

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA149/08
5115109

BETWEEN ROGER JOHN BOWDEN
Applicant

AND THE VICE CHANCELLOR OF
VICTORIA UNIVERSITY OF
WELLINGTON
Respondent

Member of Authority: G J Wood

Representatives: Roger Bowden on his own behalf
Victoria Healy for the Respondent

Investigation Meeting: 1 October 2008

Determination: 11 November 2008

DETERMINATION OF THE AUTHORITY

[1] This employment relationship problem is about whether Professor Bowden's salary for the 2006 year was properly set. In particular Professor Bowden considers that his salary had to remain relevant to the requirements of his position as a professor of economics and finance and that the 2.6% rise given was inadequate, especially when academics on the collective agreement received a 4.5% pay rise and this is what his Head of School had recommended. Professor Bowden withdrew his claim for penalties against the university at the investigation meeting.

[2] The issues for determination are:

- What does the individual employment agreement require of the university when reviewing Professor Bowden's salary;

- Whether the university's decision should be impacted by apparent bias, an alleged inability of the decision-maker to properly assess Professor Bowden's salary and the unacceptable time delay in concluding the process; and
- Were the actions of the university, in determining a salary increase of 2.6%, what a fair and reasonable employer would have done given the terms of the agreement, his performance, the pay rise to other workers of 4.5%, and the recommended pay rise to Professor Bowden at the same level.

The Terms of the Agreement

[3] Until 2000, Professor Bowden had worked for Victoria University of Wellington on a three year fixed term position as National Bank Chair of Finance. In August 2000, he was appointed to the position as Professor of Economics and Finance at the School of Economics and Finance in the faculty of Commerce and Administration. In 2006, his performance was monitored by Professor Stephen Burnell, the Head of the School of Economics and Finance. The final decisions on salary were made by Professor Peter Thirkell, the pro-Vice Chancellor in the Faculty of Commerce and Administration, who was also a Professor of Marketing.

[4] Professor Bowden is employed pursuant to an individual employment contract signed on 14 August 2000. The relevant part of that contract states:

... your salary will be reviewed on an annual basis to ensure it remains relevant to the requirements of the position. The salary review will also consider performance in the position (against your agreed performance plan) and retention and market issues (for example, demand and supply for cognate skills and experience, and changes to academic salary ranges).

[5] Most professorial staff are employed under a collective employment agreement, which has different terms in relation to professional development and leave, amongst other things.

[6] Professor Bowden's position description is fairly generic, covering key responsibilities such as research, teaching and working with the Head and other members of the school. The position has relationships with other members of staff as well as organisations outside the university. There is a need for the appointee to be well qualified in economic issues in general, and to be able to conduct research and teach advanced courses as well as undergraduate courses. Given the focus in the person specification on econometrics, financial economics or law and economics, the relevant organisations outside the university are necessarily focussed on the finance industry. The professor is required to hold a PhD,

demonstrate excellence in research and teaching, be able to provide academic leadership and work with the Head of School and build relationships with people outside the university.

[7] I conclude that the above matters are the ones to be assessed when setting Professor Bowden's salary to ensure it remains relevant to the requirements of the position. These are thus the requirements of the position for the purposes of his salary review. I also accept that these are fairly much the standard expectations of a professor of any sort in a university, except that there is of course a need for expertise in economic issues and a knowledge and understanding of the finance industry.

[8] Those are the key issues to be dealt with by the university in setting Professor Bowden's salary. There are other matters that must also be taken into account, however. These are performance in the position against the performance plan and retention and market issues. Examples of those market issues are demand and supply for cognate skills and experience and changes to academic salary ranges. There is however, no requirement for strict relativity with other staff members' pay.

[9] This is not a personal grievance for unjustified dismissal where a fair and reasonable employer would either dismiss or not, i.e. there are basically only two options available. A fair and reasonable employer here must conform to the terms of the contract, but otherwise is able to exercise its managerial discretion. Thus in exercising its management prerogative to set Professor Bowden's salary the university must have some discretion. However, the exercise of that discretion must conform to the parties' individual employment agreement as described above (see for example *Ruddlesden v. Unisys New Zealand Ltd* [2004] 2 ERNZ 163 at paras.[48] and [54]).

Procedural issues

[10] Professor Bowden was rightly concerned that because of the ongoing process of discussion and dispute over the level of his salary increase in 2006, it was not finalised until August 2007. Any prejudice to Professor Bowden, however, has been met by the university's agreement to pay interest on the salary increase for the relevant period.

[11] Professor Bowden also claims that Professor Thirkell should not have undertaken his salary review because he had a conflict of interest in that he was supporting a new initiative which Professor Bowden had actively opposed on behalf of the School of Economics and Finance in general. I accept Professor Thirkell's assurances that even though his own pay was in part determined on his success in bringing in this new initiative, Professor Bowden's

opposition on behalf of members of the School played no part in his assessment. Responsibly, even Professor Bowden made no allegation that there was actual bias.

[12] Furthermore, Professor Bowden's suggestion that Professor Thirkell should have stood aside is, in my view, an unreasonable expectation in all the circumstances. Employers are required to set salaries for their staff in accordance with their employment agreements. It would be quite unreasonable to expect employers generally to require another of the employer's staff to assess remuneration levels wherever there had been some potential conflict between the employer's representative normally setting the salary and the employee. This would put employers in an unworkable situation as they could not, for example, address performance concerns that had previously been addressed directly by that employer's representative within the period of assessment.

[13] The simple fact is that Professor Thirkell was to assess Professor Bowden's performance and that is what happened. He had to be able to undertake that assessment from a position of trying to understand what Professor Bowden had done over the year. It was unreasonable to expect him to agree with everything that Professor Bowden had done in that period and thus never to be in conflict with him over anything.

[14] Professor Bowden also claims that Professor Thirkell was unable to assess his performance because Professor Thirkell has been appointed to the position of Head of Commerce due to his generalist skills and experience and was not trained in economics and finance. While I accept that Professor Burnell was in a better position because of his economics and finance background than Professor Thirkell to determine Professor Bowden's level of remuneration, I accept that Professor Thirkell had sufficient skills and experience to do so across the whole of the school, which was his responsibility. Furthermore, there is nothing in the agreement that requires any particular person to undertake the assessment and Professor Thirkell had the benefit of Professor Burnell's recommendation.

[15] As I have already indicated, the position held by Professor Bowden, although having a focus on finance, was otherwise generally that of a professor at the university. Professor Thirkell, as head of school, was very well placed to assess matters of professorial remuneration across the school. Furthermore, Professor Thirkell had access to Professor Bowden's performance assessment and knew of his supervisory responsibilities and other contributions to the work of the university.

[16] There is nothing in the contract that requires Professor Thirkell to accept the recommendations of Professor Burnell. However, as a good employer, Professor Thirkell was required to take into account Professor Burnell's recommendation and the correspondence clearly shows that he did so.

The Collective Agreement Increase of 4.5%.

[17] As I have found above, changes to academic salary ranges are a relevant factor in the salary review process. However, the agreement does not provide for any set relativity between Professor Bowden's position and those of other academics at the university. It is simply a factor to be considered in the mix. The fact that Professor Bowden was not given a 4.5% increase, despite that being recommended, is therefore not sufficient of itself to lead to a conclusion that Professor Thirkell's decision was in breach of the parties' agreement.

Performance review

[18] Professor Bowden's 2006 performance review was conducted by Professor Burnell, who stated that that everything went well apart from some minor student issues with MMA501. Other than that, teaching and research activities were said to be going very well.

[19] Professor Burnell recommended the increase of 4.5% as he felt the collective agreement increase should be applied to Professor Bowden because he had met his performance expectations. That is, however, not required by the agreed contract.

[20] Professor Thirkell took a different view to Professor Burnell. Although he accepted that Professor Bowden's performance met expectations, he had concerns in respect of some of his key responsibilities. To him there was no evidence of academic leadership and innovation or the attracting of research funding. He also believed that Professor Bowden did not develop and maintain research programmes, or collaborate with his colleagues, because he was seldom on campus, which meant that he was unable to assist other colleagues or students directly. He believed that Professor Bowden was no longer developing new programmes because the one programme he had brought in was no longer new. He noted that he only looked after one PhD student and had a light teaching load, which meant a relatively light workload compared with other professors.

[21] While Professor Bowden rightly points to a great increase in revenue through the introduction of his graduate course four years ago, I accept Professors Thirkell and Burnell's evidence that academics are not paid more as a result of bringing in students, because this is

inconsistent with academic freedom and other values. On that basis I accept that Professor Bowden's success in bringing in high fee paying students to the university was not a directly relevant matter in respect of remuneration.

[22] Professor Thirkell, from his position of Head of the Faculty of Commerce and Administration, was entitled to take a different view than Professor Burnell on these matters because of his breadth of responsibility, but had to accept, as I conclude he did, that Professor Bowden's performance met expectations.

Demands and Supply for Cognate Skills and Experience

[23] Professor Bowden considers that assessment of academic salaries in other countries should have been instituted by the university. This was not done by the university, but equally Professor Bowden provided no hard data on changes in salaries for professors of economics and finance internationally. Under the agreement, however, it is not necessary to provide the sort of sophisticated international quantitative analysis suggested by Professor Bowden.

[24] I accept Professor Bowden's view that the best national comparators to his position are to two other finance professor positions in New Zealand, one of which is unfilled. I accept Professor Thirkell's evidence, however, that he was aware of the Auckland situation and that although the pay for that position was a bit higher, that was similar to what happened in other positions between Victoria and Auckland. There was no corroborating evidence by Professor Bowden that the payment for his position was out of sync with that of the Auckland position.

[25] I also accept that in the areas of finance, accounting and information technology (and perhaps marketing), the university can not compete with salaries in the private sector, but that there is a loading provided. I also accept that that loading had been provided for at the commencement of the relevant agreement.

[26] I conclude that while Professor Thirkell's assessment was pretty much a 'wet finger in the air' assessment by comparison, that does not make it inconsistent with the university's obligations.

Overall assessment

[27] With other academics being paid 4.5% more for the 2006 year, Professor Thirkell's decision to pay Professor Bowden only 2.6% can not be seen as generous. However, I am satisfied that Professor Thirkell properly assessed the requirements of Professor Bowden's position, namely as a professor at Victoria University in a general sense, with specific emphasis on economics skills and necessary links to the finance industry, in determining his salary. I also accept that he took into account the fact that others were being paid 4.5% and that Professor Bowden had met his performance expectations.

[28] On the other hand, there were grounds for paying a lesser increase such that Professor Thirkell genuinely believed that he was able, in his discretion, to set Professor Bowden's salary increase at 2.6%, which covered inflation. While I accept that it may have been the first time it was brought to Professor Bowden's attention that his absences from university and his relatively light workload would impact on his salary, these are relevant factors within the contemplation of the parties' agreement, because Professor Thirkell was entitled to compare Professor Bowden's work with that of other professors and he genuinely believed that he had a lesser workload and had not performed to the higher level, principally because of his lack of involvement on campus.

[29] I therefore dismiss Professor Bowden's claims.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority