

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

The Minister administering the State Service Act 2000

(T13667 of 2010)

and

Australian Education Union, Tasmanian Branch

DEPUTY PRESIDENT TIM ABEY

HOBART, 30 April 2010

Industrial dispute - threatened and impending moratorium on NAPLAN testing - order issued

REASONS FOR DECISION

[1] On 29 April 2010 the Minister administering the State Service Act 2000 (the applicant), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Australian Education Union, Tasmanian Branch (AEU) (the union) concerning a dispute (threatened or impending) relating to the conduct of the National Assessment Program – Literacy and Numeracy (NAPLAN) tests programmed to be conducted between 11–13 May 2010. Both parties indicated that there was no prospect of settling the matter through the conciliation process. Accordingly the Commission proceeded to immediately hear submissions from the parties.

[2] The Minister seeks an order expressed in the following terms.

"The Commission formally orders the AEU, Tasmanian Branch not to engage in any industrial action, including any ban or moratorium, by the AEU, its Officers, employees or members in connection with the conduct of the NAPLAN tests to be conducted between 11-13 May 2010 inclusive."

[3] Mr Watson outlined the nature of NAPLAN including the *My School* website where the results are ultimately published.

[4] NAPLAN is conducted annually on a nationwide basis. The program commenced in 2008. This year the tests are to be undertaken by students in years 3, 5, 7 and 9. The tests will involve 18260 students. Students who undertook the tests in 2008 when in years 3, 5 and 7 will undertake NAPLAN tests this year in years 5, 7 and 9 respectively. Students in year 3 this year will undertake NAPLAN tests for the first time.

[5] On 12 April 2010 the AEU Federal Executive adopted the following decision:

"Despite the urging of the profession, the body of research and evidence and the repeated attempts by the AEU to negotiate a satisfactory outcome, the Federal Government has failed to introduce measures necessary to protect students, schools and school communities from the damaging

effects of league tables and the incomplete, inaccurate and invalid representation of student data on the My School website.

Given our ethical and professional responsibility we cannot sit by and watch our students, schools and school communities continue to be damaged due to the Government's intransigence.

Therefore the AEU Federal Executive declares a national moratorium on the implementation and administration of NAPLAN 2010 until the profession's concerns have been addressed."

[6] The AEU Tasmanian Branch has in turn directed members to comply with the Federal Executive decision and place a moratorium on the NAPLAN testing in 2010. The direction was issued in the following terms:

"No member (teacher, principal, support staff) is to administer the NAPLAN 2010 tests in your school, nor should members assist others to do so. This means that you should not assist in the NAPLAN testing program in any way."

[7] It was this direction Mr Watson said, which gave rise to *"threatened or impending"* industrial dispute.

[8] In accordance with s.33 of the *Education Act* the Secretary had issued an instruction to School principals to ensure that the tests are conducted. Under s23 of that Act principals are required to comply with such instructions. Mr Watson acknowledged that the combination of circumstances has placed principals in a difficult position.

[9] Mr Watson submitted that the AEU moratorium will have serious implications. In particular:

"Those years 3, 5 and 7 students who participated in the 2008 NAPLAN tests will be denied the opportunity to have their academic performance tracked and tailored learning programs implemented for them if the 2010 tests are not undertaken and further they will not be able to undertake a NAPLAN test until 2012, some four years since their previous test.

Those students in year 3 in 2010 who are due to undertake the test for the first time will not have their progress first measured until year 5 in 2012."

[10] Mr Watson said that NAPLAN was an integral and non-negotiable component of the National Education Agreement. Failure to conduct the tests would put at risk up to \$157m in Commonwealth funding. Specifically Tasmania would stand to lose up to \$9m in reward payments. In addition the capacity of the Department to make submissions to Treasury under the *"Closing the Gap"* program would be severely compromised. This involves funding on a needs basis of up to \$10m per annum.

[11] The alternative of conducting the tests without the cooperation of AEU members was clearly sub optimal. Apart from the additional cost of *"several hundred thousand dollars"* students as young as seven would be placed in foreign environment without the support of their normal teacher.

[12] Mr Watson referred to the following decisions of interstate tribunals.

- NSW IRC 265 of 2010. Decision of Boland J dated 14 April 2010. Recommendation that no industrial action, including any ban or moratorium take place in connection with NAPLAN tests.
- WA IRC C 12 of 2010. Decision of Kenner C dated 21 April 2010. Order issued requiring union members to undertake NAPLAN tests
- Queensland IRC D/2010/43. Decision of Bloomfield DP dated 20 April 2010. Direction issued requiring no industrial action, including any ban or moratorium, in connection with NAPLAN testing.
- ACT FWA PR996655 Deegan C dated 29 April 2010. Order issued requiring no industrial action in connection with NAPLAN testing.

[13] Mr Watson said that public interest considerations demanded that the order as sought be granted.

[14] Mr Lane said that the AEU was broadly supportive of NAPLAN as a useful component of the broad range of assessment mechanisms continually undertaken within schools.

[15] The problem, he said, was the misleading nature of the *My School* website and, in particular, the capacity of outside media entities to construct and publish *league tables* from the data contained on the web site.

[16] Mr Lane said that overwhelmingly teachers and their organizations had, from a professional point of view, an abhorrence of league tables, which, he said, inevitably led to a narrowing of the curriculum, coupled with an exodus from lesser performing schools, thus making an existing problem worse.

[17] Mr Lane referred to a range of published material, both Australian and international, highly critical of the league table concept.

[18] As professionals, Mr Lane submitted, teachers had a duty and an obligation to take action when they considered the long-term interests of students was at risk.

[19] The action they had taken was a moratorium, not a ban. Teachers were quite prepared to administer NAPLAN, provided an accommodation could be reached with the Commonwealth Minister and Deputy PM, which would prevent the publication of league tables. Unfortunately, to date Ms Gillard had proved intransigent and refused to negotiate, Mr Lane said.

[20] Mr Lane submitted that the Commission lacked the jurisdiction to make the order sought. He said that there was no industrial dispute with the employer. The NAPLAN moratorium resulted from a professional difference with the Commonwealth Minister. Neither the employer, not the Commission could influence the outcome of that difference. As such there was not an industrial matter which gave rise to an industrial dispute.

[21] Mr Watson submitted that teachers were required under their *Statement of Duties*¹ to undertake assessment of student progress. Their refusal to do was clearly embraced within the expression;

"any matter pertaining to the relations of employers and employees..."

[22] The action threatened by the union and its members was not expressly excluded in the definition of *industrial matter*.

Findings

[23] I deal firstly with the jurisdictional question.

[24] It is of significance that the action contemplated has been found to constitute an industrial matter in the decisions referred to above. Whilst it must be acknowledged that each tribunal operates under different statutes, a number of Supreme Court judgments have concluded that the powers available of s31 of the Tasmanian Act are to be read broadly, rather than the converse.

[25] There are two issues at play in this matter. The first concerns a professional difference between the AEU and the Commonwealth Minister. That is clearly a political issue and, arguably not an industrial matter, although I am certainly not being definitive on that point.

[26] However, arising out of this professional difference is a refusal by the AEU and its members to undertake tasks (NAPLAN assessment) during May 2010, in accordance with their contract of employment. That action clearly in my view amounts to an *industrial matter*, and as a consequence a *threatened or impending* industrial dispute exists. My view on this question is strengthened by the existence of s.50A of the Act, which reads:

" 50A. Power to stand down without pay

Notwithstanding any other provision of this Act, an employer may stand down, without pay, any employee who refuses to perform any or all of the duties that the employee normally carries out and could reasonably be expected to carry out for such period as the employee continues to so refuse."

[27] Accordingly, I reject the AEU application concerning jurisdiction.

[28] I would not for one moment question the sincerity or genuineness of the concerns held by the AEU in relation to league tables.

[29] As a matter of course the Commission is invariably reluctant to issue orders without first attempting to resolve the issue/s giving rise to the actions/behavior complained of. This case is different. The professional difference between the AEU and the Commonwealth Minister is beyond the influence of this Commission and, in all probability, the instant employer. This does not mean however that the Commission should ignore the very real public interest considerations arising out of the dispute.

¹ Exhibit A4

[30] The public interest appears to have been a major consideration in the interstate decisions referred to above. The position is succinctly expressed by the observations of Boland J in the NSW decision:

17 At this stage of the proceedings there would appear to be two reasons why teachers should not place any ban or moratorium on the NAPLAN test. The first is that if no test takes place in 2010 it would be enormously disruptive, especially to the achievement of any longitudinal assessment of the educational progress of students through their schooling, for the reasons expressed by the Department. I cannot imagine the community would support that occurring, even if there is considerable disquiet about league tables. The industrial action could also jeopardise the funding arrangements for public schools in New South Wales and there is clearly no public interest whatsoever in that occurring.

18 Secondly, the Department has indicated that the test is critical and must proceed. Presumably, if the ban were imposed, one option for the Department would be to engage persons other than members of the Federation to conduct the test - a less than optimal arrangement. In those circumstances, the test would proceed, the people of New South Wales would be put to millions of extra dollars of unnecessary expense, the Federation would run the risk of being prosecuted for breach of dispute orders if such orders were to be sought and made and, in the meantime, the Federation would have achieved nothing except to isolate its members from what would now appear to be a fundamental part of the national educative process.

19 Admittedly, the material I have is limited. But at this point I am of the firm view that the greater public interest lies with the Commission facilitating the conduct of the NAPLAN test, not endorsing, tacitly or otherwise, industrial action that could forestall that test in furtherance of the AEU's campaign opposing league tables."

[31] Mr Lane urged that the greater public interest would be served by allowing matters to take their course, in the hope that the long-term interests of students are protected through the ultimate preclusion of league table publication.

[32] The Commission is not qualified to offer a comment on this proposition. My concern is the here and now. I have formed the view that, overwhelming, the public interest would best be served by the conduct of the NAPLAN tests in accordance with the May 2010 schedule. I propose to issue an order to that effect.

[33] I also note that the data resulting from the tests will not be published until September 2010. This allows a further window for the AEU to continue to press their position with the Commonwealth Minister.

Order

Pursuant to section 31 of the *Industrial Relations Act 1984* I hereby order that the AEU Tasmanian Branch, its officers, employees or members, not engage in any industrial action, including any ban or moratorium, in connection with the conduct of the NAPLAN tests to be conducted between 11–13 May 2010 inclusive.

Tim Abey
DEPUTY PRESIDENT

Appearances:

Mr M Watson appearing for the Minister administering the State Service Act 2000 with Ms J Gale

Mr C Lane appearing for the Australian Education Union, Tasmanian Branch with Ms L Wright

Date and place of hearing:

2010
April 29
Hobart