

8 August 2014

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Attention Hon Hekia Parata

Ministry of Education
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By e-mail:
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Attention: Bishop Barry Jones

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OUR LADY OF FATIMA & ST PAUL'S INTEGRATION PROPOSAL

1. We act for Our Lady of Fatima School Board of Trustees ("OLOF"). We met with members of OLOF in late June to discuss the Board's concerns with regard to the proposal by Bishop Barry Jones (the "Bishop") to close down Our Lady of Fatima (the "School") and St Paul's, Dallington and integrate a new school, St Francis of Assisi Catholic School. Our advice to them at the time (and now) was to seek an immediate injunction to prevent any further consideration of the Bishop's proposal on the grounds of its unlawfulness.
2. Our client has now referred the letter from NZEI dated 23 July 2014 to us. This letter gives formal notice to our client that the Bishop's proposal is at odds with the obligation upon the Minister and the Boards to ensure existing staff retain their positions as part of any "reorganisation" as the proposal has now been confirmed to be.
3. This letter details our client's concerns in respect of the Bishop's proposal. These concerns relate to both the practicality and, more importantly, the legality of the proposal to close down the School.
4. Having considered the relevant consultations conducted by the Bishop to date, the correspondence with the Bishop and the Minister of Education (the "Minister"), the 1981 Integration Agreement and the various applicable statutes which govern these unique circumstances, our view is the Bishop's proposal is unlawful. Any attempt to implement the proposal will expose the Bishop, the Minister and the Board to actions from staff members. In order to prevent this we are instructed that, if necessary, the Board will seek to prevent the implementation of the proposal through the Courts.

Executive Summary

5. Our view as to the unlawfulness of the proposal is based on the following conclusions:

- a. The Bishop's power, as Proprietor of the School, to cancel the Integration Agreement under the Private Schools Conditional Integration Act 1975 (the "Act") is fettered by clause 6(c) of the 1981 Integration Agreement to the extent that his purported attempts to cancel the Integration Agreement have been unlawful;
- b. In the event that the Integration Agreement is cancelled:
 - i. the School will become provisionally registered as a private school and will be bound by the provisions of the Education Act 1989 (the "1989 Act");
 - ii. the Bishop will not unilaterally be able to close the school. Doing so as proposed is an unlawful attempt to circumvent the closure provisions under the Act which are specifically limited to the Minister;
 - iii. the Board would continue to manage the school after cancellation and would control whether the school was closed or not;
 - iv. the teachers would effectively become employees of the Board/Bishop under a private school arrangement and, if closure occurred, the Board/Bishop would be liable for compensation as the closure decision is not genuine under the Employment Relations Act 2000 (the "ERA"); and
 - v. the proposal is also an attempt to avoid the provisions of the Primary Teachers Collective Agreement and Part VII of the State Sector Act and clearly breaches the obligation to ensure existing staff retain their positions as part of any reorganisation.
6. Accordingly, putting aside the inadequate nature of the consultation undertaken to date, the proposal at its very heart is unlawful. The only lawful option is for Our Lady of Fatima School to remain open and for it to be confirmed as the parish school with staff and students from a closed St Paul's integrated into it.

Proposed Cancellation of the Integration Agreement

7. The proposal by the Bishop to close down the School is based on an exercise of the power at section 11C of the Act to cancel the Integration Agreement by mutual agreement between the Proprietor and the Minister. We consider that clause 6(c) of the Integration Agreement, to which the Bishop is bound, effectively fetters his ability to agree to closure of the School under clause 11C. Clause 6(c) says:

[the Bishop] may invoke the powers conferred upon him by the Private Schools Conditional Integration Act 1975, if in the opinion of the Proprietor the Special Character of the School as defined and described in this Deed of Agreement has been or is likely to be jeopardised or the Education with a Special Character provided by the School as defined and described in this Deed of Agreement is no longer preserved and safeguarded.
8. The ability to agree under section 11C to cancel the Integration Agreement is one of the "powers" conferred upon the Bishop by the Act. Accordingly, the Bishop's ability to invoke section 11C is limited to where clause 6(c) is satisfied. There is no basis upon which clause 6(c) is applicable in these circumstances making the Bishop's proposed exercise of section 11C unlawful. Any suggestion that clause 6(c) is satisfied will be met with firm opposition from our clients.

9. Even in the event that the Bishop could seek cancellation by agreement, the Minister is by no means bound by the Bishop's proposal to cancel and has a duty to independently consider the appropriateness and reasonableness of the proposal. Given the significant consequences for the staff, and the effect the proposal has of avoiding Part VII of the State Sector Act, we do not consider the Minister should agree to the cancellation in any event.

After Cancellation: decision to close and continued control

10. If mutual agreement was reached to cancel the Integration Agreement, the immediate consequence is that the School will become provisionally registered as a private school under section 35A of the 1989 Act.
11. The Board, as controlling authority of the School, would retain operational control of the school after cancellation while the Bishop would simply retain ownership. The division of functions between the Bishop as proprietor and the Board as the controlling authority support the view that the Bishop has no power to close the school and the continued operation of the school would be up to the Board. This view is inferred from the terms of the integration agreement and reflects how the school operated prior to integration in 1981 with the Bishop merely being the proprietor (effectively holding the land and buildings on trust for the school) and the school operated by the Sisters of the Holy Faith.
12. Further, this view is consistent with Roman Catholic Canon Law, which appears to suggest a division between ownership and operation. The relevant canons are:

Can. 803 (1) A catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as catholic by ecclesiastical authority.

Can. 806 (1) The diocesan Bishop has the right to watch over and inspect the catholic schools situated in his territory, even those established or directed by members of religious institutes. He has also the right to issue directives concerning the general regulation of catholic schools; these directives apply also to schools conducted by members of a religious institute, although they retain their autonomy in the internal management of their schools.

(2) Those who are in charge of catholic schools are to ensure, under the supervision of the local Ordinary, that the formation given in them is, in its academic standards, at least as outstanding as that in other schools in the area.

13. When these Canons are read in conjunction with one another it is difficult to see how Canon Law gives the Bishop the authority to close the School. That is particularly the case where:
 - a. the School was never operated by the Bishop;
 - b. since integration in 1981 there has been a written acknowledgment that the school is catholic and it has been operated by a Board; and
 - c. on the cancellation of the agreement the school needs to be able to operate as a private school – absent anything clear in the Act or Integration Agreement the maintenance of the existing division of functions should be favoured over the Proprietor assuming operational control.

14. The Bishop as 'Proprietor' is effectively a trustee who must provide and maintain the land and buildings for the operation of a school that is controlled by a Board. That position survives the cancellation of the Integration Agreement meaning the Bishop has no power to close the school.
15. In any event, if the decision to close the school was one to be made by the Bishop, such a decision would likely be unlawful. Cancelling the Integration Agreement under section 11C and then closing the school would be seen as an attempt by the Bishop to circumvent the limited closure power of the Minister under section 12 of the Act (which is limited to specific circumstances). Section 11C was not intended to be used in this way to provide the Proprietor with an incidental power of closure.
16. Neither the original Act nor the 1998 amendments to it provided the Proprietor with a power to unilaterally close the school. That is indicative of Parliament's intention to limit that power to the Minister; Section 11C cannot be used to circumvent that.
17. Further, the Bishop would likely be under a duty as proprietor to ensure the continuation of the school for the benefit of the Sisters of the Holy Faith and the OLOF community. That is consistent with the guidance provided to "Trustees, Principals and Staff of New Zealand Catholic Integrated Schools" which says:

[b]ecause the Bishop or Religious Institute or Trust Board, as Proprietor, holds the school in trust for the Catholic community that originally established the school, the Proprietor continues to be the legal owner of the property that constitutes the Integrated school.
18. It would, therefore, be a breach of that trust to close the school in the manner proposed.

Impacts on Staff

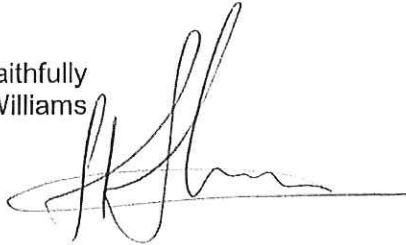
19. Our client has received advice from the New Zealand Educational Institute ("NZEI") who has advised that the proposal is in breach of the Board's obligations under the Primary Teachers Collective Agreement (the "PTCA"). In particular, the proposal runs entirely counter to the obligation on the Board to maximise the retention of its employees. NZEI also consider the proposal is in direct opposition to the obligations under the State Sector Act 1988.
20. We agree. We consider that the proposal is an attempt to avoid the application of the PTCA and the State Sector Act 1988 thus making the proposal unlawful. We also consider that the proposal exposes the Bishop, the Minister and the Board to serious liability for employment law breaches under the Employment Relations Act 2000. After cancellation, and as a consequence of provisional registration as a private school under s35A of the 1989 Act, the Board will become obligated to pay staff salaries.
21. If closure was to occur then the Board/Bishop would be bound by the provisions of the Employment Relations Act 2000 and the limitations on redundancies therein. Non genuine redundancies would result in liability for compensating staff. The redundancies following closure will not be genuine as, firstly, they would be for an ulterior purpose (school merger) and, secondly, the Bishop/Board would have alternative options other than closure available.

Conclusion

22. For the reasons outlined in this letter the Bishop's proposal is unlawful and cannot be acted on either by the Bishop or the Minister. Our client is prepared to challenge the legality of the proposal at each step should it proceed and it considers the only real

option available to the Bishop/Minister is to consider an alternative solution. It is obliged to do this because, as pointed out by NZEI, it needs to comply with its obligations as a good employer and act in accordance with the PTCA and the State Sector Act 1988.

Yours faithfully
Wynn Williams

A handwritten signature in black ink, appearing to be 'J W A Johnson / H T Shaw', written over a horizontal line.

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23 July 2014

Noeline Soper
Chairperson, Board of Trustees
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Dear Noeline

Good employer responsibilities

The Ministry of Education has now formally advised NZEI Te Riu Roa that your school along with St Pauls are involved in a school reorganisation. You will be aware that your Board is bound by the terms and conditions of the Primary Teachers Collective Agreement (PTCA).

Appendix 4 clause 2 of the PTCA requires that your Board follows the "good employer" provisions of Part VII of the State Sector Act. These are detailed in clause 2.1 a – f.

NZEI Te Riu Roa has a number of concerns over the process followed to this point. We believe that it has been neither fair nor orderly, in fact, quite the opposite. While we realise that your board has had very little opportunity to influence the process to this point we would suggest that now is the time to put the welfare of staff to the forefront.

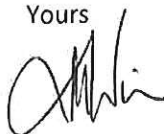
Clause 2.1 (e) requires the Board to keep as many staff as possible employed. You will be aware that what is currently proposed is likely to do the exact opposite. There will be no requirement on the Board of any new school to offer employment to any of the staff.

While there are different provisions for Support Staff their agreement still requires the Board to be a good employer and we would take that to mean that you would treat them in exactly the same manner as the teaching staff.

The current proposal by the Bishop would see the closure of both schools and the opening of a new school. This proposal runs counter to the obligation on the employer to keep as many staff as possible employed. The Secretary of Education is a party to the agreement and to this point does not appear to have considered its obligations under the PTCA. NZEI Te Riu Roa would expect that the Board would be raising the issue of maintaining the employment of the maximum number of staff with the Ministry of Education.

NZEI remains committed to exploring alternatives that would meet the objective of keeping as many of the permanent current staff as possible in employment.

Yours



Lance Win
Field Officer

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