PPTA TE WEHENGARUA ANNUAL CONFERENCE 2017

Guidelines for negotiating a compensatory mechanism for reasonable endeavour.

2017 PPTA Conference Paper from The Canterbury Region

Recommendations:

1. That the report be received.
2. That a clear process in the form of guidelines be negotiated in the 2018 STCA round to ensure branches have a tool to implement section 5.1A.1(d)
3. That a clear process in the form of guidelines be negotiated in the 2018 STCA round for those teachers who are teaching large numbers of pupils and for whom the present mechanism does not represent in 5.9.2.

Introduction

There has been considerable work by PPTA and its members over the past decade to limit class size in our secondary and area schools. We have had two papers to Conference in 2007 and 2011.

In 2007 NZPPTA negotiated a class size clause in the Collective Agreement (5.9)

5.9.1 States that Clause 5.1.A 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 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 5.1.A.1 (d) shall apply.

There are no clear guidelines leaving it wide open for abuse and continued undervaluing of teachers. It is not equitable.

Reasons for the paper:

What do we know?

From working with the one of the largest branches in Christchurch the Canterbury Regional Committee has discovered that in 2017 we are now facing challenges that were not even thought of in 2007. We are now challenged by Modern Learning Environments (MLE) or Innovative Learning Environments (ILE). The number of students involved in these classrooms and the work involved has not been considered in the context of the average class size. In 2007 the negotiation was based on a normal loading for teachers of five classes a week with a total of 20 hours' contact time. The number of classes was divided to come up with an average of 26 students per class. This may be the case for some schools in 2017. However MLEs and other structures change this conversation. For example, a teacher of Health has to teach all Junior Health classes, another teaches all Junior Music classes.

In these cases these teachers teach up to and over 190 students over the week. When using the mechanism as prescribed, these teachers' average is fewer than 26 due to the number of classes they teach. As the mechanism

was incorporated to ease workload these teacher find that they float under the parameter of compensation, therefore are excluded. These teachers are not the only ones in Canterbury in this dilemma.

Others find that they do exceed the 26 as per the agreement. However, the compensation mechanism without guidelines is hard to come to agreement over. STCA is silent on an agreed mechanism. The principal holds the line that they have used all reasonable endeavour. What is reasonable endeavour? What does it mean? How can the teacher be compensated by an agreed process where the contract is silent as to what the steps are to reach this process.

The relevant clauses:

Firstly, clause 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 on 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.***

This expects Principals (employers) to use the reasonable endeavour clause to achieve an average class size of no more than 26 students; however, if this cannot be attained, then 5.1A.1(d) **shall** be invoked.

And 5.1A.1 says

Each employer ***must*** *have a timetable policy which* ***shall*** *incorporate:*

> ***5.1A.1(d)***

A process for 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 been unable to achieve the class size provision in 5.9.2

This clearly states that if an average class size of 26 cannot be attained then an agreed compensatory mechanism **will** apply **(not, it may apply).**

The two clauses together say that the employer must use reasonable endeavour to try to give each teacher an average class size of 26 or fewer and where this is not actually reasonably possible then the teacher shall be compensated by an agreed mechanism.

The problem though is that firstly teachers who are entitled are getting bogged down when all reasonable endeavours have been exhausted and find themselves going through the same matters again. This point is brought up in the case of Yewbelle v London Green Developments (2006)

The Case Law:

1. *Yewbelle –v- London Green Developments (2006)* where Mr Justice Lewison said "the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again."

2. Mr Justice Flaux QC in *Rhodia International Holdings Ltd* agreed with the words of Mr Justice Lewison in Yewbelle regarding all reasonable endeavours. However, he did so, subject to one caveat; "the caveat is that, where the contract specifies certain steps will have to be taken…as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that could in one view said to be involving the sacrificing of a party's commercial interests." From this analysis it is apparent that, whilst the protection of one's own interests is important, a party must consider with great care any specific actions which it agrees to take when entering into such agreements.

References:

1. [2007] EWHC 292 (Comm), Times 06-Apr-2007, [2007] 2 Lloyds' Reports 325

2. Rhodia International Holdings Limited & Another v Huntsman International LLC [2007] EWHC 292

Options

Whilst the STCA talks of a process providing for circumstances it gives no guidance at all as to what this process is or how it should be constructed in order for members to obtain compensation for what is rightly theirs. A stalemate can then ensue and it is this stalemate that is causing frustration for members in branches in the Canterbury region To quote James Thornton; (1). *the soaring force of the environmental activist*.

Actions for Enforcement:

"Corporations speak in the grammar of money' writes Thornton in his book (Client Earth 2017). 'If you want them to take (environmental) laws seriously, then you make them pay a great deal of money, for violating them. Then, suddenly, they'll wake up to it.

"If unchecked, governments will always drift towards what companies want, because companies are fantastically more powerful than citizens."

Our members' situation is no different to the corporate descriptions of James Thornton. Principals have more power than a teacher seeking through an unspecified process to reduce to an average class size of 26. Principals can, and will, drift to what they, the employers want and are more powerful than the individual teacher.

Canterbury Region is urging that a clear process be negotiated for 5.1A.1(d) in the 2018 negotiations rounds. Such guidelines must give a clear process so that 5.1A.(d) has some teeth.

Members need to feel supported and not feel like they are lone soldiers facing the big boys with all the power. They do not want to comply because the the STCA does not provide details of an appropriate mechanism.

1.James Thornton is the founding CEO of ClientEarth. *The New Statesman* has named him as one of 10 people who could change the world. *The Lawyer* has picked him as one of the top 100 lawyers in the UK. In 2016, he was named as one of the 1,000 most influential people in London and also won Leader of the Year at the Business Green Awards.

2.The Difference Between 'Reasonable' and 'Best' Endeavours

The phrases 'reasonable endeavours' and 'best endeavours' are commonly found in commercial contracts. However, there is some debate over the meaning of each term, and which is the appropriate one to use. There is no exact legal definition but case law can offer some guidance as to the obligations of each party, and which term is preferable when drafting such contracts.

[1]Historically the courts have been reluctant to draw a firm line between the two kinds of obligation. For example, in the case of *Overseas Buyers –v- Granadex (1980)* Judge Mustill said "perhaps the words best endeavours in a…contract mean something different from doing all that can reasonably be expected – although I cannot think what the difference might be."

[2] Similarly in *IBM –v- Rockware Glass (1980)* Lord Justice Buckley said "in the absence of any context indicating to the contrary, this [an obligation to use best endeavours] should be understood to mean that the [party] is to do all he reasonably can…" This is essentially a blurring of the line between 'reasonable' and 'best' endeavours.

The most recent guidance on this question has been offered by Mr J Flaux QC in *Rhodia International Holdings Ltd –v- Huntsman International LLC (2007)* who made it clear that 'reasonable' and 'best' endeavours placed different levels of obligation upon the concerned party. He said, "there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can."

[1] [1980] 2 Lloyd's Rep 608 : Mustill J

[2] [1980] FSR 335: Buckley LJ, Geoffrey Lane LJ, Goff LJ#

[3]A further issue of concern when faced with these contractual obligations is the extent to which a party will be expected to sacrifice their own commercial interests in the bid to fulfil their obligations. Clearly a balance should be retained between one's own interests and those of the party with whom an agreement has been made. Mr J Flaux QC in *Rhodia International Holdings Ltd* agreed with the words of Mr Justice Lewison in Yewbelle regarding all reasonable endeavours. However, he did so, subject to one caveat; "the caveat is that, where the contract specifies certain steps will have to be taken...as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that could on one view said to be involving the sacrificing of a party's commercial interests." From this analysis it is apparent that, whilst the protection of one's own interests is important, a party must consider with great care any specific actions which it agrees to take, when entering into such agreements.

Conclusion:

It is clear that an obligation to use 'best endeavours' places a party under a stricter obligation than one to use 'reasonable endeavour.' However, one should be aware of clauses in commercial contracts which subject a party to using 'all reasonable endeavour' as this should not be viewed in the same way as 'reasonable endeavour.' It is also important to consider any specific activities or services that a party is agreeing to undertake or provide, as these will be enforceable, even if they place the party at a commercial disadvantage.

"Endeavour Clauses" in Commercial Contracts

There are three types of "endeavour" obligation that are commonly used in practice- 'best endeavours', 'all reasonable endeavours' and 'reasonable endeavours'. The distinction between them is somewhat unclear; however, the parties to a contract need to ensure they protect their exposure by qualifying the extent of the obligations they undertake. Where the obligations require a party to achieve an outcome, the parties must be careful as failure to perform that obligation will be considered a breach of contract.

[3] References [2007] 2 Lloyd's Rep 325; [2007] EWHC 292 (Comm)

One way in which parties can minimise the risk of breaching the contract is by contracting to endeavour to achieve a certain outcome, rather than taking on an absolute obligation. In practice, the customary phrases mentioned above are normally used but it is important to note that the contracting parties will remain at risk as the scope and meaning of these is uncertain.

Ultimately, what is required under an endeavour clause depends on the other provisions in the contract and the surrounding commercial context. If the aim of or the criteria by which an endeavour clause is measured is not clear, then the clause itself may not be enforceable.

In order to prevent any confusion or potential litigation further down the line, the underlying objective of an endeavour obligation should be defined clearly and precisely at the drafting stage of any contract. In doing so, consideration must be given to the steps that the relevant party should take. An express provision should be made for this in the contract.