

ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION AT PARAGRAPH
[3] OF THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 153/08
5077492**

BETWEEN DR RANGIHIROA BLAKE PANOHO
Applicant

AND THE VICE-CHANCELLOR OF THE
UNIVERSITY OF AUCKLAND
Respondent

Member of Authority: Leon Robinson

Representatives: Peter Cranney for Applicant
John Rooney for Respondent

Investigation Meeting: 29 November 2007
30 November 2007

Submissions Received: 3 January 2008
5 February 2008
8 February 2008

Determination: 24 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Dr Rangihiiroa Blake Panoho ("Dr Panoho") says he was unjustifiably dismissed from his employment as a Lecturer in the University of Auckland's Art History department. The Vice-Chancellor of the University of Auckland ("the Vice-Chancellor") says that Dr Panoho's employment was terminated for redundancy. Dr Panoho asks the Authority to resolve the problem by orders for his reinstatement and compensation.

[2] The parties were unable to resolve the differences between them by the use of mediation.

[3] I order that the evidence gathered in the investigation and as disclosed in the pleadings in relation to Dr Panoho's personal medical condition and history may not be published.

The facts

[4] Dr Panoho is of Te Uriroroi and Te Parawhau descent, hapu of Ngapuhinui. He was employed by the Vice-Chancellor as a lecturer in Maori Art and Art History on 9 January 1997.

[5] Dr Panoho attained all his educational qualifications from the University of Auckland. He has a BA majoring in Art History, a Master of Arts degree, and a PhD which he completed in 2001.

[6] In 1995 the head of the Department of Art History Dr Leonard Bell ("Dr Bell") informed Dr Panoho there would be a .5 lectureship available in 1996. That information, the possibility of a scholarship and the desire to be closer to his wife's mother prompted Dr Panoho and his family to move just north of Auckland from where they had resided in Wellington.

[7] Dr Panoho was appointed to a temporary part-time lectureship position in the Department of Art History teaching a course on Contemporary Maori and Polynesian Art. By letter of appointment dated 6 March 2006 this position ran from 6 March 1996 to 31 December 1996. The conditions of appointment letter said this about the Vice-Chancellor's Department of Art History:-

One of the prime objectives of the Department is to further expand research-based teaching programmes dealing with the visual arts of the South Pacific (including New Zealand), so that the University of Auckland becomes an international leader and centre in respect of teaching, research and publication in the arts of this area.

[8] It was a condition of appointment that applicants should have fluency in Maori language and established networks within the Maori community. Specific duties of the position were said to include teaching and research in the history and practice of Maori art both traditional and contemporary.

[9] Dr Panoho applied for and was interviewed for a full-time Lectureship in Art and Art History and was appointed on 9 January 2007. The terms of his employment were those contained with the Academic Staff Collective Employment Contract 1996 and as set out in a letter of appointment from the Vice-Chancellor's Registrar and endorsed "Tenurable" which stated:-

Following a recommendation from the Head of the Department of Art History I have pleasure in conveying to you an offer of a Lectureship in Maori Art and Art History in the Department of Art History in accordance with the following conditions:

This offer is subject to the successful completion of all the requirements for the award of your PhD.

1. *Tenure*

This is a tenurable appointment. Tenure (until the mandatory retirement age) will be granted subject to your successfully completing a four-year initial term. Further details concerning tenure are given in the attached Collective Contract.

2. *Date of Appointment*

The appointment will be from a date to be arranged as soon as possible.

3. *Salary*

Salary will be Point 4 on the scale for Lecturers the full time rate at present being \$48,750 pa.

4. *Duties*

You will be responsible to the Vice-Chancellor through the Dean of Arts and the Head of the Department of Art History for the satisfactory performance of such duties as may be required by the Head of the Department of Art History.

[10] Dr Panoho submitted his PhD in October 2001 and on 6 November 2001 he was granted continuation subject to the completion processes for the PhD by 1 March 2002. This was completed and Dr Panoho was granted continuation.

[11] On 19 September 2005 Dr Panoho tells the Authority he was verbally and physically intimidated by another member of staff. I shall refer to this event as "the incident" and as a result of it Dr Panoho says in the ensuing months to the first half of 2006 he experienced considerable work stress.

[12] Dr Panoho took steps to resolve the workplace issues arising out of the incident including mediation which was regrettably not successful. Dr Panoho prefers not to inform the Authority of the detail of the incident and the Authority does not pursue it being in the Authority's view a peripheral issue not germane to matters presently requiring determination. That is not to minimize the obvious significance of the

matter to these parties however. Dr Panoho says he had a lot of support for the position he adopted in the matter.

[13] As a result of the workplace issues arising as a consequence of the incident, Dr Panoho became increasingly unwell during 2006.

[14] On 19 July 2006 Dr Panoho discussed his existing situation and continuing ill health with Dr Bell. Dr Bell then enlisted the assistance of the Vice-Chancellor's human resources advisors and in particular Ms Sandra Lem ("Ms Lem") in relation to Dr Panoho's situation.

[15] Ms Lem arranged for Dr Panoho to consult psychiatrist Dr Rob Shieff ("Dr Shieff") for assistance. She wrote to Dr Shieff by letter dated 20 July 2006.

[16] Dr Shieff wrote to Ms Lem by letter dated 31 July 2006. Dr Shieff materially wrote in response to the matters posed for response by Ms Lem that:-

- Dr Panoho had presented with a specific psychiatric disorder (a single episode of Major Depression) but that would not preclude his continued employment.
- Dr Panoho was not currently capable of discharging any of his responsibilities and would not be for some 12-16 weeks.
- There were substantial difficulties from Dr Panoho's perception within the workplace (of an interpersonal and environmental nature) which warranted significant attention and substantial alteration which could enable a gradual reintroduction to work after 12 - 16 weeks, starting at 12 hours per week and increasing to full time over 2-3 months.
- If he returned to the work environment with the stressors unchanged Dr Panoho would rapidly relapse to Major Depression.

[17] Dr Shieff hoped that the work environment was amenable to facilitated change, and that there would be a modification of managerial processes and communication that could assist Dr Panoho. He also proposed a meeting in three months time

involving Dr Panoho and his wife and a representative of Human Resources to discuss Dr Panoho's health and improvements within the Department including potential facilitation and mediation.

[18] A restructuring process then intervened. In late July and August 2006, the Vice-Chancellor's Dean of Arts Professor John Morrow ("Professor Morrow") had commenced a review of the faculty directed at restructuring.

[19] The Professor John Morrow wrote to Dr Panoho by letter dated 12 September 2006 enclosing a covering letter and a significant document entitled "Faculty of Arts Academic Staffing Proposal Consultation Document 2006" ("the Consultation document").

[20] Ms Karen Lysaght an external human resources consultant retained by the Vice-Chancellor ("Ms Lysaght") assists the Authority with evidence of the rationale and process adopted by the University in its restructuring of the Faculty of Arts. The Faculty was not meeting its target contribution to the 2006 University budget due to a reduction in equivalent full-time student ("EFTS") numbers as a result of a weakening in demand from both international and domestic students. The consultation document noted that revenue from the faculty in such circumstances would not be sufficient to meet current expenses and return to the University the rate of contribution required to maintain central services and infrastructure. In respect of the Department of Art History, the Consultation document noted that projections for 2007 to 2009 pointed to further reductions in EFTS. It was considered that the Department of Art History had nearly two more permanent full time ("FTE") equivalent staff than warranted and that a forecast decline would exacerbate the situation. The Faculty of Arts proposed that permanent academic staff in the Department of Art History be reduced by 2.5 FTE with the disestablishment of two FTE by mid 2007 and 0.5 FTE by natural attrition with the termination of a fixed term contract early in 2008. It was considered that these reductions would ensure a sustainable level of academic and discretionary staffing in the Department in medium term.

[21] The Consultation document also set out proposed selection criteria and the process in the event that the proposal to disestablish academic positions was confirmed. The criteria proposed were broadly academic qualifications, teaching contributions, research, service and performance. Staff had until 6 October 2006 to

provide their feedback on the proposed restructure as set out in the Consultation document.

[22] Professor Morrow advised that staff were invited to discuss the process and any concerns they had at meetings to be held on Wednesday 20 and 27 September. The covering letter said this:-

Please find attached a Consultation Document regarding a proposal to reduce academic positions in some areas of the Faculty.

1. *budget position of the Faculty 2007-2009*
2. *proposal for aligning academic staffing levels with EFTS revenue*
3. *proposed selection criteria and process for academic staff*
4. *proposed process for voluntary severance and Other alternatives*
5. *proposed timeline; and a*
- 6 *process for providing and reviewing feedback on proposal*

The process to be followed has been carefully structured to ensure that every potentially affected member of staff has the opportunity to provide constructive feedback and that this feedback will be fully considered in framing a final recommendation to the Vice Chancellor.

I encourage you to provide feedback in order to achieve the best outcome for the Faculty and your Department Please email your feedback to the following address: foartsproposal@auckland.ac.nz or mailed in hard copy directly to Jocelyn Gamble, Faculty of Arts.

It is appreciated that this proposal will cause some staff uncertainty and concern. Staff members are welcome to access counselling and advisory services provided and paid for by the University through the Employee Assistance Programme throughout the consultation period. This independent and Confidential programme is provided by EAP Services and counsellors may be contacted anytime on 358-2110.

I thank you in advance for your feedback.

[23] Dr Panoho wrote to Professor Morrow by email of 14 September 2006 as follows:-

Tena koe Professor Morrow, Dean of Arts

Ngaa whakawhetai mo te pepa. Thank you for sending me the proposal regarding the reduction of academic positions in the faculty and (in relation to my particular situation) within the Department of Art History.

As your letter offers no wider reference to my absenteeism from what was quite clearly a very important meeting I wanted to apologise sincerely and clarify my non-attendance. You may perhaps be outside a loop that involves Art History, Human Resources and a medical practitioner talking to one another and not informing other parts of the University regarding my particular situation.

The suggestion by Len Bell in late July that in relation to stress related issues and sickness resulting from the job I see a doctor appointed by the University led to a commissioned medical report (dated 31 July). This document advised that I receive 3 months sick leave away from my work environment to try and recover. At the end of this period I was to meet again with the doctor and re-assess the situation at that point.

I feel your letter throws me into a difficult position at the moment caught between two crises - my health and the 'potentially affected' longevity of my employment. Regarding the former area I accepted the doctors prognosis to take a complete break from the work environment which has played a large role in my current ill health. It is distressing now that this particular employment crisis involving the university seems to require active and full engagement with colleagues, management and attendance of meetings. I don't know how these sorts of matters are resolved. However, I did want to bring to your attention the two polemically different responses currently being required by the university. I am struggling to reconcile these two areas as symbiotic and am currently focused on trying to regain my health.

*I look forward to hearing from you soon regarding this current predicament.
Penei whakaaro.*

[24] Professor Morrow wrote back to Dr Panoho that same day. He wrote:-

Dear Rangi,

Many thanks for this acknowledgement. I very much regret that I had to intrude on your sick leave by sending the consultation document to you but it was necessary for you to receive formal notice of the process proposed in it. I am most sorry for any distress this may have caused you.

Although all members of the Faculty are entitled to respond to the proposals if they wish to do so, I understand fully that you are concerned that engagement in this process may impact adversely on the process of recovery. I would recommend that you give priority to making the most of the opportunities that sick leave will give you to recovering your health. If you find that making a written response to the proposals will not compromise your recovery, then you may wish to avail yourself of that opportunity. I will also be happy to meet privately with you if you think it would be useful but once again, I encourage you to give priority to your health.

In the event that the process outlined in the document gives rise to a selection process affecting your Department I will contact you to discuss the process and to offer assistance if you are still on sick leave at that point.

With best wishes for your ongoing recovery,

John

[25] Dr Panoho tells the Authority he took Professor Morrow at his word expecting that Professor Morrow would revert to him personally, and it causes Dr Panoho much angst that Professor Morrow did not do so.

[26] On 14 September 2006 the Faculty of Arts Human Resources advisor Olivia Monk (“Ms Monk”) wrote to Dr Panoho advising that the University accepted Dr Shieff’s recommendation for a meeting to address Dr Panoho’s return to work and outstanding issues. Ms Monk wrote:-

Dear Rangihiroa

Thank you for your call on Wednesday 13 September regarding your appointment with Dr Robert Shieff and the recommendation he has made concerning your recovery and return to work.

I can confirm that you are on paid sick leave until Friday 3rd November 2006.

Dr Shieff has recommended he hold a case conference with you, Adrienne and someone from Human Resources prior to your return to work to resolve any outstanding issues and to determine how best to manage your return to the workplace. The University is agreeable to this recommendation and I will be in touch within the next month to organise this meeting. I would expect that Sandra Lem would be the Human Resource’s representative but I will confirm this prior to the meeting.

Please do not hesitate to contact me should you have any questions.

[27] Dr Panoho was content with Ms Monk’s advice. He apprehended the reference to outstanding issues to also refer to the outstanding historical workplace issues.

[28] The feedback from staff in relation to the Consultation document was considered by a Review Committee which met from Sunday 8 October to Friday 13 October 2006. Its recommendations were submitted for consideration by the Vice-Chancellor. There were changes made as a result of the feedback. The Vice-Chancellor interviewed the Review Committee and with some amendments approved the Dean’s preparation of a finalised Confirmation Document.

[29] As at 13 October 2006 Dr Panoho had not heard from Ms Lem as he had expected to following Ms Monk’s advice of 14 September. So he wrote to her by email of the same date requesting a time for the proposed meeting as follows:-

Kia ora Sandra

A reminder that Olivia Monk, in your absence wrote nearly a month ago in response to my query, confirming that either you or her would organise a meeting with Dr Shieff, my wife, someone from Human Resources and myself regarding my sick leave and work related issues. I have to date had no notification. Could

you please confirm a time with myself and Dr Shieff's Practice Manager within the next week or so regarding a date in October for this Case Conference. Best

[30] Ms Lem wrote back to Dr Panoho by email on 16 October 2006. She wrote:-

Good Morning Rangihiroa

I have just returned from annual leave and Olivia has discussed her communication with you during my absence. I will discuss a possible case conference with your HOD in the first instance and get back to you once I have further details. I hope to do this in the next day or so.

[31] The following day on 17 October Dr Panoho wrote back to Ms Lem as follows:-

Kia ora Sandra

Thanks for this. I would appreciate a response by mid-week if possible.

*Noho ora mai koe
Na Rangihiroa*

[32] Ms Lem emailed Dr Panoho on 20 October 2006 as follows:-

Good afternoon Rangihiroa

I met with the Dean and your Head of Dept Len Bell late on Thursday and as a consequence I have written to Dr Shieff today requesting he meet with you again to medically assess your recovery and to determine your ability to return to the workplace. Once this medical assessment has taken place we will be in a better position to discuss a case conference. At your earliest convenience, please contact Dr Shieff's nurse directly to make an appointment. The contact phone number is 09 360 0360 I look forward to receiving feedback from Dr Shieff in due course.

[33] Ms Lem's letter to Dr Schieff letter dated 20 October 2006 invited him to make recommendations about Dr Panoho's return to work. She particularly asked Dr Schieff:-

- *When will Dr Panoho be fit to return to duties and what restrictions (if any) would be placed on his work in terms of hours and duties?*
- *Are you able to recommend ways in which the University could support Dr Panoho's recovery and return to productive academic work?*

[34] On 2 November 2007 Dr Shieff wrote to Ms Lem. Dr Schieff advised that Dr Panoho was then in a position to have a carefully supervised and structured process of returning to his duties. Dr Shieff stated that return should be in graduated steps. He

identified a significant risk of relapse of major depression if the work environment had not changed. He advised he would not recommend a return to work until the University had conducted a review of the environment that had led to Dr Panoho's emotional deterioration and had also determined whether or not significant change could be brought about to mitigate the risk of relapse. He wrote materially:-

It would be my belief that, while Rangi is currently fit to commence a return to work process that, if he is required to return to an environment which is no different from that which he left some months ago, the challenges and points of tension are likely to impact on him again, both briskly and significantly, thereby placing him at very high risk for Depressive Relapse. To mitigate against this unacceptable eventuality, I would encourage Rangi not to return to work at this time, until a meeting can be held with the relevant personnel, in order to undertake a review of the environment leading to Rangi's substantial emotional deterioration, and to determine whether or not sufficient change can be brought about, in order to contain these points of frustration and conflict, in order to mitigate against the otherwise high probability of a Depressive Relapse for Rangi.

[35] On 7 November 2006 Professor Morrow wrote to the Department of Art History's Academic Staff Members, including Dr Panoho, enclosing a significant "Confirmation document" detailing the consultation and review process, confirming staffing reductions, selection criteria and process and the timeline. This document was also presented to affected staff at meetings held this same day.

[36] The Confirmation document set out the:-

- (i) consultation and review process;
- (ii) feedback and decisions related to EFTS, FTE, SSR (student staff ration) and programme viability;
- (iii) feedback about comparisons, other issues, and the selection process and criteria including voluntary redundancy;
- (iv) confirmed staffing reductions by department/school;
- (v) confirmed selection criteria and process;
- (vi) confirmed process and terms of voluntary redundancy and other alternatives; and
- (vii) the confirmed timeline.

[37] The Confirmation document stipulated that identified affected staff were invited to complete and submit an Individual Academic Profile to the Selection Committee

using a suggested template. Alternatively staff could submit an Academic CV. This material was to assist the Selection Committee make its selection decisions. In the event that staff did not provide an individual academic profile or academic CV to the Selection Committee, then the necessary information would be sought from RIMS and/or Department Research reports, Department or school staffing and teaching plans and CVs on file.

[38] The confirmed criteria for selection were these:-

- (a) contribution to teaching (experience and achievement in teaching);
- (b) contribution to research and/or scholarship and/or artistic activity or professional activity; and
- (c) contribution to the University and institutional planning, governance and operations and/or to the discipline and/or the community.

[39] Dr Panoho emailed Ms Lem on 17 November 2006 objecting to the input sought from him on the grounds of his health. He wrote:-

Kia ora Sandra

I am writing to clarify my current situation regarding sick leave. I have been strongly advised by Dr Shieff to not undertake any university duties or interact with the department at any level until the process I am involved in has been worked through properly and resolved.

I am therefore concerned regarding a range of urgent requests sent me by the University. I am being required to provide substantial material in relation to my continuing employment. I have been sent by courier and e-mails, from the dean and associate dean information in relation to this current round of downsizing arts faculty teaching staff.

Due to my current condition I have been unable to address or process any of this material. Further while I have been receiving this material from University I have not been involved in any consultation process or communication with colleagues.

I am being required to provide my academic profile and CV which will be assessed regarding whether I am selected for severance or redundancy or alternatively whether I am chosen to continue teaching at the Department of Art History. I am aware that there is a deadline extended to Thursday 23 November regarding the current requests. This is a difficult predicament with which to engage. Given my condition and the Doctor's advice I am unable to comply at this point with this range of requests. The Dean of Arts is aware of my situation

and in an earlier e-mail advised that my health was a priority before a return to duties. I enclose his letter below and look forward to hearing from you regarding a possible date for a Case Conference to follow up my prior consultations with Dr Shieff.

[40] On 17 November 2006 Ms Lem wrote to Dr Panoho as follows:-

Dear Rangi

Thank you for your email of 17 November 2006.

I understand that you have been unwell and was therefore unable to attend a meeting of the Art History staff that was held by the Dean on 07 November 2006. The purpose of this meeting was to present and discuss with you the decision to reduce staffing in the Faculty of Arts. In your absence, the University is required to ensure you receive formal written notification of the academic staffing proposal and confirmation documents, and you will continue to receive information during this process.

I appreciate that given your medical condition you need time to concentrate on improving your health. There is, therefore, no expectation for you to provide the Individual Academic Profile or Academic CV to the Selection Committee as requested in the Confirmation Document. I would like to assure you that the Dean's office will prepare and submit the necessary documentation on your behalf and present it to the Selection Committee.

I can only reiterate the Dean's previous comments and extend my best wishes for your ongoing recovery.

[41] Ms Lem wrote again to Dr Panoho by letter dated 4 December 2006. The Draft version presented to the Authority says this:-

Dear Rangi

I can confirm I have now received a further written report from Dr Rob Shieff outlining your progress over the last three months. Dr Shieff has advised me that in his view you are now in a position to be able to commence a structured and supervised return to your previous role and responsibilities.

In light of the timing and the fact that semester two ended on 10 November 2006, the University has continued to support your absence by providing you with a further period of paid sick leave that will conclude on Monday 11 December 2006.

I would like to propose you then avail, yourself of four weeks of accrued annual leave entitlement from Tuesday 12 December 2006 up to and including Friday 12 January 2007.

I have arranged, for you to meet with me and your head of Department Associate Professor Len Bell at 10am on Monday 15 January 2007 to discuss and address those issues that were evident prior to your extended period of absence so that together we can facilitate your successful return to the workplace.

Please do not hesitate to contact me if you require further clarification in this matter and accept my very best wishes to you and your family for the festive season.

[42] It appears the final version actually despatched to Dr Panoho was this:-

Dear Rangī

I can confirm I have now received a further written report from Dr Rob Shieff outlining your progress over the last three months. Dr Shieff has advised me that in his view you are now in a position to be able to commence a structured and supervised return to your previous role and responsibilities.

In light of the timing and the practicability of initiating a managed return to work programme now that semester two has ended, the University has agreed to extend your paid sick leave until Monday 11 December 2006. I would propose that you then avail yourself of four weeks of accrued annual leave entitlement from Tuesday 12 December 2006.

[43] Dr Panoho was not pleased with Ms Lem's advice. He wrote to her by letter dated 7 December 2006. He referred to his repeated requests for a case conference as had been recommended and stated that the University had expressly accepted Dr Shieff's proposal in that regard. He repeated his request for a case conference.

[44] By letter dated 13 December 2006 Professor Morrow wrote to Dr Panoho and advised that Dr Panoho's position had been disestablished. The letter said:-

I regret to inform you that as a result of the recent consultation and review process associated with proposed staffing reductions in the Department of Art History in the Faculty of Arts, and the subsequent confirmation and selection process, it has been determined that the position of Lecturer which you currently hold will be disestablished.

In the next week we will meet with you to discuss other opportunities or alternatives you may wish to consider. We will also discuss the process of disestablishment and the date this will occur. Sandra Lem, HR Advisor, will be in contact with you in the next day or so to arrange a suitable meeting time.

Should you wish to consider Voluntary Severance please contact Sandra Lem to discuss this option and to receive the information relating to Voluntary Severance and an application form. You have until 2 March 2007 to apply for Voluntary Severance.

I appreciate that this is a significant time of change, causing you uncertainty and concern, and encourage you to use the support services provided through EAP should you wish. We will make every effort to assist you during this transition and will discuss with you the career management services that will be made available to you by the University, through Grafton Consulting Group.

In the meantime if you have any questions please do not hesitate to contact Sandra Lem on ext.82914 or by email at s.lem@auckland.ac.nz.

[45] Ms Lem prepared a letter bearing the date 20 December 2006 purporting to offer a formal consultation period of one month, commencing from 8 January 2007. Dr Panoho denies receiving this letter.

[46] The following day on 21 December 2006, Ms Lem emailed Dr Panoho's representative Jane Kostanich, Association of University Staff (AUS) regional organiser ("Ms Kostanich") following a call to her from Dr Panoho's wife. Mrs Panoho apparently advised Ms Lem Dr Panoho no longer wished to communicate with Ms Lem or the faculty about the next phase of the process.

[47] On 17 January 2007 the Association of University Staff ("AUS") raised a personal grievance on Dr Panoho's behalf and proposed mediation. The grievance related to both the workplace issues, health issues and the disestablishment of Dr Panoho's position.

[48] The parties attended mediation on 12 March 2007 but matters were not resolved.

[49] The Vice-Chancellor's director of Human Resources Ms Kath Clarke ("Ms Clarke") wrote to Dr Panoho by letter dated 3 April 2007. Dr Panoho was informed that his employment with the Vice-Chancellor was being terminated by reason of redundancy. Dr Panoho was advised that he was entitled to six months' notice termination of employment making 26 October 2007 his last day of employment with the University. The University advised that its view was that it was not practicable for Dr Panoho to work out the notice period. It proposed subject to any comments from him, to terminate his employment on 13 April 2007 and pay him in lieu of notice. Dr Panoho was required to respond to the proposal by 11 April 2007 failing which his employment would terminate on 13 April 2007. Although said to be copied to AUS, advisedly this did not occur.

[50] By email dated 11 April 2007, the AUS informed the University that AUS intended to be at a reconvened mediation, scheduled for 12 April 2007.

[51] By email dated 11 April 2007 the University informed the AUS that it had withdrawn from the mediation process.

[52] Ms Clarke's delegate wrote to Dr Panoho by letter dated 13 April 2007. The director advised she had not received a response to a request from Dr Panoho to meet to discuss the issue of working out his notice. Consequently she advised that Dr Panoho's employment was terminated effective of 13 April 2007. She further advised that the University was willing to continue mediation. The letter was copied to the AUS.

[53] By email dated 13 April 2007 the AUS objected to the dismissal and made it clear that Dr Panoho did not agree with the proposal to payment in lieu of notice. AUS on Dr Panoho's behalf agreed to further mediation.

[54] The problem remained unresolved and was not resolved by further mediation.

The merits

[55] It now falls to the Authority to resolve the problem on the application made by Dr Panoho. In determining whether the Vice-Chancellor's decision to terminate Dr Panoho's employment was justifiable the Authority applies the test prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[56] The starting point is always the relevant employment agreement provisions. At the time of his termination, Dr Panoho was employed under the terms of the Academic Staff Collective Agreement (2006 – 2007) ("the Collective"). The Collective contains redundancy provisions at Schedule 7.

[57] I do not consider arguments about tenure. Dr Panoho has a very different basis for his claims than was initially lodged. That is because significant evidence emerged

following the Authority's investigation meeting. I called for the Vice-Chancellor to provide to the Authority any documentation in relation to Dr Panoho's selection for redundancy, it appearing rather odd that no witness for the Vice-Chancellor had done so. The Vice-Chancellor duly provided the relevant section of the Academic Staffing Review Selection Committee Recommendations Paper, an internal memorandum dated 13 December 2006 from the Vice-Chancellor to Professor Morrow and a written report from the EEO Manager on the selection process. I am certain this further information was elucidating for Dr Panoho, if not distressing. I shall return to this matter later.

[58] The Vice-Chancellor required two full-time positions be made redundant. He did not identify particular positions as redundant, but instead applied a process to select persons to be made redundant. Dr Panoho was one of them. As a result, Dr Panoho was then required to put himself forward for selection for a position which I do not agree was actually redundant.

[59] Curiously, none of the witnesses for the Vice-Chancellor were able to give the Authority clear evidence of the deliberations relating to Dr Panoho. All they could say was that Dr Panoho had scored below expectation in two of three areas and they could not say which two. The witnesses did not produce any written documentation evidencing the deliberations.

[60] According to Professor Morrow, the Academic Staffing Review Selection Committee met on Friday 24 November 2006 and Sunday 26 November 2006 to Friday 1 December 2006. Professor Morrow chaired the Selection Committee as Dean but he was not present on 24 November 2006. Ms Lem was in attendance. The Selection Committee considered all written information provided to it. It reviewed and discussed each staff member in turn. It eventually reached provisional assessment and selections. It then consulted heads of Departments and in the Department of Art History's case, Dr Bell and then incoming head of Department Professor Elizabeth Rankin. There was a consideration of each individual and their ability to make a contribution to the Department. In each case, the individual's teaching, research, and service contribution was considered in line with the individual staff member's academic grade and workload.

[61] In Dr Panoho's case, his most recent CV on file prepared for a previous department review was considered together with a summary of his teaching, research and service as provided by the head of department. Professor Morrow emphasises that the committee had a full record of Dr Panoho's achievements before it as well as information from the heads of department about its planning of curriculum and teaching changes. As well as considering individual staff members, Professor Morrow says the overall needs of the Department of Art History were considered as well. The committee recommended that Dr Panoho's position and the position of another employee of almost 30 years service be disestablished. As there were other staff within the Department who could teach Maori and Pacific Art History, the committee considered the University could still be able to meet its obligations in respect of the Treaty of Waitangi and the promotion of Maori participation in University life.

[62] As evidenced by a memorandum from the Vice-Chancellor to Professor Morrow dated 13 December 2006, the Vice-Chancellor met with the Selection Committee on 5 December 2006 from 2.00pm to about 3.20pm. The Vice-Chancellor and his delegation received assurances that the selection process had been fair and transparent, and that recommendations for the retention or disestablishment of academic staff positions were based only on the selection criteria advised in the Confirmation document. On the basis of those assurances, the Vice-Chancellor accepted the Selection Committee's recommendations and in particular that Dr Panoho's position be disestablished.

[63] It is my view the assurances given to the Vice-Chancellor were incorrect.

[64] Ms Lem took part in the deliberations concerning Dr Panoho. I find that her letter of 4 December 2006 was amended because of what she had learned of the Selection Committee's deliberations. Ms Lem being aware Dr Panoho's "position" was to be disestablished, amended her draft so that final version did not discuss a case conference as Dr Panoho was pursuing.

[65] I am not persuaded that the position Dr Panoho held as Lecturer in Maori and Pacific Art History was redundant. I mean by that, I do not accept that a lecturing

position in Maori and Pacific Art History was superfluous to the employer's requirements.

[66] Nothing I have heard persuades me that the Vice-Chancellor no longer required a lecturer or instruction to students in the visual arts of the South Pacific (including New Zealand) if by that the Department's literature means Maori and Pacific Art. The University of Auckland is situated in the largest Polynesian city in the world.

[67] The Vice-Chancellor was advised and he accepted that advice, that the Department of Art History in deciding to disestablish the position held by Dr Panoho as Lecturer in Maori and Pacific Art History would still be able to meet its obligations. Professor Morrow explains to the Authority that there were other staff in the Department who could teach in the area.

[68] I do not understand there to have been any enquiry as to forecast demand for courses in Maori and Pacific Art History as justification for the termination of Dr Panoho's position.

[69] Although the Vice-Chancellor's witnesses were unhelpfully, if not conveniently, vague in their recall as to the particulars of the deliberations in relation to Dr Panoho, I regard the Selection Committee's recommendations paper dated 2 December 2006 provided to the Authority as the best evidence of the discussion.

[70] The paper confirms that the Selection Committee received his most recent CV together with a summary of his teaching, research and service contributions which had been provided by the head of department from his academic performance reviews. There is also reference to faculty examination of the RIMS database having revealed no research reported additional to what was included in those documents.

[71] Dr Panoho was assessed as having failed to meet expectations in teaching, research and contribution. The heads of department reported they "were aware of some student dissatisfaction with the content and style of Dr Panoho's teaching at Stage 3 and postgraduate level".

[72] The Head of Department also reported Departmental concerns about Dr Panoho's ability to design his courses to distinguish between the different Stages and provide progression of study for students and to avoid overlap of content with other courses. The Selection Committee was also informed that both heads of department had discussed with Dr Panoho ways of improving his teaching but had seen no positive response to their suggestions. The Selection Committee noted that the head of department had not directed Dr Panoho to take CPD courses but had instead tried to provide him with mentoring and good examples of what was required.

[73] The Selection Committee concluded that while Dr Panoho was a good speaker, his course design and delivery were unsatisfactory. The Selection Committee's questioning of the head of department also led it to the view that Dr Panoho had had difficulty in collaborating with his colleagues in coordinating a teaching programme.

[74] The heads of department also informed the Selection Committee that Dr Panoho's intention to publish his PhD as a book had not been realised. The Selection Committee formed the view that this publication project was facing serious difficulties. The Selection Committee doubted whether Dr Panoho was likely to meet publication expectations of a lecturer in the short to medium term.

[75] The Selection Committee thought Dr Panoho's service contribution was marginal with respect to expectations of a lecturer.

[76] I have perused the EEO Manager's report. The EEO Manager's observations do not affect my conclusions. I note there is a statement expressing concern about, I assume, Dr Panoho's termination.

[77] It is obvious the Selection Committee was materially influenced by very serious allegations in relation to Dr Panoho's performance. This element of the deliberations was not put before the Authority by the Vice-Chancellor's witnesses.

[78] Performance concerns must be dealt with by proper performance management. I find it odd, if not unacceptable, that the Vice-Chancellor could have permitted such concerns to remain undealt with especially given Dr Panoho's length of service.

[79] It was improper to reach adverse views about Dr Panoho without ever having permitted him an opportunity to be heard in relation to those adverse views. It was a breach of the statutory duty of good faith and a fundamental breach of natural justice for the Selection Committee to have reached its conclusions without ever having sought Dr Panoho's comments, input or response. As well, the Selection Committee had never intended to seek his input. There is no reason why it could not have put the information it was considering to Dr Panoho to comment on before it reached its conclusions.

[80] The summary prepared of Dr Panoho's teaching, research and service contributions that had been provided by the head of department from "APRs" and the information from the RIMS database were never put to Dr Panoho. The information gathered may have been incorrect or inaccurate. I am concerned that no person on the Selection Committee or any of the Vice-Chancellor's advisors apprehended any need for verification. Although the Vice-Chancellor's agents had relieved Dr Panoho from providing the information himself, the Vice-Chancellor was not relieved of the responsibility to ensure he was considering accurate information.

[81] The decision to terminate Dr Panoho's employment must be carried out fairly and sensitively. That is because the Act obliges the parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other.

[82] Section 4(1A)(c) of the Act required the Vice-Chancellor to provide to Dr Panoho access to information relevant to the continuation of his employment as well as an opportunity to comment on the information before the decision was made. That section says this:-

4. *Parties to employment relationship to deal with each other in good faith*
 (1A) *The duty of good faith in subsection (1)—*
 (a) *is wider in scope than the implied mutual obligations of trust and confidence;*
and
 (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[83] These can also be said to be matters of common courtesy and natural justice. A person at peril of suffering penalty is entitled to be heard in their defence. The Selection Committee and the consultants who devised the process, did not consider these fundamentals necessary in either the application or the design of it. The Vice-Chancellor failed to act in good faith towards Dr Panoho because he failed to provide Dr Panoho access to the particular matters the Selection Committee actually considered when it deliberated over whether to continue Dr Panoho's employment and further, because he failed to provide Dr Panoho an opportunity to comment on the information the Selection Committee did in fact consider before it made its decision and then recommended to the Vice-Chancellor.

[84] I cannot discern any kind of weighting or ranking process in the Selection Committee's deliberations of the 10.5 FTE positions in the Department of Art History. Quite apart from the adverse conclusions reached of Dr Panoho, I fail to seek any methodology in the nature of a preferencing exercise. I am unable to discern how it particularly was that Dr Panoho prevailed over his colleagues as one of two whose positions were to be disestablished. In the absence of evidence of the same, I am left inevitably suspecting that no such exercise was actually carried out.

[85] The assurances to the Vice-Chancellor and his delegation that the selection process had been fair and transparent, and that recommendations for the retention or disestablishment of academic staff positions were based only on the selection criteria advised in the Confirmation document were unfounded. In Dr Panoho's case, for the reasons I have outlined above, the selection process had not been fair and nor had it been transparent. Because of the issues disclosed in the Selection Committee's report, and not by the Vice-Chancellor's witnesses, there is a very real likelihood that Dr Panoho was actually dismissed for poor performance rather than by operation of the selection criteria.

[86] Dr Panoho's condition does not excuse the Vice-Chancellor's actions or relieve him from the obligations at law. While the Vice-Chancellor felt obliged to involve Dr Panoho in the restructuring process notwithstanding Dr Panoho's illness, the Vice-Chancellor did not feel himself similarly obliged to involve Dr Panoho in the matters his Selection Committee actually considered.

The determination

[87] An employee liable for dismissal by reason of redundancy is entitled to be treated fairly and sensitively. I find that Dr Panoho was neither treated fairly nor sensitively. The Vice-Chancellor failed to act in good faith towards Dr Panoho. He also failed to act as a good employer.

[88] Standing back and considering matters objectively, I now determine for all the above reasons that the Vice-Chancellor's decision and how the Vice-Chancellor acted were not the actions of a fair and reasonable employer. **I find that Dr Panoho was unjustifiably dismissed. He has a personal grievance and he is entitled to remedies in settlement of that grievance.**

[89] I have not commented on arguments made on Dr Panoho's behalf in relation to the Treaty of the Waitangi and the Vice-Chancellor's obligations arising in relation thereto. I mean no disrespect in not dealing with those arguments. I have resolved this employment relationship problem by reference to ordinary principles of employment law.

The resolution

[90] In considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Dr Panoho's actions contributed towards the situation that gave rise his personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[91] I find that Dr Panoho did not contribute to the situation that gave rise to the personal grievance and there was no blameworthy conduct on his part which could constitute contributory fault which led to that situation, nor which requires a

reduction. There is therefore no basis for reducing the nature and extent of the remedies to be granted to Dr Panoho.

[92] Dr Panoho's application to the Authority pleads two causes of action. That is not typically language used in the Authority. I decline to grant any declaratory relief - the language lawyer's use. Instead, I concentrate on resolving the problem irrespective of how it is described by the parties. In essence, Dr Panoho challenges the Vice-Chancellor's decision to dismiss him. That is the decision and the actions in relation to it that I resolve.

Reinstatement

[93] Dr Panoho seeks reinstatement to his former employment with the Vice-Chancellor as a Lecturer in Maori and Pacific Art History at the University of Auckland.

[94] Professor Morrow says that reinstatement is impracticable because there is no vacant position with the Department of Art History and there is no funding to create a new position. He says that if reinstated, the Vice-Chancellor will have to create a role for Dr Panoho which is not required and which is not viable. In that situation, Professor Morrow says the Vice-Chancellor may need to consider others for redundancy and go through a restructuring process again in order to address the continuing problem of overstaffing. He says that reinstatement would have a serious financial impact on the Department which is unable to absorb the cost of a staff member who cannot contribute to the level of activity. Finally in this regard he says the courses for 2008 have been set and advertised and therefore it is too late to place Dr Panoho in a teaching role for 2008.

[95] Professor Morrow next says that Dr Panoho has referred to unresolved issues with the University and stated that he sees his relationship with the University as "problematic" and has also expressed a desire to "move on". Because of these statements, Professor Morrow says it is impracticable to reinstate Dr Panoho because it will require him to return to an environment that he himself says he cannot return to.

[96] I do not hear Dr Panoho say he cannot return to his former employment and do not understand him ever saying that. Quite the contrary, he is on record as being

clearly desirous of returning and having acted to have his employer commit to participate in a case conference with the medical professional with a view to facilitating his return.

[97] It is submitted for Dr Panoho that now that he has discovered the baseless, unfair and unanswered criticisms of his work, he is now in a position to “move on”. “Move on” is colloquial for leaving the past behind, I say. It is submitted that Dr Panoho is ready to move on – but as a lecturer in Maori Art History at the Department of Art History.

[98] I agree with the submission that the fact a reinstatement may have inconvenient consequences cannot deprive a dismissed worker of the mandatory remedy of reinstatement.

[99] I note that the Vice-Chancellor has been on notice since August 2007 and likely earlier that Dr Panoho was seeking reinstatement.

[100] I also note that the Selection Committee and the management of the Department of Art History were content to reallocate the function of Dr Panoho’s previous role amongst other teaching staff. His area of work remained an important component of the Department’s curriculum and teaching plans. I see his return as entirely complementary for the Department and the duties he previously performed now being performed by others, can be performed once again by him.

[101] I accept that Dr Panoho's career is very likely ended if he is not reinstated because he says there is nowhere else that has a position in Maori and Pacific Art History.

[102] Having weighed the various considerations I am moved to conclude that to deny Dr Panoho’s return is tantamount to licensing unlawful conduct. Dr Panoho has a right not to be unjustifiably dismissed. The remedy for that situation I think must be Dr Panoho's reinstatement. That is the remedy the Legislature intends to the primary one for persons in Dr Panoho's position. He having been found to have a personal grievance and having sought reinstatement, he is entitled to the primary remedy. I am

persuaded Dr Panoho's right to the primary remedy outweighs the inconvenience to the Vice-Chancellor.

[103] In accordance with sections 123(a), 125 and 126 of the Act, **I order the Vice-Chancellor of the University of Auckland to immediately reinstate Dr Rangihiroa Blake Panoho to his position as Lecturer in Maori and Pacific Art History in the Department of Art History.**

Reimbursement

[104] Dr Panoho does not seek any orders for reimbursement.

Compensation

[105] I accept the submission that Dr Panoho only learned the true reasons for his dismissal after the Selection Committee recommendation paper was provided to him after the Authority's investigation meeting. That situation can only have exacerbated Dr Panoho's anguish.

[106] Dr Panoho describes the uncertainty of the situation he finds himself as causing tenuous family living, an embarrassing professional status, loss of mana, insecurity regarding job future, personal problems involving self-esteem and well-being and continuing humiliation arising out of unsuccessful mediation and communication with the University.

[107] He says the dismissal is damaging for the mana of his wider whanau and his reputation amongst his own people and those of his wife.

[108] There are future financial effects as well. He and his family have suffered significant financial hardship. He and his wife borrowed heavily from the bank to finance travel for research purposes abroad including the United States, overseas lectures and symposia in Europe, North, South and Central America.

[109] The sacrifices by his family, involving material resources and time were justified to them as part of a broader programme involving a lifelong commitment he had made to the discipline of art history and Maori and Polynesian art. He refers to assurances he gave his wife and other supporters that his career and the quality of his

work would bring rewards and their support would be reciprocated. He says he feels guilty and angry that he has not been able to repay family loyalty and the support given by referees and artists along the way.

[110] Dr Panoho says he has very few job prospects. He is most apprehensive about the effect of the dismissal on his future if the dismissal is not overturned.

[111] Dr Panoho fears for the future without an income and says he has little chance of securing a similar position. He says his faith in the specialised nature of his career was misplaced and now he is required to broaden his applications for other employment to meet the wider demands of the current job market. Both his family and he are distressed that they will eventually no longer be able to sustain their mortgage, their lifestyle and to maintain the home which they have focused significant energy on renovating. Dr Panoho's career was central to achieving the stability of his family life.

[112] Dr Panoho is particularly aggrieved that he is no longer a major contributor to the family mortgage. His wife has had to take on a job she had hoped to have permanently left behind. He describes deep humiliation at the prospect of not being able to help cover the mortgage. He says these kinds of pressures make for a tense and anxious family life at a stage in his career where his family should be feeling more rather than less secure about his future prospects. He says it feels as if he is about to lose everything - his job, his home and his family.

[113] He has been employed doing gardening and part-time secondary school teaching at his local college. He says he has made quite extensive efforts to gain employment in his field but has not been successful. He concedes his work is so specialised that finding related work will be difficult.

[114] Dr Panoho's wife says Dr Panoho's mana has been trampled on by the University. She describes her husband and their life together. She describes how he is now less passionate about life, lacks enthusiasm and is daily placed in a position where he has to convince others of his usefulness. She tells of his depth of anger and frustration in his conversations with which she describes as heart breaking. She is

gravely concerned with the effects on her husband's identity the Vice-Chancellor's actions have caused.

[115] I accept that Dr Panoho has suffered humiliation, loss of dignity and mana and injury to his feelings because of the unfairness in the process by which his employment was determined to terminate. I accept that Dr Panoho has been paid redundancy compensation pursuant to the collective. That compensation is contractual in nature on the occasion of the loss of the employment. It is not compensation for the unfairness arising out of unlawful action which I am now presently concerned with.

[116] Having regard to his evidence, his length of service and the nature of his personal grievance, I award Dr Panoho \$25,000.00 compensation. **I order the Vice-Chancellor of the University of Auckland to pay to Dr Rangihiroa Blake Panoho \$25,000.00 as compensation.**

Costs

[117] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Cranney is to lodge and serve a memorandum within 14 days of the date of this Determination. Mr Rooney is to lodge in the Authority a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

[118] I thank the representatives for their assistance in this investigation.

Leon Robinson

Member of Employment Relations Authority