 1996 STCEC began in November 1995. Both parties agree that the bargaining was protracted and robust, involving strike action. It took place in a relatively hostile period of industrial relations.

[15] The key issues were remuneration and salary progression. The union was also concerned about workload, and retention and recruitment.

[16] Included in the early claims by the State Services Commission (SSC), the lead agency for the 1995 to 1996 negotiations, was a claim for a clause that allowed boards

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<sup>4</sup> The emphasis in Appendix A and the subsequent appendices is mine and highlights the predecessor clause and changes to the clause.

of trustees to require teachers to undertake up to 10 days of professional development per year in vacation time. The union rejected that claim.

[17] Between March and August 1996 negotiations, including over call backs for professional development, continued. The notes and correspondence provided to me in the course of the hearing illustrated how fraught the negotiations were. They went down to the wire and the final wording of the professional development clause was not settled until the last minute.

[18] At around about 4.30 am on Friday 16 August 1996, the parties agreed settlement terms including a provision in relation to professional development.

[19] It was agreed that cl 4.6.2 of the 1994 STCEC be replaced with cl 5.6.2 of the 1996 STCEC.<sup>5</sup> Clause 4.6 of the 1994 STCEC stated:

**4.6 Division of Year into Terms and Holidays**

4.6.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part VII of the Education Act 1989.

4.6.2 The parties to this contract acknowledge that teachers may attend school during vacation time for the purposes of school administration or for preparation and co-ordination with colleagues for the next term; and that teachers use vacation time away from school for such purposes as curriculum or technical refreshment and for the preparation of resources or programmes for the next teaching term.

[20] Clause 5.6 of the 1996 STCEC stated:

**5.6 Division of Year into Terms and Holidays**

5.6.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part VII of the Education Act 1989.

5.6.2 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days per annum and provided also that the needs of the individual teacher are taken into account and the teacher's own initiatives in undertaking professional development during time when the school is closed for instruction is considered. Teachers who

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<sup>5</sup> 1996 STCEC, pt 5 is set out in full in Appendix B.

participate in terms of this requirement shall be reimbursed for any actual and reasonable costs incurred in accordance with Part Seven of this contract.

*Note: This provision shall not apply to teachers in the Correspondence School. The provisions applying to those teachers are contained in Part Eleven of this contract.*

[21] No other changes were made to “Part Four” (then Five) “Hours of Work”.

### *1999 STCEC*

[22] The Ministry of Education (the Ministry) took over as the lead agency for the negotiation of the next STCEC.<sup>6</sup>

[23] Bargaining for a replacement STCEC formally commenced with an offer of settlement from the Ministry to the union in a letter dated 12 August 1998. Among the matters dealt with in the offer was a proposal to substitute the words “five days per annum” with “10 days per annum” in cl 5.6.2.

[24] I note that this aspect of the offer followed on the heels of what had been agreed with NZEI Te Riu Roa as part of the Primary Teachers’ (including Deputy and Assistant Principals and other Unit Holders) Collective Employment Contract which stated:<sup>7</sup>

## **2.9 Hours of Work/Leave**

**2.9.1** Employees shall work such hours as may be reasonably required of them to enable them to properly fulfil their responsibilities as teachers whether or not such hours exceed 40 hours per week. The normal hours of work for employees should as far as practicable however not exceed 40 hours per week Monday to Friday.

**2.9.2** It is acknowledged that employees are required to undertake such duties as:

- preparation, evaluation and assessment time generated by classes/sessions and the students within them, or by other requirements such as the need to report on the progress of individual students;
- counselling of students;
- administrative responsibilities of individual teachers;
- attending courses and meetings;

<sup>6</sup> Bargaining was from August 1998 to June 1999.

<sup>7</sup> Primary Teachers’ (including Deputy and Assistant Principals and other Unit Holders) Collective Employment Contract, effective from 1 February 1998 until 30 April 2001.

– professional development  
in addition to their normal class contact time, and that these factors have been taken into consideration in determining the employee's hours of work and leave entitlements.

**2.9.3** Except as provided in 2.9.1 employees shall not be required to attend school during any time when the school is officially closed for instruction. However Boards may require employees to attend school or elsewhere, when the school is closed for instruction (except on weekends or public holidays unless by agreement) for up to ten days per school year (or the equivalent) for all or any of the following purposes – school administration, school preparation and co-ordination, pre-term planning curriculum and/or technical refreshment and/or professional development. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that employees' individual needs are taken into account. Employees' own initiatives in undertaking work for the above purposes shall be counted when applying this clause.

**2.9.4** Where employees are required to attend school or elsewhere when the school is closed pursuant to 2.9.3 they shall be reimbursed for any actual and reasonable costs incurred in accordance with Part 7 of this contract.

[25] The PPTA responded rejecting the Ministry's proposal to replace five days with 10 days in cl 5.6.2.

[26] Negotiations were ongoing and difficult. In early May 1999 the union presented a settlement package. It did not include an increase in requirements to participate in professional development days. The union's position was that inclusion of such a claim would not be ratifiable – the membership regarded it as professionally insulting and industrially unacceptable. To not have an increase in days was equally unacceptable to the Ministry.

[27] As with the negotiations for the 1996 STCEC, there were bigger issues and areas of focus for the negotiations as a whole. The Ministry was proposing that boards of trustees have the ability to opt out of the collective contract and negotiate their own employment arrangements with their staff, to introduce professional standards and expectations linked to pay, as well as proposing the removal of union fee deductions and paid union meetings. Pay rates and workload were also major areas of disagreement.

[28] Also, as with the previous set of negotiations, even when progress was made on other issues, there were final sticking points – the extent to which the employer could require staff to attend at school or elsewhere when the school is not open for instruction, for certain duties including professional development, was such an issue.

[29] I was provided with notes of bargaining and internal communications where it appears that the parties went backwards and forwards over a few days in May 1999, trying to deal with the apparent impasse on the extent of call backs. I did not find these notes and internal communications helpful except to show that it is apparent that there were a number of false starts, with both parties being told by their respective stakeholders to try again.

[30] A settlement agreement was reached on 10 June 1999 to then go to ratification.

[31] Clause 5.6.2 of the 1996 STCEC was deleted and a new cl 5.3 was added:<sup>8</sup>

### **5.3 Duties When Schools Are Not Open For Instruction**

5.3.1 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days or equivalent per annum and provided also that the needs of the individual teacher are taken into account and that the teacher's own initiatives in undertaking professional development during time when the school is not open for instruction are considered.

5.3.2 The employer may require teachers to attend school or elsewhere when the school is not open for instruction for up to five days or equivalent per annum for all or any of the following purposes – school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that teachers' individual needs are taken into account. Teachers' own initiatives in undertaking work for the above purposes shall be counted when applying this clause.

5.3.3 Where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to 5.3.1 and 5.3.2 above, they shall be reimbursed for any actual and reasonable costs incurred.

*Note: This provision shall not apply to teachers in the Correspondence School. The provisions applying to those teachers are contained in Part Eleven of this contract.*

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<sup>8</sup> 1999 STCEC, "Part Five" is set out in full in Appendix C.

[32] These changes shifted the clause from under the heading “Division of Year into Terms and Holidays” and created a new and standalone clause entitled “Duties When Schools Are Not Open For Instruction”.

[33] Clause 5.3.1 was similar to the previous cl 5.6.2 with some amendments.<sup>9</sup>

[34] Clause 5.3.2 was new. It allowed the employer to require teachers to attend school, or elsewhere, when a school is not open for instruction for up to an additional five days or equivalent per annum for what are commonly referred to as administrative purposes.

[35] Clause 5.3.3 was previously at the end of cl 5.6.2 but was now slightly amended and separated out.

[36] The clause has remained unchanged since, although “Part Five” has changed around it and it is now cl 5.4 of the 2019 STCA.<sup>10</sup>

[37] The clause has been the subject of proposals from the Ministry in bargaining in 2015 and 2018. The first proposed the insertion of the words “during holidays (vacations)” after the words “when the school is not open for instruction”. Alternatively, the Ministry proposed that the words “on a day” replace “at times” before “when the school is not open for instruction.” These proposals were not accepted. These proposals illustrate the difficulty with the wording but were made after the dispute arose, and so I do not attribute them with any force other than being an attempt to resolve the issues through negotiation.

#### *The history of the dispute*

[38] As previously indicated, these proceedings were initially filed in the Authority in late 2012 in relation to an issue over reimbursement of various expenses incurred by teachers when they were required to attend school after 3 pm during term time for parent teacher meetings, prize-giving and open school evenings.

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<sup>9</sup> Refer block text.

<sup>10</sup> 2019 STCA, pt 5 is set out in full in Appendix D.

[39] However, that was not the first time the parties had questioned the application and/or interpretation of the clause. On 25 June 1999 Chris Wells, from the Ministry, wrote to Kevin Bunker, for the union, in relation to the “PPTA News” dated 10 June 1999,<sup>11</sup> which was sent out prior to the ratification meetings for the 1999 STCEC. Mr Wells took issue with the statement that “[the five days] includes report evenings, open nights and the like”.<sup>12</sup>

[40] He advised that the Ministry negotiators were of the view that this did not reflect the meaning or intent of the provision and stated that “[t]he term open for instruction is defined with reference to the number of half days a school is required to be open for instruction” and that report evenings etc, which take place on days on which the school is open for instruction, would not fall within the parameters of the clause.

[41] The union and the Ministry met that same day, after which Andrew Kear, co-advocate for the union, sent a fax to Mr Wells attaching the pages of the PPTA instruction/guidelines, issued in 1996 after the 1996 STCEC was settled. Mr Kear noted that the instructions/guidelines had been run past the SSC before they were issued, and it had approved the words. I accept that this occurred and that the SSC, as bargaining agent, was aware of the instructions/guidelines.

[42] Under the heading “What does ‘not open for instruction’ mean?”, the PPTA’s 1996 instructions/guidelines stated:

Any time when the school is not open to students for teaching it is closed for instruction.

A school is open for instruction for 380 half days per year. A school half day is defined by the Education Act as either two hours prior to mid-day or two hours following mid-day.

Any time outside these 380 half days can be counted in the five day limit. This will include vacation periods and weekends but also any time after timetabled instruction ends on a school day.

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<sup>11</sup> “Contract Update”.

<sup>12</sup> Referring to the additional five days the employer would be able to require teachers to attend school or elsewhere for school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison purposes.

[43] Once the 1999 STCEC was ratified, the Ministry issued its own guidelines on 2 July 1999. It did not discuss or dispute what “not open for instruction” meant but noted that the additional requirement of five days for administration purposes under cl 5.3.2 of the 1999 STCEC was “intended to be for attendance over and above what would normally be part of teachers’ duties such as parent teacher evenings and prize-givings.”

[44] On 16 July 1999, the union wrote to the Ministry,<sup>13</sup> stating that there had been consistency in the union’s approach to how the terms “open for instruction” and “half day” were applied. On that basis, it asserted that report evenings, open nights and the like constituted, in general, an out-of-the-ordinary or extra involvement outside the period when the school was open for instruction.

[45] The union issued its own further advice on the application of cl 5.3 of the 1999 STCEC, in particular as it related to the operation of cl 5.3.2, in relation to the five days for administration purposes. It took the view that while a full application of the clause meant “not open for instruction” was any time before the first period of the day and any time after the last period of the day, this would be practically absurd and it wished to operate the clause in a sensible fashion. That was (in general terms) to regard the school day as being from 8.30 am to 4.30 pm, with times outside of that falling into the category of times when the school is not open for instruction.

[46] There was no evidence of the parties reaching an agreed position on the meaning of the words at that time.

[47] The matter seems not to have been taken any further. Later, issues that arose in relation to the operation of the clause (July 2000 and May 2006) focused on other aspects of the operation of the clause – the scope of the requirement to reimburse<sup>14</sup> and the requirement to have regard to individual development needs – not the meaning of “not open for instruction”.

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<sup>13</sup> On the basis that Mr Kear’s fax of 25 June 1999 did not necessarily constitute a full and complete response to the Ministry’s letter of the same day.

<sup>14</sup> Whether or not it included childcare.

[48] In an ideal world of industrial relations, such issues are resolved either by reaching agreement as to what the meaning is, or renegotiation of the clause. In this case, it appears that the Ministry and the union made the call to rely on collaborative relationships within the schools to work it out on a day-to-day basis. Both sets of guidelines encourage this. That approach was effective for at least 12 years.

[49] As the union noted in evidence, problems over the application of call backs<sup>15</sup> tended to be symptomatic of an underlying industrial problem rather than a problem in its own right.

[50] Whether the dispute at Rodney College falls into that category or not is not for decision here, but it appears to have brought the dispute to a head. Even then, however, the trigger for the dispute was a debate over the entitlement to reimbursement, as opposed to the requirement to work or the timing of that requirement. Nevertheless, it is now for the Court to determine the meaning of the phrase “not open for instruction” in cl 5.4 of the 2019 STCA.

[51] To do so it is necessary to not only look at the factual and contractual context of the clause, but also the statutory context.

### **Statutory context**

[52] Within “Part Five” of the 2019 STCA, cl 5.3.1(a) provides that “Half-day” shall have the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957. As set out in the 1981 reprint of those regulations, under the part titled “Grading and Staffing of Post-Primary Schools”, reg 51 provided, inter alia:

“Half day”, in relation to any post-primary school, means the whole of any period during which the school is normally open for the instruction of pupils:

“Period” means a morning period, an afternoon period, or an evening period, of not less than 2 hours duration:

“Morning period” means a period commencing before noon on any day:

“Afternoon period” means a period commencing during the afternoon and ending not later than 6 pm on any day:

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<sup>15</sup> The colloquial term coined by the union to refer to the ability in the clause for a board of trustees to require teachers to participate in professional development or administration when the school is not open for instruction.

“Evening period” means a period commencing not earlier than 5 pm of any day:

...

“Teaching half day” means the services for a half day of a full time or a part time teacher in charge of an approved class or of approved classes; and for the purpose of computing the number of teaching half days of part time teachers in any week, 2 hours’ teaching (whether continuously or in the aggregate) during evening periods or on a Saturday, and 2 1/2 hours’ teaching (whether continuously or in the aggregate) at other times shall count as a teaching half day.

[53] Regulation 51 was not subject to amendment, although the clauses around it were. The regulations were revoked from 17 May 2006 by s 61(4)(a) of the Education Amendment Act 2006. Nevertheless, reference to the regulations remains in the 2019 STCA and was also in the predecessor agreements. The regulations and the statutory context within which the provision was negotiated are relevant to the interpretive exercise.

[54] The Education Act was the operative statute at the time of the initial insertion of what would become cl 5.4 of the 2019 STCA and at the time of the negotiations for the 2019 STCA. That Act has subsequently been replaced by the Education and Training Act 2020. The transitional provisions of the Education and Training Act require that the provisions of the Education Act continue to apply to this matter as if they had not been repealed or replaced by the new Act.<sup>16</sup>

[55] When the first iteration of the provision was negotiated into the 1996 STCEC, the Education Act referred to the term “open for instruction” in both s 65A, under the heading “Length of School Year”, and s 65B, under the heading “Terms”, with reference to both when a school is “open for instruction” and “not open for instruction”.<sup>17</sup>

[56] Section 65A provided, for the purposes of the length of the school year, that the Minister may prescribe the number of “half-days” on which schools must be open during the next year and stated that every board shall ensure that each school it administers was “open for instruction” on the number of half days required.<sup>18</sup>

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<sup>16</sup> Education and Training Act 2020, sch 1, cl 2.

<sup>17</sup> Education Act 1989, ss 65A and 65B (as at 25 June 1993).

<sup>18</sup> The hyphens in “half-days” in ss 65A and 65B were removed and added at various times during the life of these sections.

[57] Section 65B provided, for the purposes of a school term, that the Minister may prescribe, by reference to dates, days, or half-days, the terms that schools must observe during the next year.<sup>19</sup> It required that every board ensure that any school it administers was “open for instruction” on every day during the terms prescribed. To that end it stated:<sup>20</sup>

**65B Terms**

...

- (2) Except as provided in this Act, every Board shall ensure that the schools it administers are in every year *open for instruction* on every day during the terms prescribed, ascertained, or determined for the year under subsection (1) of this section.
- (3) For the purposes of s 65A and subsection (2) of this section—
  - (a) On any day, a school is *open for instruction* for a half-day only, if—
    - (i) It is in fact *open for instruction* for 2 hours or more before noon; but is *not in fact open for instruction* for 2 hours or more after noon; or
    - (ii) It is in fact *open for instruction* for 2 hours or more after noon; but is *not in fact open for instruction* for 2 hours or more before noon; and
  - (b) On any day, a school is *not open for instruction at all if it is not in fact open for instruction* for 2 hours or more before noon and for 2 hours or more after noon.

...

[58] Section 65C required that schools be “closed” on Saturdays and Sundays and public holidays (subject to limited exceptions).

[59] The Education Legislation Act 2016 made a number of changes to the Education Act. It inserted the definition of a half-day into s 60:<sup>21</sup>

**half-day**, in relation to a school, means a period of 2 hours or more during which the school is *open for instruction*

[60] Section 65A remained largely unchanged.<sup>22</sup>

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<sup>19</sup> Education Act 1989, s 65B (as from 1993 before amendment on 20 May 2010 by s 18 of the Education Amendment Act 2010).

<sup>20</sup> Education Act 1989, s 65B (as from 1993 before amendment on 20 May 2010 by s 18 of the Education Amendment Act 2010).

<sup>21</sup> Education Legislation Act 2016, s 6 (emphasis added).

<sup>22</sup> Education Act 1989, s 65A (as from 20 May 2010). Section 65A(2A) had been added to clarify the situation during strikes and lockouts.

[61] Section 65B in relation to school terms by then stated:<sup>23</sup>

...

(2) Every board must ensure that each school it administers is open for instruction for 1 half-day that finishes at or before noon and 1 half-day that starts at or after noon on every day during the terms prescribed, ascertained, or determined under subsection (1).

...

[62] As at 2016, s 65B provided boards with some flexibility, by entitling them to vary the time at which any one or more half-days took place. The section continued to set out that a school was “not open for instruction at all” if it was open for less than one half-day.<sup>24</sup>

[63] Section 65C remained in substance the same, requiring that every board must ensure that its schools are “closed” on the weekend and public holidays (subject to limited exceptions).<sup>25</sup>

[64] It is apparent, within the regulations referenced in the 2019 STCA, and its predecessors, and the statutory context, that the phrase “open for instruction” is heavily linked to the period when a school is open and the statutory concept of a half-day before and/or after noon. The phrase “not open for instruction” has a corollary meaning, with a school “not open for instruction at all” if it was open for less than one half-day.

### **Principles relevant to interpretation**

[65] The Court has recently considered the principles of contractual interpretation in *Vulcan Steel Ltd v Manufacturing & Construction Workers Union*.<sup>26</sup>

[66] As set out in *Vulcan Steel*,<sup>27</sup> the Supreme Court confirmed in *New Zealand Airline Pilots’ Association Inc v Air New Zealand Ltd* that interpretation principles relating to contracts should apply to employment agreements.<sup>28</sup>

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<sup>23</sup> Education Act 1989, s 65B(2) (as from 29 October 2016) (emphasis added).

<sup>24</sup> Section 65B(3C).

<sup>25</sup> Education Act 1989, s 65C (as at 1 January 2014).

<sup>26</sup> *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78.

<sup>27</sup> At [27].

<sup>28</sup> *New Zealand Air Line Pilots’ Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [74]–[78].

[67] The key principles of contractual interpretation were articulated by that Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* as follows:<sup>29</sup>

... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provides by the contract as a whole and any relevant background informs meaning.

[61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

[62] It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language (even a “serious utterance”) is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties (such as financiers). The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties’ awareness being itself part of the relevant background. ...

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. ...

[68] In *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, the Supreme Court made clear it would not revisit those principles.<sup>30</sup> In its substantive decision it also affirmed the approach to contractual interpretation in *Firm PI 1 Ltd*.<sup>31</sup> Relevantly for this case, it also addressed the issue of admissibility of evidence of prior negotiations and subsequent conduct concerning a contract. It concluded that the determination of the

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<sup>29</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63] (footnotes omitted).

<sup>30</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2020] NZSC 73 at [1](a).

<sup>31</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43]–[46], [232]–[233] and [250]. The majority cautions that the courts are not necessarily well placed to assess the commercial common sense of a contractual provision.

admissibility or otherwise of extrinsic material, is to be regarded as an evidential issue. It is therefore to be determined in accordance with the law of evidence, in light of the substantive law on contractual interpretation,<sup>32</sup> applying the fundamental principles as set out in ss 7 and 8 of the Evidence Act 2006 (the EA).<sup>33</sup>

[69] Accordingly, consideration of these provisions of the EA assists in the task of resolving what evidence should be considered when proving anything relevant to the notional reasonable person. It follows that evidence which shows only a party's subjective intentional belief as to the meaning of words, or an undeclared negotiating stance or position, should, under that Act, be inadmissible.

[70] The Court's approach to these issues is set out in *Vulcan Steel*.<sup>34</sup>

[29] In *Maritime Union of New Zealand v TLNZ Ltd*, this Court discussed the application of EA principles in this way:

... Although the Employment Court is noticeable by its absence from the schedule of Courts to which the Evidence Act applies expressly, the Evidence Act's principles and contents are nevertheless an important source of reference whenever the admissibility of evidence is challenged or otherwise in question. ...

[30] More recent cases have emphasised that the equity and good conscience test under s 189(2) of the Employment Relations Act 2000 is the focus of the enquiry. Nevertheless, it is clear that, in the interests of justice, hearings should not be bogged down with evidence which is irrelevant. As this is also the purpose of ss 7 and 8 of the EA, we consider it appropriate in this case to rely on the statements of the Supreme Court as to admissibility.

[71] As in *Vulcan Steel*, it is appropriate in this case to rely on the statements of the Supreme Court as to admissibility.

[72] The parties were invited to make submissions on the impact of *Bathurst* on this case.<sup>35</sup> Both took the opportunity to do so. The submissions largely focused on assertions as to what evidence was not subjective and what was communicated. Issues had arisen during the hearing about the admissibility of pre-negotiation material. Some material relating to subjective intention was excluded, although some remained

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<sup>32</sup> *Bathurst*, above n 31, at [57] and [232].

<sup>33</sup> At [62]–[68], [75]–[76] and [232].

<sup>34</sup> *Vulcan Steel*, above n 26, at [29]–[30] (footnotes omitted).

<sup>35</sup> Which was decided after the hearing was concluded.

as it had already been referred to in evidence. I agree with what is said in *Vulcan Steel* and have not found the uncommunicated internal communications of either party relevant.

[73] Both parties sought to rely on the advice they wrote to their respective stakeholders as proof of what the clause was intended to mean. This material was not helpful in the interpretive exercise. In almost all instances the material was not shared with the other party and does not assist with an objective interpretation of the provision in context. What is apparent from the history set out above is that the final iteration of the clause was the product of significant negotiation and compromise. The initial so-called “bottom lines” that the parties, and in particular the Ministry, refer to, were not helpful in the context of fraught and lengthy negotiations where “bottom lines” were constantly revised on both sides and bargaining went to the wire.

[74] For the purposes of this analysis, I have found material that was part of the communications between the parties (the contents of which were therefore known to both of them), or widely published guidelines issued by each of them to all schools, helpful. As noted above, I have also found the statutory context in which the provision was negotiated and the regulations expressly referred to in the 2019 STCA, relevant.

[75] Finally, it is not unusual, when considering the background circumstances of a collective agreement, to have regard to the fact that a given provision has a long history, adopted in successive collective agreements. Those agreements and surrounding documents are extrinsic evidence which, in this case, are part of the background like any other contextual evidence. Applying the principles of ss 7 and 8 of the EA, the earlier collective agreements and contracts are relevant and admissible.

## **Analysis**

### *Clause in a contractual context*

[76] As noted in *Firm PI*,<sup>36</sup> the context provided by the contract as a whole informs meaning. If the language at issue construed in the context of the contract as a whole

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<sup>36</sup> *Firm PI*, above n 29, at [60].

has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.<sup>37</sup>

[77] Accordingly, it is helpful to begin by assessing the ordinary and natural meaning of cl 5.4 in its contractual context and then move on to consider whether the structure of the bargain, any specialised meaning, the history of the clause or considerations of commercial absurdity affect that assessment.<sup>38</sup>

[78] Part five of the collective employment agreement within which cl 5.4 sits is set out in full at Appendix D. For ease of reference, I set out the clause again:

**5.4 Duties When Schools Are Not Open For Instruction**

5.4.1 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days or equivalent per annum and provided also that the needs of the individual teacher are taken into account and that the teacher's own initiatives in undertaking professional development during time when the school is not open for instruction are considered.

5.4.2 The employer may require teachers to attend school or elsewhere when the school is not open for instruction for up to five days or equivalent per annum for all or any of the following purposes – school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that teachers' individual needs are taken into account. Teachers' own initiatives in undertaking work for the above purposes shall be counted when applying this clause.

5.4.3 Where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to 5.4.1 and 5.4.2 above, they shall be reimbursed for any actual and reasonable costs incurred.

*Note: This provision shall not apply to teachers in Te Aho o Te Kura Pounamu. The provisions applying to those teachers are contained in Part Eleven of this agreement.*

[79] At this point the Court is simply attempting to ascertain the meaning of the clause, interpreted in the context of the agreement as a whole – the approach must be that of a reasonable person, having all the background knowledge which would have reasonably been available to the parties in the situation they were in at the time of the

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<sup>37</sup> At [63].

<sup>38</sup> At [64].

agreement. The background knowledge which would reasonably have been available for both parties therefore includes knowledge of the previous agreements and a significant level of understanding of the statutory context within which they were operating, the secondary school environment and the process of collective bargaining.

[80] Part five of the 2019 STCA sets out the various factors that influence the hours of work of individual teachers and identifies the guidelines and requirements that apply when setting the hours of opening of schools and the structure of timetables. That is apparent from, for example, the fact that “Part Five” is titled “Hours of Work”.

[81] The phrase “not open for instruction” is not defined by the parties. In order to ascertain the meaning of “when the school is not open for instruction”, it is therefore helpful to look at when the school is “open for instruction”.

[82] When read in conjunction with the Education Act and the regulations, secondary schools are “open for instruction” during the two half-days per day, 10 half-days per week and 380 half-days per year, as set out in the Education Act.<sup>39</sup> Schools are “closed” and therefore not open for instruction on Saturdays, Sundays, Easter Tuesday and public holidays.<sup>40</sup> They are open for instruction during the whole of any period during which the school is normally open for the instruction of pupils.<sup>41</sup>

[83] “Not open for instruction” must then, on the face of it, incorporate vacation time but also weekends, public holidays and Easter Tuesday.

[84] The general provision at the beginning of “Part Five”, throughout all iterations of the contract, sets out the factors influencing the hours of work of individual teachers, over and above the number of classes they may be timetabled to teach. By the time this dispute arose and in the 2019 STCA, cl 5.1.2 specifically acknowledges and accepts that the hours of opening of schools are designed to meet the curriculum and pastoral needs of students and are determined according to “well-understood national guidelines or specific legal requirements”. Clause 5.1.3 states that the clauses

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<sup>39</sup> Education Act 1989, ss 65A and 65B.

<sup>40</sup> Education Act 1989, s 65C.

<sup>41</sup> Education (Salaries and Staffing) Regulations 1957, reg 51.

which follow identify the guidelines and requirements upon which the decisions in individual schools are made. Clause 5.4 must be read within that context.

[85] Clause 5.1A requires a timetabling policy. Clause 5.2 deals with non-contact time allocations for teachers and acknowledges the importance of duties other than classroom teaching, which teachers are required to undertake while schools are “open for instruction”. Non-contact time is based on individual teachers’ timetabled hours comprising a total of 25 hours per week.

[86] Clause 5.2 sets out the non-contact time allocations for teachers. It states that non-contact time is based on timetabled periods of 25 hours per week or a combination of “periods of time” equivalent to 25 hours per week. It goes on to state that non-contact time may be a combination of differing periods of time.

[87] Clause 5.3 sets out definitions for the purposes of the clause. A “Half day” has the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957. As set out above, this states that a half-day in relation to any post primary school, means the whole of any period during which the school is normally “open for the instruction” of pupils. “Overtime” means any timetabled teaching time in excess of two half-days on any one day or 10 half-days in any one week and includes timetabled teaching on Saturdays and Sundays, public holidays or vacation times.

[88] Clause 5.4, headed “Duties When Schools Are Not Open For Instruction”, is directly after the definitions clause. Provisions relating to the length of a school day, a school week, or a school year, all follow directly after.

[89] Clause 5.5 relates to the length of a school day, which is determined according to the requirement that students are required to be in attendance for two half-days, one before noon, the other after noon. It notes that the normal teaching load in respect of any one day is therefore related to that requirement.

[90] Clause 5.6 sets out that the length of a school week is determined according to the requirement that students are normally required to be in attendance for 10 half-

days on the days Monday-Friday inclusive. Again, the normal teaching load is related to that requirement.

[91] Clause 5.7, which deals with the length of a school year, sets out that schools are required to be “open for instruction” at least 380 half-days in any one calendar year. Again, the normal teaching load in respect of any one year is related to that requirement.

[92] At cl 5.8 which is headed “Division of Year into Terms and Holidays”, it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with pt 7 of the Education Act.

[93] It is apparent from the above that the concept of half-days, before and after noon, are at the heart of the legal requirements relating to the operation of a school day. That must necessarily impact on a teacher’s hours of work.

[94] The evidence of both parties was that they had avoided setting fixed hours of work, including start and finish times for teachers, in the collective agreement because the nature of the work meant that teachers would often work outside of the hours of instruction (either at school or outside of school, depending on timetabling) to undertake the wide-ranging duties of their positions. The union’s unchallenged evidence was that, in practical terms (depending on timetabling), teachers are required to be on site from 9 am to 3 pm but, in general, are there from about 8.30 am to 4.30 pm.

[95] All of this leads to a plain reading, in context, that during the term, there are periods of time during a day when a school is open for instruction and periods of time when it is not. This can be contrasted with vacations, weekends or public holidays when, for the whole day (as opposed to times), a school is not open or is closed for instruction.

[96] The reference to “five days *or equivalent*”<sup>42</sup> in both cls 5.4.1 and 5.4.2 contemplates that the five days may be made up of blocks of time.

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<sup>42</sup> Emphasis added.

[97] Further, the provision refers to “*at times* when the school is not open for instruction”, not “*days*”.<sup>43</sup> By referring to “times”, the wording contemplates periods (times) during a day when a school is open for instruction and periods (times) when it is not.

[98] Accordingly, the wording of the provision, “*at times* when the school is not open for instruction”, in the context of the legislation and the whole of “Part Five”, supports the plaintiff’s interpretation. That, however, is not the end of the exercise.

*Do the words “not open for instruction” in cl 5.4 refer only to vacation time?*

[99] Mx Hornsby-Geluk submits that the second defendant’s negotiators,<sup>44</sup> at all times, intended the ability to call back teachers for the purposes of professional development (in the 1996 STCEC), administration purposes (in the 1999 STCEC) and the consequential ability to claim reimbursement for reasonable costs incurred, would only apply in relation to vacation time. They say this was a bottom line for the second defendant’s negotiators at the time and that they would not and did not move from this position. They submit that was what the parties intended the words “not open for instruction” to mean and the clause should be interpreted consistent with this (they say) shared intention.

[100] In support of this submission, substantial evidence was produced in relation to the aims of the bargaining from the second defendant’s negotiators’ perspective. Most of this evidence (Cabinet papers, correspondence between the negotiators and to interested Ministers including the Minister for Education) was not available to the plaintiff at the time and therefore is only evidence of subjective intent. Accordingly, I do not attribute that material with relevance for the purposes of establishing a shared intention as part of this interpretive exercise.

[101] That said, it is not disputed that the 1996 STCEC claim from the SSC was that 10 days (later negotiated to five days) would be taken from vacation time and it was well known that this claw-back of holidays was an important claim for the Government

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<sup>43</sup> Emphasis added.

<sup>44</sup> The SSC for the 1996 STCEC and the Ministry for the 1999 STCEC and subsequent negotiations.

of the day. Equally, however, the evidence is clear that the claim was unacceptable to the union and its members and this was communicated to the SSC at the time.

[102] In relation to the 1996 STCEC, the negotiating stances of the parties do not greatly assist in the interpretation exercise. Contracts are often a product of compromise. The ‘give’ in bargaining is not always in the same clause as the ‘take’ and, as was the case here, there is often no agreement until everything is agreed.

[103] It is correct that cl 5.6.2 of the 1996 STCEC was put under the heading “Division of Year into Terms and Holidays”. It replaced cl 4.6.2 in the 1994 STCEC, which acknowledged that teachers may attend school during vacation time for the purposes of school administration or for preparation and co-ordination with colleagues for the next term. The Ministry says the 1996 STCEC, and therefore the 1999 clauses and the current clause, by inference, also refer to vacations.

[104] However, cl 5.6.2 of the 1996 STCEC, unlike the previous cl 4.6.2, does not refer to vacation time at all. It uses the phrase “at times when the school is not open for instruction”.

[105] These were sophisticated bargaining parties. It is reasonable to take the words used (or not used) as deliberate. The parties could have retained reference to vacations. They did not.

[106] Further, the movement of the clause in the second iteration of the provision does not support the proposition that the provision only refers to vacations.<sup>45</sup> It was moved away from underneath the heading “Division of Year into Terms and Holidays” and into a standalone provision headed “Duties When Schools Are Not Open For Instruction”. The clause has remained in that position since.

[107] Mx Hornsby-Geluk put much emphasis on the witnesses’ agreement that what the words meant in the 1999 STCEC was the same as what was agreed in the 1996 STCEC. Of course, that begs the question of what was agreed in 1996. The Ministry says it agreed that “not open for instruction” meant vacation time, and that shifting the

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<sup>45</sup> 1999 STCEC.

clause and changing the wording (as occurred in the bargaining for the 1999 STCEC) is of no consequence.

[108] That cannot be correct, particularly given that, with this collective contract, as with most collective contracts, people other than the negotiators will read the agreement and interpret it, often years later. It is even more important, in those circumstances, that we look at the text of the clause construed in the context of the document as a whole. Readers cannot be expected to go back 25 years to work out what the provisions mean.

[109] Further, it is reasonable to assume that moving and renaming the clause was consistent with the (unchanged) understanding at the time.

[110] There is nothing in the (then new) wording of the clause that would indicate that the parties intended to limit the employer's right to require attendance to only be able to be exercised in vacation time.

[111] It is not sufficient to look only at the heading that the clause sat under as at 1996; it is necessary to look at the whole part within which it now sits, as discussed above.<sup>46</sup>

[112] To the extent that the meaning of the words remained the same between both agreements, that meaning was not that it only applied to vacations.

[113] When "Part Five" of the 2019 STCA is read as a whole with the knowledge of the history of the clause and consistent with its purpose, the argument that the words "not open for instruction" in cl 5.4 can be said to relate only to vacation times, is unsustainable. The meaning is inclusive of, but broader than, "vacations".

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<sup>46</sup> At [78]–[97].

*Do the words “open for instruction” only refer to the two-hour, two half-days on a day a school is open?*

[114] Mr Cranney submits that the meaning of the phrase “open for instruction” in the 2019 STCA, and in the education legislation, is the same and that the phrase “not open for instruction” has a consequential meaning.

[115] He says it is inconceivable that the negotiators at the time were unaware of the statutory provisions. Further, the wording “open for instruction” is specifically picked up elsewhere in the agreement.<sup>47</sup>

[116] On that basis Mr Cranney submits that the period “when a school is open for instruction” is as set out in the Education Act.<sup>48</sup> It is the 380 half-days before and after noon during the week (Monday to Friday) during term time. He says that it excludes all Saturdays and Sundays (unless appropriate statutory exemption has been obtained), public holidays and Easter Tuesday<sup>49</sup> because a board must ensure schools are closed on these days. It is common ground and he also accepts that it excludes the term breaks (vacations).

[117] Mr Cranney goes further. He says it must also exclude periods prior to the school opening for instruction for the morning half-day and after the school closes after the post noon half-day.

[118] The Ministry says that meaning is not what was intended by the parties at the time of negotiation and would result in a commercially absurd outcome. The evidence of Ms Holsted<sup>50</sup> was that once the school was open for instruction on a day – that is, it had been open for at least two hours before or after noon – that rendered the whole day as “open for instruction”.<sup>51</sup>

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<sup>47</sup> 2019 STCA, cl 5.7. See also 1996 STCEC, cl 5.5 and 1999 STCEC, cl 5.6.

<sup>48</sup> Education Act 1989, ss 60, 65A and 65B.

<sup>49</sup> Section 65C.

<sup>50</sup> Now the Chief Executive of the Ministry of Education and also referred to as the Secretary for Education, but then a Senior Adviser in the Education Sector Group and the State Services Commissioner’s legal negotiator.

<sup>51</sup> Despite it logically following from this approach that weekends, public holidays and Easter Tuesday would not be times when the school is open for instruction and, therefore, times to which the clause would apply, Ms Holsted maintained the view that the clause only related to vacations, as that was the intention at the time. I have already dealt with that view above; it is unsustainable.

[119] The problem for the Ministry is that Ms Holsted’s view – that once a school had been open for instruction for at least one half-day, it was open for instruction for the whole day (beginning at 12 am and ending at midnight) – is also commercially absurd but, more importantly, inconsistent with the provisions of “Part Five” in terms of the definition of overtime,<sup>52</sup> and the length of a school day.<sup>53</sup>

[120] The plaintiff’s argument, however, has some attraction. On the face of it, it is consistent with the wording of “Part Five” as a whole, the clause in question and the statutory framework within which it is operating.

[121] It is also consistent with the guidelines that were published by the PPTA in 1996 and circulated to its members with the approval of the SSC.<sup>54</sup> In those guidelines, “not open for instruction” is said to mean any time a school is open outside the 380 half-days per year that a school is required to be open for instruction, which “will include vacation periods and weekends but also any time after timetabled instruction ends on a school day.”

[122] However, while it is attractively simple to interpret the wording in the manner proposed by Mr Cranney, it goes too far and would ignore the other provisions of “Part Five”.

*The natural and ordinary meaning of the words*

[123] Both parties’ legal positions in relation to the provision are inconsistent with the tenet of “Part Five” as a whole, which is to retain flexibility for both schools and teachers in how they manage the delivery of the curriculum and meet the pastoral needs of the students within certain guidelines and legal requirements. It recognises that much of a teacher’s work is performed away from the workplace and outside the 25 hours that they are individually timetabled to deliver.<sup>55</sup>

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<sup>52</sup> 2019 STCA, cl 5.3.1.

<sup>53</sup> 2019 STCA, cl 5.5.

<sup>54</sup> At [41]–[42] above.

<sup>55</sup> Including periods of both contact and non-contact time.

[124] Clause 5.1.2 of the 2019 STCA specifically acknowledges and accepts that the hours of opening of schools are designed to meet the curriculum and pastoral needs of students. Each employer must have a timetabling policy,<sup>56</sup> which incorporates non-contact entitlements based on timetabled hours comprising a total of 25 hours or a combination of periods of time equivalent to 25 hours per week.<sup>57</sup> This presumes that a teacher is at school and working for more than the four hours per day, 20 hours per week, that Mr Cranney's two half-day analysis would allow.

[125] The union's witnesses' evidence was that, while formal instruction commonly starts at 9 am and finishes at approximately 3-3.15 pm, for practical purposes, a teacher's working day will generally be from approximately 8.30 am to 4.30 pm. Accordingly, taking into account the many factors influencing the work of teachers as set out at cl 5.1.1, those are the times when a school is open for instruction. Despite the union's stated legal position, its witnesses considered times outside of that (slightly broader) timeframe to be the times when the school is not open for instruction.

[126] This also makes sense in terms of the natural and ordinary meaning of the words.

[127] The purpose of the clause was to enable the employer to require teachers to be at school or elsewhere for professional development or administrative purposes at times when they would not generally be required to be at work. To interpret the natural and ordinary meaning of the words "times when the school is not open for instruction" as being before 8.30 am and after 4.30 pm on days during the school term, weekends, public holidays, Easter Tuesday and vacations, is entirely consistent with that purpose and the context of "Part Five" of the collective agreement.

[128] Having made that assessment of the meaning of the words in the contractual context and history of the provision, it is necessary to move on to consider whether the structure of the bargain, any specialised meaning or consideration of commercial absurdity affect that assessment.

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<sup>56</sup> 2019 STCA, cl 5.1A.1.

<sup>57</sup> 2019 STCA, cl 5.2.2.

*Commercial/industrial structure of the bargain*

[129] Prior to what would become cl 5.4 being introduced, there was no ability to call teachers back to work during the vacations, weekends or any other time when the school was not open for instruction. Teachers may well have undertaken work during these times,<sup>58</sup> but the hours of work provision did not allow them to be directed to do so.

[130] Clause 5.4 of the 2019 STCA confers on a board of trustees an express right to require teachers to undertake five days or equivalent of professional development per year, and five days or equivalent of administration, preparation, co-ordination, departmental or related activities and community, parent and whanau contact and liaison per year, when the school is not open for instruction, either at the school or elsewhere.

[131] To allow the employer to prescribe times at which a teacher is required to be at school or elsewhere outside of timetabled teaching, was a concession for the union and a benefit for the employer.

[132] The evidence of the union was that it was a significant concession both in 1996 and in 1999, given the members' views on their workload and the offence taken at what they saw as the questioning of their professionalism and the suggestion that they did not already work outside timetabled hours. The evidence from the Ministry is that they wanted an ability to require teachers to attend at school during vacations.

[133] The requirement that actual and reasonable costs be reimbursed does not take the commercial and industrial analysis further. While pitched as a benefit to the union at the time, I consider it to be neutral. That, however, does not undermine the bargain that the Ministry achieved. Reimbursement of expenses incurred is by no means a windfall; it simply ensures that teachers are not financially disadvantaged by having to attend school or elsewhere.

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<sup>58</sup> The union's evidence was that they did undertake such work.

[134] What was achieved in 1996 was an ability for boards of trustees to require teachers, before 8.30 am and after 4.30 pm on days during the school term, on weekends, public holidays, Easter Tuesday and vacations, to attend professional development opportunities for up to a total of five days, provided also that the needs of the individual teacher and the teacher's own initiatives are taken into account. After 1999, they could also require such attendance for up to five days (or equivalent) for administrative purposes. They did not have that ability previously. It may not have been the bargain that was initially sought by the Ministry but it still had value. The natural and ordinary meaning of the clause that I have set out above does not undermine that value. It is consistent with the commercial and industrial structure of the bargain reached.

*Specialised meaning*

[135] Parties to contracts will sometimes use words that have specialised meanings within a particular profession, industry, trade or locality and the Court is entitled to receive evidence which demonstrates that the parties have negotiated such a meaning.<sup>59</sup>

[136] As noted above, there was no evidence that the parties mutually intended the words to have the specialised meaning of "vacation".

[137] While Mr Cranney did not go so far as to suggest that "open for instruction" had a specialised meaning per se, his submission was that the parties intended that the phrase have the meaning prescribed in pt 7 of the Education Act, being that a school is "open for instruction" every year for the number of half-days prescribed by the Minister,<sup>60</sup> and therefore "*not* open for instruction"<sup>61</sup> at any other time.

[138] While the statutory meaning aids in interpretation, it is not the end of the exercise. Taking into account the purpose of the provision, the contractual intent and the wording of the provision itself, the meaning of "open for instruction" is broader than the narrow definition of half-day in the statute.

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<sup>59</sup> *Firm PI*, above n 29, at [84].

<sup>60</sup> Education Act 1989, s 65A.

<sup>61</sup> Emphasis added.

### *Commercial/industrial absurdity*

[139] The Ministry submitted that to interpret the words “open for instruction” in the way proposed by the union (to mean only the two two-hour, half-day periods on a day the school is open) was commercially absurd. It pointed to the union’s own recognition of this in its guidelines issued after the 1999 STCEC. That interpretation has not been accepted as the natural and ordinary meaning of the words.

[140] Where contractual language, viewed in the context of the whole contract, has a natural and ordinary meaning, a conclusion that it provides a commercially absurd result should only be reached in the most obvious and extreme case.<sup>62</sup> This is not such a case.

[141] The Court’s interpretation does not inhibit school activities.<sup>63</sup> There is nothing to prevent a school scheduling courses or events and requiring attendance by the teacher at times during the school week but when the school is not open for instruction. It simply means that the time should be credited towards either their professional development or administration days and if reasonable costs were actually incurred as a result, they be reimbursed.

[142] The interpretation of this Court set out above does not result in any commercial/industrial absurdity.<sup>64</sup>

### **Conclusion**

[143] Construed in the agreement as a whole, the ordinary and natural meaning of clause 5.4 is that the words “times when the school is not open for instruction” mean weekends, public holidays, Easter Tuesday, vacations and times before 8.30 am and after 4.30 pm on days during the school term.

[144] This meaning is consistent with the purpose of the clause itself, which was to enable the employer to require teachers to be at school or elsewhere for professional

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<sup>62</sup> *Firm PI*, above n 29, at [93]. See also *Bathurst*, above n 31.

<sup>63</sup> At [95] and [127].

<sup>64</sup> At [95] and [127].

development or administrative purposes at times when they could not previously be required to be at the workplace. It is also consistent with “Part Five” more broadly, which was to retain flexibility for both schools and teachers in how to manage the delivery of the curriculum and meet the pastoral needs of the students within certain guidelines and legal requirements.

[145] The determination of the Authority is set aside and this decision of the Court stands in its place.

[146] Costs are reserved. The parties are encouraged to agree costs. If, however, the parties cannot reach agreement on this issue, an application for costs should be lodged within 21 days; any response should be filed 21 days thereafter.

Kathryn Beck  
Judge

Judgment signed at 2.30 pm on 4 July 2022

1994–1995 STCEC

**Part Four: Hours of Work**

**4.1 General**

4.1.1 As well as the number of classes a teacher may be timetabled to teach, the hours of work of individual teachers are influenced by factors such as:

- (a) the preparation, evaluation and assessment time that may be generated by those classes and the students within them or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;
- (b) the counselling and pastoral needs of students;
- (c) the administrative responsibilities of individual teachers either in respect of their curriculum or pastoral responsibilities or in respect of the general administration of the school; and
- (d) the extent to which individual teachers may participate in the extra-curricular programmes of the school.

4.1.2 For the foregoing reasons the parties to this contract further acknowledge and accept that the hours of opening of schools, the structure of the timetables and like matters are designed to meet the curriculum and pastoral needs of students and are determined within each school (according to well understood national guidelines or specific legal requirements).

4.1.3 The clauses which follow identify the guidelines and requirements upon which the decisions in individual schools are made.

**4.2 Definitions**

4.2.1 For the purposes of this clause, unless the context otherwise requires:

- (a) “Half day” (HD) shall have the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957.
- (b) “Overtime” shall mean any timetabled teaching time in excess of two half days on any one day, or in excess of 10 half days in any one week, and shall include any timetabled teaching time scheduled on a Saturday or a Sunday except where the timetabled teaching time is correspondingly reduced, and any timetabled teaching time scheduled for any statutory or other full holiday specified in this contract or during any vacation fixed in accordance with Part VII of the Education Act 1989.
- (c) The term “teaching time” can include supervision, non-scheduled supervision time of students, teacher non-contact time, administrative duties or other directed or non-directed duties.

### **4.3 Length of School Day**

- 4.3.1 For each school the length of the “school day” shall be determined according to the requirement that students are normally required to be in attendance for two half days, one before noon, the other after noon.
- 4.3.2 The normal teaching load in respect of any one day is therefore related to that requirement and takes account of the normal timetabling practices of each school.

### **4.4 Length of School Week**

- 4.4.1 Except where interrupted by any statutory holiday or any other holiday allowed for in accordance with Part VII of the Education Act 1989 or by any provision in this contract authorising the absence of teachers, the length of the school week for each school shall be determined according to the requirement that students are normally required to be in attendance for 10 half days on the days Monday to Friday inclusive.
- 4.4.2 The normal teaching load in respect of any one week is therefore related to that requirement.
- 4.4.3 As noted in subclause 4.2.1(b) the 10 half days in any one week may include timetabled teaching time scheduled for a Saturday or a Sunday.

### **4.5 Length of School Year**

- 4.5.1 Except where reduced by any lawful decision of the employer to close the school to students, the length of the school year for each school shall be determined according to the requirement that schools are required to be open for instruction at least 380 half days in any one calendar year.
- 4.5.2 The normal teaching load of teachers in respect of any one year is therefore related to that requirement.

### **4.6 Division of Year into Terms and Holidays**

- 4.6.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part VII of the Education Act 1989.

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| 4.6.2 The parties to this contract acknowledge that teachers may attend school during vacation time for the purposes of school administration or for preparation and co-ordination with colleagues for the next term; and that teachers use vacation time away from school for such purposes as curriculum or technical refreshment and for the preparation of resources or programmes for the next teaching term. |
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## 1996–1998 STCEC

**Part Five: Hours Of Work****5.1 General<sup>65</sup>**

5.2.1 As well as the number of classes a teacher may be timetabled to teach, the hours of work of individual teachers are influenced by factors such as:

- a) the preparation, evaluation and assessment time that may be generated by those classes and the students within them or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;
- b) the counselling and pastoral needs of students;
- c) the administrative responsibilities of individual teachers either in respect of their curriculum or pastoral responsibilities or in respect of the general administration of the school; and
- d) the extent to which individual teachers may participate in the extra-curricular programmes of the school.

5.2.2 For the foregoing reasons the parties to this contract further acknowledge and accept that the hours of opening of schools, the structure of the timetables and like matters are designed to meet the curriculum and pastoral needs of students and are determined within each school according to well understood national guidelines or specific legal requirements.

5.2.3 The clauses which follow identify the guidelines and requirements upon which the decisions in individual schools are made.

**5.2 Definitions**

5.2.1 For the purposes of this clause, unless the context otherwise requires:

- a) “Half day” (HD) shall have the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957.
- b) “Overtime” shall mean any timetabled teaching time in excess of two half days on any one day, or in excess of 10 half days in any one week, and shall include any timetabled teaching time scheduled on a Saturday or a Sunday except where the timetabled teaching time is correspondingly reduced, and any timetabled teaching time scheduled for any statutory or other full holiday specified in this contract or during any vacation fixed in accordance with Part VII of the Education Act 1989.
- c) The term “teaching time” can include supervision, non-scheduled supervision time of students, teacher non-contact time, administrative duties or other directed or non-directed duties.

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<sup>65</sup> These clauses have erroneously been numbered 5.2.1–5.2.3 instead of 5.1.1–5.1.3.

### **5.3 Length of School Day**

- 5.3.1 For each school the length of the “school day” shall be determined according to the requirement that students are normally required to be in attendance for two half days, one before noon, the other after noon.
- 5.3.2 The normal teaching load in respect of any one day is therefore related to that requirement and takes account of the normal timetabling practices of each school.

### **5.4 Length of School Week**

- 5.4.1 Except where interrupted by any statutory holiday or any other holiday allowed for in accordance with Part VII of the Education Act 1989 or by any provision in this contract authorising the absence of teachers, the length of the school week for each school shall be determined according to the requirement that students are normally required to be in attendance for 10 half days on the days Monday to Friday inclusive.
- 5.4.2 The normal teaching load in respect of any one week is therefore related to that requirement.
- 5.4.3 As noted in subclause 5.2.1(b) the 10 half days in any one week may include timetabled teaching time scheduled for a Saturday or a Sunday.

### **5.5 Length of School Year**

- 5.5.1 Except where reduced by any lawful decision of the employer to close the school to students, the length of the school year for each school shall be determined according to the requirement that schools are required to be open for instruction at least 380 half days in any one calendar year.
- 5.5.2 The normal teaching load of teachers in respect of any one year is therefore related to that requirement.

### **5.6 Division of Year into Terms and Holidays**

- 5.6.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part VII of the Education Act 1989.

- 5.6.2 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days per annum and provided also that the needs of the individual teacher are taken into account and the teacher’s own initiatives in undertaking professional development during time when the school is closed for instruction is considered. Teachers who participate in terms of this requirement shall be reimbursed for any actual and reasonable costs incurred in accordance with Part Seven of this contract.

**Note:** *This provision shall not apply to teachers in the Correspondence School. The provisions applying to those teachers are contained in Part Eleven of this contract.*

## 1999–2001 STCEC

**Part Five: Hours of Work****5.1 General**

- 5.1.1 As well as the number of classes a teacher may be timetabled to teach, the hours of work of individual teachers are influenced by factors such as:
- a) the preparation, evaluation and assessment time that may be generated by those classes and the students within them or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;
  - b) the counselling and pastoral needs of students;
  - c) the administrative responsibilities of individual teachers either in respect of their curriculum or pastoral responsibilities or in respect of the general administration of the school; and
  - d) the extent to which individual teachers may participate in the extra-curricular programmes of the school.
- 5.1.2 For the forgoing reasons the parties to this contract further acknowledge and accept that the hours of opening to schools, the structure of the timetables and like matters are designed to meet the curriculum and pastoral needs of students and are determined within each school according to well-understood national guidelines or specific legal requirements.
- 5.1.3 The clauses which follow identify the guidelines and requirements upon which the decisions in individual schools are made.

**5.2 Definitions**

- 5.2.1 For the purposes of this clause, unless the context otherwise requires:
- a) "Half day" (HD) shall have the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957.
  - b) "Overtime" shall mean any timetabled teaching time in excess of two half days on any one day, or in excess of 10 half days in any one week, and shall include any timetabled teaching time scheduled on a Saturday or a Sunday except where the timetabled teaching time is correspondingly reduced, and any timetabled teaching time scheduled for any statutory or other full holiday specified in this contract or during any vacation fixed in accordance with Part VII of the Education Act 1989.
  - c) The term "teaching time" can include supervision, non-scheduled supervision time of students, teacher non-contact time, administrative duties or other directed or non-directed duties.

**5.3 Duties When Schools Are Not Open For Instruction**

- 5.3.1 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days or equivalent per annum and provided also that the needs of the

individual teacher are taken into account and that the teacher's own initiatives in undertaking professional development during time when the school is not open for instruction are considered.

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| 5.3.2 | The employer may require teachers to attend school or elsewhere when the school is not open for instruction for up to five days or equivalent per annum for all or any of the following purposes – school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that teachers' individual needs are taken into account. Teachers' own initiatives in undertaking work for the above purposes shall be counted when applying this clause. |
| 5.3.3 | Where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to 5.3.1 and 5.3.2 above, they shall be reimbursed for any actual and reasonable costs incurred.  |

*Note: This provision shall not apply to teachers in the Correspondence School. The provisions applying to those teachers are contained in Part Eleven of this contract.*

#### **5.4 Length of School Day**

- 5.4.1 For each school the length of the "school day" shall be determined according to the requirement that students are normally required to be in attendance for two half days, one before noon, the other after noon.
- 5.4.2 The normal teaching load in respect of any one day is therefore related to that requirement and takes account of the normal timetabling practices of each school.

#### **5.5 Length of School Week**

- 5.5.1 Except where interrupted by any statutory holiday or any other holiday allowed for in accordance with Part VII of the Education Act 1989 or by any provision in this contract authorising the absence of teachers, the length of the school week for each school shall be determined according to the requirement that students are normally required to be in attendance for 10 half days on the days Monday to Friday inclusive.
- 5.5.2 The normal teaching load in respect of any one week is therefore related to that requirement.
- 5.5.3 As noted in subclause 5.2.1(b) the 10 half days in any one week may include timetabled teaching time scheduled for a Saturday or a Sunday.

#### **5.6 Length of School Year**

- 5.6.1 Except where reduced by any lawful decision of the employer to close the school to students, the length of the school year for each school shall be determined according to the requirement that schools are required to be open for instruction at least 380 half days in any one calendar year.
- 5.6.2 The normal teaching load of teachers in respect of any one year is therefore related to that requirement.

## **5.7 Division of Year into Terms and Holidays**

- 5.7.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part VII of the Education Act 1989.

2019–2022 STCA

**PART FIVE: Hours of Work**

**5.1 General**

5.1.1 As well as the number of classes a teacher may be timetabled to teach, the hours of work of individual teachers are influenced by factors such as:

- (a) The preparation, evaluation and assessment time that may be generated by those classes and the students within them or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;
- (b) The counselling and pastoral needs of students;
- (c) The administrative responsibilities of individual teachers either in respect of their curriculum or pastoral responsibilities or in respect of the general administration of the school; and
- (d) The responsibilities of individual teachers arising from their appointment to a Kāhui Ako Teacher role;
- (e) The extent to which individual teachers may participate in the extra-curricular programmes of the school.

5.1.2 For the foregoing reasons the parties to this agreement further acknowledge and accept that the hours of opening of schools, the structure of the timetables and like matters are designed to meet the curriculum and pastoral needs of students and are determined within each school according to well-understood national guidelines or specific legal requirements.

5.1.3 The clauses which follow identify the guidelines and requirements upon which the decisions in individual schools are made.

**5.1A Timetabling Policy**

5.1A.1 Each employer must have a policy on timetabling, developed in consultation with its teaching staff. This policy shall incorporate:

- (a) The non-contact entitlements of 5.2.3 to 5.2.6 below as relevant for the type of school;
- (b) Class size matters, including the class size provisions of clause 5.9 below;
- (c) Reference to other matters, including hours of duty outside of timetabled hours, which impact on timetabling practices;
- (d) A process providing for circumstances where, for genuine reason during timetabling or at short notice, it is not possible to provide the non-contact time entitlements described in 5.2.3(a), 5.2.4(a), 5.2.5(a) and 5.2.6(b) and where the employer has used reasonable endeavour and is unable to achieve the class size provision in 5.9.2.

## **5.2 Non-Contact Time**

- 5.2.1 The non-contact time allocations for secondary teachers are an acknowledgement of the importance to quality education of the duties other than classroom teaching (such as those referred to in 5.1.1(a to d) above) which teachers are required to undertake while schools are open for instruction.
- 5.2.2 For the purposes of 5.2, non-contact time is based on individual teachers' timetabled hours comprising a total of 25 hours or a combination of periods of time equivalent to 25 hours per week.
- 5.2.3 (a) The employer shall provide five timetabled non-contact hours within each school week to each full-time teacher subject to 5.1A above. The non-contact time may be a combination of differing periods of time which total no less than the equivalent of five non-contact hours.
- (b) The individual time allowances provided under clause 3.7 (Te Atakura), 3.8 (Beginning Teacher), 3.8A (Head of Department Beginning Teacher Time Allowance) and 3.8B (Specialist Classroom Teacher) of this Agreement shall be in addition to the non-contact time entitlements above.
- 5.2.4 **Specialist Secondary Teachers of Technology**  
Specialist secondary teachers of technology who come within the coverage in clause 1.4(a).
- (a) The employer shall timetable each full-time specialist secondary teacher of technology for no more than 20 contact hours within each school week subject to 5.1A above. The contact time may be a combination of differing periods of time which total no more than the equivalent of twenty contact hours.
- (b) The maximum classroom contact hours of each full time specialist secondary teacher of technology provided above shall be reduced by any individual time allowances provided under clause 3.8 (Beginning Teacher) of this Agreement.
- 5.2.5 **Permanent Unit Holders**
- (a) The employer shall provide as a minimum the following non-contact time entitlement to each teacher allocated permanent unit(s) in addition to the non-contact time entitlements set out in 5.2.3 and 5.2.4:
- (i) one hour per week for holders of one permanent unit;
  - (ii) two hours per week for holders of two permanent units; and
  - (iii) three hours per week for holders of three or more permanent units.
- (b) The non-contact time allocations expressed in 5.2.5(a)(i-iii) are minimum entitlements. For the fourth and subsequent permanent unit(s) the employer will endeavour to provide one hour for each additional permanent unit. The employer may continue to provide additional non-contact time above this for senior management positions in accordance with school policies.
- (c) The individual time allowances provided under clause 3.7 (Te Atakura), 3.8 (Beginning Teacher), 3.8A (Head of Department Beginning Teacher Time Allowance) and 3.8B (Specialist Classroom Teacher) of

this Agreement shall be in addition to the non-contact time entitlements above. The Beginning Teacher Time allowance (Clause 3.8) is calculated before the non-contact time entitlements are calculated.

#### 5.2.6 Part-time Teachers

The timetabled hours of part-time teachers shall be determined according to the following provisions. Attention is drawn to clause 4.5.1 which sets out the basis of the establishment of a part-time teacher's FTTE proportion as the sum of their timetabled class contact hours and any allocated timetabled non-contact time.

- (a) The employer will endeavour to provide non-contact time for part time teachers who are employed between 0.48 FTTE and 0.89 FTTE to allow such teachers non-contact time that is proportionate to that provided to full-time teachers (five hours per week under clause 5.2.3). The timetabled non-contact time outlined in the table in (b) shall continue to operate as a minimum entitlement.
- (b) The minimum timetabled non-contact time of part-time teachers (including specialist secondary teachers of technology who come within the coverage in clause 1.4(a)) subject to 5.1A is outlined in the table below:

FTTE	Minimum timetabled non-contact hours per week
0.89	3.0
0.87 – 0.88	2.5
0.85 – 0.86	2.0
0.83 – 0.84	1.5
0.75 – 0.82	1.0
0.72 – 0.74	0.5
Below 0.72	None

- (c) The placement of each part-time teacher's timetabled non-contact hours within the timetable shall be in discussion with the individual teacher and recognise the distribution of the individual's timetabled class contact hours. The teacher is required to be available in the school during their timetabled non-contact time.
- (d) Nothing in (a) – (c) above shall operate to reduce current agreements around the proportion of a full-time position to which a part-time teacher is appointed. Fixed-term arrangements with respect to all or part of a part-time teacher's hours of work shall continue according to their current basis, including any agreement to revision of these hours.
- (e) The individual time allowances provided under clause 3.7 (Te Atakura), 3.8 (Beginning Teacher), 3.8A (Head of Department Beginning Teacher Time Allowance), 3.8B (Specialist Classroom Teacher) and 5.2.5(a) (Permanent Unit Holders) of this Agreement shall be in addition to the non-contact time entitlements above.

#### 5.2.7 Inquiry time

A board in an approved Kāhui Ako will be entitled to allocate a number of hours of inquiry time in each school year which will be generated by the relevant Staffing Order. The board will determine the allocation of the inquiry time following consultation with its teaching staff and the person in the Kāhui Ako Leadership role.

### 5.3 Definitions

5.3.1 For the purposes of this clause, unless the context otherwise requires:

- (a) “Half day” (HD) shall have the meaning implied by its use in the Education (Salaries and Staffing) Regulations 1957.
- (b) “Overtime” shall mean any timetabled teaching time in excess of two half days on any one day, or in excess of 10 half days in any one week, and shall include any timetabled teaching time scheduled on a Saturday or a Sunday except where the timetabled teaching time is correspondingly reduced, and any timetabled teaching time scheduled for any public or other full holiday specified in this agreement or during any vacation fixed in accordance with Part 7 of the Education Act 1989.
- (c) The term “teaching time” can include supervision, non-scheduled supervision time of students, teacher non-contact time, administrative duties or other directed or non-directed duties.

### 5.4 Duties When Schools Are Not Open For Instruction

5.4.1 The employer may require teachers to participate in professional development opportunities at times when the school is not open for instruction provided that no teacher shall be required to attend for more than five days or equivalent per annum and provided also that the needs of the individual teacher are taken into account and that the teacher’s own initiatives in undertaking professional development during time when the school is not open for instruction are considered.

5.4.2 The employer may require teachers to attend school or elsewhere when the school is not open for instruction for up to five days or equivalent per annum for all or any of the following purposes – school administration, preparation and coordination, departmental or related activities and community, parent and whanau contact and liaison. The employer will endeavour to arrange matters at the school in such a way that any requirement under this section is not unreasonable and that teachers’ individual needs are taken into account. Teachers’ own initiatives in undertaking work for the above purposes shall be counted when applying this clause.

5.4.3 Where teachers are required to attend school or elsewhere when the school is not open for instruction pursuant to 5.4.1 and 5.4.2 above, they shall be reimbursed for any actual and reasonable costs incurred.

*Note: This provision shall not apply to teachers in Te Aho o Te Kura Pounamu. The provisions applying to those teachers are contained in Part Eleven of this agreement.*

## **5.5 Length of School Day**

- 5.5.1 For each school the length of the “school day” shall be determined according to the requirement that students are normally required to be in attendance for two half days, one before noon, the other after noon.
- 5.5.2 The normal teaching load in respect of any one day is therefore related to that requirement and takes account of the normal timetabling practices of each school.

## **5.6 Length of School Week**

- 5.6.1 Except where interrupted by any public holiday or any other holiday allowed for in accordance with Part 7 of the Education Act 1989 or by any provision in this agreement authorising the absence of teachers, the length of the school week for each school shall be determined according to the requirement that students are normally required to be in attendance for 10 half days on the days Monday to Friday inclusive.
- 5.6.2 The normal teaching load in respect of any one week is therefore related to that requirement.
- 5.6.3 As noted in subclause 5.3.1(b) the 10 half days in any one week may include timetabled teaching time scheduled for a Saturday or a Sunday.

## **5.7 Length of School Year**

- 5.7.1 Except where reduced by any lawful decision of the employer to close the school to students, the length of the school year for each school shall be determined according to the requirement that schools are required to be open for instruction at least 380 half days in any one calendar year.
- 5.7.2 The normal teaching load of teachers in respect of any one year is therefore related to that requirement.

## **5.8 Division of Year into Terms and Holidays**

- 5.8.1 For the purposes of organising their educational programmes it is noted that schools are permitted to divide the school year into teaching terms and holidays (vacations) in accordance with Part 7 of the Education Act 1989.

## **5.9 Class Size**

- 5.9.1 Clause 5.1A requires each employer to have a policy on timetabling, developed in consultation with its teaching staff. This policy shall incorporate reference to class size.
- 5.9.2 It is expected that employers will use reasonable endeavour to achieve, for each individual teacher with more than one class, an average class size (based upon the teacher’s timetabled classes and the roll of each of those classes) of no more than 26 students and where this cannot occur 5.1A.1(d) shall apply.

*Note: This does not preclude averages of less than 26 students.*