

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 31
5401969

BETWEEN MURRY THORNLEY AND
CAROLYN BROWN
Applicants

A N D MARLBOROUGH BOYS'
COLLEGE BOARD OF
TRUSTEES
Respondent

Member of Authority: David Appleton

Representatives: Dzintra King, Counsel for Applicants
Peter Hall, Advocate for Respondent

Investigation Meeting: 15 April 2014 and 24 February 2015 at Blenheim

Submissions Received: 24 February 2015 from Applicant
24 February 2015 from Respondent

Date of Determination: 6 March 2015

DETERMINATION OF THE AUTHORITY

- A. The management units removed from Ms Brown and Mr Thornley were not fixed term units, but permanent units. Employer's superannuation contributions are accordingly due in respect of these units for the period from 1 November 2007.**
- B. The respondent did not act in breach of the surplus staffing and merger provisions of the applicable collective agreement, but did act in breach of an obligation to pay the units. The respondent is to reinstate the units and pay to the applicants arrears plus interest.**
- C. The applicants were each unjustifiably disadvantaged by the way**

that their units were removed from them and are entitled to compensation.

D. Costs are reserved.

Employment relationship problem

[1] The applicants, two teachers employed by the respondent, argue that the respondent has breached the terms of the Secondary Teachers Collective Agreement (the Collective Agreement), and the duty of good faith, by the fact and manner of removing management salary units from them in 2012, resulting in a drop in their annual remuneration. They also claim an unjustified disadvantage arising out of the removal of their units.

[2] They seek compliance orders, payment of arrears and an order that the respondent pay superannuation contributions on their units, which they say were permanent management units rather than fixed term units.

[3] The respondent opposes the applications on the grounds that the units previously allocated to the two applicants were never permanent units and that the school had the right to remove the units from the two applicants. They say that the terms of the Collective Agreement relied upon by the applicants were not triggered by the removal of the units.

[4] The respondent also argues that valid personal grievances relating to their unjustified disadvantage claims were not raised within 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred.

[5] The considerable time lapse between the first and second investigation meetings was largely due to the parties wishing to adduce additional evidence after the first meeting relating to the way units have been reallocated since 2011. This involved a detailed analysis of data by Mr Thornley, and his conclusions in relation to that analysis, and Mr Hegarty's responses to those analysis and conclusions.

Background

[6] Salary units are provided to Boards of Trustees by the Ministry of Education for the purpose of recognising management, responsibility, recruitment, retention and/or reward and are generated by formula using the school's entitlement staffing.¹

[7] Marlborough Boys College (the College) currently recognises four types of salary unit (apart from special units), namely project units, pastoral units, senior management units and curriculum units. The units that Ms Brown and Mr Thornley lost in the beginning of 2012 were both curriculum units, linked to the subjects that they taught.

[8] In around February 2011 fixed term and permanent units were removed from the salaries of teachers at the College, but were reinstated in March 2011 after the intercession of Ms Lynn Robson of the Post Primary Teacher's Association. Ms Robson's evidence is that the principal of the College, Mr Wayne Hegarty, agreed in future to follow the provisions in the Collective Agreement when reviewing the allocation of units. Later in 2011, teachers were asked by Mr Hegarty to apply for permanent and fixed units as part of a reorganisation of how they were distributed, although at the beginning of 2012 only three curriculum units were removed; Ms Brown and Mr Thornley's, and a third which had been allocated to a maths teacher who resigned.

Ms Brown

[9] Ms Brown has been employed at the College since 1987 and is currently employed as the Head of Food Technology and Hospitality Studies. She currently has no teaching assistants but has had in the past. She falls under the Graphics and Technology Faculty of the College. She says that she was allocated a management unit for her position as Head of Department in the year 1999 and that this was designated as a fixed term unit when this was first allocated. She says that there was no discussion about the management unit over the years and so argues that it became a permanent unit during that period.

[10] The Authority saw a copy of a letter to Ms Brown from the then Principal, Mr Rodgers, dated 17 August 1999, which addressed a number of concerns of

¹ Ministry of Education website – *Salary units, senior and middle management allowances.*

Ms Brown and which referred to her being awarded a management unit called a PR2 (Position of Responsibility) for terms 3 and 4 of 1999 to acknowledge the additional work she had done in setting up the food technology classroom after a refurbishment. However, I understand that this is not the same unit that was awarded to her in 1999 in recognition of her being head of the food technology department.

[11] The Authority also saw a copy of a memorandum dated 21 June 2001 from the head of the technology faculty, Mr Colin Currie, to Mr Rodgers which referred to Ms Brown being in receipt of a PR1 for her position. I understand that this is the disputed management unit.

[12] The evidence about the exercise that was followed which led to Ms Brown's unit being removed is not entirely clear, as it appears that it was combined with the opportunity for staff to apply for project units. It appears that Ms Brown applied for two project units in late 2011, but was informed by letter dated 14 December 2011 that her applications had been unsuccessful. Ms Brown's uncontested evidence is that she did not find out that the management unit which she had held since 1999 (worth \$4,000 per annum by 2011) had been removed until 27 January 2012 when she noticed it was missing from her pay. It appears that no letter was sent to Ms Brown in respect to the loss of this unit. Ms Brown has not had the unit reinstated since then.

Mr Thornley

[13] Mr Thornley has been employed at the College since 2000 and teaches Geography and Social Studies. He falls under the Social Sciences Faculty of the College. It is his evidence that, in 2006, he had a meeting with the then Principal concerning the fact that he was the Head of the Geography Department and so should receive a management unit as his predecessor had. The Principal agreed to this and the unit was backdated to 28 January 2006. Mr Thornley says that it was explained to him that there were no permanent units available at that time but that the Principal would remedy that situation in the future. Mr Thornley says that the matter was never referred to again and so the unit was clearly permanent. He said that, from 2006, he was also Assistant Head of Faculty.

[14] Mr Thornley applied for a unit as part of the reorganisation of unit allocation, but was unsuccessful. He did not find out until 27 January 2012 because the letter from the College advising him of this had been incorrectly addressed, and had been

returned by NZ Post to the College. Mr Thornley first saw the letter in his pigeon hole upon his return at the start of the new school year. This evidence is uncontested.

Mr Hegarty's evidence

[15] It is the evidence of Mr Hegarty that he was appointed to the position of Principal in term 4 of 2009 and that the College had been experiencing a number of problems up to that point, including the appointment of statutory managers, financial problems requiring a \$1.3m loan, the College being subject to an annual Education Review Office Review, poor achievement rates and poor community perception.

[16] Mr Hegarty's evidence is that, when he commenced as Principal, the interim Principal advised him that staff members had a major concern about the lack of transparency in how units, middle management allowances (MMAs) and reduced teaching hours had been allocated between the teaching staff. Mr Hegarty said that he was concerned that there was an inequality of allocations and a lack of transparency.

[17] Mr Hegarty's evidence was that it was his intention in 2011 that the units would be reallocated to get a more even balance between and within the faculties based upon the subject hours taught in the faculty. Mr Hegarty explained that, in 2011, a review took place which revealed that some teachers in charge of subjects did not have a fixed-term unit but had experienced a growth in teaching hours and staff requiring support, whereas other teachers in charge with a fixed-term unit taught subjects which had stayed constant or declined in teaching hours and staff requiring support.

[18] Mr Hegarty said that where this situation had been identified, the teacher in charge of subjects which had grown in teaching hours and staff requiring support would receive a fixed-term unit and the teacher in charge of subjects which had stayed constant or declined in teaching hours and staff requiring support would lose their fixed-term unit. In effect, the teachers in charge losing their units were Mr Thornley and Ms Brown. The applicants state that the College failed to comply with the surplus staffing and merger provisions of the Collective Agreement in removing the units.

[19] Apart from the fact that the respondent argues that no reorganisation took place to trigger the surplus staffing provisions, Mr Hegarty's evidence was that the surplus staffing provisions did not apply because:

- (a) The teachers (Mr Thornley and Ms Brown) were not appointed to positions to which permanent units were allocated;
- (b) No positions had been lost;
- (c) The total number of units available in the year in question was the same as in the preceding year; and
- (d) The number of MMAs were in fact higher.

[20] Mr Hegarty agreed in his oral evidence to the Authority that permanent units had not been taken away from any staff member during the review.

The collective agreement

[21] The current Collective Agreement for the period 2013-2015 sets out the base scales in accordance with which trained and untrained teachers are paid and also specifies that management units shall be paid at the rate of \$4,000 per annum. The parties confirm that the wording of the material clauses in relation to the allocation and removal of management units has not changed since 1999, although the clause numbering may have. I shall therefore quote from the current collective agreement for ease of reference.

[22] Clause 4.3 of the Collective Agreement deals with the allocation of units. Clause 4.3.1 provides, *inter alia*, as follows:

The employer, following consultation with its teaching staff, will determine the use of units. Up to 40% of the units may be allocated on a fixed-term basis.

[23] Clauses 4.3.4, 4.3.5 and 4.3.6 provide as follows:

4.3.4 At the time of allocating a fixed-term unit or units the employer shall specify either the period of time for which the teacher shall be entitled to that fixed-term unit or units, or the particular assignment or task to be undertaken for which that fixed-term unit or units has been allocated.

4.3.5 The entitlement to that fixed-term unit or units shall cease at the expiry of the specified period or on completion of the specified assignment or task.

4.3.6 The employer may reallocate to the same teacher a fixed-term unit or units for a further period of time or for a further particular assignment or task.

[24] Clause 4.3.9 provides as follows:

- 4.3.9 *Where a teacher appointed to a position to which unit(s) are allocated loses that position or has the position altered in status because of the application of the surplus staffing provisions of this agreement the salary protection arrangements of those provisions shall apply provided:*
- (a) *That where the allocation has been made on a fixed-term basis the period of protection shall be for the lesser of the term of the appointment agreed or for one year while the teacher continues to hold a position at the school; and provided also:*
 - (b) *That in no case shall the eventual salary reduction be to a rate less than would otherwise apply had the teacher not been appointed to a position to which unit(s) had been allocated. For the sake of clarity, any increments received or due in accordance with clause 4.2.3 or 4.3.7 or 4.3.8 above shall remain payable or due notwithstanding the teacher's reduction in status.*

[25] The surplus staffing and merger provisions are set out in clause 3.9 of the Collective Agreement. Material clauses are as follows:

3.9.1(a) Where, by reason of a reorganisation of, or a change in the attendance at, or the sale or transfer of, a school or centre; or by reason of the closure, or change of class of a school or centre an employer is required to reduce the number of teaching positions or to alter the status of positions to which units are allocated, the position(s) to be disestablished or altered in status shall be determined in accordance with the provisions set out in this part and in Appendix H. These provisions apply only to a teacher appointed as a permanent secondary teacher or a permanent manual training teacher in an approved manual training establishment.

[26] Appendix H of the Collective Agreement provides as follows:

Surplus staffing procedures

- 1.1 *Where a school is required to reduce staffing or alter the status of positions because of the operation of clause 3.9.1(a) of this agreement, the following procedures will apply:*
- (a) *The employer shall inform employees of the number of full-time teaching equivalent (FTTE) positions to be disestablished and the number of positions to which units are allocated to be altered in status.*
 - (b) *The employer shall attempt to meet any reduction required by the use of attrition. Attrition is the non-replacement of employees who die, retire, resign,*

transfer or are promoted. The employer will adopt a policy of reviewing vacancies when staff surpluses are expected to arise whereupon a partial or complete freeze will be placed on recruiting new permanent employees and/or promotions.

1.2 *Where the reduction in staffing or alterations in status of positions cannot be fully met by attrition, the following voluntary options, as defined in clause 3.9.4, will be made available to employees:*

- (a) *Supernumerary employment;*
- (b) *Retraining;*
- (c) *Long service payment*

provided that the employer shall not be bound to agree to any voluntary offer. The employer's decision shall be final. In the case of employees who are job sharing this clause will only apply where both employees volunteer for the options.

1.3 *Where the staffing reductions or alterations in status cannot be fully met by using attrition and voluntary options the remaining reductions or alterations shall be made in accordance with the following:*

- (a) *A detailed analysis of the school's current curriculum and pastoral needs and of the projected needs for the following year will be carried out after consultation with employees. The completed analysis will be made available to employees and the Association.*
- (b) *The employer after consultation with a nominee of the national executive of the Association will identify the basic scale teaching positions to be disestablished in accordance with the following guidelines in the order stated:*
 - (i) *The curriculum balance within the school and pastoral care considerations;*
 - (ii) *The tenure of the position(s) being considered; and*
 - (iii) *The duration of service in the school of employees holding any positions being considered.*

Note: *Trained beginning employees in their first year had absolute protection and their positions cannot be considered for disestablishment.*

- (c) [omitted]
- (d) *The employer after consultation with a nominee of the national executive of the Association will identify the positions to which units are allocated to be altered in*

status in accordance with the following guidelines in the order stated:

- (i) *The balance of the distribution of the units within the school and will take cognisance of the administrative curricular and pastoral needs of the school;*
- (ii) *Duration of service in the school of employees holding any positions being considered.*
- (e) *A teacher whose position is reduced in status shall have available the period of salary protection set out in clause 3.9.5(b).*
- (f) [omitted]

1.4 *A teacher whose position is to be disestablished or reduced in status shall be:*

- (a) *Notified of the change at least two months before the effective date of disestablishment or reduction; and*
- (b) *In the case of employees whose position is to be disestablished, notified of the options available in clause 3.9.3 and Appendix H of this agreement; or*
- (c) *In the case of employees whose position is to be reduced in status, notified of the options available in clause 3.9.5 and Appendix H of this agreement.*

1.5 *Re-establishment of positions which become available after the issuing of disestablishment notices:*

- (a) *When disestablishing positions or units in accordance with clause 1.3 above the employer shall determine and record the order of disestablishment.*
- (b) *If, as a consequence of roll change or staff changes following the issuing of notice(s) of disestablishment, one or more positions become available then, in the curriculum areas in which the positions have become available, the notice(s) of disestablishment shall be withdrawn in reverse order to the record of disestablishment.*

[27] It is the respondent's case that the surplus staffing and merger provisions contained in clause 3.9 and Appendix H of the Collective Agreement have not been triggered by the review of units that took place in 2011 as there was no *reorganisation* of the school.

The Issues

[28] The following issues need to be determined by the Authority:

- (i) Were the units allocated to Mr Thornley and Ms Brown permanent or fixed-term?
- (ii) Did the provisions at clause 3.9 and in Appendix H of the Collective Agreement apply to the review of units carried out by the College in 2011?
- (iii) If the answer to the question at (ii) above is in the affirmative, were the provisions complied with by the College?
- (iv) If they were not complied with, what remedies are the applicants entitled to?
- (v) Did the College act in bad faith in carrying out the reallocation exercise?
- (vi) Did the applicants suffer an unjustified disadvantage in their employment?

Were the units allocated to Mr Thornley and Ms Brown permanent or fixed-term?

[29] No letters were produced by the respondent relating to the allocation to Mr Thornley and to Ms Brown of the respective units in question, and it is conceded by the respondent that, although the units had been referred to as fixed term units during their employment on payslips, for example, the provisions of clause 4.3.4 of the Collective Agreement had not been complied with because the respondent had neither specified the period of time for which Ms Brown and Mr Thornley would be entitled to their units, nor the particular assignments or tasks that were to be undertaken for which the units had been allocated.

[30] It is Ms King's submission that this non-compliance means the unit allocated to Ms Brown and Mr Thornley must have been permanent units. However, I do not believe that the wording of clause 4.3.4 states that, for a unit to be fixed term, it is a necessary requirement that a period, assignment or task must be specified. What has

happened is that, if the units were intended to be fixed term, the provisions of clause 4.3.4 have been breached. That does not, in itself, necessary turn the unit into a permanent unit.

[31] However, clause 4.3.4 must be read in conjunction with clauses 4.3.5 and 3.4.6. Clause 4.3.5 makes clear that the entitlement to the unit must cease when the specified period has expired or the specified assignment or task has been completed. Clause 4.3.6 gives the employer the right to reallocate the fixed term unit to the same teacher for a further period of time or in relation to a further assignment or task.

[32] No periods, assignments or tasks were specified in respect of the units respectively allocated Mr Thornley or Ms Brown, and the corollary of this is that there was no way of either of them knowing when their units had to cease. In the absence of such a specified trigger point, the units must continue indefinitely until they are terminated in some other, lawful way. Furthermore, there was no *reallocation* to Ms Brown and Mr Thornley of their units by the respondent, presumably because nothing triggered that reallocation.

[33] In the absence of specified events triggering the cessation of the units under clause 4.3.5, the units were, logically, of indefinite duration. The Collective Agreement recognises no other types of unit other than fixed term or permanent units, and so, as the units in question were not fixed term and, furthermore, were indistinguishable from permanent units, which are also of indefinite duration, for all practical purposes, the units allocated to Mr Thornley and Ms Brown were permanent units.

Did the provisions at clause 3.9 and in Appendix H of the Collective Agreement apply to the review of units carried out by the College in 2011?

[34] I agree with Ms King that the starting point of the necessary analysis is clause 3.9.1(a), rather than 4.3.9 of the Collective Agreement as asserted by Mr Hall. Clause 3.9.1(a) is somewhat tortuously drafted, but it is possible to pick it apart. Clause 3.9.1(a) sets out what triggers the procedure to be followed when a teacher's position is to be disestablished or altered in status. The triggers are set out in two stages, as follows:

First there must be:

- a. a reorganisation of a school or centre; or
- b. a change in the attendance at a school or centre; or
- c. the sale or transfer of a school or centre; or
- d. the closure of a school or centre; or
- e. a change of class of a school or centre

and, second, there must arise from one of the above events a requirement on the employer to:

- f. reduce the number of teaching positions; or
- g. alter the status of positions to which units are allocated

[35] Ms King submits that there was a reorganisation of the College (the reorganisation of the way units were allocated) which gave rise to a requirement to alter the status of position to which units were allocated (by the removal of those units). The respondent strongly refutes this, saying that there was no surplus staffing position or merger in place at the time when the review of units took place and so clause 3.9 simply is not relevant.

[36] Whilst the review of the way that the units were allocated certainly resulted in a reorganisation of the unit distribution, I am unconvinced that it amounted to a reorganisation of the College itself. First, the day to day operation of the College involves a multitude of activities at all levels, and from time to time an established practice will be changed, resulting in a *reorganisation*. However, that will not necessarily be a reorganisation of the school itself. For example, one teacher may reorganise the way he or she dispenses homework in his or her class, or the time of the daily lunch breaks may be reorganised, or the day on which swimming lessons are given to year 10 may be changed. However, these would not constitute a reorganisation of the College itself. Similarly, I do not accept that the changes that resulted from the unit review constituted a reorganisation of the College itself.

[37] More significantly, the overall purpose of clause 3.9 must be taken into account when interpreting clause 3.9.1(a). It is to set out a detailed process when

there is a surplus staffing or merger situation. There was no such situation in 2011 when the unit review occurred.

[38] Finally, I do not need to decide whether there was a requirement to alter the status of positions to which units are allocated because this limb only becomes operative when one of the five triggering events in paragraph 34 (a) to (e) above had occurred. None had.

[39] Therefore, I do not accept that the surplus staffing and merger provisions of the Collective Agreement (including Appendix H) were relevant to the unit review that occurred in 2011. Accordingly, the respondent has not breached the terms of the collective agreement that was in operation at the time the unit review occurred.

Did the College act in bad faith in carrying out the reallocation exercise?

[40] The purpose of Mr Thornley producing a significant amount of further data after the first investigation meeting was to seek to demonstrate to the Authority that the rationale of the unit review that was explained by Mr Hegarty (to achieve a more even balance between and within the faculties based upon the subject hours taught in the faculty) has not been achieved, and so the respondent did not act in good faith. Mr Thornley's analysis was painstakingly done and, at first sight, when one reviews the spread of units across the seven faculties between 2008 and 2014, there does not appear to have been a convergence or averaging that one might expect if parity between the faculties had been achieved.

[41] However, I accept the evidence of Mr Hegarty that this analysis paints too simplistic a picture. First, the objectives of the use of salary units changed over the years, and whilst the main objective in 2011 was to address perceived disparities between staff, in later years it has been to help underpin the strategic goals of the College. Second, the criteria that were used in allocating units in 2011 were refined in later years as feed-back from faculty heads and staff has been taken into account.

[42] Having heard the evidence of Mr Hegarty, I accept that there was no intent to target Ms Brown and Mr Thornley for reasons of bad faith, and that the reason given at the time of the 2011 unit review, to even up perceived imbalances and to achieve transparency, was the genuine motivation for it.

[43] I also accept that the reasons for the units being taken away from Ms Brown and Mr Thornley were genuinely intended. In Ms Brown's case, in 2011, she held a curriculum unit and a MMA, taught 7 hours in the subject area in the senior school, had a reduction in her teaching hours but supported no other staff. By contrast, the teacher in charge of furniture in the same faculty held no curriculum unit (but had a MMA), taught 49 hours in the senior school, had no reduction in teaching hours and did support another staff member. For this reason, Mr Hegarty said, the curriculum unit was taken away from Ms Brown (but not passed onto the furniture teacher).

[44] In Mr Thornley's case, there was perceived to be a need to give MMAs to the classics teacher (because of an increase in demand for that subject) and the accounting teacher because of difficulties in recruiting and retaining someone to teach in a field which the College wished to grow for strategic reasons. Mr Thornley's unit was sacrificed to pay for these MMAs Mr Hegarty said.

[45] However, the evidence was inconsistent to a degree, which raises a concern about the process of consultation followed. First, Mr Hegarty was unable to show where Ms Brown's unit went, although he was sure that it did not go unallocated. Second, it appears that one curriculum unit is equal in value to four MMAs, but only one MMA was allocated (to the accounting teacher) in 2012, the classics teacher not getting one until 2013. Therefore, only one quarter of Mr Thornley's unit could be accounted for.

[46] Mr Hegarty surmised the units were used as project units. However I accept the evidence of Ms Brown and Mr Thornley that they were not told where the units went. This highlights a fundamental problem with the way that the consultation in relation to the unit review was conducted. Section 4 of the Employment Relations Act 2000 (the Act) provides as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(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.

(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

*(1C) For the purpose of subsection (1B), **good reason** includes—*

(a) complying with statutory requirements to maintain confidentiality;

(b) protecting the privacy of natural persons;

(c) protecting the commercial position of an employer from being unreasonably prejudiced.

[47] Whilst the subject matter of the unit review was not proposed or likely to have an adverse effect on the continuation of employment of one or more employees, the duty of good faith enshrined in s. 4 of the Act required a consultation process that gave the affected staff an opportunity to be informed about the proposed changes before they were implemented and to comment on them. The principles of consultation have been dealt with in a number of judgements of the Employment Court. One of the seminal cases is *Communications and Energy Workers' Union v Telecom NZ* [1993] 2 ERNZ 429, in which the Employment Court set out the following principles of consultation in the employment context (at page 455):

(1) The word "consultation" does not require that there be agreement.

(2) On the other hand it clearly requires more than mere prior notification.

*(3) If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views" (see *Port Louis Corp*).*

(4) This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.

(5) *The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: "they must be free to say what they think" (see Port Louis Corp).*

(6) *Consultation must be allowed sufficient time (McGechan J).*

(7) *Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade (McGechan J).*

(8) *Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus (McGechan J).*

(9) *Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done (McGechan J).*

(10) *The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh (McGechan J).*

(11) *There are no universal requirements as to form or as to duration of consultation.*

(12) *Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at agreement.*

[48] It is clear from the evidence that there was no consultation with Ms Brown or Mr Thornley about the specific proposals to remove their curriculum units in order to create a more equal disposition of remuneration units within the technology faculty, taking into account the furniture teacher (in Ms Brown's case) or to recognise a rising numbers of students in classics and a greater need in accounting (in Mr Thornley's case).

[49] It is not possible to say whether the outcome would have been the same if there had been proper consultation with Ms Brown and Mr Thornley. For example, Ms Brown may have been able to point to differences in her work compared to the furniture teacher which supported her retaining her unit. In the absence of knowledge that she was being compared to that teacher, though, she was deprived of that opportunity. Furthermore, Ms Brown should have been told into which area her unit would be reallocated, so she could make representations about that proposal.

[50] Similarly, Mr Thornley may have been able to have demonstrated that his subject area had an equal strategic importance as accounting, say. Again, in the absence of knowledge that his area was deemed to be less important strategically than accounting and that this was a criterion in deciding whether he kept his unit, he was deprived of that opportunity. Also, it is not clear where three quarters of his unit

went. He should have been told about where it was proposed to be reallocated so he could make representations.

[51] In summary, there has been a significant failure to act in good faith towards the two applicants due to the flawed consultation process that occurred.

Did the applicants suffer an unjustified disadvantage in their employment?

[52] First, I am satisfied that personal grievances were validly raised on behalf of both Ms Brown and Mr Thornley in respect of the removal of their units. Both only found out about the removal on 27 January 2012. Ms Robson raised a detailed personal grievance alleging, inter alia, unjustified disadvantage on behalf of Ms Brown by letter to Phil Robinson, the Chairman of the Board of Trustees, on 28 March 2012.

[53] Mr Thornley's position was raised by Ms Robson in a letter to Mr Robinson dated 29 March 2012. She stated that his loss of a management unit *was a copycat situation to that outlined at length in my letter referring to Carolyn Brown's circumstances*. I am satisfied that, in the circumstances, this reference by Ms Robson to Mr Thornley was, by reference to her previous letter relating to Ms Brown, sufficiently particularised to have enabled the respondent to have understood the concern being raised on Mr Thornley's behalf.

[54] Section 103A of the Act provides as follows:

Section 103A Test of justification

(1) 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 applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[55] First, I am satisfied that failing to have given Ms Brown and Mr Thornley a proper opportunity to comment on the proposed removal of their units, by way of a process in which they were informed of the respective rationales for the proposed removal of their units, and the proposed recipients of the reallocation of their respective units, caused each of them a disadvantage in their employment.

[56] Second, I am satisfied that the disadvantage caused to them was unjustified, in that no fair and reasonable employer could have failed to have properly consulted with the two applicants in all the circumstances.

Remedies

[57] The applicants seek orders that

- a. the units be reinstated to the applicants with effect from 27 January 2012,
- b. interest be paid on the sums that should have been paid since 27 January 2012,
- c. superannuation contributions be made in respect of the units (having been found to have been permanent units); and
- d. the applicants be each awarded \$5,000 in respect of humiliation, loss of dignity and injury to their feelings.

Reinstatement of the units

[58] Although I have found that there had not been a breach of the surplus staffing and merger provisions of the Collective Agreement, I believe that there has been a breach of clause 4.3.3, which provides:

Fixed-term units allocated for any reason will be paid in addition to the teacher's rate of pay, including any permanent units.

[59] This clause provides that permanent units are to be paid as part of the teacher's rate of pay. Therefore, the failure of the respondent to pay to Ms Brown and to Mr Thornley their permanent curriculum units since 27 January 2012 constitutes a breach of this contractual requirement. Accordingly, it is appropriate to order compliance pursuant to s137(1)(a)(i) of the Act, whereby the units are to be reinstated to the remuneration arrangements of Ms Brown and Mr Thornley respectively. The respondent should reinstate these payments by no later than 27 March 2015. Once reinstated, the applicants shall be entitled to continue to receive payments of the units until they are lawfully removed in accordance with the terms of any applicable collective agreement and the provisions of any applicable law.

[60] I note that clause 5.2.5 provides as follows:

5.2.5 Permanent Unit Holders

(a) The employer shall provide as a minimum the following non-contact time entitlement to each teacher allocated permanent unit(s) in addition to the non-contact time entitlements set out in 5.2.3 and 5.2.4:

(i) one hour per week for holders of one permanent unit;

[61] I believe that both Ms Brown and Mr Thornley have been entitled to at least one hour of non-contact time each week in any event, although, if not, the parties are directed to discuss ways that such a failure may be rectified.

[62] Section 131 of the Act provides

131 Arrears

(1) Where—

(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or

(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—

the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.

(1A) The Authority may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it.

(2) Subsection (1) applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.

(3) Subsection (1) does not affect any other remedies for the recovery of wages or other money payable by an employer to any employee under an employment agreement or a contract of apprenticeship.

[63] In accordance with s.131 of the Act I am able to order that arrears of the units removed from the two applicants be paid to them. On the question of whether these arrears should be paid for the whole of the period from the date of removal until the date of the reinstatement of the units, I note that clause 4.3.7 of the Collective Agreement refers, inter alia, to permanent unit holders who do not meet G3+ qualification and what happens if they lose their permanent units. The reference, in 4.3.7(c)(i) is to permanent units being lost *following competence review or if appointed to a position without permanent units*. No evidence has been provided to suggest that either Ms Brown or Mr Thornley has been subjected to an adverse competence review or have been appointed to (an alternative) position without a permanent unit.

[64] Therefore, there is no reason why the two applicants should not be regarded as having properly been entitled to payment of their units, which I find were permanent, since 27 January 2011 to the date of the reinstatement of those units.

[65] Incidentally, I note that the Collective Agreement provides at clause 4.9.1(c) that a teacher holding a permanent unit or units in terms of clause 4.3 is not entitled to receive the service increment provided for in clause 4.9. I am not aware if either Ms Brown or Mr Thornley has been in receipt of such a service increment, but if they have been the respondent will be entitled to make adjustments to the payment of arrears in accordance with this exception.

Interest

[66] Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause

of action arose and the date of payment in accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

(3) Subclause (1) does not authorise the giving of interest upon interest.

[67] Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes the rate of 5.0% per year for the purposes of section 87 of the Judicature Act 1908.

[68] Both Ms Brown and Mr Thornley have been deprived of the use of the money that their curriculum units provided since 27 January 2012. I have found that they were deprived of that money unjustifiably, and to their disadvantage. I find that it is appropriate to order the inclusion of interest, which is to be calculated at the rate of 5%, in respect of the period from 27 January 2012 until the arrears respectively owed to the applicants have been paid in full.

Superannuation contributions

[69] The applicants say that fixed term units are not treated as salary payments for superannuation purposes as they do not qualify for employer contribution. Permanent units do. This has not been contested by the respondents. Having found that the curriculum units allocated to Ms Brown and Mr Thornley were permanent units, the applicants are therefore entitled to be the benefit of the employer superannuation contributions that should have been paid on the payments.

[70] Section 142 of the Act provides that no action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose. Therefore, in respect of this arrears action, as the statement of problem was received by the Authority on 30 October 2013, the Authority cannot order payment of arrears of employer superannuation contributions for the period prior to 1 November 2007.

[71] Although the applicants have set out in the statement of problem what sums they say are due to them in respect of employer superannuation contributions, the respondent has not addressed these specific calculations. I therefore direct that the parties seek to agree what is owed to the applicants in respect of employer

superannuation contributions for the period from 1 November 2007. In the absence of agreement by 27 March 2015, the applicants may thereafter make an application to the Authority to determine the matter.

Compensation for humiliation, loss of dignity and injury to feelings

[72] Section 123(1)(c)(i) of the Act provides that, where the Authority has determined that an employee has a personal grievance, in settling the grievance it may provide for, inter alia, payment to the employee of compensation by the employee's employer, including compensation for humiliation, loss of dignity and injury to their feelings.

[73] Ms Brown's evidence was that the whole issue of the removal of her unit has left her feeling undervalued and underappreciated for the many years of dedication she has shown to the College. She reiterated her upset during her oral evidence to the Authority.

[74] Mr Thornley's evidence was that he felt that the removal of his unit constituted an innuendo that he was not fit for management positions, and that prevented him from applying for the position of deputy faculty head when it became available. He said he felt frustration and anger over what he saw as an injustice. This certainly came across during Mr Thornley's oral evidence during the first day of the Authority's investigation meeting.

[75] I am satisfied that both Ms Brown and Mr Thornley each suffered humiliation, loss of dignity and injury to their feelings as a result of the removal of their units and because of the way they were removed. It is not possible to closely compare the respective levels of their humiliation, loss of dignity and injury to feelings, but I am satisfied that each of them felt moderate levels of these effects. I am also satisfied that the sum of \$5,000 is an appropriate level of compensation for both Ms Brown and Mr Thornley.

[76] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[77] I am satisfied that neither Ms Brown nor Mr Thornley contributed in any blameworthy way to the situation that gave rise to their respective personal grievances. Accordingly, I decline to reduce the remedies awarded.

Orders

Ms Brown

[78] I order the following:

- a. That, by no later than Friday 27 March 2015, the respondent reinstate to Ms Brown one permanent curriculum unit in the sum of \$4,000 a year (or such other sum as may be agreed from time to time between the Secretary for Education and the New Zealand Post Primary Teachers' Association), which she is to retain until lawfully removed from her in accordance with the terms of any applicable collective agreement and the provisions of any applicable law;
- b. That the respondent is to pay to Ms Brown arrears calculated by reference to the curriculum unit that was removed from her for the period from 27 January 2012 until payment of the next instalment of the curriculum unit referred to in order (a) above;
- c. That the respondent is to include in the payment of the arrears referred to in order (b) above interest calculated at the rate of 5%, in respect of the period from 27 January 2012 until the arrears referred to in order (b) above have been paid to Ms Brown in full;
- d. That the parties seek to agree what is owed to Ms Brown in respect of employer superannuation contributions for the period from 1 November 2007. In the absence of agreement by 27 March 2015, Ms Brown may make an application to the Authority to determine the matter;
- e. That, if Ms Brown has been in receipt of a service increment pursuant to clause 4.9 of the Collective Agreement, the respondent will be entitled to make adjustments to the payment of arrears of the

curriculum unit in accordance with the exception at clause 4.9.1(c) of the Collective Agreement; and

- f. That the respondent pay to Ms Brown the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act.

Mr Thornley

[79] I order the following:

- a. That, by no later than Friday 27 March 2015, the respondent reinstate to Mr Thornley one permanent curriculum unit in the sum of \$4,000 a year (or such other sum as may be agreed from time to time between the Secretary for Education and the New Zealand Post Primary Teachers' Association), which he is to retain until lawfully removed from him in accordance with the terms of any applicable collective agreement and the provisions of any applicable law;
- b. That the respondent is to pay to Mr Thornley arrears calculated by reference to the curriculum unit that was removed from him for the period from 27 January 2012 until payment of the next instalment of the curriculum unit referred to in order (a) above;
- c. That the respondent is to include in the payment of the arrears referred to in order (b) above interest calculated at the rate of 5%, in respect of the period from 27 January 2012 until the arrears referred to in order (b) above have been paid to Mr Thornley in full;
- d. That the parties seek to agree what is owed to Mr Thornley in respect of employer superannuation contributions for the period from 1 November 2007. In the absence of agreement by 27 March 2015, Mr Thornley may make an application to the Authority to determine the matter;
- e. That, if Mr Thornley has been in receipt of a service increment pursuant to clause 4.9 of the Collective Agreement, the respondent will be entitled to make adjustments to the payment of arrears of the

curriculum unit in accordance with the exception at clause 4.9.1(c) of the Collective Agreement; and

- f. That the respondent pay to Mr Thornley the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[80] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. In the absence of agreement by Friday 27 March 2015, any party seeking a contribution towards their costs is to serve and lodge a memorandum setting out the level and basis of the costs sought by no later than Friday 17 April 2015, and the other party may serve and lodge any response by no later than Friday 1 May 2015.

David Appleton
Member of the Employment Relations Authority