IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2021] NZEmpC 87
EMPC 116/2018

IN THE MATTER OF	a proceeding under the Employment Relations Act 2000, the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960
BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION INCORPORATED First Plaintiff
AND	LISA KIRSTEN HARGREAVES Second Plaintiff
AND	PAMELA SHERYL FOYLE Third Plaintiff
AND	LEANNE MARGUERITA DONOVAN Fourth Plaintiff
AND	DEBRA LEE ENO Fifth Plaintiff
AND	SECRETARY FOR EDUCATION First Defendant
AND	HAVELOCK NORTH HIGH SCHOOL Second Defendant
AND	TAURANGA GIRLS' COLLEGE Third Defendant
AND	THAMES HIGH SCHOOL Fourth Defendant
AND	TAITA COLLEGE Fifth Defendant

Hearing:	6–10 May 2019, 13–17 May 2019 and 10–14 June 2019 (Heard at Wellington) Memoranda filed on 19 March 2020, 2 June 2020, 24 July 2020, 24, 27 and 31 August 2020, 28 September 2020 and 12 October 2020
Court:	Chief Judge Christina Inglis Judge M E Perkins (until 30 May 2019) Judge K G Smith
Appearances:	A S Butler, M McMenamin, S Hayman and H Bergin, counsel for plaintiffs V Casey QC, K Wevers, L Jackson and W Aldred, counsel for defendants
Judgment:	22 June 2021

JUDGMENT OF THE FULL COURT

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[1] The New Zealand Post Primary Teachers' Association Inc (NZPPTA) issued a proceeding against the Secretary for Education of the Ministry of Education seeking a determination of equal pay. The claim was on behalf of part-time secondary school teachers who are members of the union and whose work falls within the coverage clause of the current collective agreement. The union is joined in this proceeding by four secondary school teachers each one of whom works part-time and has made a claim against the board of trustees of the school at which they are employed.

[2] The allegations, which will be discussed in more detail shortly, are that part-time secondary school teachers in state and integrated secondary schools are unlawfully discriminated against on the basis of sex because of the way they are paid under the collective agreement. A striking feature of the proceeding is that the alleged discrimination arises from the collective agreement itself and not from the conduct of any of the defendants. The claims are made under the Equal Pay Act 1972, the Government Service Equal Pay Act 1960[1] and the Employment Relations Act 2000 (the Act).

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[1] Now repealed as from 6 November 2020 by s 34 of the Equal Pay Amendment Act 2020.

[3] This proceeding began in the Employment Relations Authority but was removed to the Court.[2] It is entirely concerned with the Secondary Teachers' Collective Agreement effective from 28 October 2015 to 27 October 2018 (STCA). The collective agreement was negotiated between the NZPPTA and the Secretary for Education, acting under delegation from the State Services Commissioner. The Secretary for Education is, therefore, a defendant in this proceeding because of her delegated authority to conduct collective bargaining for this industry.

[4] School boards of trustees employ secondary school teachers but do not negotiate collective agreements.[3] The board of trustee defendants employ the second to fifth teacher plaintiffs (the teacher plaintiffs). Boards of trustees became employers of teachers following the introduction of the now repealed Education Act 1989, which arose out of the initiative known as "Tomorrow's Schools". Boards of trustees are responsible for implementing the collective agreement settled in bargaining between the NZPPTA and the Secretary for Education.

[5] While bargaining is undertaken by the NZPPTA and the Secretary for Education, they are precluded from including in their collective agreement matters about the total teacher workforce. That subject is a matter of Government policy.[4]

[6] Before discussing the claim in more detail a brief comment is required about the procedural history of this litigation because it was interrupted by a significant dispute that arose at the conclusion of the plaintiffs' closing submissions.

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2 *The New Zealand Post Primary Teachers Association Inc v The Secretary for Education of the Ministry of Education* [2018] NZERA Wellington 43 (Member Tetitaha).

3 The State Sector Act 1988, s 74 required the Secretary for Education, under delegation from the Commissioner, to consult with representatives of employers who would be bound by the collective agreement. In practice, consultation over the STCA took place with the New Zealand School Trustees Association. Section 74 was repealed by s 669(3)(g) of the Education and Training Act 2020 on 1 August 2020. The State Sector Act was repealed and replaced by the Public Service Act 2020 on 7 August 2020.

4 The staffing formula is set by Order in Council.

Procedural history

[7] After extensive preparation and case management the parties called detailed, and complex, evidence over the course of approximately two and a half weeks. Closing submissions were presented on 12–14 June 2019.

[8] On the last day of the hearing, during Mr Butler's closing submissions for the plaintiffs, Ms Casey QC, counsel for the defendants, objected to the legal framework she perceived was being put forward. She interpreted Mr Butler's submissions as advocating for a reverse onus of proof about causation; that is, who bore the burden of proving that the alleged discrimination was, or was not, based on sex. It appeared she was concerned that, if the plaintiffs were proposing a reverse onus so the burden fell on the defendants, their intention to do so had not been adequately stated and to allow the proceeding to be concluded on that basis would be unjust.

[9] The timing of the objection meant it was not possible to hear arguments when it was made. An exchange of submissions was timetabled. They were received on 20 and 27 June, 29 October and 12 November 2019. Unfortunately the evolving, and we think elusive, nature of the positions of the parties was not clarified in those submissions. It was necessary to direct a further hearing which took place on 19 March 2020.

[10] Ms Casey's objection was dismissed but the defendants were given an opportunity to consider calling further evidence.[5] The defendants accepted that opportunity and, at a conference on 5 June 2020, elected to call further evidence. What was anticipated was evidence from survey data and accompanying expert evidence about it. Steps to obtain, compile, exchange and present this evidence were timetabled, anticipating that the hearing would resume on the first available date after 2 November 2020. Eventually, the hearing was scheduled to resume on 1 December 2020.

[11] The anticipated survey data evidence did not materialise. By memorandum of 24 August 2020 Ms Casey advised the Court that it had not been possible to procure

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5 *New Zealand Post Primary Teachers' Association Inc v Secretary for Education* [2020] NZEmpC 74.

the evidence in the time frame available. Instead, the defendants had decided to obtain evidence from a broad sample of secondary school timetabling policies. The Court was advised that the process of collating and analysing these timetable policies had started, with a view to assessing the comparative non-curriculum workloads on full-time and part-time teachers. Despite this change of tack counsel anticipated there would be no difficulty in the evidence being available for the hearing to resume as previously planned.

[12] Not surprisingly, the plaintiffs objected to this development because the further evidence they anticipated receiving had undergone a significant change. They considered that the defendants were taking steps that did not comply with the leave that was granted. An unsuccessful objection to this proposed course of action was taken.

[13] The next step in this procedural saga was a further memorandum from Ms Casey providing a progress report. She advised that the timetable policies did not appear to demonstrate anything sufficiently relevant. As a result, the Secretary for Education had decided not to provide further evidence. Initially, there was some uncertainty about whether the boards of trustees defendants might separately seek to present further evidence, because they took independent advice. In the end they did not seek to do so. While providing the progress report, Ms Casey's memorandum took the opportunity to make further submissions, which drew a critical response from Mr Butler.

[14] The upshot of these false starts was that the hearing scheduled for December 2020 was vacated. The evidence and submissions remain as they were at the conclusion of the hearing in June 2019.

The collective agreement

[15] Before describing the plaintiffs' claims in more detail an introductory comment is needed about the STCA. The collective agreement traces its existence to the former Secondary Teachers' Award and to policies and instructions compiled by the former Department of Education in codified regulations called the Green Manuals. After the

introduction of the Employment Contracts Act 1991 the Award became a series of collective employment contracts. Following the introduction of the Act the first collective agreement was bargained for in 2001.

[16] The STCA's coverage clause applies to work undertaken in state and integrated schools. Specifically, it covers teachers in secondary schools and their subsidiary units, teachers in years 7–13 schools and their subsidiary units, specialist secondary teachers of technology classes at years 7 and 8 in technology host schools, or at schools or centres where the specialist secondary teacher is employed to predominantly teach technology classes at years 7 and 8.

[17] The collective agreement extends to teachers in composite schools (other than area schools) and special schools and units who teach year 9 students and above; itinerant teachers of instrumental music employed by secondary schools; and secondary teachers responsible for teaching and learning programmes for students years 9 and above, or across years 7–10, in Te Aho o Te Kura Pounamu (the Correspondence School).

[18] The collective agreement does not apply to secondary school principals.

The claims in more detail

[19] The plaintiffs' case is that the way the STCA deals with part-time teachers is unlawful indirect discrimination based on sex in breach of the Equal Pay Act or, alternatively, the Government Service Equal Pay Act and the Act.

[20] The focus of this proceeding is on the way the STCA differentiates between full-time teachers and part-time teachers over the allocation of time during a school day when a teacher is not required to provide tuition to students and is, instead, able to perform other work or duties. The time when a teacher is providing tuition to students during the school day is described as timetabled contact hours. Where a teacher is released to be able to perform other work or duties during the school day that is described as timetabled non-contact time.

[21] The significance of referring to the timetable is to ensure that what is provided occurs during the school day when other teachers and students are present, distinguishing it from work that takes place at other times. In this judgment the shorthand terms contact time and non-contact time have been used.

[22] The plaintiffs' claim is that the STCA unlawfully discriminates against part-time teachers because it fails to provide them with non-contact time at a fully prorated rate to the non-contact time provided to full-time teachers.

[23] The claim is that, as a consequence, part-time teachers (being members of a category of workers that is predominantly female) receive a lower pay rate than that which would be paid to a male performing work of equal value.

[24] The plaintiffs pleaded that, as at May 2019, part-time teachers are not allocated "paid non-contact time on a pro-rata basis". The claim was that this non-contact time would be the pro-rata allocation of a full-time teacher equivalent (FTTE) entitlement based on the numbers of hours a part-time teacher is employed to teach. Later in this judgment the relevant provisions of the STCA dealing with the allocation of non-contact time to some part-time teachers is described.

[25] Underpinning the proceeding is a claim that the work required of part-time teachers involves the same skills, responsibilities and working conditions as full-time teachers. The same effort was said to be required because the work often involves extensive, intensive and continuous physical, mental and emotional effort necessitating high levels of continuous focus and concentration.

[26] The first cause of action was for alleged breaches of the Equal Pay Act. This claim is that the work of part-time teachers is predominantly performed by women and has been historically undervalued and continues to be undervalued. The pleaded particulars supporting this allegation were that:

(a) historically, female teachers were paid less for their work than their male colleagues;

(b) female teachers in New Zealand were prohibited by law and contract from marrying or returning to teaching after marriage and having children;

(c) this differential treatment in society persists today; and

(d) historically there was:

(i) gender disadvantage for female teachers and principals in career advancement;

(ii) an unjustified use of fixed-term agreements for women teachers;

(iii) inadequate sick and domestic leave provisions for women teachers;

(iv) an impression by female teachers that they were unable to contribute to, or influence, school decisions;

(v) inequitable provision of classroom release time or non-contact time for part-time teachers (who are disproportionately women);

(vi) a phenomenon whereby women are considered to be carers such that the skills, responsibilities and effort are considered inherent and are not properly accounted for in the salary paid; and

(vii) a phenomenon whereby part-time work performed by females was undervalued.

[27] Against those pleadings the plaintiffs alleged that the rate of remuneration for part-time teachers does not constitute equal pay, because it is less than the rate that would be paid to male employees:

(a) with the same, or substantially similar, skills, responsibilities, and service;

(b) performing work under the same, or substantially similar, conditions; and

(c) performing work that involves the same, or substantially similar, degrees of effort.

[28] Attention then turned to nominating a comparator. The one chosen was full-time teachers.

[29] The difference in pay between full-time and part-time teachers was described in the pleading in the following way. The claim was that the pay rate for full-time teachers in the STCA includes pay for one hour of non-contact time for each four hours worked, but the pay rate for part-time teachers does not include the same provision. This different treatment of non-contact time was pleaded as reducing part-time teachers' pay, compared to full-time teachers' pay, in a discriminatory way.

[30] The relief sought by all the plaintiffs against the Secretary for Education was a "determination" of equal pay under the Equal Pay Act, being a determination that:

(a) the Secretary for Education had breached the Equal Pay Act; and

(b) the Secretary for Education would comply with the Equal Pay Act by providing or facilitating the provisions of:

(i) pro-rata non-contact time to all part-time secondary teachers in future; or

(ii) commensurate compensation in lieu of this time for the work performed by part-time teachers.

[31] The relief claimed was largely mirrored in the other two causes of action. The second cause of action, under the Government Service Equal Pay Act, was pleaded in the alternative. While relying on general pleadings about the similarities between the skills and work of part-time and full-time teachers, this cause of action referred to the salaries of the teacher plaintiffs being met wholly from money appropriated by Parliament and that they performed equal work under equal conditions to full-time teachers. The claims were that they were not paid the same salary or wages as full-time teachers resulting in discrimination based on sex.

[32] The third cause of action involved claims by the teacher plaintiffs that the STCA gave rise to personal grievances on the basis of discrimination by reason of sex. It was alleged that the defendant boards of trustees had refused or omitted to provide to them the same terms of employment and conditions of work as provided for other employees with substantially similar qualifications, experience or skills, employed in the same or substantially similar circumstances, by consistently failing to make provision for non-contact time for them on a pro-rata basis. The treatment referred to was that they had been discriminated against by reason of being female employees.[6] The relief claimed was a determination that each teacher plaintiff has a personal grievance and costs.

[33] While the teacher plaintiffs sought relief from their employers, the generic nature of the claims means that, if they succeed, the result will probably apply to other part-time secondary school teachers in state schools.

[34] Not all of the claims apply to all of the defendants. The NZPPTA sought remedies against the Secretary for Education under the Equal Pay Act and the Government Service Equal Pay Act but not against any of the other defendants. Each of the teacher plaintiffs sought remedies against the Secretary for Education and their employer board of trustees.

[35] Mr Butler explained that all of the claimed remedies were forward looking and the plaintiffs did not seek a monetary award other than costs.

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6 The claims seek to apply ss 103(1)(c), 104 and 105(1)(a) of the Act.

[36] The defendants took a common position in resisting these claims maintaining that the STCA did not unlawfully discriminate. While they accepted some of the plaintiffs' propositions about the teaching profession, they did not accept that it necessarily followed that all part-time teachers discharged the same tasks as full-time teachers or that the skills required were the same.

[37] There was no claim attempting to attribute to the defendant boards of trustees a failure to comply with the STCA, or that the defendants engaged in other activities that discriminate on the basis of sex or otherwise.

The STCA in more detail

[38] It will be apparent from this overview that the parties concentrated on explaining the method by which contact time and non-contact time was dealt with in the STCA. Under the STCA, full-time teachers are allocated contact and non-contact time based on a school timetable week of 25 hours. That allocation is divided between 20 hours of contact time per week, for present purposes meaning teaching engaged in delivering the curriculum to students, and five hours per week where they are released from those duties to attend to other tasks.

[39] Non-contact time was introduced into the collective agreement during bargaining that led to the agreement that applied from 2002. It was introduced as a method to address workloads. When introduced, the non-contact time was at least three hours per week and was available only to full-time teachers. The allocation of non-contact time increased over time until reaching five hours. It was common ground that the introduction of non-contact time built on previous arrangements between schools and teachers where time away from classroom responsibilities during the school day was provided.

[40] The next bargaining round was in 2004. The resulting collective agreement was operative from 5 August 2004 to 30 June 2007. In this agreement full-time teachers enjoyed an entitlement to four non-contact hours per week during 2004 and 2005. In 2005 schools were to endeavour to provide five hours per week. From 2006 the entitlement to five hours per week was mandatory.

[41] The collective agreement resulting from the 2004 bargaining round included a provision for some part-time teachers to receive non-contact hours; that is cl 5.2.6. The clause was introduced for two reasons. The first one was to ensure that no part-time teacher could be timetabled to teach more hours than a full-time teacher. The second reason was to provide non-contact time for part-time teachers who were approaching a full-time workload. In summary:

(a) From 2005 no part-time teacher could be timetabled for more than 21 contact hours per week, and the employer was to endeavour to provide a minimum one timetabled non-contact hour for part-time teachers appointed to positions of 0.85 FTTE and above.

(b) From 2006 no part-time teacher could be timetabled for more than 20 contact hours, and the employer was to endeavour to provide the non-contact time that would become an entitlement in 2007.

(c) From 2007 onwards, part-time teachers employed for 0.72 FTTE and above were entitled to non-contact hours in accordance with a table in the collective agreement.

[42] The plaintiffs accepted that aside from what was specified in the collective agreement schools could provide part-time teachers with as much non-contact time as they liked, so long as the amount was not less than required by the agreement.

[43] It is necessary to review relevant provisions in the STCA to provide context. The starting point is in Part Five where the parties agreed on general provisions applying to all teachers.

[44] While this part of the STCA is introduced under the heading "Hours of Work" it does not specify any. The STCA does not state the expected weekly hours of work for any teacher. Instead, under cl 5.1.1 the STCA provides that the hours of work of an individual teacher are influenced by the number of classes that person is timetabled to teach and factors such as:

(a) the preparation, evaluation and assessment time generated by those classes, and the students in them, or by other requirements such as external examination prescriptions or the need to report on the progress of individual students;

(b) counselling and pastoral needs;

(c) the administrative responsibilities of individual teachers about their curriculum, pastoral responsibilities or general school administration;

(d) the responsibility of individual teachers arising from their appointment to a Community of Schools teacher role; and

(e) the extent to which individual teachers may participate in the extra-curricular programmes of the school.

[45] Non-contact time is provided for in separate clauses, one dealing with full-time teachers and the other with part-time teachers. Clause 5.2.1 acknowledges that allocations of non-contact time recognise the importance to "quality education" of duties other than classroom teaching, which must be undertaken while schools are open for instruction.

[46] Non-contact time for full-time teachers is dealt with in cls 5.2.2 and 5.2.3(a):

> 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.
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> …

[47] The qualification in cl 5.2.3(a), that it is subject to cl 5.1A, is to each schools' timetable policy. Despite being written in this way, the STCA requires that policy to

be developed in consultation with teachers and to incorporate non-contact entitlements.[7]

[48] The entitlement to non-contact time for part-time teachers is dealt with in cl 5.2.6. The relevant parts of it are reproduced below:[8]

> 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

> …

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7 Under cl 5.1A.1 the timetable policy must also address class size and other matters such as hours of duty outside of timetabled hours and where, for genuine reasons, non-contact time cannot be provided.

8 The cross-reference in cl 5.2.6 to cl 4.5.1 is to the method by which the salary of part-time teachers is determined.

[49] Where a part-time teacher is placed on the table in cl 5.2.6 is to be fixed by discussion. The STCA requires the part-time teacher to be available in the school during timetabled non-contact time.

[50] There is a savings provision in this part of the STCA; nothing in cl 5.2.6(a)–(c) is to reduce any current arrangements a part-time teacher has with a school. Fixed-term arrangements covering a part-time teacher's hours of work continue.

[51] The next step before considering the plaintiffs' claims is to discuss what the STCA provides by way of payment of salaries. Part Four of the STCA deals comprehensively with remuneration. It begins with a statement that the collective agreement provides a base scale for trained teachers and for untrained teachers. There are two tables in this part of the agreement setting out the applicable salaries. The tables state a teacher's salary by reference to a grading, linked to qualifications and experience.

[52] In addition, Part Four provides for pay increments known as units. Each unit is $4,000 per annum and reflects other tasks required of a teacher for which the graded salary scale does not compensate them. These units are not divisible and the whole amount is payable to the teacher on appointment regardless of whether that person is employed on a full-time or part-time basis. Part Four also contains allowances a teacher may earn in addition to a salary and units.

[53] Part-time salary rates are dealt with in cl 4.5. The STCA begins by placing a restriction on the employment of a part-time teacher. They must be employed for less than 0.9 FTTE. That clause provides that a part-time teacher's salary is to be a proportion of the step in the base scale the teacher would receive if employed full-time. The number of hours for which payment is to be made is referred to in this clause as:

> 4.5.1 Part-Time Salary Rates
>
> (a) Part-time teachers must be employed for less than 0.9 FTTE. Subject to subclause 4.5.2 below, the salary of a part-time teacher shall be a proportion of the step in the base scale that the teacher would receive if employed full-time. The number

> of hours for which payment is made is the sum of the number of class contact hours plus any timetabled non-contact time. This sum shall be increased by 11 percent which is equal to an additional payment of one hour for each nine timetabled hours.
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> …

[54] The payment of 11 per cent is further explained in the following sub-clause which says that in return part-time teachers are expected to share on a pro-rata basis "at least to this extent, in the activities of the school which are outside classroom teaching as and when they are required by the principal".[9]

[55] In summary, therefore, under the collective agreement full-time teachers have been contractually entitled to an allocation of non-contact time from 2002. Subsequently, the collective agreement provided a minimum entitlement to non-contact time for some part-time teachers but only to those having higher allocations of work. For those part-time teachers with lower FTTE appointments the contractual entitlement to non-contact time reduces and eventually vanishes. There is, however, an obligation on boards of trustees to endeavour to provide proportionate non-contact time for part-time teachers employed on 0.48 FTTE and above.

The plaintiffs' building blocks

[56] Mr Butler explained the building blocks of the plaintiffs' claims as having four components:

(a) Comparability: seeking a finding that part-time teachers and full-time teachers do the same or substantially similar work.

(b) Differential treatment: seeking a finding that part-time teachers and full-time teachers are treated differently in respect of timetabled non-contact time, and this means part-time teachers are paid proportionately less than full-time teachers.

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[9] The initial confusion about the origin of this loading eventually evaporated. The parties accepted that the loading had its genesis in the Green Manuals and pre-dated the inclusion of it in the forerunners of cl 4.5.1(a) and (b).

(c) Gender: seeking a finding that differential treatment is indirectly on the basis of, or for the reason of, or on the grounds of, sex.

(d) Detriment: seeking a finding that the differential treatment leads to detriment/disadvantage for part-time teachers.

[57] Mr Butler described the claim as being a simple one when boiled down to its essential ingredients. It is that part-time teachers do the same work as their full-time peers but are paid proportionately less than them, because their pay is impacted by whether that teacher is provided with contractual non-contact time. He observed that the STCA has never guaranteed non-contact time for all part-time teachers proportionate to the non-contact time provided to full-time teachers.

[58] The plaintiffs conceded that boards of trustees may, on their own initiative, provide part-time teachers with pro-rata non-contact time.

[59] The link between how non-contact time is dealt with in the STCA, and why the plaintiffs claim part-time teachers are underpaid, was explained by Robert Willetts. He is an Advisory Officer employed by the NZPPTA, and was involved in bargaining for the STCA. The union's concern seems to fall into two parts: what the STCA provides in its table of minimum timetabled non-contact hours per week for part-time teachers is not a proper proportionate allocation of non-contact time and, consequently, those teachers are underpaid.

[60] Mr Willetts prepared a table showing the timetabled non-contact time that would be provided to part-time teachers if it was, in the union's view, properly prorated for them in the STCA. His exercise divided the time between what he described as an absolute entitlement to contractual non-contact time and a requirement to endeavour to provide it under the STCA. His table showed that, on a fully prorated allocation at the maximum FTTE (0.89), a part-time teacher would be entitled to 4.45 hours non-contact time per week. The lowest entry in his table was for a part-time teacher employed at 0.04 FTTE producing one timetable hour per week where the fully prorated entitlement would, according to him, be 0.2 non-contact hours.

[61] To demonstrate this point, Mr Willetts gave an example of how changes to the STCA would be needed to reflect the union's current position. His example was of a part-time teacher employed for 0.64 FTTE, who does not receive guaranteed non-contact time under the STCA. In this example the part-time teacher is expected to work for 16 timetabled hours per week.[10] On a prorated basis 16 timetabled hours would translate into 12.8 hours per week of contact time and 3.2 hours per week of non-contact time.

[62] Mr Willetts explained that making this change could lead to an immediate impact on the teacher's pay depending on the solution adopted to provide for this prorated non-contact time. Option one was to keep the teacher employed for 16 hours per week but divide that time between contact and non-contact time. This option would not change the teacher's pay but there would be a practical effect by reducing workload.

[63] Option two was to add non-contact time onto the teacher's hours. This solution would shift the teacher's total of contact and non-contact time to 20 hours per week; that is, 16 hours teaching plus four non-contact hours. Such a change would result in the teacher moving up the scale in the STCA from 0.64 FTTE to 0.8 FTTE with a corresponding increase in pay.

[64] If the plaintiffs succeed, Mr Willetts' example illustrates that the boards of trustees will either have to pay more to part-time teachers or address a potential staffing shortfall.

The issues

[65] We consider there are five issues:

(a) Issue 1: how is a teacher's pay calculated?

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[10] The calculation is 16/25 equals 0.64. The value of 25 is the combined maximum total of contact and non-contact time for a full-time teacher in the STCA.

(b) Issue 2: what was the gender composition of the state secondary school teacher workforce when the STCA was ratified?

(c) Issue 3: if the historical treatment of female teachers is relevant to each of the pleaded causes of action, have the plaintiffs proved what it was?

(d) Issue 4: is a comparator necessary when considering claims made under the Equal Pay Act, Government Service Equal Pay Act and the Act where indirect discrimination based on sex is claimed and, if so, what is it?

(e) Issue 5: if discrimination has been established what remedies, if any, are appropriate?

Issue 1: Pay

[66] The first issue, about how teachers' pay is calculated, is relevant to the NZPPTA's claims of differential treatment between full-time and part-time teachers.

[67] Mr Butler submitted that the Court should find as facts that part-time teachers and full-time teachers:

(a) are treated differently under the STCA in respect of timetabled non-contact time; and

(b) because of the way teachers' pay is calculated in the STCA, the different entitlements to timetabled non-contact time mean part-time teachers are paid proportionately less than they would be if they received pro-rata non-contact time.

[68] The breadth of the submission was qualified by acknowledging that some part-time teachers receive pro-rata non-contact time by way of what he described as "grace and favour".

[69] As to the teacher plaintiffs, the Court was asked to find that each of them:

(a) are not provided with pro-rata non-contact time by their defendant school; and

(b) because of the way the teacher's pay is calculated in the STCA, by not being provided with pro-rata non-contact time they are paid proportionately less than they would be if they received pro-rata non-contact time (that is, proportionately less than their full-time peers).

[70] Mr Butler noted an exception should be made for the fifth plaintiff, Ms Eno, for 2019. That was because she received a full allocation of pro-rata non-contact time in that year.

[71] The plaintiffs consider that the way the STCA deals with non-contact time impacts on the pay of part-time teachers and they are underpaid. In developing these submissions Mr Butler referred to the contractual entitlement for full-time teachers to non-contact time being introduced into the relevant collective agreement in 2002.[11] As has already been mentioned, part-time teachers were not provided with timetabled non-contact time under that collective agreement.

[72] The NZPPTA's claim about the existence of a pay differential in the STCA for equally qualified full-time and part-time teachers largely rested on an analysis by Mr Willetts. He attempted to show the link between the way the STCA provides for non-contact time and the claimed underpayment to part-time teachers by demonstrating how the union considers pay under the STCA is calculated.

[73] Mr Willetts attempted to describe the relationship between pay and work hours by differentiating between what he called pay-generating work hours and non-pay-generating work hours, saying that it was divided into three:

(a) Pay-generating timetabled contact hours which are closely defined and limited.

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[11] The collective agreement was in force between 21 August 2002 and 30 June 2004 and was referred to commonly as the 2002 STCA.

(b) Pay-generating timetabled non-contact hours which are closely defined and limited.

(c) Hours outside timetabled time which do not generate pay and which are undefined and highly variable.

[74] In this explanation Mr Willetts described contact time as "basically teaching". By its nature it generated further work for teachers in preparation, assessments, and other necessary tasks which have to be performed outside of the hours spent with students. Each contact hour spent for a teacher, he said, generated about another hour of work. That work is either undertaken in any non-contact hours or in other hours which, he considered, do not generate pay.

[75] Mr Willetts said that timetabled non-contact time is used so that teachers can undertake work they would otherwise have to perform outside of their timetabled hours. In his view, these non-contact hours allow teachers to clear work, but do not automatically create further work.

[76] In this analysis the more contact time a teacher has the more outside-contact-hours work is generated. Relevant to the claim for part-time teachers, Mr Willetts said that this further work falls completely or disproportionately into the hours worked that do not generate pay for them. That led him to conclude that the STCA's allocation of contact and non-contact time had a direct correlation with pay. Consequently, where the STCA did not provide prorated non-contact time to a part-time teacher that teacher was underpaid.

[77] Relying on Mr Willetts' evidence, Mr Butler argued that the pay structure in the STCA operates in combination with its non-contact provisions to create a pay inequity. In summary, the plaintiffs sought to apply the following analysis to the STCA to demonstrate a difference in pay for part-time teachers:

(a) The pay-generating mechanism is such that a teacher's pay is dependent on their total timetabled hours.

(b) Total timetable hours include timetabled contact hours and timetabled non-contact hours.

(c) The number of timetabled contact and non-contact hours is relevant to the pay a teacher will receive.

(d) A full-time teacher is guaranteed five timetabled non-contact hours.

(e) A part-time teacher is not guaranteed pro-rata timetabled non-contact time. It is left to individual schools to choose whether to provide more than the minimum entitlements of timetabled non-contact time to their part-time teachers.

(f) The lack of a contractual guarantee of prorated timetabled non-contact time for part-time teachers has the consequence of permitting the number of timetabled non-contact hours a part-time teacher has to be disproportionately less than the number of timetabled non-contact hours of a full-time teacher.

(g) Because pay is determined by total timetabled hours, disproportionately less timetabled non-contact time would result in disproportionately less pay for part-time teachers.

[78] While the NZPPTA accepted that teachers are paid for all of the work they perform, the point of this submission was to attempt to show that some part-time teachers are underpaid.

[79] Not surprisingly, this approach was rejected by the defendants as artificial, ignoring the fact that teachers are professionals who are paid an annual salary for all of the work they perform. The defendants' case was that the plaintiffs made a fundamental error in how teachers' pay is calculated and part-time teachers are not disadvantaged by the STCA.

[80] The flaw in the NZPPTA's reasoning, illustrated by Ms Casey, was that part-time and full-time teachers are paid salaries based on their respective FTTE allocations in the STCA. There is a direct relationship between a part-time teacher's FTTE and a full-time teacher's salary that is not affected in any way by the allocation of contact or non-contact time. We accept Ms Casey's submission that any workload differences that might be established just reflect the nature of the work, not the nature of the pay. A full-time teacher is expected to do proportionally more non-curriculum related non-contact work than a part-time teacher but that does not mean a part-time teacher has been disadvantaged, let alone subjected to discrimination.

[81] Further, Ms Casey submitted that while there are differences between part-time and full-time teachers in the STCA, remuneration must be looked at "in the round", including considering those provisions in the collective agreement that advantaged part-time teachers before a proper comparison could be made. Implicit in this submission was that the NZPPTA had been unfairly selective in its criticisms of the collective agreement. Examples where the STCA benefited part-time teachers over full-time ones were:

(a) Part-time teachers automatically earn an 11 per cent loading on their pay. The loading applies to the whole salary but the expectation in return is limited.[12] The salary covers both timetable and non-timetabled hours and applies during the whole year.

(b) Permanent part-time teachers get annual salary increments at the same rate as full-time teachers despite working fewer hours.

(c) Part-time teachers are entitled to be paid an additional amount if they act as a reliever teacher, but that does not happen with full-time teachers.

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[12] The 11 per cent loading is payment of one hour for each nine timetabled hours and, to that extent the part-time teacher is expected to share in school activities outside the classroom as and when required; see at [53]–[54] above.

(d) Most units and allowances are available to part-time teachers without being prorated.

(e) Permanent part-time teachers accrue sick leave at the same rate as if they were full-time.

[82] Ms Casey's point was demonstrated by the way the STCA provided an 11 per cent salary loading for all part-time teachers. Mr Willetts was asked whether the provision of the prorated allocation sought in this proceeding would create a disadvantage for full-time teachers because they do not have any entitlement to that loading.

[83] Mr Willetts' response was that the NZPPTA's case was brought on the basis that the collective agreement would need to change to remove the loading (in other words, that the present limitation on duties that can be required of a part-time teacher would need to be removed). That was because the STCA would need to be adjusted to replace the "one in nine" additional duties required of a part-time teacher in exchange for the 11 per cent loading.

[84] While Mr Willetts accepted changes would be required, to avoid an inequality being created for full-time teachers, this concession was not how the plaintiffs had pleaded their causes of action. The pleadings did not refer to any necessary adjustment to the 11 per cent loading or concede that it would need to be removed.

[85] Further, Mr Willetts acknowledged that what Ms Casey described as his "construct" of pay generating work, to explain how pay was calculated, was developed for this proceeding. It had not been the basis of any discussion or bargaining with the Secretary for Education when the STCA was negotiated and, therefore, when salaries were settled. This construct was criticised by Ms Casey as not fairly reflecting the work of part-time or full-time teachers or the consequences of the 11 per cent loading.

[86] In criticising the NZPPTA's assessment Ms Casey argued that the salary part-time teachers receive is calculated on the same basis as full-time teachers. The only difference in working conditions that might materialise was if the comparison used

notional average hours, when part-time teachers generally had more contact hours proportionate to their full-time colleagues.

[87] Ms Casey argued that this situation could only amount to pay inequity if it was established that working relatively more contact hours means a part-time teacher is performing relatively more work for their pay. In turn, that means to succeed the NZPPTA needs to establish that Mr Willetts' proposition is correct; that a teacher's total workload is driven by contact hours alone for both full-time and part-time teachers. Ms Casey criticised this reasoning as involving a fundamentally incorrect premise. Had there been a correlation between contact hours and workload, the STCA ought to base calculations of FTTE salary for part-time teachers on 20 contact hours per timetabled week for full-time teacher. It does not do that. The assessment is based on 25 hours per week.

[88] Ms Casey's point was that the NZPPTA's case concentrated on only a narrow aspect of a teacher's work. It therefore wrongly excluded from the comparison many tasks required of full-time teachers that are not required of part-time ones. Non-curricular work undertaken by full-time teachers, which is not reflected in either contact or non-contact time, includes responsibility for a form class or tutor class, attending staff meetings, department meetings, assemblies, prize-givings, professional learning, pastoral care, school-related duties and contributing to the school administration. We agree with this criticism. On that basis Mr Willetts' "construct" fell down.

[89] Further, there was evidence that the NZPPTA itself did not accept that part-time teachers had the same need for non-contact hours, accepting that their workloads are different from full-time teachers. Examples referred to included NZPPTA correspondence to that effect as early as 2004. In July 2004 the union presented a paper to the Ministry on part-time non-contact time. In it the union explained its position by saying that it saw the "non-contacts" as a workload management tool and that it could acknowledge some merit in the suggestion that workload pressures decline as contact reduces and at some point became manageable without extra time. By 2012 the union acknowledged that the quid pro quo in seeking fully prorated

timetabled non-contact time would be an adjustment to provide that part-time teachers would be required to undertake fully prorated duties.

[90] As to the teacher plaintiffs, with one exception, they put forward their cases on the basis that they were paid only for their contact hours; that is those hours they spend in instructing students. They said that, for the balance of the time they worked in undertaking tasks, such as preparation, they were unpaid. Mr Willetts, however, disagreed with them. He accepted that the NZPPTA's case was that their work was underpaid not unpaid.

[91] Ms Casey submitted that the case for the plaintiff teachers, Ms Pamela Foyle, Ms Leanne Donovan and Ms Lisa Hargreaves was not made out, because they did not give any evidence to the effect that their hours of work exceeded the workload expected of them by reference to the FTTEs they were employed to work.

[92] It was common ground that during school term time an average working week for full-time teachers of 50 hours could be reliably assumed. This was a rough and ready approximation of a variable workload because some subjects require more work than others, but it was accepted as broadly indicative. For our purposes we have accepted that 50 hours per week is a reasonable figure to use.

[93] Using a 50-hour working week Ms Casey illustrated that the teacher plaintiffs did not have a disproportionate workload. Ms Foyle was employed as a permanent part-time teacher at 0.8 FTTE. Her evidence was that she worked approximately 32 hours per week during term time and spent about 35 hours per week at school. Ms Casey's criticism of this evidence was that on the basis of a full-time teacher working 50 hours per week, at 0.8 FTTE Ms Foyle could be expected to work approximately 40 hours per week in term time. On that analysis, she works less than the time equivalent for her position.[13]

[13] 50 hours per week x 0.8 = 40.

[94] Ms Donovan has a permanent part-time position at 0.67 FTTE. On the same basis she could be expected to work for approximately 33.5 hours per week.[14] She gave evidence that she worked for approximately 32 hours per week during term time.

[95] The same analysis was undertaken for Ms Hargreaves, who is employed on 0.64 FTTE. Her actual hours of work were not quantified but she did not say that they exceeded the expected 32 hours per week.

[96] As to Ms Eno, at the time of the hearing she was employed as a 0.36 FTTE teacher. She was employed to teach seven hours of class-contact time and received two hours of timetabled non-contact time; something Ms Casey observed as being more than the timetabled non-contact time on a pro-rata basis than a full-time teacher would receive. Ms Casey submitted, we consider correctly, that putting aside the 11 per cent loading Ms Eno could be expected to work approximately 18 hours per week. She did not give evidence of the actual amount of time she spent working each week but there is nothing in her description of that work supporting her view that she is engaged for more time than the FTTE requires.[15]

[97] Based on these calculations Ms Casey submitted that the teacher plaintiffs do not work a higher proportion of hours than their full-time teacher colleagues. We agree with this analysis as it relates to those plaintiffs. Their evidence did not support the contention that they were underpaid in comparison to full-time teachers and it cannot support the other claims by the NZPPTA.

[98] However, that is not the end of the assessment because the NZPPTA presented Mr Willetts' hypothetical examples to illustrate the proposition that the discrimination lies in the STCA itself. Ms Casey referred to an example given by Mr Willetts, and used by Mr Butler in cross-examination, of a part-time teacher employed at 0.64 FTTE. In this example the teacher would be expected to work 32 hours per week during term time, based on an assumed 50 hours per week for a full-time teacher.

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14 50 hours per week x 0.67 = 33.5.

15 50 hours per week x 0.64 = 32; 50 hours per week x 0.36 = 18.

Adding in some hours of work to recognise the 11 per cent loading for extra duties Ms Casey arrived at a figure of "just under" 36 hours per week.

[99] A full-time teacher is required to perform 20 contact hours per week, so that a further 30 hours must be worked to get to the assumed average of 50 hours per week. The submission was that both a part-time teacher and full-time teacher in this hypothetical example are paid the equivalent salary for their notional working hours matching their FTTE. The difference, Ms Casey said, was that the part-time teacher has a slightly higher proportion of contact hours as compared to a full-time teacher. We agree. This example illustrates that a comparison made only by looking at what the STCA provides for non-contact time does not take into account the full range of tasks expected of teachers and is misplaced.

[100] We find support for Ms Casey's submissions in the evidence by Professor Deborah Cobb-Clark. She is a Professor of Applied Economics in the School of Economics of the University of Sydney. Professor Cobb-Clark's evidence included a discussion about whether a gender pay gap between men and women is in and of itself sex discrimination and she considered the underlying basis of the pay-generating "construct" relied on by the NZPPTA.

[101] Professor Cobb-Clark raised concerns about the "construct" not being scientifically robust. She was concerned that relying on it could lead to an erroneous conclusion of inequity based on sex. She drew attention to several difficulties in the NZPPTA's methodology. We agree, for reasons that will become apparent.

[102] In relation to salary, Professor Cobb-Clark posed as a question: how does the way timetabled non-contact time is allocated to part-time teachers affect their rate of pay? Her answer was that it hinged on the basis used in the calculation. She criticised Mr Willetts' analysis as focussing on teachers' pay per timetabled contact time and undertook additional calculations using his table to illustrate her point by including further calculations and alternatives. The first alternative was where a part-time teacher had an FTTE equivalent of greater than or equal to 0.72 and, therefore, a guaranteed contractual entitlement to timetabled non-contact hours per week. The

second alternative took into account the "endeavour" hours; where schools are to endeavour to provide part-time teachers with a proportionate number of timetabled non-contact hours.[16]

[103] Professor Cobb-Clark added the 11 per cent loading for part-time teachers in her calculations. The result was illuminating. In the first alternative, her table showed that the pay per total timetabled hour for part-time teachers, regardless of how much teaching time they were allocated, was 11 per cent higher than full-time teachers. The same outcome was demonstrated when she calculated the pay per hour of those part-time employees in the second alternative.

[104] Having criticised the robustness of the NZPPTA's methodology, Professor Cobb-Clark commented that there were four potential bases to compare teachers' pay to assess if there was a differential: annual salaries, pay per hour worked, pay per timetabled hour, or pay per contact hour. She commented on all four.

Annual salary

[105] As has already been noted, the STCA does not specify the hours a teacher is expected to work. For Professor Cobb-Clark that meant principals, as the ultimate supervisors of teachers, were not attempting to manage their input; that is their hours dedicated to teaching. Instead, the expected output was managed; that is class management and academic achievement. On the basis of this analysis the Professor likened teachers to other salaried employees. She thought it was common for employers to pay workers an annual salary, rather than an hourly wage, if it was easier to monitor what they accomplished on the job than to monitor the time they put into it. She was also of the view, which we think is a commonly held one about salaried positions, that salaried employees have some flexibility about when and where they work. On this analysis she considered it would be logical to focus on teachers' annual salaries when making comparisons because that is consistent with the work and how they are paid.

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16 See at [48] above.

[106] Her opinion was that there was no pay inequality relating to part-time teachers because they receive the salary that is a direct proportion of their FTTE plus 11 per cent.

Pay per total hours worked

[107] As to the second of the four bases for comparison (pay per hour worked) Professor Cobb-Clark accepted there was a logical argument for making comparisons based on the hourly wage. She explained, and we accept, that it is common in an analysis of pay differentials based on sex to focus on the hourly wage rates of men and women in considering whether discrimination has occurred, even if the persons involved are salaried. In this analysis she accepted Mr Willetts' evidence that New Zealand teachers are working more hours than those for which they are timetabled. This situation is consistent with survey data from the United Kingdom and Australia.

[108] The Professor's concern was that to undertake any assessment it would be necessary to know how total hours varied with teachers' FTTE. On the available information, including the tables she prepared, her conclusion was that part-time teachers might be expected to spend a higher fraction of their total hours in the classroom but that analysis did not take this assessment any further.

Pay per timetabled hours worked

[109] In relation to the third of the four bases, Professor Cobb-Clark accepted that pay per timetabled hour (contact and non-contact time) might be a reasonable way to make a comparison. Her table showed part-time teachers received more pay per timetabled hour than full-time teachers, specifically 11 per cent more.

Pay per contact hours worked

[110] Finally, Professor Cobb-Clark turned to consider the fourth base: pay per contact hour. It was clear to her that the number of total hours teachers work is not perfectly correlated with the number of contact hours assigned (ie. it is not perfectly predicted by them). If contact hours were perfectly correlated that would imply that

all full-time teachers would have the same workload and be working the same number of total hours. That is, however, known not to be correct. Total work hours vary amongst full-time teachers depending on the subjects they teach and each teacher's experience. Further, there are factors other than contact hours influencing the teacher's workload which have already been touched on: for example, class sizes, student composition in the classroom, subject areas, pastoral care and the other matters that make up professional teaching.

[111] This analysis led Professor Cobb-Clark to conclude that it was logical to compare full-time and part-time teachers on the basis of their annual salaries or their pay per total hours worked, if those hours could be observed.

[112] In the Professor's opinion the plaintiffs' position about pay is misconceived, because it did not correspond to the basis on which teachers were paid and ignored all other things that affect a teacher's workload.

[113] We prefer the defendants' case, that teachers are paid a salary to discharge their professional duties and while those duties may vary between full-time and part-time teachers it does not follow that any difference can be attributed to discrimination in the STCA. Mr Willetts' construct was misplaced because it lacked the robustness required to be reliable, for example, by not taking into account all of the tasks required of a full-time teacher.

[114] A complicating factor, from the NZPPTA's point of view, is the diverse nature of part-time work making it difficult to draw broad-brushed conclusions based on Mr Willetts' analysis. There are likely to be any number of part-time teachers who have non-contact time provided for in the STCA or who have made other contractual arrangements outside of the STCA. Without more information it would be dangerous to draw the conclusions Mr Willetts' evidence invited.

[115] Our conclusion is that the plaintiffs' claims of discrimination based on differences in pay cannot succeed.

[116] Finally, we make a more general observation about the NZPPTA's criticisms of the STCA and the allegations of discrimination on the basis of sex. What is in the STCA was introduced in 2002 as a way to control the workload of full-time teachers. That is what the parties bargained for. The proposal for non-contact time for full-time teachers was put forward by the NZPPTA. It was a central part of the bargaining in 2002 and what was tabled by the union in its bargaining about workloads.

[117] The offers made by the union, and the language used, were directed towards securing workload controls for full-time teachers. The workload of full-time teachers dominated bargaining. We accept that during the bargaining the position of part-time teachers is likely to have been mentioned, but it was not a significant concern to either party.

[118] The reality is that the NZPPTA bargained for a collective agreement which resulted in some significant gains for a proportion of its members. It also involved the NZPPTA making some compromises. The point is that the NZPPTA now says that the agreement which emerged from the parties' negotiations is discriminatory and the Secretary for Education is responsible for remedying the situation. The background context may have raised complex issues as to relief had we otherwise been drawn to the plaintiffs' claim. Given the conclusions we have reached, we do not need to deal with such issues and say no more about them. They are best left for another case, and full legal argument.

Issues 2 and 3: What was the gender composition of the teacher workforce and has its significance been proved?

[119] In case our assessment that the plaintiffs have failed to establish a detriment in the STCA is wrong, it is necessary to discuss the plaintiffs' claims about the gender composition of the teacher workforce because that is material to the building blocks of their case.

[120] The plaintiffs argue that the teacher workforce has been predominantly male for most of its history. The legacy of that dominance, referred to in submissions by

Mr Butler as male gender incumbency, was said to manifest itself in the present STCA. It is this male legacy that has led the plaintiffs to select full-time teachers as the comparator to use in their claims of indirect gender discrimination, even though the numbers of male and female teachers reached equilibrium in the late 1990s. We begin by accepting Mr Butler's comment, in his opening submissions, that history is important to this assessment.

[121] There was no material disagreement about the gender makeup of the secondary teacher workforce in state schools. Evidence about it was given by Mr Willetts and Ms Cheryl Remington who is a Chief Analyst at the Ministry of Education. The main source of Ms Remington's data was teacher payroll information supplied by the payroll provider, Novopay. That information is a record of every payment made in the payroll system to teachers employed at state and integrated schools.

[122] The data is comprehensive. It includes information about gender, the level of a teacher's qualifications, and where each teacher is placed on the STCA's pay scale. The information is sufficiently extensive to include whether the teacher is employed full-time, or part-time, is permanent, temporary, on a fixed term agreement or involved in job-sharing.

[123] This information is aggregated into an annual series and used for the Ministry's reporting, modelling and analysis. At the time of the hearing the data available to Ms Remington from this source had been constructed for the years 2004 to 2017.

[124] Ms Remington also described the gender makeup of the profession from 1964 to 2003 but from a difference source; historical publications of Education Statistics. There was a slight difference in the results produced by Ms Remington and Mr Willetts but they are not material. No issue was taken about the robustness of the resulting analysis.

[125] Ms Remington said that in 2017 there were 22,355 teachers employed on terms and conditions in the STCA. Of them, 61 per cent were female and 39 per cent male. The majority of teachers were employed in full-time roles (83 per cent) and the majority of full-time teachers were female (59 per cent).

[126] In 2017, 17 per cent of teachers were employed in part-time roles. The majority of part-time teachers, 74 per cent, were female. Females were also more likely than males to be in part-time roles: 21 per cent of female teachers are in part-time roles compared to 11 per cent of male teachers.

[127] Turning to historical information, Ms Remington said that from 1964 to 1984 the available data was for full-time permanent employees. That data showed the majority of full-time teachers were males comprising between 60 per cent and 64 per cent of the workforce over those 20 years. In 1969, 1970, 1983 and 1984 men made up 60 per cent of the full-time teacher workforce. In 1974 the number peaked at 64 per cent. She explained that from 1985 onwards the data showed that the percentage of full-time male teachers started to decline while the percentage of full-time female teachers started to increase.

[128] The point of equilibrium between genders was reached sometime between 1997 and 1998 when the full-time teacher workforce comprised approximately 50 per cent male and female. After 1998 the data showed that there was a steady increase in the percentage of female full-time teachers reaching 59 per cent by 2017.

[129] Ms Remington graphed information about part-time teachers as well. Some data was available from 1985 onwards. That showed women have always represented a clear majority of the part-time teaching workforce.

[130] While Ms Remington's evidence provided other comprehensive breakdowns of the available statistics her evidence about the age and gender breakdown of the part-time and full-time workforces was significant. Contrary to what might have been anticipated, the data does not tend to show that younger people are the majority of part-time workers.

[131] The age breakdown showed that the part-time workforce tended to be older. By 2017, 17.1 per cent of the part-time workforce was 65 years or older compared to only 5.4 per cent of the full-time workforce. Approximately 12 per cent of the part-time workforce is younger than 34 years old compared to approximately 22 per cent of the full-time workforce.

[132] Ms Remington analysed data from 2004, when it began to be collected, and said that this pattern of the part-time workforce being older is a consistent feature. That analysis led her to conclude that, overall, the proportion of the teacher workforce aged 65 and over has increased considerably since 2004. Those teachers continue to be more likely than other age groups to work part-time.

[133] This analysis drilled down further to consider the gender differences and age distribution between full-time and part-time teachers. Ms Remington concluded that male teachers are more likely than female teachers to work part-time when aged less than 25, between 25 and 34 both genders had similar rates of part-time work and from 35 to 64, females were more likely to work part-time than males. Her conclusions were not challenged.

[134] This information underpinned the NZPPTA's argument that historically the profession has been dominated by males. That is certainly correct. Males continued to dominate the full-time teacher workforce for several years from 1985 onwards. We consider it is also correct to say that the majority of the part-time teacher workforce has been female since at least that time, and probably earlier, and that it continues that way now. That evidence, however, only takes this matter a short distance and is not conclusive. The statistics alone do not provide sufficiently complete, or robust, evidence from which we would be prepared to draw conclusions about whether the male legacy Mr Butler referred to continues to influence the terms and conditions of the current collective agreement.

[135] Given the significance of history to the union's claim that a male legacy continues to influence the STCA, it was notable that expert evidence about the history of the education sector was not presented. Instead, Ms Bronwyn Cross explained some aspects of the history of the profession and historical discrimination.

[136] Ms Cross was a teacher for many years before taking up employment as a woman's officer with the NZPPTA followed by other roles in the union. As well as her years of experience as a teacher and union official Ms Cross was involved in the

Pay and Employment Equity Review 2008.[17] While she has a Bachelor of Arts degree in history and political science, a Diploma of Secondary School Teaching and a Diploma of Education, she was not qualified by the first plaintiff as an expert witness and eschewed any suggestion of expertise in historic discrimination against women teachers. Her view was that she was not an historical researcher.

[137] Despite that limitation Ms Cross said that, historically, the profession was a largely male domain but that over time the proportion of women in it increased. To that extent her impression of the gender make-up of the teaching profession matches what was said by Ms Remington. Ms Cross accepted that the proportion of men in full-time secondary teaching has decreased over time but added that part-time teachers have historically been, and remain, predominately female. This evidence was also consistent with Ms Remington's data.

[138] While not purporting to give expert evidence, Ms Cross made several selected observations about women teachers being subjected to discrimination in systemic and unjustified ways. Her observations contained snapshots from the twentieth century and were not disputed by the defendants.

[139] This evidence began with an event in 1924, when female teachers were subjected to unequal pay. Ms Cross produced an article from *The Dominion* newspaper in August that year about a difference in the pay scales for teachers favouring men over women. The systemic nature of this discrimination was clear in a memorandum Ms Cross produced, from the Hawke's Bay Education Board dated 31 October 1924, supporting the differential pay scale. She referred to the memorandum noting that a differentiation in favour of men had always existed. Ms Cross' view was that the memorandum from the Education Board reflected the covert discrimination that often prevented women from advancing at the same rates as men. That was because, in her view, in the appointment of teachers many of the better paid positions were filled by men as a matter of principle. Some part of the salary

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[17] The Pay and Employment Equity Review contained acknowledgments of inequality but is not determinative of issues in this proceeding; in the bargaining immediately after it was completed this report did not lead to significant changes in the collective agreement.

differentiation was reflected in men being appointed to the highest grade of teachers while women filled nearly all of the junior positions.

[140] Ms Cross referred to the New Zealand Women Teachers' Association sending a memorandum to the Minister of Education in 1938, disapproving of the salary scale for teachers which continued to differentiate between men and women. She drew attention to the memorandum informing the Minister that there was no logical reason for the differentiation in pay purely on a sex basis. The memorandum advised the Minister that differentiation on the ground of sex alone branded women teachers as inferior to single men holding similar positions.

[141] To that evidence, Ms Cross added that the issue she described, about pay scales, referring to the information she produced from the 1920s and 1930s, was not confined to the education sector. As an example she referred to the State Services Co-ordinating Committee in 1955 confirming that until there was a lead from Government, State Services should oppose any claims for equal pay on specified grounds, including that it was expected that women would work for fewer years than men making them less valuable, and male wages were based on the need to support a family. That evidence was supplemented by reference to a newspaper article appearing in *The Auckland Star* in March 1957 under the title "Can the country afford "equal pay"?".

[142] This evidence then turned to steps taken within the NZPPTA, and by it, in the 1950s to examine the issue of equal pay. Ms Cross accepted that some of the views expressed about equal pay in the 1950s were widely held and that even some women teachers were opposed to equal pay, which she took as an indication of how ingrained adverse attitudes in society were at that time. However, she acknowledged that such overt sexism is no longer as common in the profession.

[143] Ms Cross commented on the introduction of the Government Service Equal Pay Act in 1960, following a report from the Equal Pay Implementation Committee. She understood that the committee was appointed to create a plan to implement the Government's equal pay policy in the State Services. The existence of the committee, and the Government Service Equal Pay Act, in Ms Cross' evidence followed from

identified inequalities between men and women. As an example of the wide-spread nature of this inequality, her evidence stepped outside the teaching profession and referred more generally to female public servants, on marrying, being required to resign from permanent employment. Her view was that this was still the practice in the Post Office when the Equal Pay Implementation Committee made recommendations. It would appear that the events described occurred in the late 1950s or early 1960s.

[144] Ms Cross stated that many groups were involved in implementing the Government Service Equal Pay Act and referred particularly to a sub-committee that was established in 1960 to make recommendations on the application of that Act. Responsibly, she acknowledged that the introduction of this legislation was a significant development to ensure that teachers were treated equally.

[145] Ms Cross also stated that, from 1 April 1963, equal pay was implemented in the teaching profession so that all men and women teachers were on a common salary scale. For reasons that were not more fully examined in evidence, it appeared that some discriminatory practices survived after the introduction of the Government Equal Pay Act. The example given was that until 1973, from the age of 20, there were different minimum salary rates for men and women in the State Services. She went onto say that in 1970 the Director General of Education wrote to the Wellington Education Board defending different minimum salary rates for men and women. Despite the existence of legislation making such differentiation unlawful, from what Ms Cross was able to ascertain, the Department's position was that the minimum rates it was paying had nothing to do with the value of work and was based on social factors. In an explanation that would not be acceptable today, this difference was said to be based on recognising that a male teacher aged 21 may have to support a wife and family.

[146] No doubt the views expressed at that time were indicative of deeply ingrained discrimination that Ms Cross referred to in her evidence. However, she went onto say that the Wages Tribunal abolished the different minimum salary rates for men and women in State Services with effect from 1 September 1973. She accepted that this

was an important achievement following the passage of the Government Service Equal Pay Act.

[147] Other areas of historic gender-based discrimination were mentioned. One was the difference in entitlements to a removal allowance and expenses. On moving to a new job a married male teacher was entitled to removal expenses covering the cost of moving his family, but a married female teacher was not unless her husband was financially dependent on her. Otherwise she was only entitled to removal expenses to cover her own fare and the removal of her personal belongings. This policy persisted until 1977.[18]

[148] In 1977 the Government approved a package to eliminate discrimination against women in State Services. As part of it, the distinction between married men and women for transfer expenses was removed. That package applied to secondary school teachers from 1 January 1979. By 1983 the distinction between married and single employees when it came to removal expenses had ended.

[149] The next practice Ms Cross referred to was the difference in the way in which men and women were paid a married salary. Historically, she said married male teachers were paid a higher salary than married female teachers who only received a higher salary if they were the sole income earner in their household and had dependent children. Apart from the obvious discrimination she was referring to in the existence of this differential to begin with, it was compounded by the fact that married men received it automatically but married women had to prove an entitlement to it. Having made this observation about historical practice, Ms Cross accepted that the married salary was abolished before she took up her role with the NZPPTA and the need to remove it as discriminatory was acknowledged in 1976. As it happened, the married salary was abolished in 1980 and replaced with the dependent's allowance. The result of this change was that eligibility depended on a teacher's family circumstances.

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[18] The policy was the subject of proceedings: *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (SC) and *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA). Both Courts accepted the practice was discriminatory.

[150] Part of this evidence was also intended to show that systemically the teaching profession dissuaded women from seeking management positions which had the effect of depressing both their role in the profession and income. One example Ms Cross gave was the decision to abolish the position of senior mistress, which did not lead to an increase in women teachers in senior roles but had, in fact, the opposite effect. Once that role was abolished managerial functions tended to gravitate towards senior male teachers.

[151] While this evidence painted a very grim picture of what happened in the teaching profession for a significant portion of the twentieth century, Ms Cross acknowledged that it did not represent the whole picture. When questioned she accepted that some of her evidence represented a wider societal attitude at certain times and, in some ways, secondary school teachers were marginally better off than others. One concession made was the establishment of a maternity grant for women teachers.

[152] What may have appeared to be reasonably comprehensive evidence, at first blush, was not. For example, while Ms Cross gave evidence that women in the State Services were required to resign from the permanent workforce when they married, she did not refer to the fact that the practice was removed from the teaching profession as long ago as 1938. She acknowledged having been aware of the change.[19] That was about 22 years earlier than the Post Office example Ms Cross mentioned from the 1960s. When questioned, she thought the reason for this early development could be found in the Currie Commission Report in 1962 and about the need for women teachers because of a shortfall in teacher numbers.

[153] Ms Cross accepted, when questioned, that by 1963 there was formal equal pay for men and women in the teaching profession and that it was applied equally to full-time and part-time teachers. That was at a time when males dominated full-time teaching and females dominated part-time teaching.

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[19] The reference was to the Education Amendment Act 1938, s 6(1). The section prohibited an Education Board from refusing to appoint a married woman as a teacher in any school on the ground that she is married and no married woman was to be dismissed from a position in any school on the ground that she is married.

[154] Initially, Ms Cross did not mention arrangements which allowed women to access superannuation after 30 years of service rather than 40 that applied to male teachers.

[155] Ms Cross did not refer in any detail to the content of the Currie Commission Report on Education and, in particular, its comments that a new professional pattern was emerging for women in returning to the profession "after family responsibilities". The same report commented that when women returned they did so with "the same seriousness of purpose and intention to complete a career as any other professional persons". When questioned about this part of the report Ms Cross accepted that the Commission was recognising women are a valuable part of the profession and that was an opinion clearly held about 60 years ago. As an illustration, the Commission proposed recruitment and a third year of training and made proposals for the salary of teachers reflecting careers for women and men. She accepted the Commission was actively looking to create a career structure that suited the needs of women and men.

[156] This evidence suggested to us that during the 1960s and 1970s, active steps were being taken to encourage women back into the teaching profession to address a teacher shortage. One of those steps, which Ms Cross was asked about, was the creation of a housewives' credit. This was a service-related credit for post-primary grading for women teachers who had been housewives and were being invited to return to teaching. Ms Cross agreed that this was a targeted benefit. It was for the purposes of pay. She accepted that for a female secondary school teacher returning to the profession the credit was a significant benefit. Ms Cross was also asked about a decision by the then Department of Education, in the 1960's, to introduce Division M for secondary teacher training for married women. That was a half-time course for married women, spread over two years. Marriage and travelling allowances were paid to eligible women on the course.

[157] Ms Cross had also heard of an allowance referred to as the motherhood increment which continues to exist today but with the gender-neutral name childcare increment or childcare credit. When introduced, it applied to married women teachers who were entitled to a salary increment for every three years they had been wholly

occupied in the care and upbringing of their children. It appears, from the way in which Ms Cross responded to this issue when asked about it, that there could be a maximum of four increments or, effectively, it could cover 12 years of care and upbringing of children that would count towards fixing salary.

[158] The point of this discussion was to illustrate, as Ms Casey observed, that in looking at the history of male and female teachers to establish if one or other gender dominated, it is necessary to take into account both positive and negative features over time. In this case, it is very clear that in the early twentieth century, possibly as late as the 1950s, the playing field was tilted strongly against female teachers. However, changes began in the late 1930s and seemed to continue into the 1960s and later. Those changes seem to have been directed towards correcting the missteps of the previous half century.

[159] Having made that observation, we have been left with significant reservations about whether we received a complete and sufficiently balanced review of the teaching profession to enable us to accept that the legacy of male domination continued to exist and manifested itself in the STCA in 2015.

[160] Professor Cobb-Clark noted a concern that a generation had passed since the tipping point was reached where the number of full-time male and female teachers reached equilibrium in the late 1990's. That leaves open whether it could properly be said that there was any continuing influence of previous male domination of the profession, and previous discriminatory practices, after such a long time. Associate Professor Prudence Hyman, who gave evidence for the plaintiffs and was generally critical of Professor Cobb-Clark's economic analysis, accepted that it can take a long time for male incumbency to work its way out of a system but agreed that it may have done so in this profession by now.

[161] In circumstances where the gender makeup of the profession has changed dramatically over the last 40 or so years, steps were being taken a long time ago to remove discriminatory practices, and the passage of time since gender equilibrium was

reached, we expected to receive reasonably comprehensive evidence explaining why what happened before remains relevant now. That did not happen.

[162] We would not conclude that the teaching profession today could reliably be said to retain the trappings of male domination evident from many years ago.

Issue 4: A comparator

[163] While it is not necessary to consider the parties' arguments over the selection of a comparator for the claims we set out some general comments for completeness.

[164] Mr Butler explained the plaintiffs' decision to seek to compare part-time teachers to full-time teachers. He submitted that under s 2A of the Equal Pay Act, s 3(1) of the Government Service Equal Pay Act, and ss 104(1)(a) and (1)(b) of the Act, there was a requirement to draw a comparison to other employees having the same or substantially similar qualifications, skills and experience. While each of the sections used slightly different words, they did so to achieve the same general outcome: to remove discriminatory practices based on sex. While the Equal Pay Act referred to male employees that did not mean that the statute required only comparisons between men and women but, rather, positions without gender biased discrimination being compared to those suffering from it.

[165] Mr Butler submitted that the language used to describe the requisite degree of comparability in the Equal Pay Act was that the work was the "same or substantially similar" and that the expression used in the Government Service Equal Pay Act, "equal work under equal conditions", should be interpreted as having the same general meaning. From that analysis he argued that the value underpinning the Government Service Equal Pay Act is equality, which is apparent simply in light of the terms "same" and "equal" used in it.

[166] Having set that framework, Mr Butler argued that in this case full-time teachers are the appropriate comparator group. Anticipating an argument from the defendants that most full-time teachers are female, his response was that a purposive approach to

interpretation was required. To advance this purposive approach, he relied on the selection of a comparator being a means to an end.[20]

[167] Three other factors were referred to as supporting full-time teachers as the comparator. First, that the purpose of each of the Equal Pay Act and the Government Service Equal Pay Act is to eliminate discrimination against women. Second, the comparator must be free from any gender-bias affecting the rate of pay if the purpose of the legislation is to be achieved. Third, the reference to the "male" rate referred to in the legislation is a proxy for the "non-discriminatory rate". On this analysis, the plaintiffs submitted that the purpose of references to men in both statutes is to identify that the comparator should be between the affected women and a rate that is not discriminatory.

[168] Viewed in this way he submitted that full-time teachers are a comparator that benefitted from a rate of pay that was not subject to discrimination. Reasons given for that submission included the history of full-time teaching including a common practice of schools providing full-time teachers with some timetabled non-contact hours before any entitlement was incorporated into the collective agreement, and an argument that moving from a male majority to a female majority had not removed the male legacy for full-time teachers.

[169] Ms Casey took the opposing position, that in this case a male comparator is required because:

(a) the legislation juxtaposes males and females;

(b) the Equal Pay Act's long title shows its purpose is to address discrepancies in remuneration between male and female workforces where those discrepancies are based on sex; and

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[20] Drawing on *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 (EmpC), [2013] ERNZ 504. See also *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437, [2014] ERNZ 90.

(c) without identifying the comparable male-dominated workforce, it cannot be shown that a female-dominated workforce is being paid less because of their female status.

[170] The submission was that the criteria to be applied by the Equal Pay Act, in s 3, is about direct discrimination not the claim of indirect discrimination pursued by the plaintiffs.

[171] On the basis that this claim relies on s 3(1)(b), for work exclusively or predominantly performed by female employees, the Equal Pay Act was said to involve a comparative exercise which has already been summarised by this Court in *Terranova* in the following way:[21]

> … Section 3(1)(b) requires that equal pay for women for work predominately or exclusively performed by women is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination. …

[172] That led Ms Casey to submit that under s 3(1)(b) what is required is:

(a) a comparative assessment;

(b) that comparison is of "apples with oranges" (presumably meaning the comparison between men and women);

(c) that an intention to discriminate is irrelevant;

(d) that the test is objective; and

(e) that the comparator is a "notional man".

[173] Ms Casey argued that at no point in time relevant to the alleged discrimination has the full-time teacher workforce been majority male let alone male-dominated.

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[21] At [44].

[174] While we agree with Ms Casey's assessment that the evidence does not support the claimed male incumbency as part of the plaintiffs' attempt to establish unlawful discrimination, we do not agree that the Equal Pay Act and the Government Service Equal Pay Act preclude the comparator chosen by the plaintiffs. We consider the text and purpose of both the Equal Pay Act and Government Service Equal Pay Act contemplates indirect discrimination where, for example, there is a continuing legacy of gender domination in the workforce. This conclusion is required by s 6 of the Interpretation Act 1999.

[175] Had it been necessary to do so, we would have concluded that the plaintiffs' election of full-time teachers as the comparator was open to them.

[176] This is an appropriate point to mention two subsidiary issues. Both of them are about the Government Service Equal Pay Act. The first point was a jurisdictional one raised by Ms Casey. It is whether this Court has jurisdiction to grant relief under that legislation. First, because some of its provisions are spent (and the statute has been repealed). Second, because that legislation directed outcomes for Government service without reference to remedies that might be available and, as a result, where they might be pursued. A detailed analysis of this argument is not required as a result of our finding on the second issue below.

[177] The second issue raised by Mr Butler in submissions for the plaintiffs was that the Government Service Equal Pay Act could be applied to the defendants in this case

[178] The Government Service Equal Pay Act only applied to wage fixing authorities, that were required to have regard to eliminating differentiations based on sex.

[179] Wage fixing authorities were defined in s 2(1) as:

> (a) the Government Service Tribunal:
>
> (b) the Government Railways Industrial Tribunal:
>
> (bb) the Police Staff Tribunal:

(c) the Public Service Commission:

(d) every person or authority responsible for fixing the salaries or wages of Government employees.

[180] Mr Butler sought to link the Secretary for Education to the Public Service Commission. That was because the Commission continued to exist through the State Services Commissioner who, in turn, has responsibility for negotiating the collective agreements in this sector.[22]

[181] The link to the defendant boards of trustees was said to be because teachers fall within the concept of Government employees. The definition of Government employees includes all employees whose salaries or wages are met wholly from money appropriated by Parliament.[23] Not all Government employees are covered by the Government Services Equal Pay Act; it applies only to those whose remuneration is fixed by a wage fixing authority.

[182] Mr Butler's analysis of wage fixing authorities is where the difficulties arise. The Government Service Tribunal was created with the specific goal of reviewing wages prescribed for Government workers. Wages were not negotiated but set. The Government Railways Industrial Tribunal had similar powers to set wages for the railway sector as did the Police Staff Tribunal.[24]

[183] Those tribunals were not engaged in bargaining for collective agreements in the same way as has taken place here. Further, we consider the meaning to be given to subs (d) is coloured by the preceding subsections.[25]

[184] We accept that the Equal Pay Act was not intended to apply to workers who were already covered by the Government Services Equal Pay Act. The explanatory note in the original Equal Pay Bill 1972 makes this clear.[26] However. we do not

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22 State Sector Act 1988, s 74(1).

23 Government Service Equal Pay Act 1960, s 2(1).

24 See Government Railways Act 1949, s 104; Police Amendment Act 1965, ss 71-72.

25 As a consequence of the "limited class" rule. See Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 254.

26 Equal Pay Bill 1972 (60·1) (explanatory note) at 1, which stated that the Government Services Equal Pay Act had already implemented equal pay for workers covered by it.

consider that any of the defendants are wage fixing authorities nor that any of the plaintiffs had their remuneration fixed by such an authority.

Conclusion

[185] We have addressed four of the five issues stated earlier in this judgment. The fifth one has fallen away because of our conclusion that the plaintiffs have failed on the evidence to establish the case they pleaded.

[186] The plaintiffs' claims are unsuccessful.

[187] Costs are reserved. In the absence of agreement of costs the parties may file memoranda proposing a timetable for exchanging submissions.

K G Smith
Judge
(for the Full Court)

Judgment signed at 3.20 pm on 22 June 2021