IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 65
5579400

	BETWEEN	VICE CHANCELLOR AUCKLAND UNIVERSITY OF TECHNOLOGY Applicant
	AND	TERTIARY EDUCATION UNION TE HAUTU KAHURANGI O AOTEAROA Respondent

Member of Authority:	Vicki Campbell
Representatives:	Kathryn Beck for Applicant Peter Cranney for Respondent
Investigation Meeting:	On the papers
Submissions Received:	18 and 29 January 2016 from Applicant 26 January 2016 from Respondent
Determination:	2 March 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute over the operation, application and interpretation of a collective agreement. By agreement between the parties I have determined this matter on the papers and submissions received by the Authority.

[2] As permitted by section 174E of the Employment Relations Act ("the Act") this determination has not recorded all submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specific orders made as a result.

Background

[3] The Vice-Chancellor of the Auckland University of Technology ("AUT") and the Tertiary Education Union Te Hautu Kahurangi O Aotearoa ("TEU") are parties to a collective agreement dated 1 July 2013 to 30 June 2015.

[4] On 11 June 2015 AUT advised TEU of a proposal to undertake an organisational change and commenced consultation about the proposal. The proposal included proposed selection criteria against which employees would be selected into roles.

[5] During the consultation process a dispute arose over the interpretation of Part 10 of the collective agreement. Part 10 deals with organisational change in the following terms:

> **10.1 Consultation**
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> 10.1.1 Employer recognises the potential impact of significant organisational change in the work lives of Employees and seeks to minimise any negative effect of change through appropriate processes of consultation.
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> Accordingly, the Employer will notify in writing the National Secretary of TEU, the President of the local branch of TEU and affected Employees of any reviews, including mergers and amalgamations.
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> 10.1.2 The National Secretary of TEU, the President of the local branch of TEU and affected Employees will be notified in writing by the Employer of any reviews of the University's organisation structure or function, which may result in significant changes to either the structure, staffing or work practices affecting existing Employees.
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> 10.1.3 A minimum of one month will be provided to allow TEU and affected Employees to make submissions which will be considered by the Employer before making a final decision. The parties may agree to a lesser period. The one month's notice in Clause 10.1.3 will exclude the following university breaks; the summer holiday break (15 December to 31 January), - and any periods of time where the Faculty or School under review has scheduled a default leave week/s.
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> The Employer will provide the union with an opportunity to be involved in any review. The Employer will take all practicable steps to provide relevant information requested by TEU.
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> …
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> **10.3.2 Surplus Staffing**
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> A surplus staffing situation exists when as a result of reduction in funding, course demands, organisational changes or other identified factors the Employer requires a reduction in the number of Employees. …

10.3.3 Identification of Surplus Staffing

(a) In the event that a review of the University's organisation structure or function, following consultation as provided for in clause 10.1, results in a surplus staffing situation, the Employer shall advise in writing individual Employees who might be affected and shall also advise such Employees of their right to assistance from TEU.

(b) The process and/or criteria for determining the specific positions which are to be declared surplus to requirements shall be determined by the Employer following consultation with TEU.

[6] The remainder of Part 10 then deals with notice to directly affected employees and sets out the options available to them.

[7] The parties have had a number of similar disputes over the application, operation and interpretation of Part 10. AUT wishes to ensure it complies with the terms of the collective agreement and has applied to the Authority for a determination on the interpretation of the disputed aspects of Part 10 for guidance in future organisational change situations.

Issues

[8] The issue for determination is whether the consultation referred to in clause 10.3.3(b) may occur as part of the consultation referred to in clause 10.1.3.

The Law

[9] The principles applying to the interpretation of collective agreements were recently summarised by the Employment Court in *Tertiary Education Union v Vice Chancellor University of Auckland*[1]:

> The interpretative exercise is directed at establishing the meaning the parties to the agreement intended the words in dispute to bear.
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> The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context. If the words are ambiguous the inquiry will similarly move to an assessment of relevant facts and circumstance. This part of the process is directed at ascertaining the meaning of the words when read contextually.
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> The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made. It follows that dislodgment of an apparently plain and ordinary meaning may occur when such a meaning would lead to a nonsensical result, whether because it defies commercial common sense or otherwise.

[1] [2015] NZEmpC 169.

> Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.
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> An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which the agreement was entered into. Evidence of post contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear. Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.[2]

Position of the parties

[10] AUT submitted that the natural and ordinary meaning of the words of the collective agreement allows for consultation about the selection criteria to occur at the same time as the consultation set out in clause 10.1.

[11] AUT submitted that if it proposes a review of a faculty or school that may result in significant changes to staffing, it must logically identify the potentially affected positions as part of this notification. Otherwise, the TEU and affected employees would not have sufficient information to enable them to make meaningful submissions during consultation.

[12] AUT says that this indicates the consultation under clause 10.1 and the consultation under clause 10.3.3(b) may occur concurrently. In AUT's submission meaningful consultation about a potential surplus staffing situation cannot occur without including consultation about the process and criteria for determining the positions affected.

[13] AUT argues that clause 10.1.3 provides for a "final decision" to be made after the consultation. The use of the words "final decision" implies that consultation will be complete after the process referred to in clause 10.1.3 with no further consultation required including any consultation under clause 10.3.3(b) which should occur before notification of a "final decision".

[14] TEU argues that the clauses set out in Part 10 provide for a standard process for consultation about organisational change and allows for a two part consultation process. The first part of the consultation process is about whether the proposal to make changes to the organisational structure should proceed or not. The second part

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[2] Ibid at [5] to [8].

of the consultation process is about how the effects of the decision are to be dealt with.

[15] TEU says that the consultation requirements set out in clauses 10.1 and 10.3.3(b) are separate obligations and cannot occur concurrently. TEU argues that the consultation right set out in clause 10.1 is conferred on the union as well as affected employees while the consultation right set out in clause 10.3.3(b) is conferred on the union only.

Determination

[16] The organisational change set out in the proposal presented to the affected employees and the TEU in June 2015 included a proposal to disestablish six positions and establish three new positions in the Law Faculty. The proposal also included the proposed criteria to be used to select the employees who would potentially be declared redundant. The inclusion of these factors in the proposal documents was sensible given that AUT were consulting not only with TEU and its members, but also employees who were not covered by the terms of the collective agreement and therefore not covered by any further consultation requirements set out in the collective agreement.

[17] Setting out the proposed selection criteria also provided valuable information which would assist those affected by the change proposal to consider what, if any, feedback they would proffer to AUT on the change proposal.

[18] Informing the interpretation of the disputed clause 10.3.3(b) is clause 10.3.2 which defines when a surplus staffing situation will exist. A surplus staffing situation will exist only as a result of a reduction in funding, course demands, organisational changes or other identified factors requiring a reduction in the number of employees. In this case AUT was undertaking a significant organisational change.

[19] To identify when a surplus staffing situation exists, AUT must have made a decision about whether to implement the proposed organisational change. The wording in clause 10.3.2 provides for a surplus staffing situation to exist only after the employer has identified that it "…*requires a reduction in the number of Employees*." [my emphasis]

[20] The final decision to implement the proposed changes must have been made before AUT can be said to "require" a reduction in the number of employees. Until

the final decision is made to implement the change a reduction in staff numbers is only a proposal and cannot be said to be a requirement.

[21] It follows that clause 10.3.3 only becomes operative when AUT has a surplus staffing situation which only occurs once it has decided it requires a reduction in staff numbers. That decision can only properly be made after a period of consultation about the proposed change. This is supported by the words used in clause 10.3.3(a) which requires AUT to notify employees who might be affected "…*after the consultation process provided for in clause 10.1 results in a surplus staffing situation*". [my emphasis]

[22] It is only after AUT has decided a surplus staffing situation exists that clause 10.3.3(b) also comes into play. Clause 10.3.3(b) requires consultation between AUT and the TEU (but not others) about the "…*process and/or criteria…*" for determining the specific positions which are to be declared surplus.

[23] AUT has argued that the consultation requirement about the process and criteria for determining the specific positions which are to be declared surplus can be done concurrently with the consultation about the change proposal. I do not agree. The wording of the collective agreement requires consultation about the process and or criteria after the final decision about the proposed change and a surplus staffing situation exists.

[24] Part 10 of the collective agreement sets out a sequential flow of events. Firstly a change proposal is to be subject to consultation following which a final decision on the proposal will be made. If the final decision requires a reduction in the number of employees, a surplus staffing situation will exist. At that point individual employees are notified that they might be affected by the change and that they are entitled to seek assistance from TEU and AUT is to consult with TEU as to the criteria and/or process for determining the specific positions which are to be declared surplus. Once the specific positions have been identified affected employees are notified in accordance with the provisions of the remainder of Part 10.

Costs

[25] Costs are reserved. As this involves a dispute I am of a mind to let costs lie where they fall. However, the parties are invited to resolve the matter. If they are unable to do so TEU shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. AUT shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority