

Tertiary Council appointments process controlled by Council

Legislation	Ombudsmen Act 1975 , Education Act 1989
Ombudsman	Mel Smith
Case number(s)	A10076
Date	2003

Nomination for appointment to Tertiary Council pursuant to s 171(2)(f)(ii) Education Act 1989 required workers' organisation to be consulted—Council refused to appoint organisation's sole nominee and sought further nominations from organisation—appointment process stalled—alleged unreasonable failure by Council to consult—Ombudsman held consultation confers no rights on an organisation and that Council controlled appointments process

A position on a particular Tertiary Council (the Council) had been vacant for three years. Section 171(2) of the Education Act 1989 governs appointments to Tertiary Councils with subsection (f)(ii) stating that a Council must appoint one person in accordance with the Council's constitution 'after consultation ...with the central organisation of workers within the meaning of the Labour Relations Act 1987.' The relevant workers' organisation had proposed a candidate for nomination. However, after considering the nominee, the Council asked for further nominations from the workers' organisation and advised it of criteria it had since set for the appointment. The workers' organisation was of the view that its original nominee met the relevant criteria and was able to represent the views of the workers' organisation and so it refused to nominate any further candidates. The Council declined to appoint the nominee and, as a result, the appointment process stalled.

The workers' organisation complained to the Council that it had acted unreasonably by having failed to consult it under section 171(2)(f)(ii) of the Education Act and by creating the appointments criteria after having received its original nomination. Further, it considered that the Council's failure to appoint its sole candidate was also unreasonable. It said that it had been the Council's past practice to appoint such a nominee as that proposed.

The Council responded, saying that the appointment process and final decision lay solely with the Council. The failure of the workers' organisation to provide additional nominations had prevented it from progressing further. The workers' organisation then wrote to the Ombudsman asking him to investigate the matter under the Ombudsmen Act. In the investigation, the Ombudsman first considered the requirements set out in section 171(2)(f)(ii) of the Education Act:

'(2) ... the Council of an institution shall include -

(f) Having regard to the courses provided by the institution –

(ii) One person appointed in accordance with the Council's constitution after consultation by the person or body making the appointment with the central organisation of workers within the meaning of the Labour Relations Act 1987.'

The Ombudsman noted that, while this section required consultation, it did not specify exactly how this was to occur. The Council reported that the form of consultation it decided to take *'was to ask the workers' organisation to provide two (or more) names for the Council to choose from.'* The Ombudsman then referred to judicial comments made in *Wellington International Airport v Air New Zealand* [1993]1NZLR 671 on the meaning of consultation. The Ombudsman noted that it is now well settled law that the appointments process does not confer any rights upon those who must be consulted.

The Ombudsman also noted that the Education Act required the Council to have regard to the courses provided by the tertiary institution and that any appointment was to be made in accordance with the Council's constitution. This Act appeared otherwise to leave the process of appointment to the Council.

The Ombudsman considered that while the Education Act is clear that the Council cannot make an appointment without first consulting the workers' organisation, it does not in any way dictate the process of such appointment nor does it require the appointment of a particular person. The Council was therefore not obliged to consider only the workers' organisation's particular preference, nomination or assessment of suitability or qualification. The Ombudsman observed that the consultation process might also be satisfied if the Council were itself to seek nominations from other sources, providing it consulted with the workers' organisation before finally making an appointment.

It was also the Ombudsman's view that the responsibility lies with the Council for ensuring the proper statutory process is followed when making an appointment. Therefore, the issue of what criteria a candidate must meet for appointment to the Council and whether a particular candidate meets that criteria is necessarily a decision for the Council. The Ombudsman also noted that because the appointments process fell significantly under the control of the Council, it must bear some responsibility for the delays in filling the position. The Ombudsman formed the view that the Council cannot be considered to have acted unreasonably either by failure to consult, or in the manner in which it established the appointment criteria, or by failing to appoint the only candidate who was nominated under the Education Act.

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