

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

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

**[2025] NZEmpC 102
EMPC 78/2025**

IN THE MATTER OF proceedings removed in full from the
Employment Relations Authority

AND IN THE MATTER OF a determination of a preliminary legal issue

AND IN THE MATTER OF an application for leave to commence
proceedings

BETWEEN THE SECRETARY FOR EDUCATION
Plaintiff

AND NEW ZEALAND POST PRIMARY
TEACHERS' ASSOCIATION
INCORPORATED TE WEHENGARUA
Defendant

Hearing: 7 May 2025
(Heard at Wellington)

Appearances: S Hornsby-Geluk, counsel for Plaintiff
T Kennedy, counsel for Defendant

Judgment: 21 May 2025

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN
(Determination of a preliminary legal issue; Application for leave to commence
proceedings)**

[1] An issue has arisen between the Secretary for Education and the New Zealand Post Primary Teachers' Association Inc Te Wehengarua as to the teaching arrangements that need to be in place at schools where there is to be a paid union meeting.

[2] The Secretary lodged a statement of problem with the Employment Relations Authority, seeking:

- (a) resolution of a dispute as to the proper construction of cl 10.4.1(c) of the Secondary Teachers Collective Agreement – 2022 to 2025 (the STCA); and
- (b) a declaration in respect of the PPTA’s obligation under s 26(3) of the Employment Relations Act 2000 (the ER Act).

[3] A preliminary issue has arisen as to whether the Secretary is able to take the proceedings. That issue covers the question of standing to commence the proceedings as the sole applicant, and if required, whether the Secretary should be granted leave to commence proceedings in respect of s 26(3) of the ER Act.

[4] Broadly speaking, the employment relationship problem raised by the Secretary concerns whether the PPTA is required to make arrangements with school boards of trustees to ensure that a school remains “open for instruction” (as opposed to what it describes as “supervision”) during paid union meetings.¹ It is boards of trustees who are the employers of teachers.

[5] The Secretary seeks declarations regarding the following three questions:

- (a) Is the PPTA required to make such arrangements with a school board as may be necessary to ensure that a school remains open for instruction within the meaning of cl 10.4.1(c) of the STCA during a paid union meeting?
- (b) Is a school that gives students the option of attending school while staff attend a paid union meeting, and provides “supervision” of those who do attend and/or access to self-directed learning, open for instruction under cl 10.4.1(c) of the STCA?

¹ *The Secretary for Education v New Zealand Post Primary Teachers’ Association Te Wehengarua* [2025] NZERA 110 at [2].

- (c) Are the requirements of s 26(3) of the ER Act met during paid union meetings where the school gives students the option of attending school and provides “supervision” for those who do attend and/or access to self-directed learning?

[6] The PPTA also lodged a statement of problem, seeking a declaration that the relevant arrangements under s 26(3) of the ER Act and cl 10.4.1(c) of the STCA are between the PPTA and the applicable boards of trustees (as the employers) and not the Secretary.² It seeks a declaration that the Secretary is not to be involved in, and is not to interfere with, arrangements for paid union meetings that are to be made as between the PPTA and the board of trustees for each relevant school.³ The PPTA’s position is that the Secretary does not have standing to bring these proceedings.

[7] The Secretary applied for the whole matter to be removed by the Authority to the Employment Court. That application was opposed by the PPTA. However, the Authority removed both proceedings to the Employment Court as it considered that important questions of law were likely to arise in the matter other than incidentally.⁴

[8] The Secretary subsequently applied for leave in the Court to commence proceedings regarding s 26, pursuant to s 29 of the ER Act. It did so without prejudice to its primary position that it had standing in relation to all matters relating to these proceedings. The Secretary also applied for urgency for the proceedings, which was granted.⁵

[9] There are, in essence, two distinct but related issues that the Secretary wishes to have considered. First, there is the dispute about the interpretation, application, or operation of cl 10.4.1(c) of the STCA, which provides:

The union must make such arrangements with the employer as may be necessary to ensure that the school remains open for instruction during any union meeting, including, where appropriate, an arrangement for sufficient union members to remain available during the meeting to enable the school to remain open for instruction.

² At [3].

³ At [18].

⁴ At [19]-[24].

⁵ *The Secretary for Education v New Zealand Post Primary Teachers’ Association Te Wehengarua* [2025] NZEmpC 54.

[10] The second, and similar issue, raised by the Secretary is with respect to the PPTA's obligations under s 26(3) of the ER Act, which provides:

The union must make such arrangements with the employer as may be necessary to ensure that the employer's business is maintained during any union meeting to which subsection (1) applies, including, where appropriate, an arrangement for sufficient union members to remain available during the meeting to enable the employer's operations to continue.

[11] As the PPTA raised the issue of standing with respect to s 26, the Secretary filed an application pursuant to s 29 of the ER Act, which provides:

29 Persons who have standing in proceedings relating to unions

The following persons have standing to commence or be a party to or be heard on matters within the Authority's jurisdiction that relate to a union under this Part:

- (a) the union:
- (b) a member of the union:
- (c) another union with a direct interest in the proceedings:
- (d) the Registrar of Unions:
- (e) an employer who is directly affected by the existence of the union or its activities:
- (f) with the leave of the Authority, any other person.

[12] The Secretary does not come within s 29(a) to (e). Her application (if one is necessary) is under s 29(f).

As a party to the STCA, the Secretary may bring a dispute

[13] I deal first with the issue of whether the Secretary has standing to bring a dispute over cl 10.4.1(c) of the STCA.

[14] The provision on disputes in the ER Act is s 129:

129 Person bound by, or party to, employment agreement may pursue dispute under this Act

(1) Where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute in accordance with Part 10.

(2) If the dispute relates to a collective agreement, the person or party pursuing the dispute must ensure that all union and employer parties to the agreement have notice of the existence of the dispute.

[15] Also relevant are ss 585 and 591 of the Education and Training Act 2020:

585 Application of Employment Relations Act 2000

Except as otherwise provided in this subpart, the Employment Relations Act 2000 applies in relation to the education service.

and

591 Personal grievances and disputes

Despite section 586,—

(a) in relation to a personal grievance, the employer is the employer as defined in section 10(7); and

(b) in relation to a dispute about the interpretation, application, or operation of any collective agreement, the employer is the employer as defined in section 10(7), acting, if the Public Service Commissioner so requires, together or in consultation with the Commissioner; and

(c) in relation to any other employment relationship problem (within the meaning of section 5 of the Employment Relations Act 2000), the employer is the employer as defined in section 10(7).

[16] Under s 10(7) of the Education and Training Act 2020, boards of trustees of State schools are the employers.

[17] Section 586 of the Education and Training Act confirms that it is the Public Service Commissioner who is responsible for negotiating collective agreements in the state education service. For those purposes, the Public Service Commissioner has the same rights, duties, and obligations under the ER Act as the Commissioner would have if the Commissioner were the employer.⁶ The parties to resultant collective

⁶ Education and Training Act 2020, s 587.

agreements are the Commissioner and the relevant union.⁷ The collective agreements, however, bind the employing boards of trustees and the employees of those boards who are members of the relevant union.⁸ The employing boards have the rights, obligations, and duties of employers under the ER Act as if they were parties to the collective agreement.⁹ The Public Service Commissioner may delegate his responsibilities for negotiating collective agreements in the state education sector.¹⁰

[18] The situation in the education service, whereby the employers are not named parties to, and do not negotiate, the collective agreements is probably unique. An added complication, that has previously given rise to litigation, is that collective agreements in the education sector include terms that bind the employers, and terms that bind the Secretary. In *The Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*, the Court of Appeal held that the Secretary was properly named as the sole respondent in proceedings before the Authority alleging breaches by the Secretary of an obligation that, under the collective agreement, was hers alone.¹¹ While the issue differed from those in the present proceedings, in reaching its conclusion the Court of Appeal noted that the Secretary was a party to the collective agreement, and that s 129 of the ER Act recognises two distinct classes of potential claimants; a person bound by a collective agreement, and a party to the agreement.¹² The PPTA suggested that, while the judgment confirmed that the Secretary could be pursued as a party in this context, it did not follow that she would be entitled to bring such a dispute herself. As a matter of logic, I do not accept that can be correct.

[19] The Court of Appeal also observed that “an employment relationship problem” is not confined to the parties to the employment relationship itself, and extends to a person whose obligations relate to or arise out of the employment relationship. That observation is consistent with the later decision of the Supreme Court in *FMV v TZB*,

⁷ Section 586(5).

⁸ Section 586(6).

⁹ Section 586(7).

¹⁰ Section 592. The Public Service Commissioner has previously delegated his role in respect of education sector bargaining to the Secretary. In the upcoming negotiations, however, the Public Service Commissioner is retaining his responsibility for collective bargaining with school teachers and principals in the education sector; see *Te Kawa Mataaho - Public Service Commission “Commissioner to lead bargaining with education sector”* (press release, 2 May 2025).

¹¹ *The Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* [2013] NZCA 272, [2013] ERNZ 664.

¹² At [23].

which made it clear that it is not only parties to employment relationships that can have employment relationship problems, or can bring or defend proceedings in the Authority; the important element is the nature of the problem, not the identity of the parties.¹³

[20] I note that the Secretary is not a disinterested party, even in respect of obligations that sit with boards of trustees. She has a role in respect of the education service as a whole, with that role extending to bargaining for and entering into collective agreements when the Public Service Commissioner delegates that role to her.¹⁴

[21] The starting position is that on its face, s 129 of the ER Act allows the Secretary, as a party to the collective agreement, to bring a dispute. The PPTA's argument is, however, that s 591(b) of the Education and Training Act requires s 129 to be read down so that only employers bound by the collective agreement may bring a dispute. It says the Secretary cannot bring a dispute, even though she is a party to the collective agreement. I do not agree.

[22] The purpose of s 591(b) of the Education and Training Act, alongside its surrounding provisions, is to enlarge the role of the Public Service Commissioner or his delegate.¹⁵ The provision imposes further obligations on an employer who brings or is the respondent to a dispute, requiring it, if the Public Service Commissioner so requires, to act together with or in consultation with the Commissioner. Those obligations are greater than the obligation in s 129 of the ER Act, that the person or party pursuing a dispute must ensure that all union and employer parties to the agreement have notice of the existence of the dispute. It does not follow that s 591(b) bears on s 129 of the ER Act in a restrictive way.

¹³ *FMV v TZB* [2021] NZSC 102 at [104].

¹⁴ As per her statutory powers; see generally the Education and Training Act 2020.

¹⁵ Generally, the provisions in subpart 4 empower the Commissioner or prescribe duties owed to him. See, for example, s 593, which empowers the Commissioner as the negotiator of collective agreements in the education service, s 592, which provides his delegatory powers, and s 590, which prescribes notification obligations on boards to the Commissioner about strike participation.

[23] The PPTA's interpretation also would be in contrast to the position of a union, who, as a party to a collective agreement, is entitled to pursue a dispute under s 129, even where the rights and obligations of the agreement do not attach to them. That too counts against the PPTA's argument.

[24] The PPTA also suggested that, because the Secretary is not privy to the obligation under cl 10.4.1(c), her concern in respect of the clause cannot constitute a dispute for the purposes of s 129. That suggestion also strains the plain meaning of s 129 and the broad meaning of "dispute" ascribed by s 5 of the ER Act. It is clear from the proceedings that have ensued, and the discussions prior, that there is a dispute between the PPTA and the Secretary about cl 10.4.1(c).

[25] In conclusion on the dispute issue, the Secretary, as a party to the STCA, is able to pursue a dispute about the interpretation, application or operation of cl 10.4.1(c) of the STCA by virtue of s 129 of the ER Act.

Leave granted to the Secretary to commence a proceeding relating to s 26

[26] I now turn to the Secretary's application for a declaration in respect of the PPTA's obligations under s 26(3) of the ER Act.

[27] Section 26 is within Part 4 of the ER Act; it concerns union meetings, with s 26(3) setting out the union's obligation to make certain arrangements with respect to such meetings.

[28] Section 29 of the ER Act sets out who has standing to commence or be a party to or be heard on matters within the Authority's jurisdiction that relate to a union under Part 4. The Secretary does not fall within sub paras (a) to (e). Accordingly, she cannot commence a proceeding as of right.

[29] However, she applies for leave to do so, relying on s 29(f).

[30] The PPTA submitted that this was not a matter that was before the Authority or removed to the Court. I do not agree. In reaching its decision to remove the whole matter to the Court, the Authority expressly referred to the question as to whether leave

is required in terms of s 29 of the ER Act, and if so, whether it should be granted.¹⁶ I proceed on that basis.

[31] Clearly s 29(f) envisages people other than those listed in s 29(a) – (e) to be able to bring proceedings with leave.

[32] As noted, the Secretary is not a disinterested party in these matters. She has a direct interest in the implementation of arrangements in schools under s 26(3) of the ER Act, which can materially impact the delivery of education services.

[33] Further, the issue the Secretary wants the Court to consider under s 26(3) of the ER Act overlaps considerably with the dispute that the Secretary has brought. It is in the interests of all parties that the dispute over cl 10.4.1(c) of the STCA and the interpretation issue under s 26(3) of the ER Act are heard together.

[34] Accordingly, leave is granted to the Secretary to commence proceedings in respect of the PPTA's obligations under s 26(3) of the ER Act.

[35] The registry is now to arrange a telephone directions conference to progress the substantive matters towards a hearing.

[36] Costs are reserved.

J C Holden
Judge

Judgment signed at 11 am on 21 May 2025

¹⁶ *The Secretary for Education v New Zealand Post Primary Teachers' Association Te Wehengarua*, above n 1, at [19].