

# School Boards as Employers: Employment Law in Education

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## Introduction

Boards of trustees of schools now face new responsibilities and challenges as employers created by the “Tomorrow’s Schools” education reforms and the advent of the Employment Contracts Act 1991. This paper provides an outline of the rights, responsibilities and duties of boards as employers under current employment law. In summary, a school board is in a unique position in employment law being the employer of various employees (teachers, administrative staff and support staff) without having the power to negotiate directly with employees or employees representatives over employment terms (this role being performed by the State Services Commission). In addition to the duties the Employment Contracts Act and the common law places on all employees, school boards have specific statutory powers and duties under the Education Act 1989 and State Sector Act 1988. Finally, boards have special responsibilities to the Ministry of Education through their personnel goals and objectives in their school charters. The paper begins with a broad outline of the legislative framework applying to school boards as employers, identifies the main groups involved in industrial relations in the education sector, describes the collective employment contracts which apply, and finishes by discussing some recent employment cases of interest in the education sector.

## Legislative Framework

There are three principal Acts which impact on school boards as employers. These are the Education Act 1989, the State Sector Act 1988, and the Employment Contracts Act 1991.

### 1 *Education Act 1989*

The starting point for an examination of the Education Act as it relates to employment is section 65(1) which grants boards the general power to appoint, suspend and dismiss staff. However, this power is subject to two restrictions:

- (a) The number of teachers a Board can employ may be limited by regulations made pursuant to section 91H of the Education Act, limiting the number of teachers which may be employed by any particular school, or by all schools; none have been made and staffing numbers are still governed by regulations from 1981.
- (b) The power to dismiss, or suspend teachers is subject to the ability of board

employees to bring a personal grievance in the Employment Tribunal against a board if they consider that the action is unjustified.<sup>1</sup>

The Education Act also requires every board to have a staff representative who is to be elected by members of the staff.<sup>2</sup> Finally, the Act provides for a payroll service to be provided for boards by the Ministry of Education.<sup>3</sup> Every board is required to use the payroll service provided by the Ministry of Education, unless they are authorised by the Secretary of Education not to.<sup>4</sup>

Boards have responsibilities to the Ministry in relation to employment issues through their charters of aims, purposes and objectives. Each charter must contain certain sections known as the National Guidelines. The compulsory sections in relation to personnel matters include the following goals:

- (a) To enhance learning by staffing the school with teachers and ancillary/support staff to meet curriculum objectives;
- (b) To be a good employer, abide by industrial awards, and endeavour to maintain harmonious industrial relations;
- (c) To develop sound personnel policies, which treat staff fairly, protect students and promote staff performance and the effective use of resources;
- (d) To provide equal access, consideration and equal encouragement in the areas of recruitment, selection, promotion, conditions of employment and career development.

Each charter, including these personnel goals, has effect as an undertaking by the board to the Minister of Education, which is enforceable in the courts by the Ministry against a board.

## 2 *State Sector Act 1988*

The State Sector Act states that except as it otherwise provides, the Employment Contracts Act applies in relation to the education service.<sup>5</sup> Therefore, the general law of employment, as modified by the State Sector Act, applies to school boards. Employees of boards have the usual rights to bring a personal grievance, and the same restrictions on strikes by employees (and lockouts by boards) that are contained in the Employment Contracts Act apply.

- (a) Duty to be good employer.

The State Sector Act contains detailed provisions relating to the duties on employers in the education service. The general duty is contained in section 77A which states that every employer in the education service shall operate a personnel policy that complies with the principle of being a good employer. A good employer is defined as one who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring:

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- (i) good and safe working conditions;
  - (ii) an equal employment opportunities (“EEO”) programme;
  - (iii) the impartial selection of suitably qualified persons for appointment;
  - (iv) recognition of the aims and aspirations of the Maori people, the employment requirements of the Maori people and the need for greater involvement of the Maori people in the education service;
  - (v) opportunities for the enhancement of the abilities of individual employees;
  - (vi) recognition of the aims and the aspirations and the cultural differences of ethnic or minority groups;
  - (vii) recognition of the employment requirements of women; and
  - (viii) recognition of the employment requirements of persons with disabilities.<sup>6</sup>

(b) Codes of Conduct

Boards are to ensure that their employees maintain proper standards of integrity, conduct, and concern for the public interest, and the wellbeing of students attending the institution.<sup>7</sup> The mechanism by which this can be achieved is a code of conduct. The Ministry may issue a code of conduct covering the minimum standards of integrity and conduct that are expected from teachers and other employees.<sup>8</sup> Such a code of conduct is only to be drawn up after consultation with employers’ representatives, employee organisations, and the State Services Commission; no such code has to date been issued by the Ministry. A board is able to draw up its own code of conduct, setting out standards of integrity or conduct to apply to its employees, as long as this code of conduct is not inconsistent with the Ministry’s code; at present boards have a free hand in adopting their own codes in the absence of any code from the Ministry.

(c) Performance Criteria

The Ministry may, in consultation with the Commission, prescribe the matters that are to be taken into account by school boards in assessing the performance of teachers.<sup>9</sup> Again, boards are able to prescribe their own matters to be taken into account when assessing the performance of teachers where (as is the present case) the Ministry has not set any criteria.

(d) EEO programmes

The Ministry is responsible for promoting, developing and monitoring equal employment opportunities in schools.<sup>10</sup> It is responsible for developing and publishing an EEO programme and ensuring that that programme is complied with. An EEO programme is one which is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate inequality in respect to the employment of any persons or group of persons.

(e) General powers and duties

The Act reinforces the power of boards contained in the Education Act to appoint such employees and terminate such employees (subject to teacher registration requirements) in the efficient running of schools and confirms that they have all the rights, duties and powers duties of an ordinary employer.<sup>11</sup> Boards have a duty to act independently in decisions regarding individual employees, including appointments, promotions, demotions, transfers, disciplinary procedures and dismissals.<sup>12</sup>

Section 77G of the State Sector Act provides that all appointments are to be made on merit, and a board is required to give preference to the person who is “best suited” to the position. A case which concerned the apparent inconsistency of this section with a clause in a collective employment contract giving redundant teachers preference for vacancies, *NZPPTA v Long Bay College Board of Trustees*, is discussed below.<sup>13</sup> There is also a potential inconsistency between this section, requiring appointment on merit, and section 77A(2) which requires boards to develop an EEO programme; if an EEO programme provided for positive discrimination in employment, it could arguably be inconsistent with the “best suited” obligation of boards. School boards are required to notify any vacancy or prospective vacancies, other than temporary or casual vacancies, in a manner sufficient to enable suitably qualified persons to apply for the position.<sup>14</sup>

### 3 *Employment Contracts Act 1991*

#### (a) Personal Grievances

An employee may bring a personal grievance against a school board under the provisions of the Employment Contracts Act for:

- (i) unjustified dismissal;
- (ii) other unjustified action, not being a dismissal, affecting the worker’s employment to his/her disadvantage (for example, a warning);
- (iii) sexual harassment;
- (iv) discrimination; or
- (v) duress.<sup>15</sup>

By far the most common personal grievance is that of unjustified dismissal. An employee may bring a unjustified dismissal action against a board if he or she considers that the dismissal has been either substantively unjustified (that is, there were not good grounds for the dismissal) or procedurally unfair or both. If the employee’s complaint is upheld by the Employment Tribunal, the Tribunal can do any or all of the following:

- (i) reinstate the employee to his or her former position or another similar position;
- (ii) reimburse the employee for the wages lost between the dismissal and the Tribunal hearing;

- (iii) compensate the employee for any prospective future benefit that the employee has lost by reason of the dismissal;
- (iv) compensate the employee damages for the humiliation, injury to feeling, and loss of dignity that the employee has suffered as a result of the dismissal; or
- (v) in cases of sexual harassment, make recommendations as to the future conduct of the employer.<sup>16</sup>

Boards can insure against the risk of a compensation award and the legal costs associated with defending a personal grievance claim; a number of recent awards against school boards have been substantial.

#### (b) Strikes and Lockouts

Strike action is defined in the Act to apply not only to the situation of employees refusing to work but also to the situation of staff partially discontinuing their employment, reducing their normal performance of it or breaking their employment contracts. A strike is unlawful under the Employment Contracts Act if it:

- (i) occurs while a collective employment contract is still in force,;
- (ii) is concerned with the issue of whether a collective employment contract would bind more than one employer;
- (iii) relates to a personal grievance; or
- (iv) relates to a question of interpretation of the employment contract.<sup>17</sup>

A strike is lawful if it relates to the negotiation of a collective employment contract for the employees concerned.

There are some types of strikes which are not classified as either unlawful nor lawful under the Act. A strike action in these circumstances may, however, be unlawful under the general law. For example, a strike for political reasons may be unlawful if it would constitute the tort of unlawful interference with contractual relations. Therefore, employees who strike for reasons unconnected with the negotiation of a collective employment contract may be striking unlawfully.

#### **Parties involved in education sector bargaining**

The State Services Commission is responsible for negotiating every collective employment contract applicable to employees in the education sector.<sup>18</sup> Negotiations are to be conducted between it and the employees themselves, or their authorised representatives,<sup>19</sup> and are to be conducted in consultation with the Ministry and representatives of school boards.<sup>20</sup> In practice, negotiations are between the Commission and the relevant employee unions, and are conducted in consultation with representatives from the New Zealand School Trustees Association. For employees, who are “bulk funded” the Commission has delegated this power to individual boards, subject to stated parameters.

A collective employment contract is to be between the Commission and the employees in the education sector, although the relevant employee organisations may (and have) become a party to that contract.<sup>21</sup> Where the Commission has not delegated its power to negotiate to boards, the collective employment contract entered into between the Commission and employees is binding on school boards.<sup>22</sup>

In terms of the structure of the Employment Contracts Act, the Commission can be seen to be the school boards' bargaining agent for the purposes of negotiating the collective employment contracts with its employees. The employees unions are the employees' bargaining agents. However, the situation differs from the normal bargaining structure in that a board cannot revoke the bargaining authority of the Commission and negotiate with its employees directly regarding a collective employment contract; the Commission has to agree to delegate its power. However, the statutory power granted to the Commission to negotiate employment contracts relates only to *collective* employment contracts, and boards have the ability to negotiate individual employment contracts with any employees, who wish to do so. In practice, the content of any individual employment contract will be modelled on the applicable collective employment contract in consultation with the Commission. Any employee may revoke the bargaining authority of its representative (the union) and seek to negotiate an individual employment contract directly with a school board. The Commission is also required by statute to consult with the Ministry when negotiating a collective employment contract.

The New Zealand Post Primary Teachers Association is the union that represents teachers in secondary schools. The NZPPTA has recently merged with the Kindergarten Teachers Union. The New Zealand Educational Institute is the union that represents primary school teachers. The New Zealand School Trustees Association is the organisation which represents most school trustees. The Commission is required by statute to consult with school board representatives and in practice does so by consulting with the Association.

### **Collective employment contracts**

There are presently six collective employment contracts which apply in the education sector. These are:

Primary Teachers Collective Employment Contract (1 July 1992 to 30 June 1994).

Primary Principal, Deputy, and Assistant Principals Collective Employment Contracts (1 July 1992 to 30 June 1993).

Secondary Teachers Collective Employment Contract (this was ratified on 30 March 1993).

Support Staff in Schools Collective Employment Contract (31 August 1992 to 1 September 1993).

School Caretakers and Cleaners Voluntary Multi Employer Contract (15 August 1993 to 30 November 1993).

Kaiarahi Reo, Assistants to Teachers of Students With Severe Disabilities and Special

Education Assistants Collective Employment Contract (1 July 1992 to 30 June 1993).

All of these contracts were negotiated between the Commission and the various employee organisations, and follow the same basic format. The essential distinction between the contracts is between “compulsory” collective employment contracts, such as the Secondary Teachers, Primary Teachers and Primary Principals, Deputy and Assistant Principals contracts, and “voluntary” contracts such as the support staff, and school caretakers contracts.

For compulsory contracts, a board has no choice whether or not to be a party. As the employees to whom these contracts apply are centrally funded, such as teachers, the Commission has retained control over the negotiations, and school boards are deemed automatically to be a party to these contracts pursuant to section 74(5) of the State Sector Act.

For employees who are bulk funded by the board, such as caretakers, and support staff, the Commission has delegated authority to negotiate the collective employment contract to the board, if the board so wishes. This means the board may choose voluntarily to be a party to the collective employment contract negotiated by the Commission, or may choose to negotiate its own contract within the parameters set down by the Commission.

### Recent cases

1 *New Zealand Post Primary Teachers Association v Long Bay College Board of Trustees*.<sup>23</sup>

This case concerned an application for a compliance order brought by a teacher who was seeking to be appointed to a position pursuant to a clause of his collective employment contract. The relevant clause was to the effect that any teacher made redundant, who applied for a position of equal or lower status for which the teacher was suitable, was to be appointed to that position.

However, the Employment Tribunal noted an apparent inconsistency between that clause and section 77G of the State Sector Act, and referred the matter to the Employment Court for determination. Section 77G provides:

An employer making an appointment under this Act shall give preference to the person who is best suited to the position.

However, the Court held that the clause was not inconsistent with this section, as it was open to the parties to the collective employment contract to further define the person who was “best suited” to the position. That is, by stating that teachers made redundant should be appointed to vacant positions the parties had determined that redundant teachers would be the persons who were “best suited” to the position.

Any possible inconsistencies between section 77G and any equal employment opportunities clauses in a collective employment contract could also be reconciled by using the same reasoning, so that the minority applicant is deemed to be the person best suited for the position for the purposes of section 77G.

## 2 *Bailey v Minister of Education*<sup>24</sup>

This case is notable primarily for the size of the compensation awarded to the employee. The employee was employed by the Ministry. The Employment Court had held that without any statutory authority, the Ministry had engineered the applicant's transfer to a position where it could readily be foreseen that the applicant would be an early casualty of any surplus staffing situation. A surplus had, in fact, occurred and he had been put on a part-time position. The Ministry refused the applicant's request for an inquiry and continued to pay his salary at the part-time rate. This action was held to be unjustified.

The Court had, in an earlier judgment, indicated that this was "manifestly a case in which reinstatement should be seen as the primary and most important remedy". However, because of restructuring in the education system, reinstatement of the applicant was not practicable.

The Court awarded:

- (a) Reimbursement of wages lost \$44,285.
- (b) Compensation for partial loss of superannuation benefits \$47,500.
- (c) Compensation for mental distress and injury to feelings \$25,000.
- (d) Compensation by way of interest \$6,384.
- (e) Costs \$1500.

The total award made to the employee was \$124,669.

## 3 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*<sup>25</sup>

In this widely reported case, the employee was a school deputy principal. He was dismissed by a subcommittee of the board of trustees after a protracted series of conflicts with the principal, over the deputy principal's reluctance to change his duties and responsibilities when required to do so. The principal also claimed that the deputy principal's relationship with subordinate staff was unsatisfactory. The principal complained about the deputy principal's conduct to the school board of trustees. The principal was ex officio a member of the board. The board had a personnel subcommittee comprising the board chairman, the principal, and two other board members. This subcommittee met the deputy principal and a union official. At the meeting, the chairman of the board made a statement to the effect that it was important for the board to support the principal.

At a further meeting, the subcommittee passed a resolution that the employee's conduct would be monitored and that he would be provided with a list of specific concerns and complaints. After advice from the School Trustees Association the board tried to recategorise the latter meeting and discussion as a warning to the grievant. As a result of this action one board member who was a member of the subcommittee resigned.



Some improvement was noticed in the deputy principal's conduct. Four months later the board of trustees received a report from the subcommittee recommending the deputy principal's dismissal and this was approved by the board. The chairman of board again took advice from the Association. As a result, he reconvened the board meeting in order to modify the resolution to give the grievant a chance to comment satisfactorily, failing which dismissal would result. A notice to this effect was handed to the deputy principal.

The personnel subcommittee again met, and heard the deputy principal. Half an hour was allowed for this. The principal was present at this meeting and remained after the grievant was required to leave. The personnel subcommittee subsequently met and decided to dismiss the deputy principal and did so. Before the dismissal the fact of the dismissal became known, and rumour about the grounds for it became rife in the community.

The Employment Court held that the principal was by statute, and in fact, the respondent's Chief Executive Officer who was entitled to expect that the grievant should perform the duties lawfully and reasonably expected of him and in the manner directed by him. However, the Court held that the board of trustees was the appropriate body to have made the decision to dismiss the grievant. The board could delegate to the personnel subcommittee to investigate and report back, but could not delegate the decision to dismiss to the subcommittee. This was considered by the Court not to be a mere technicality but "the stuff of what fairness is in action".

The Chairman of the board and the principal, both of whom participated substantially in the decision to dismiss, were in law, biased. The principal was in the role of complainant and prosecutor, while also holding a position on the decision making body. The principal had made clear his view that the deputy principal should be dismissed. Because of the principal's exhibition of predetermination and bias, he should have stood aside in the decision making process. Instead, he paid a very active part. Likewise, the board Chairman had, at an early stage, voiced his support for instituting disciplinary proceedings against the deputy principal, before he had heard the deputy principal's side of the story. The Chairman was openly antagonistic to staff support for the deputy principal. He had further influenced the personnel subcommittee's deliberations by announcing that the board had to support its principal. This was an irrelevant consideration and amounted to bias and predetermination by the Chairman.

The hearing that the deputy principal had been given was defective because his opportunity to respond was subject to tight time constraints, and was therefore nominal rather than real. The board's action in seeking advice (twice) only after it had already embarked on a course of action was unsatisfactory. The initial meeting was not intended to be a warning. The recategorisation of the meeting as a warning was an attempt by the board to bypass an important procedure in which the deputy principal was entitled to rely.

However, reinstatement was impracticable because the Court was not satisfied that if reinstated, the deputy principal could work harmoniously with the principal for the benefit of the school. Furthermore, the deputy principal was responsible to a significant degree for the plight in which he found himself. The Court awarded the deputy principal only 25% of the remuneration lost. The Court awarded \$25,000 for humiliation and

distress, arising from the sudden and unexplained dismissal of a senior teacher in circumstances under which no explanation was given. Costs of \$6,500 were also awarded against the board of trustees. For the future, the board was recommended to obtain advice before making significant decisions, and consider and monitor the roles of trustees as complainants, prosecutors, and decisionmakers.

In another case, *Masters v Waitati School Board*, the Employment Tribunal held that the board, which was partially comprised of parents dissatisfied with a staff member's performance and who had brought the complaint, was in law biased against the staff member.<sup>26</sup>

Therefore, it is apparent that extreme care must be taken in selecting those members of the Board of Trustees who are to make a decision to dismiss. If anyone has acted as complainant or "prosecutor" against a staff member, he/she should be excluded. Likewise, anyone who has acted on the staff member's behalf should also be excluded as he/she will have been involved in the case beforehand and would not be able to consider the facts with an open mind. This means that, potentially, the principal, the staff representative, and parent representatives who have been involved in bringing a complaint against a staff member may all be biased and unable to participate in a dismissal decision.

4 *New Zealand Post Primary Teachers Association v Board of Trustees of Kelston Boys High School (No 1)*<sup>27</sup>

This case concerned a school teacher. In July 1989 during an argument with other teachers, it was discovered that he had been drinking alcohol before work that day. He was given the option of having disciplinary proceedings instituted against or alternatively taking a year's leave of absence. He took a year's leave of absence, but at the end of that year the disciplinary proceedings were activated against him anyway.

The grievant was subsequently dismissed after being found guilty of disobeying a lawful obstruction, conduct unbecoming of a teacher, and being absent without leave. A member of the board making the decision had previously acted as a PPTA representative and confidential counsellor to the grievant and was on the board as a staff representative. The principal (who was effectively the prosecutor) was also on the board.

The Court held the real nature of the unpaid leave agreement included the teacher's concession that he would not return to the school. The grievant was therefore not entitled to rely on the agreement that disciplinary proceedings would not be brought.

However, given that the board hearing was not only to conclude where the misconduct had been proved, participation by the staff member trustee in the board's deliberations caused the Board of Trustees to be biased in law. Further, the board's dominant motive in bringing the charges against the teacher, and deciding to dismiss him, was to prevent the grievant's return to the school. In this sense, the board's motive was, in law, improper.

As the board had acted improperly and with bias the dismissal was procedurally unjustified. Also, in all the circumstances the grievant's dismissal went beyond a penalty which might be described as strict, and was not fair and reasonable and was indeed harsh and unduly severe. The dismissal was therefore also substantively unjustified.

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*(The writer wishes to acknowledge the assistance of his colleague Malcolm Crotty in the preparation of this paper.)*

- 1 Under section 27(1)(a) of the Employment Contracts Act 1991.
- 2 Sections 94(1)(c) and 97 Education Act 1989.
- 3 Section 89(1) Education Act 1989.
- 4 Section 89(2) and 89(3) Education Act 1989.
- 5 Section 73 State Sector Act 1988.
- 6 Section 77(A)(3) State Sector Act 1988.
- 7 Section 77(A)(3) State Sector Act 1988.
- 8 Section 77B State Sector Act 1988.
- 9 Section 77C State Sector Act 1988.
- 10 Section 77D State Sector Act 1988.
- 11 Section 77E State Sector Act 1988.
- 12 Section 77F State Sector Act 1988.
- 13 Unreported, 18 December 1992, AEC 96/92, Employment Court, Finnigan J.
- 14 Section 77H State Sector Act 1988.
- 15 Section 27(1)(a)-(e) Employment Contracts Act.
- 16 Section 40 Employment Contracts Act.
- 17 Section 63 Employment Contracts Act
- 18 Section 74 State Sector Act.
- 19 Section 74(3) State Sector Act.
- 20 Section 74(2) State Sector Act.
- 21 Section 74(4) State Sector Act.
- 22 Section 74(5) State Sector Act.
- 23 Supra, note 13.
- 24 [1992] 3 ERNZ 1.
- 25 [1992] 3 ERNZ 243.
- 26 Unreported, 26 March 1992, AEC 11/92.
- 27 Unreported, 3 July 1992, CT 61/92, Employment Tribunal, DS Miller.