

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 116
5521937

BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION Applicant
AND	SECRETARY FOR EDUCATION First Respondent
AND	VICE-CHANCELLOR UNIVERSITY OF AUCKLAND Second Respondent
AND	TEACH FIRST NEW ZEALAND TRUST Third Respondent

Member of Authority: James Crichton

Representatives: Tanya Kennedy, Counsel for Applicant
Jenny Catran with Madeleine Conway, Counsel for First Respondent
Phillippa Muir with Gemma Peachey, Counsel for Second Respondent
Marie Whisker with Lauren Adams, Counsel for Third Respondent

Investigation Meeting: 29 July and 3 September 2015 at Wellington

Submissions Received: 3 September 2015, from the Applicant
28 July and 31 August 2015, from the First Respondent
2 September 2015 from Second Respondent

Determination: 27 November 2015

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my first determination concerning the dispute between these parties, I identified the issue between them in the following terms at para.[12] :

For the avoidance of doubt the investigation meeting set down for 29 July 2015 will determine whether or not there have been breaches of the Secondary Teachers Collective Agreement (the Collective Agreement) and potentially by implication the State Sector Act 1986 (in relation to certain appointments made to positions at some secondary schools including One Tree Hill College and Onehunga High School).

[2] While that is the essence of the claim made by the applicant (PPTA), set out more fulsomely the claim is:

- (a) That the subject appointments were not advertised as required by the collective agreement and the State Sector Act 1986 (the 1986 Act);
- (b) That that process failed to give preference to the person best suited to the job;
- (c) The selection process was not either impartial or proper;
- (d) In particular, the selection process was not based on experience, qualifications and abilities relevant to teaching;
- (e) The process failed to comply with the good employer obligations; and
- (f) Some of the conditions of the appointment were inconsistent with the collective agreement.

The nature of the dispute

[3] PPTA and the Secretary for Education are parties to a collective agreement which broadly covers the work of secondary teachers working in secondary schools across New Zealand.

[4] The University of Auckland provides tertiary courses of study leading typically to the conferring of undergraduate and post-graduate degrees in a wide range of academic disciplines.

[5] Teach First is a registered New Zealand trust which, for the purposes of this proceeding, has created, with the University of Auckland, a post-graduate diploma in teaching (secondary field-based) taught through the Teach First New Zealand Trust and the University of Auckland.

[6] Critically for our purposes, this form of teacher training involves Teach First participants being employed in schools for fixed terms during the duration of the diploma and teaching students unsupervised during that process. As part of the programme, each Teach First trainee is employed in a school on a fixed term engagement which it is said complies with the law in that regard.

[7] The diploma requirements contemplate a six week residential programme of intensive study at the University of Auckland in November and December followed by employment by a host school from the beginning of the following school year for a fixed term of two years. Trainees are paid a full time salary but have a maximum of 12 hours a week contact time with students. This equates to .6 of a full time teacher equivalent and compares with .8 for teacher trainees undertaking the more usual route to becoming a certificated teacher.

[8] The balance of the working time (.4) is spent with in-school mentors (certificated teachers) and academic study towards the requisite diploma.

[9] Trainees also participate in a leadership development course run by Teach First which is separate from the diploma proper, participate in intensive study at the university during the school year and must complete research papers as well.

[10] There are university assessors who visit each trainee throughout the two years of the fixed term engagement. A three weeks practicum at other schools is provided for. To achieve a successful outcome from the programme, trainees require satisfactory course work both in school and in the away school practicum as well as meeting the Teachers' Council criteria for provisional registration.

[11] While it is apparent PPTA and the Secretary for Education appear in this proceeding as parties to the collective agreement which PPTA maintains has been breached by the programme I have just briefly described, the University of Auckland appears under protest having maintained since it filed its Statement in Reply and repeated subsequently on a number of occasions including in its submissions filed on 2 September 2015, that it has no part in the dispute.

[12] Conversely, Teach First is of course intimately involved in the issue although it is not party to the collective agreement. It is its programme which is the essence of the matter in dispute. Teach First submissions, and indeed its evidence, proceed on

the footing of firstly supporting the primary submissions of the Secretary for Education, and secondly, assisting the Authority with factual matters.

[13] Notwithstanding the disparate positions of the second and third respondents, both have been happy to rest primarily on the submissions made by the Secretary for Education in relation to this matter.

The PPTA's position

[14] The PPTA says the positions occupied by Teach First trainees in secondary schools are teaching positions and therefore the normal rules that apply to such positions ought to apply to Teach First positions.

[15] This means, for instance, the incumbent must have either a limited authority to teach (LAT) or be a registered teacher, and that the work performed by the incumbent is the work of instructing students and is therefore covered by the collective agreement.

[16] The Education Act requires that only persons having teacher registration or a LAT may occupy a teaching position and there is a defined process for advertising and selecting persons to fill teaching positions including the requirement the best person for the job must be appointed. In that regard, the collective agreement and the State Sector Act are intertwined because the one refers to the other. Pursuant to s.77A of the 1988 Act, and clause 3.1.1 of the collective agreement, schools are obliged to be good employers and the terms of s.77A set out what that means. Amongst other things, those intertwined provisions require the *"impartial selection of suitably qualified persons for appointment"*.

[17] Similarly entwined provisions found in clause 3.2.1 of the collective agreement and s.77G of the 1988 Act require the appointment of the best person for the job.

[18] PPTA say one of the ways in which the *"best person"* test is able to be met is through widely disseminated advertising and again the collective agreement is instructive because it provides at clause 3.2.2(a) that vacant positions will generally be required to be advertised in the *Education Gazette*. Broadly, permanent full time and part time positions and long term relieving and fixed term full time positions of more than one term are all required to be advertised in this way.

[19] It is common cause that none of the positions in dispute in the present proceeding were advertised, either in the *Education Gazette* or elsewhere so the PPTA contends it follows inexorably that the process is in breach.

[20] In addition to those matters touching on the collective agreement and the 1988 Act, PPTA also compares and contrasts the Teach First programme with the alternative initial teacher education (ITE) programmes, noting students studying ITE are neither employed by schools, nor paid, nor able to teach students without a registered teacher supervising them.

The Secretary for Education's response

[21] Submissions for the Secretary for Education (Education) say the positions occupied by the Teach First trainees are "*not teaching positions*" but are in fact "*specially formulated, supernumerary Teach First positions*". Education says the candidates are selected through a rigorous process and host schools are required to comply with the 1988 Act and the collective agreement.

[22] Education maintains the positions are "*not vacant positions or teaching positions*" and by virtue of being "*part time*" are not required to be advertised in the *Education Gazette*.

[23] Education says the positions are "*inextricably linked*" to the diploma programme taught through the University of Auckland and the positions the trainees occupy "*do not reflect any teaching vacancy, as the students taught by the Teach First participants would otherwise be absorbed into other existing classes*".

[24] Moreover, I am urged not to look at the obligations in the collective agreement and the 1988 Act in isolation but to reflect on what Education calls "*four overlapping decisions: approval of the programme, enrolment, employment and LAT*".

[25] The University must approve candidates for the programme because it has to teach the programme and the participants must be able to obtain a LAT from the Education Council before that person can participate in the Teach First programme.

[26] Moreover, Boards of Trustees have an obligation to determine how their school is to be staffed and it is submitted that in relation to the evidence I heard from Onehunga High School and Papatoetoe High School, those schools "*redesign their*

timetable to accommodate a supernumerary Teach First student. They did this by reducing their class sizes ...”.

[27] Education says that Boards must be good employers, are required to act independently and many of the provisions which PPTA relies upon do not apply because it is contended the Teach First positions are temporary positions. If that is accepted then s.77H of the 1988 Act does not apply and PPTA is accused of being “*highly technical*” in its interpretation of these obligations.

[28] Education maintains the recruitment and appointment process is robust and amongst other things contends that appointment is on merit, that the best person for the job is appointed although it appears to accept the pool of persons who can be considered for appointment for any Teach First vacancy must by definition exclude all registered teachers which rather calls into question the submission the best person for a vacancy within what can only be characterised as a teaching role, may not be a registered teacher.

[29] PPTA is also accused of being highly technical in its submission that the schools themselves ought to advertise the positions and it is suggested that requirement goes further than is required by any of the leading cases such as *Principal of Auckland College of Education v. Hagg* [1997] 2 NZLR 537.

[30] That may be so but it does rather avoid the practical reality (on which PPTA dwells) that the participants in the Teach First programme are actually on the staff of the host school for a two year period so it is difficult to escape the practical conclusion the host school is the employer of the participant. If, as PPTA maintains, the participant is filling a role within that school that might otherwise have been occupied by a person recruited in the more traditional manner, then the logic PPTA applies has some attraction.

[31] In effect, all PPTA is saying is if the school is the employing body (which is common cause), it is difficult to see why some other entity ought to recruit the trainee and that fact ought to have the effect of avoiding the usual obligations of the employer.

[32] It is true that the host schools interview the recommended candidate before appointment, but they do not make any real selection; in effect, all they are asked to do is to accept or reject the proffered candidate.

[33] Education says the subject positions in host schools are effectively “*Teach First positions*” and not strictly speaking “*teaching positions*” at all. Furthermore, Education contends that if PPTA is challenging the validity of the concept of a Teach First position, then its remedy is a judicial review of the decision made by the then Teachers Council in 2012 under the Education Act. But with respect, that proposition misconceives PPTA’s view; PPTA simply says the Teach First programme does not comply with either the 1988 Act or the collective agreement.

Issues

[34] I need to consider the following specific questions:

- (a) Are these teaching positions;
- (b) Are the positions part time;
- (c) Are they supernumerary positions;
- (d) Are the positions properly advertised; and
- (e) Is the best person selected?

Are these teaching positions?

[35] In my judgment, this is the fundamental question because everything flows inexorably from the answer to this question. If the positions in question are teaching positions, then it would seem to follow that the relevant other factors, that plainly apply to teaching positions, are in play.

[36] Conversely, if the subject positions are not teaching positions but some other kind of position, then arguably the provisions on which PPTA relies can be avoided.

[37] I have concluded on the basis of the evidence I heard and the helpful submissions from counsel that these are teaching positions. Indeed, I find it difficult to escape that conclusion; whatever else is true, the Teach First participants who are involved are in front of classrooms, providing instruction to students, and on any reasonable construction of the relevant provisions, that constitutes teaching.

[38] In this connection, I simply do not accept the submission made for Education to the effect there is no clear definition of either a teacher or a teaching position

because even if, as Education submits, there are a variety of definitions offered across a range of statutes, it is difficult to escape the conclusion that in ordinary common parlance, we understand a teacher to be a person who instructs students.

[39] Moreover, there is a perfectly satisfactory definition in the Education Act 1989 at s.120 which defines a teaching position as a position that “*requires its holder to instruct students; ...*”.

[40] That seems to be precisely the category of person we are talking about and in my view, if it is accepted Teach First trainees are occupying teaching positions within the meaning of that expression in the Education Act, then it is difficult to escape the conclusion that the provisions of the collective agreement and the 1988 Act must apply.

[41] I do not accept the contention offered by Education these positions are “*specially formulated as Teach First positions*”; all of the evidence suggests that what Teach First trainees are doing is providing instruction to students, and that means they are occupying a teaching position and if they are occupying a teaching position within the meaning of the Education Act, then it seems to me the normal rules ought to apply.

Are the positions part time?

[42] Having rejected Education’s submission these positions are somehow a special category of Teach First positions, a special category which is not mentioned in any of the provisions of the collective agreement or in statute law, the next question is whether the positions are part time or not. The importance of this question is simple; Education says they are part time and therefore clause 3.2.2 of the collective agreement does not apply. Clause 3.2.2 of the collective agreement is the clause which mandates advertising in the *Education Gazette* in certain defined circumstances. It is contended that if these positions are part time, then they need not be advertised.

[43] I do not accept these positions are part time. Teach First trainees are employed for a two year fixed term engagement and paid on that basis. In my judgment these are fixed term full time positions of more than one term and accordingly fall squarely within the terms of clause 3.2.2. It follows these provisions must be advertised in accordance with the collective agreement because they are

teaching positions within the coverage of the collective agreement and clause 3.2.2 is directly applicable.

[44] I reach this conclusion even if it could be argued s.77H of the 1988 Act does not apply because the section specifically excludes from its ambit acting, temporary, casual or relieving situations and it could perhaps be argued the Teach First positions in host schools by virtue of their only existing for two years fell within that category.

[45] But again, the issue of whether the position is part time or not is almost a supplementary question because if, as I have already established, the positions occupied by Teach First trainees are not some special category of position but ordinary teaching positions, then the way in which those positions have to be filled is stipulated by Part 7A of the 1988 Act which provides generally for personnel provisions in the education service and the intertwined provisions within the collective agreement. In terms of those respective provisions, there is a defined process once an employing Board has determined to fill the position and it is not available to the host Board to, as it were, make up its own process: *Hagg*.

Are the positions supernumerary?

[46] I am not persuaded the positions are in any special category including supernumerary. As witnesses for PPTA make clear, a reference to a supernumerary position in the education sector confers a particular term of art and the meaning of supernumerary in education is not congruent with the meaning attributed to the word in Education's submissions on this point.

[47] Moreover, the short point is, given my considered view the positions adopted by Teach First trainees are teaching positions, it matters not at all what schools call them; the collective agreement and the operative statute both apply.

Were the positions properly advertised?

[48] I am satisfied the positions were not properly advertised in accordance with the statutory enactment or the collective agreement. Clause 3.2.2 of the collective agreement and s.77H of the 1988 Act both require notification of the vacancy such that suitably qualified persons can apply. Indeed, the collective agreement provision requires advertising in the Education Gazette for positions that qualify; I find these positions do qualify, as I have already made clear.

[49] Given my conclusion these are teaching positions it follows the advertising regime is not optional but mandatory. I conclude these positions were not properly advertised in accordance with the law.

Is the best person for the job appointed?

[50] The relevant provision in the statute is s.77G: it simply provides an employer making an appointment must appoint the best person available to the position.

[51] In that regard, I accept PPTA's argument that by excluding all certificated teachers from any ability to aspire to positions advertised as "*Teach First*" positions, the programme is effectively ensuring it is less, rather than more, likely s.77G will not be complied with.

[52] This is for the very straightforward reason a role in a school of a teaching position would best be occupied by an already certificated teacher.

[53] Nor am I attracted by Education's argument there is a rigorous process adopted by both Teach First and the University of Auckland in selecting persons to become Teach First trainees. The fact is the employer is the host school Board and that entity has virtually nothing to do with the selection process notwithstanding the fact it subsequently becomes the employer of these individuals once they have been through the recruitment process. In effect, the employer is being held at arm's length from the recruitment and selection process and it seems to me that on any reasonable construction of both the collective agreement and the 1988 Act, the employer carries the onus.

[54] For instance, s.77G of the 1988 Act refers to an "*employer*" and s.77H does likewise. Given it is common cause the employer of the trainees is the host school Board, it seems to follow logically that the employer Board cannot have fulfilled its legal obligations. There is nothing technical about this conclusion; it is simply what the law says.

[55] Teach First and the University of Auckland say their robust process has produced large numbers of applicants for each available place, that as a consequence they have been able to select the very best applicants and then promote them to positions within the host schools.

[56] But because, by definition, the only persons who may apply for Teach First traineeships are persons who are not currently registered teachers, it seems difficult not to conclude a whole tranche of potentially better, or best, qualified people are not being considered and that means s.77G and its entwined collective agreement provision is not being complied with.

What are the obligations of the host Board?

[57] The host Board's obligations are clear. They are employing Teach First candidates to provide instruction to students albeit on a reduced basis than would apply if those candidates were replaced by certificated teachers. But the fact remains the Teach First interneers are providing tuition and on that basis, I am satisfied host school Boards have not fulfilled their legal obligations in terms of both the 1988 Act and the collective agreement.

[58] In order for there to be a role for a Teach First trainee to fulfil, there must be a vacancy. It seems to me sophistry to say the Teach First roles are somehow "*manufactured*". I put the suggestion of "*manufacturing positions*" to Mr Gall, the principal of Papatoetoe High School who gave evidence at my investigation meeting and he agreed with the characterisation.

[59] But, however the positions are created and whether they are manufactured or not, they are positions requiring an individual to provide instruction to students which means the Education Act, the State Sector Act and the collective agreement are all triggered to require the time honoured process.

[60] I do not accept Education's submission there is a sort of new category of Teach First position within the education sector. That is certainly a manufactured reality. If Teach First trainees are providing instruction to students then they are occupying a teaching position and if they are occupying a teaching position, the Board has obligations to meet which have been very eloquently set out by the Court of Appeal in *Hagg*:

The object of sections 77G and 77H, and of the parallel provisions of clause 3.2 and 3.3 of the collective employment contract is obvious enough. It is to ensure that such appointments are made openly and on merit. The requirements cannot be waived by employer or employee. They cannot contract out. ... There are two public interests involved. One is the interest of the public at large in securing and ensuring an open system for appointments on merit to a

major part of the public sector, the education service. The other is the interest of other potential applicants who might have applied when the ... appointment was advertised ...”

[61] Those words have the same force today as they had when they were written and I am satisfied the effect of the Teach First arrangements are to seek to abrogate the usual rules by purporting to create a new class of employee which somehow avoids the effect of the collective agreement and the relevant statute law.

Determination

[62] For reasons which I hope are transparent, I have concluded that the present arrangements by which Teach First is promoting its teacher training regime are in breach of the collective agreement and the State Sector Act 1988.

[63] If there are vacancies in secondary schools which involve the instruction of students (teaching positions), then those vacancies ought to be advertised in the usual way in the *Education Gazette* in accordance with the requirements of clause 3.2.2 of the collective agreement and appointments made to the subject vacancy in accordance with s.77G of the 1988 Act and clause 3.1.1 of the collective agreement.

[64] Anything less than that seems to me to not comply with the collective agreement or the operative statute, the latter providing a comprehensive collection of principles the legislature has determined ought to inform personnel matters in the education sector.

[65] I am satisfied that if there is to be a construct within the education service which allows Teach First to progress its particular vision of teacher training, that will need legislative amendment and amendment to the collective agreement as well.

[66] For the avoidance of doubt, I am satisfied there are breaches of clause 3.1 and 3.2 of the collective agreement together with breaches of s.77F and s.77G of the State Sector Act 1988. I consider that s.77H may not have been breached, but only because I think it could be argued the proviso in the section might exclude the particular terms of the two year appointment to a host school.

[67] While I have not dwelt in this determination on a breach of s.77F, that section requires the employer (for which read the host Board for these purposes) to act independently in matters relating to the appointment of staff. Given the nature of this programme, it seems to me impossible for boards to act independently and indeed

they are effectively dependent on the Teach First programme rather than independent of it.

[68] There will be orders accordingly.

Costs

[69] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority