Determination Number: AA 278/05
File Number: AEA 691/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	The Association of Staff in Tertiary Education (ASTE): Te Hau Takitini o Aotearoa (Applicant)
AND	Waiariki Institute of Technology (Respondent)
REPRESENTATIVES	Mr Mike Dawson, Advocate for Applicant Mr Richard Harrison, Counsel for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	19 July 2005
DATE OF DETERMINATION	22 July 2005

DETERMINATION OF THE AUTHORITY

ASTE seeks an injunction to prevent the respondent, Waiariki Institute of Technology, from proceeding with implementing four notified reviews. The application is based on an allegation that the reviews notified on 27 June 2005 are in breach of clause 11.1 of the Collective Employment Agreement and also in breach of s.4 (4) (b), (c) (d) and (e) of the Employment Relations Act 2000.

Part 11 of the CEA contains surplus staffing provisions. The relevant parts of clause 11 read as follows:

Clause 11.1 Consultation

In accordance with the principles contained within these clauses, the National Secretary of the Association of Staff in Tertiary Education and the Chairperson of the local branch of the Association will be notified by the employer:

- *prior to the commencement of any reviews of the whole, or part of the Institute's organisational structure or function, which may result in significant changes to either the structure, staffing or work practices affecting existing employees;*

- *when there has been a reduction in demand for a course or group of courses sufficient to affect the structure, staffing or work practices affecting existing employees.*

The employer will provide the union with the opportunity to be involved in any review.

11.3 Definition

A surplus staffing situation exists when, as a result of the processes described in 11.1 above, the employer requires a reduction in the number of employees, or employees can no

longer be employed in their current position, at their current grade (i.e. the terms of appointment to their present position), then the options in Clause 11.5 below shall apply.

11.4 Notification

Where a surplus staffing situation in terms of clause 11.3 arises the employer shall advise the National Secretary of ASTE, the Chairperson of the local branch of the Association and the employees affected not less than two months prior to the date by which the surplus staff are to be discharged. …

Relevant Events

On 5 July 2004 the Chief Executive, Dr Reynold McPherson, asked Mr Peter Huntley, the Director of Human Resources, and Mr Jared Dawson, the Director of Finance, to initiate an improvement project which was called "Personnel Costs". The catalyst for this was a Tertiary Advisory Monitoring Unit (TAMU) report which noted that Waiariki had higher personnel costs than institutes of a similar size. Messrs Huntley and Dawson were instructed to visit other institutes and ascertain whether there were opportunities for Waiariki to reduce its personnel costs. After completing the visits and discussions with other institutes Messrs Dawson and Huntley put together a report that was first to be discussed by the Executive (comprising the seven Waiaraki directors) and then by the Senior Management Team (SMT). The report was dated 7 April 2005. The SMT was instructed to discuss the report with their staff and get feedback.

Ms Jenny Chapman, the Assistant Secretary in the Central Northern Region, deposed that on 6 April 2005 she and Ms Rae Mutu, the ASTE Co Branch Chair at Waiariki, met with Mr Huntley to discuss a number of issues. In the course of the conversation, Mr Huntley said he was working with Mr Dawson on something to improve efficiencies at Waiariki and that it was going to SMT for discussion on 10 May. He would not provide a copy, saying it was not a review, but did indicate he would seek SMT approval to release it to the unions. Ms Mutu made notes of the meeting. Mr Huntley said that the SMT process might result in restructurings. He was asked how he would involve ASTE. Mr Huntley said that the recommendations that would result would be the end of the project and that full consultation would follow; that SMT needed to endorse the recommended projects and that it was a process of identifying projects for further investigation. There would be no recommendations to implement anything, only as to what needed to be looked at. This, however, was not what came to pass.

On 13 April Ms Mutu, who had obtained a copy of the report from her manager, faxed it to Ms Chapman. The following day Ms Mutu forwarded an email dated 7 April which had been sent to SMT with the subject "Review of Personnel Costs", which she had received via other staff who had received it from their heads of school, who were members of the SMT.

When Ms Chapman received the document she attempted to contact Mr Huntley but he had gone on two weeks' leave. She left a message saying she wanted an assurance that the document and the process did not constitute a review. She subsequently received a message from a Ms Murphy of HR who indicated she had spoken to Mr Gary Dender, the then Waiariki Academic Director, who said the document was a discussion paper only going to SMT. Ms Chapman asked Ms Mutu to follow this up with Mr Dender and to get something in writing. Nothing was received.

When Mr Huntley returned on 2 May she sent an email stating that there had been verbal assurances it was not a review but that no written assurances had been received to that effect. Ms Chapman sought information from Mr Huntley about the figures referred to in the report and also what the personnel problems were seen as being.

On 3 May, Mr Huntley replied saying it was a discussion document and that if after discussion any reviews or projects were to develop project teams would be established. He also said the information request was not relevant.

Ms Chapman replied on 5 May saying his reply was confusing as it referred to both investigation and implementation. She pointed out that because many of the recommendations referred to doing particular things, any decisions on those things would be likely to mean implementing the recommendations rather than investigating them in a review context. She also reiterated her information request. Ms Chapman received no reply.

On 10 May the ASTE Branch sent a memo to SMT. There had been no invitation to consult and they had to ascertain how to get documents to SMT. Ms Chapman, Ms Mutu and Ms Leonie Nicholls, the other Branch Co Chair, sent a submission to the secretary of SMT.

The employer is saying that this formed part of the consultation, if consultation was needed at this stage. Ms Chapman said the memo was sent to record what ASTE had been told about the status of the document and noted that the document seemed to ignore policies or working parties that had been negotiated. She also noted the apparent lack of factual information and the fact that information had not been provided. No response was received to this communication. The document stated that the union had been told that any decisions made would not implement the recommendations.

No consultation took place at this stage. There had been no agreement with ASTE about a process, ASTE was not given information it had requested, ASTE had not been given a copy of the document by Waiariki and there was no feedback from the Institute to ASTE.

As she had received no further communication Ms Chapman emailed Mr Huntley on 17 May, asking him to advise what had happened at the SMT meeting. Again, there was no response. There were 2 SMT meetings: one on 10 May and one on 24 May

On 21 June she received a number of emails from members who had been sent the final recommendations by their respective Heads of School. It appears that there were Executive discussions after the SMT meeting and that the CEO had signed off on all the recommendations. Mr Huntley emailed the 20 June document "Report to Executive on Personnel Costs" to SMT on 21 June. The email with the document said "… we are happy to attend team meetings to discus the final document". No notification was sent to ASTE. The documents Ms Chapman received from members advised that the CEO had accepted all the recommendations. As Ms Chapman correctly notes, a number of the recommendations were decisions to disestablish positions held by ASTE members.

The Report to the Executive states:

> *The recommendations to the Executive contained within this report have been developed following a consultation process spread over a number of weeks. The consultation process included obtaining feedback from staff via their managers. Submissions from staff and from the unions were also taken into account when developing recommendations for future action or projects.*

She emailed Mr Huntley on 24 June noting that she had received nothing from him about the Executive Report, of which she had not been sent a copy, and that a number of the decisions made were in breach of the CEA and also contrary to the verbal assurances he had previously provided.

She wrote:

I note the comments at the beginning of the report on a consultative process and your note about taking account of union concerns. That is clearly untrue, as what transpired is what I stated to you as a major concern – that is Waiariki has got into decision making without following contractually agreed processes.

I had been repeatedly assured by you that no decisions would be made by this particular process. The document shows that this assurance as at best misleading. Because, as contrary to your assurances, there are decisions contained within the document which affect staffing you are in breach of the collective agreement.

As I have repeatedly said to you, a review process is about real consultation about the substantive proposal, not consultation on its implementation. It appears that this distinction is still not understood.

Mr Huntley replied on 24 June stating:

At this point in time, no reviews which will impact staff or their jobs, have been started. They will not start until managers have met with staff and discussed the Personnel Costs report with them, and informed them of the process to follow. Then Statements of Work)some call them terms of reference) will be developed and approved before the recommended review commences.

There are no decisions in that document affecting staffing numbers. Any recommendations in that respect will follow the completion of the recommended reviews.

Ms Chapman replied stating that he appeared to consider the consultation provisions related only to the implementing of change, and that was incorrect. She received no reply. Further communications followed between Mr Mike Dawson, ASTE National Legal Officer, and Messrs Huntley and McPherson asking that that matters be put on hold, which request was denied. On 28 June Mr Huntley emailed notification of seven reviews.

The content of four of these notices clearly indicated that decisions had been made and the proposed consultation was about how the decisions would be implemented. This was not notification of a review in accordance with clause 11.1.

On the provision of counselling services the review aim was stated to be:

To determine the most appropriate pathways to implement the recommendation that counselling services to students be arranged on contract from an external provider in order to hold or reduce the cost of provision of this service.

The review aim for the EAP Improvement reads:

That all counselling services for staff be provided through the Employee Assistance Programme (EAP), suggested by the employee's manager, with counselling provided by external consultants.

The review aim for the provision of health education services reads:

To develop contracts with the local District Health Board (DHB) to provide health education services currently provided by Te Manawa staff.

The aim for the Learning Commons was:

That Waiariki reconceptualises the library as a "Learning Commons" to provide student-centred and focused support services that are fully integrated with the provision of learning improvement and library services.

It all these four instances it is very clear that a decision had already been made and that in the case of first three notices redundancies would result. During the Investigation Meeting I raised a concern I had that arguably the employer had already moved to 11.4, the notification of redundancy stage, albeit not formally following the process but with the clear result that staff would lose their jobs.

When did the obligation to notify a review arise?

Part of the difficulty experienced in this case is the imprecise use of language. Although there are references to a review the respondent was at the same time denying that a review was taking place.

The memorandum from Messrs Huntley and Dawson to SMT has as its subject "Review of Personnel Costs". The Executive Summary says, inter alia:

This document reports the findings of a review….

The review of costs was initiated after a report ….

The review was undertaken….

The document refers to the identification of "a number of opportunities to improve the student focused learning and teaching" and states:

These opportunities are translated into a number of recommendations that appear later in the document.

The document identifies "four central themes", one of which is staffing. It goes on to say:

Within each of these themes, several topics were discussed from which 26 recommendations have been derived. The recommendations are intended to encourage debate and stimulate a critical review of how Waiariki chooses to operate and offer its services. From this debate, it is envisaged that change recommendations for the future will be derived and agreed. Each of these recommendations may require an implementation project in its own right.

The majority of the 26 recommendations clearly had the potential to "result in significant changes to either the structure , staffing or work practices affecting existing employees" (Clause 11.1).

ASTE's memo to SMT stated:

We have been assured that it is not actually a review document, despite it being called that, and the decisions to be made are not decisions that would actually implement any of these recommendations. rather the decisions are about deciding if any of the recommendations

are worth investigating further, and for the decision about possible implementation to be part of review processes later down the track with full consultation. There are also some matters which are items for negotiation within the Collective agreement, so are not items that can actually be decided on and implemented as such. Our comments are made on this basis. The submission concluded:

To conclude, we are alarmed that there is a dearth of information on which to actually base decisions that will prove to be in Waiariki's best long-term interest.

Mr Harrison referred me to Auckland City Council v NZPSA Inc [2003] 2 ERNZ 386 (CA). That decision dealt with obligations to consult pursuant to s.4 Employment Relations Act 2000. Section 4 speaks of a "proposal". To propose something, according to the OED, is to: "put forward for consideration or as a plan", to "intend". A "proposal" is "the act or an instance of proposing something; a course of action so proposed".

Clause 11.1 refers to a "review". I do not accept that the two concepts are identical. Mr Dawson provided me with some dictionary definitions of "review", which included "to write a critical assessment of, a general survey or report" and "a formal or official inspection". The OED defines it as "a general survey or assessment of a subject or thing, a revision or reconsideration, to reconsider or revise, to view again". I think the use of "review" in the sense of "a general survey or assessment of a subject or thing" is the most appropriate one in this case.

In the Auckland City Council case (supra) there was both a review, undertaken by William Birch Consulting Ltd which was completed on 14 December, and subsequent proposals. At a Council meeting on 19 December 2001 some of the recommendations were accepted. The Employment Court had held that the obligation to consult arose in relation to the implementation of the recommendations that were adopted at the Council meeting of 19 December. The Court of Appeal rejected that conclusion and said at para 19:

This reasoning represents an almost unlimited approach to the Act and to the decisions of this Court cited. On such an approach it would be equally reasoned that the initial Council resolution determining to review expenditure amounted to a proposal potentially impacting on employees and relevant to future collective bargaining. On that basis it is hard to think of a decision in the conduct of a business that would be outside the obligation.

The Employment Court noted in NZPSA Inc v ACC [2003] 1 ERNZ that there was no explicit statutory provision to consult in regarding s.4 (4) (d) which deals with "a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work …". However, clause 11.1, which is headed "consultation", states that "The employer will provide the union with an opportunity to be involved in any review". It is self evident that this means the union must be consulted. The contractual provision and the statutory provision are not the same. The employer has bound itself to a provision that is more stringent than the statutory one. The Employment Court said that consultation must have begun the moment options were contemplated that may have, if accepted, affected employees' interests and that it was unlikely that a general rule could ever be laid down.

At the point that the report to SMT was prepared it was evident that if parts of the report were actioned there would be significant effects upon staff. At that stage, pursuant to clause11.1, there was an obligation to notify the union about the review and to allow the union to be involved in it. The relevant date is 7 April 2005. In reaching the conclusion that it was at that point that the obligation to notify and consult arose rather than the time that the review was initiated in 2004, I

have taken into account the fact that prior to the report being written it could not have been said with any degree of certainty that anything was happening that might result in significant changes.

Once matters progressed to the point where the recommendations were accepted and couched as decisions that were to be implemented, the time for consultation had clearly passed. Had I not found that the obligation to consult arose at the time of the SMT report I would have given serious consideration to a quia timet injunction. This would have been on the basis that in my view the employees whose positions would be subject to being contracted out would have had a well founded fear that, given what was being considered was implementation and not the rationale for the contracting out, no consultation undertaken at that point could have been proper consultation.

The Institute indicated that it would vary the wording of the review notices. I have today received copies of the varied notices. I have considered whether the reworded and reissued notices rectify the situation. I have also taken note of the fact that an injunction is a discretionary remedy and that it is also an equitable remedy. I think that in the interests of fairness the employees must be put back into the situation they would have been in had the employer abided by the contract in the first instance.

An injunction shall issue restraining the respondent from proceeding with the four reviews in contention, both as originally notified on 27 June and also as renotified and reworded on 21 July 2005. The proper time for notification was 7 April 2005 and I think that staff potentially affected by the recommendations of the Review of Personnel Costs should have the ability to have a clean slate. I make this decision despite being aware that the recommendations in the Review and the reviews as renotified on 21 July are to all intents and purposes the same. The purpose of returning to the 7 April date is to ensure that any decisions made after that date, contrary to the provisions of the CEA, do not stand.

Costs

If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority