

BETWEEN JOAN ELSON-WHITE of Whangarei,  
School Teacher

Plaintiff

AND THE EDUCATION BOARD OF THE  
DISTRICT OF AUCKLAND a body  
corporate constituted under  
the Education Act 1964

First Defendant

AND ARTHUR NEWMAN VICKERY DOBBS  
of Wellington, Director  
General of Education

Second Defendant

Hearing: 18 December 1975

Judgment: 23.12.75

Counsel: J.F. Jeffries and M.P. Reed for Plaintiff  
D.L. Mathieson for Defendants

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JUDGMENT OF COOKE J.

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Sections 165 and 203 of the Education Act 1964 give the Governor-General power, by Order in Council from time to time, to make regulations for various purposes. The removal expenses of teachers are dealt with by reg. 16 of the Education (Salaries and Staffing) Regulations 1957, as substituted in 1973. It is as follows :

16. (1) If a teacher holding a permanent position in the Education service is obliged, through no fault of his own, or by other special circumstances approved by the Minister, to transfer to another position in the service, he shall be entitled to be paid the actual and reasonable expenses of his removal to the other position.

(2) If a teacher is appointed on promotion from one permanent position in the Education service to another permanent position in the service, he shall be entitled to be paid the actual and reasonable expenses of his removal to the other position.

(3) If a teacher is appointed without promotion from one permanent position in the Education service to another permanent position in the service, he may be paid the actual and reasonable expenses of his removal to the other position if it is in a secondary school at which in the opinion of the Minister it is difficult to obtain staff.

(4) If a married male teacher, or a woman teacher who is eligible under these regulations or any salary order for additional salary by reason of her marriage, takes up his or her first appointment, he or she shall be entitled to be paid -

(a) Half the cost of the conveyance of the teacher's household furniture and effects incidental to his or her appointment but not exceeding \$120 in any case; and

(b) Half the cost of the conveyance of the teacher and his or her family (if any) incidental to his or her appointment.

(5) If any person having a teaching qualification holds a position by reason of that qualification as an officer or probationer in the Public Service, he shall, on obtaining a permanent position in the Education service at a maximum salary higher than his salary in the Public Service, be entitled to payment of the actual and reasonable expenses of his removal to that position. For the purposes of this subclause the terms 'officer', 'probationer', and 'Public Service' have the same meanings as in the State Services Act 1962.

(6) A teacher on his first permanent appointment to a position in any school, or manual training centre, that is approved for country service, shall be entitled to be paid the actual and reasonable expenses of his removal to that position.

(7) On the completion of such continuous period of country service, being not less than 2 years, as the Director-General may approve, in any schools or manual training centres approved for country service, a teacher shall be entitled to be paid the actual and reasonable expenses of his removal to any permanent position in the Education service that is not approved for country service; and if under subclause (1) or subclause (2) of this regulation, the teacher is also entitled to be paid those expenses, his rights under this subclause shall subsist and shall entitle him to payment of the actual and reasonable expenses of his future removal to any permanent position in the Education service in such circumstances that, were it not for this provision, he would otherwise not be entitled to be paid those expenses.

(8) A teacher on his second permanent appointment to a school, or manual training centre, approved for country service where the transfer is from a school or centre not so approved may, in special circumstances and with the prior approval of the Director-General, be paid the actual and reasonable expenses of his removal to that position. Where the expenses are so refunded and the teacher completes not less than 3 years continuous country service in any schools or centres approved by the Director-General for the purpose he shall be entitled to be paid the actual and reasonable expenses of his transfer to his next permanent position in the Education service not approved for country service; and if, under subclause (1) or subclause (2) of

this regulation, the teacher is also entitled to be paid those expenses, his rights under this subclause shall subsist and shall entitle him to payment of the actual and reasonable expenses of his future removal to any permanent position in the Education service in such circumstances that, were it not for this provision, he would otherwise not be entitled to be paid those expenses; but no payment under this subclause for the cost of the conveyance of a teacher's household furniture and effects shall exceed \$240.

(9) The Minister shall lay down from time to time the general conditions governing payment of removal expenses including household articles which may be included in the removal, the cost of the conveyance of the teacher and his family, and the extent to which accommodation and other expenses may be paid.

(10) For the purposes of this regulation, the term 'Education service' means employment in any position -

(a) As a teacher in a State primary school, intermediate school, intermediate department, Maori school, manual training class, composite school, or post-primary school;

(b) As a teacher in any school or specialist service under the control of the Department of Education;

(c) As an itinerant teacher or a teacher of a special subject in the Department of Education or under an Education Board;

(d) On the teaching staff of a teachers college.

The plaintiff is a school teacher. Formerly she and her husband lived in Whangarei and she was employed at Kamo High School, being graded PR2, H.O.D. Languages. She applied successfully for a position advertised in the Education Gazette as Senior Master/Mistress at Keri Keri High School. By letter dated 10 December 1973, addressed to her at Whangarei, the Auckland Education Board confirmed that she had been appointed by the Board to the position of Senior Mistress at the latter High School with effect from 1 February 1974; the appointment to be subject to the provisions of the Act, the Regulations, the Board's bylaws, and any future amendments to the foregoing. The appointment resulted in an increase in the plaintiff's salary and she understood it to be promotion; but nothing turns on that for the purposes of this case. It is common ground that the Keri Keri High School is

approved for country service and that on her first permanent appointment to a position there the plaintiff was, accordingly, in terms of reg.16(6), 'entitled to be paid the actual and reasonable expenses of his removal to that position. It is also common ground that 'his' must be read for present purposes as 'her', by virtue of the rather quaintly expressed provision in s.4 of the Acts Interpretation Act 1924 that, if not inconsistent with the context and unless there are words to exclude or restrict such meaning, in every Act (including regulations made thereunder) 'words importing the masculine gender include females'. So the plaintiff's entitlement to actual and reasonable expenses of her removal arose under reg.16(6), even if not also under reg.16(2). In a letter to the Secretary of the Board, dated 21 November 1973, the plaintiff requested advice about removal expenses and a furnishings allowance, mentioning that she had been advised that she was probably entitled to these. She said that at Keri Keri her husband would be working to develop their property, which would not be productive for some years, and would be financially dependent on her. In her affidavit she says that her husband resigned his position in Whangarei to allow her to take up the Keri Keri appointment. The plaintiff was anxious to move before Christmas. Having received no reply to her letter, she telephoned the offices of the Board on 24 December 1973. She was told that she was entitled to the grant of full removal expenses, and to obtain three quotations and accept the lowest. That she did, and she sent on to the Board an invoice for \$175 from Hardie Bros (Northland) Limited. She says that in an endeavour to keep removal expenses to a minimum she and her husband packed two trailer loads of personal possessions, which were mainly books, and transported them to Keri Keri personally. She received no further communication from the Board until after the move. Then, by a letter dated 4 February 1974 and addressed to her at her former home in Whangarei,

the Board by its General Manager, after expressing regret for the delay in replying, advised her that she did not qualify for payment of anything more than the removal of her own personal effects and teaching aids. The letter continued: 'Before a married woman can receive full removal expenses as for a married man she must be eligible for receipt of married salary, or prove that her husband is invalided'. In his affidavit Mr L.J. McCarthy, the former General Manager of the Board, explains that he gave careful consideration to the plaintiff's request but decided that it should be declined and that there was no sufficient reason for departing from the policy set out in the Education Department's Administration Manual Part C, paragraph C 26.3.4. Annexed to his affidavit is a copy of paragraphs C26.3.1 to C26.3.6 of the Department's Administration Manual. Those paragraphs are quite elaborate and it is unnecessary to reproduce them here. Suffice it to say that there is no reason to doubt that Mr McCarthy's interpretation of the policy embodied in them is correct. They proceed on the basis that a married man living with his wife is entitled to all the expense items listed in the chapter, according to the category of his appointment - first country service appointment promotion, etc. Married women are treated differently. A distinction is drawn between married women with non-dependent husbands and married women with dependent husbands. As to the latter, when a woman supports a husband who is an invalid and who is dependent on her financially, payment of removal expenses as for a married man 'will be considered': each case is to be submitted to the Department for consideration, together with appropriate supporting evidence. But if a married woman lives with her husband and he is not fully dependent on her, she is said to be entitled only to her own fares and hotel expenses and, as to 'removal expenses', 'She may receive a refund of the cost of shifting her own personal effects only (i.e. clothing and school books, etc.)'.

but not the cost of shifting any of the household possessions, whether owned in common or not'.

The plaintiff asked the New Zealand Post Primary Teachers' Association, of which she was a financial member, to take up the matter. There was correspondence between the Association and the Department. In a letter dated 16 May 1974, signed on behalf of the Director-General of Education, the Department supported the Board's view that the plaintiff's case did not 'meet the requirement for full removal expenses'. The letter said that in the circumstances the Director-General could not authorise payment of full removal expenses to Mrs Elson-White; and it contained various other statements, some of which are apparently alluded to in the grounds set out in the application filed on behalf of the plaintiff in this Court. In a letter to the plaintiff's solicitors, dated 30 October 1974, signed on behalf of the General Manager of the Board, it is stated: 'You will appreciate, of course, that the decision concerning Mrs Elson-White's application for removal expenses is in line with the Regulations'. In the correspondence before the Court there is no other reference by the Board or the Department to the Regulations.

The application filed on behalf of the plaintiff is intitled as being under Part I of the Judicature Amendment Act 1972. It seeks a review of what is described as 'the decision of the first defendant delivered on 4 February 1974 in which the first defendant decided that the plaintiff did not qualify for full removal expenses under the Education (Salaries and Staffing) Regulations 1957'. It alleges that the decision was given without jurisdiction or was based on error of law in one or more respects. But the application does ask in the alternative for a declaration that the first defendant is liable for the reasonable removal expenses of the plaintiff and her family. It was mainly to that broad and relatively simple proposition that Mr Jeffries directed



his argument. In my judgment that approach to the law is the right one.

The papers filed on behalf of the plaintiff, as distinct from her counsel's argument in Court, showed, I think, a misconception of the issue. In a case of this kind, review under Part I of the Judicature Amendment Act 1972 would be appropriate only if the Board has a 'statutory power of decision' within the meaning of s.3 of that Act. But the Regulations do not confer on the Board a power to make a decision deciding or prescribing rights, privileges or eligibility. They provide that a person in the plaintiff's circumstances shall be entitled to actual and reasonable expenses of her removal to a new position. By force of the Regulations, the Board as employer is bound to pay her whatever is comprehended in the expression 'actual and reasonable expenses of her removal to that position'. There is no clause ousting the jurisdiction of the Court and giving the employing Board power in the event of a dispute to determine the extent or content of a teacher's entitlement under reg.16(6). An example of these clauses - and, incidentally, a criticism - is to be found in Wilkinson v. Barking Corporation [1948] 1 K.B. 721. To challenge a decision made under such a clause, an application for review would prima facie be appropriate: Healey v. Minister of Health [1955] 1 Q.B. 221. But the present case is not in that category. In the event of a dispute the rights of the teacher under reg.16(6) fall to be determined by the Court, much as the Court would determine a dispute between an individual employee and an individual employer under an ordinary contract of service. If called upon to decide whether an expense proved to have been incurred by a teacher was in fact reasonable, the Court would take into account inter alia any relevant evidence of general practice. A social issue of some importance is involved, but that is certainly no reason why the Court, if a question of legal right is properly raised before it, should shrink from

exercising its jurisdiction. At this stage of the present case the question raised is one of law. It is no less suitable for the discretionary remedy of declaration than, for example, the question decided by the House of Lords in London Ealing Borough v. Race Relations Board [1972] A.C. 34.

When the position just outlined was pointed out to counsel in the course of the argument, both sides were agreed - very sensibly, if I may say so - that so far as possible procedural difficulties should not be allowed to prevent a ruling by the Court on the real issue. Mr Jeffrie applied if necessary for an amendment of the application to convert it into an originating summons for interpretation of reg.16(6). Mr Mathieson consented to this course. Counsel realised that only questions of law can appropriately be determined on such an originating summons. As already indicated, the relief claimed in the application as filed does include the kind of declaration that would be appropriate on an originating summons. Pursuant to rule 270 of the Code of Civil Procedure the proceedings will accordingly be amended and are to be treated as an originating summons whereby the plaintiff, claiming to have acquired rights under the Regulations, applies for a declaratory order determining the true interpretation of reg.16(6) and in particular whether the first defendant is liable thereunder for the reasonable removal expenses of the plaintiff and her family. This brings the case within s.3 of the Declaratory Judgments Act 1908.

Turning now to the central issue, it should first be recorded that Mr Mathieson, to whom I am indebted for a careful argument, acknowledged that the Minister has not laid down general conditions governing payment of removal expenses - at least that it cannot be proved that he has done so. Regulation 16(9) provides that this shall be done from time to time, and a regulation in that form has been in existence since 1957. Perhaps the Department has overlooked the necessity of placing the matter before a Minister, with the



result that successive Ministers have omitted to do what the regulation requires. Whatever the explanation, the Court has to deal with the case on the footing that no general conditions have been laid down under reg. 16(9). In particular the defendants accept that the paragraphs in the Department's Administration Manual setting out the policy which the General Manager of the Board sought to apply are not general conditions laid down under reg. 16(9). Nor is it contended that any other provision of the Act or the Regulations gives those paragraphs statutory force for the purposes of the present case.

Another point of common ground is that the Education service is not within the scope of either the Government Service Equal Pay Act 1960 or the Equal Pay Act 1972. So there was no argument directly based on either Act. Further it was said for the plaintiff that, when a married male teacher is entitled under the Regulations to actual and reasonable expenses, 'through usage and practice actual and reasonable expenses means full household removal expenses, travelling expenses, accommodation (if necessary) for the teacher and all his family and also an allowance for soft furnishings and other benefits where applicable'. (Instance of other benefits were said to be the payment of a proportion of land agency and legal expenses.) Counsel for the defendants accepted that general statement, subject to the qualification that there may be special circumstances where the general usage and practice does not apply. The essence of Mr Mathieson's argument was that in reg. 16(6) 'the actual and reasonable expenses of his removal' is an expression wide enough to be 'capable as a matter of law of covering the expenses of moving a teacher's family, but that whether such expenses are to be allowed in any given case is a question of fact and discretion. I understood his primary contention to be that this question of fact and discretion is to be decided by the Board in the light of the facts of each case;

and, presumably, that the policy embodied in the Department's Administration Manual can be taken into account by the Board. If that is not right, he accepted as an alternative that the Court would have to determine the question in the event of a dispute, but that it would still ultimately be a question of fact in every case. For the reasons already given, I think the alternative view is right.

The scheme of reg.16 is that in various defined circumstances a teacher is entitled to the actual and reasonable expenses of his removal, but there is a special provision about first appointments. It applies only to a married male teacher or a woman teacher eligible for additional salary by reason of her marriage. Plainly it is intended to be less than an entitlement to actual and reasonable expenses. Half only of certain costs is payable. As to conveyance costs, there is an express reference to the family - 'Half the cost of the conveyance of the teacher and his or her family (if any) incidental to his or her appointment'. Apart from a reference in reg.16(9), that is the only reference to a 'family' in the whole regulation, and both are directed to the cost of conveyance of the teacher and his family, not to the cost of removing household articles. Yet, as already mentioned, in the case of a married man it has been accepted in practice that 'the actual and reasonable expenses of his removal' within the meaning of reg.16(6) usually cover the expenses of moving the household, notwithstanding the absence from reg.16(6) of any express reference to a family. Considering the regulation as a whole I think that reg.16(6) justifies the practice. 'The actual and reasonable expenses of his removal' appears to be intended as a compendious expression covering various kinds of removal expenses if actually and reasonably incurred by the teacher. For instance it would extend to the removal of household articles and the conveyance and accommodation of persons. Whether the expenses claimed have been actually

incurred by the teacher and whether they are reasonable or questions of fact for determination in any given case.

On that view it would be wrong to treat the financial dependency or otherwise of a spouse as a criterion. On a teacher's first permanent appointment to a position in a school approved for country service, he or she is entitled to be paid the actual and reasonable expenses of his or her removal to that position. If he or she actually incurs reasonable expenses in moving his or her spouse or other family, those expenses are recoverable from the employing authority. Whether the teacher is a man or a woman is not of itself important for this purpose. The simple question whether he or she has actually incurred reasonable expenses of his or her removal. If the family has to move because of the teacher's new appointment, he or she may well incur reasonable expenses and these may well include the cost of conveying both household articles and household members. If so, they are expenses of his or her removal, within the meaning of the regulation, as they have been necessitated solely by that removal. Whether the teacher's spouse is earning or can earn an income or has independent means is beside the point.

The plaintiff claims to have incurred expenses for the packing and cartage of family furniture and effects and insurance, totalling \$175. She also claims a soft furnishings allowance of \$180 and travelling costs for three separate trips of 52 miles each at the standard rate per mile. The present proceedings were not designed to raise the questions whether these expenses were in fact incurred by the plaintiff because of her removal and were reasonable. There has been no suggestion that the proceedings can be converted by amendment into an action in which these questions of fact could be determined. Probably the parties will now be able to reach agreement. If not, further proceedings will be necessary and the Court will have to decide the questions

of fact after hearing evidence.

It may be as well to add the following. Regulation 16(9) requires the Minister to lay down the general conditions governing the matters there listed. No question has been raised in this case about the validity of reg.16(9) or about the validity of reg.16 as a whole; and s.2 of the Statutes Amendment Act 1945, which is to be read together with and deemed part of the Acts Interpretation Act, provides that no regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority. The old Education (Salaries and Staffing) Regulations 1948, Part XVII, provided for removal expenses in a more detailed way than the present Regulations and contained no provision corresponding to reg.16(9). The terms of ss.165 and 203 of the Education Act 1964 would also require close consideration before reg.16(9) was acted on. Assuming the full validity of reg.16, a question might arise as to whether the Minister has power in general conditions under reg.16(9) to discriminate on the basis of sex. That question has not been argued in this case. So I would be going beyond my province if I expressed any opinion on it.

There will be a declaration that on her appointment to a position at the Keri Keri High School the plaintiff was entitled to be paid the actual and reasonable expenses of her removal from Whangarei to that position; and that such expenses would include the expenses of moving her household articles and her family, if actually incurred by the plaintiff and reasonable. Leave will be reserved to each party to apply for any further declaration. Having substantially succeeded, the plaintiff is entitled to costs. If these cannot be agreed, counsel may submit memoranda.

*R. B. [Signature]*

Solicitors:

Scott, Hardie Boys, Morrison and Jeffries, Wellington, for Plaintiff

Crow Office, Wellington, for Defendants.