

**Attention is drawn to the Order Prohibiting
Publication of certain information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 225
3066412

BETWEEN	DR SALLY LARK Applicant
AND	THE VICE-CHANCELLOR OF MASSEY UNIVERSITY Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Cranney, counsel for the Applicant
Hamish Kynaston and Louise Grey, counsel for the
Respondent

Investigation Meeting: 21 November 2019 at Wellington

Submissions Received: On the day, orally and in writing from both parties

Date of Determination: 10` June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Sally Lark was a senior lecturer in the School of Sport, Exercise and Nutrition based at Massey University's Wellington campus until her position was disestablished with effect from 24 May 2019. Dr Lark claims her employer did not adhere to the binding provisions of the applicable collective agreement and her dismissal for redundancy was unjustified. She seeks reinstatement, lost wages, compensation and costs.

[2] The Vice-Chancellor of Massey University (Massey) denies Dr Lark was dismissed unjustifiably. Massey says Dr Lark's position was disestablished following a genuine and fair change process and that it acted both in good faith and fairly and reasonably throughout, in accordance with its collective agreement with the Tertiary Education Union (TEU).

[3] In the course of the Authority's investigation, references were made to a number of Massey employees who were not part of the investigation. To protect the privacy of those employees, I made a non-publication order prohibiting the publication of the names or identifying details of employees who were part of the restructuring process referred to in this determination. The order includes members of the reconfirmation panel.

Background

[4] Dr Lark was employed by Massey as a Senior Lecturer from 2008 until the termination of her employment for redundancy in May 2019. She was located on Massey's Wellington campus in the School of Sport, Exercise and Nutrition (SSEN or the School).

[5] In November 2018 Massey initiated a restructure of SSEN, which employed staff on the Auckland and Manawatu campuses as well as Wellington. Massey's proposal entailed consolidating the School in Manawatu and Auckland and discontinuing its presence in Wellington. It also included disestablishing all positions below Professor/Associate Professor on the Wellington and Manawatu campuses. Four new Lecturer/Senior Lecturer positions to be based on the Manawatu campus were to be established.

[6] Massey wrote to Dr Lark on 14 November 2018 notifying her of the proposal and informing her that the reconfirmation provisions of the CA would apply. Massey advised Dr Lark:

As there are currently 7.8 FTE spanning across the range, it is proposed that these positions would be filled through a contestable, reconfirmation process as set out in the restructuring/redundancy provisions of your employment agreement.

[7] Following its initial consultation process, Massey informed Dr Lark of its preliminary decision on 5 February 2019. This included advice that, contrary to its earlier letter, the reconfirmation provisions did not apply to her situation. Massey's letter to Dr Lark advised her:

... the previous reference to a contestable reconfirmation process would only apply in respect of the Manawatu based positions, where five ongoing, full time senior lecturers and one lecturer would compete (through a reconfirmation selection process) for the remaining four senior lecturer/lecturer positions. ... For clarity, therefore, as your position is Wellington based you would not be eligible to compete through a contestable reconfirmation process for the reduced number of senior lecturer/lecturer positions on the Manawatu campus.

[8] Massey invited Dr Lark to consider the content of the preliminary decision document and provide her views in response to the changes it had proposed. In its statement in reply, Massey characterised its initial advice to Dr Lark regarding her participation in the reconfirmation process as having been made “in error”.

[9] Dr Lark provided her comments, which included her observation that there were no legal grounds to exclude her eligibility to apply for reconfirmation positions. She referred specifically to the clause of the CA containing the criteria for reconfirmation that, in her view, included her.

[10] Professor Jane Mills, Pro-Vice-Chancellor of Massey, responded to Dr Lark’s feedback on 25 February 2019. In relation to Dr Lark’s comments on her eligibility for reconfirmation, Professor Mills’ response included the following:

Although the employment agreements (MUCEA and MUIEA) do not specifically provide, reconfirmation does not apply across the University’s three campuses (being that they are in three different cities), i.e. it has only ever been applied to staff where there is a reduction in the number of like-positions on the same campus/city.

If the University had two campus locations in the same city, e.g. Auckland Central and Albany, then reconfirmation would apply. And as much as we cannot force people to take up an alternative position on another campus and city (supported by employment case law), we cannot permit staff on one campus to compete with affected staff on another campus for a reduction in the number of like-positions on that campus.

Furthermore, if reconfirmation did happen to apply across campuses, should a Wellington staff member choose not to apply for reconfirmation to a position based in Palmerston North, they would be forced to resign their employment under subclause 8.5.4.4 of the MUCE/IEA and would not be entitled to redundancy compensation. We would see this as being a very unfair situation, and is a further reason why reconfirmation does not apply across Massey’s three campuses.

[11] Massey released its final decision on the SSEN review on 27 February 2019. This confirmed its preliminary proposal. In relation to the Manawatu campus positions that were open for affected staff to apply for, the review decision noted:

No decisions or predetermination has been made around appointments to the reduced number of senior lecturer/lecturer positions on the Manawatu campus. The contestable reconfirmation will follow a very strict and structured selection process overseen by People and Culture. The strongest candidates would be confirmed into the remaining positions.

[12] Professor Mills wrote to Dr Lark the same day, conveying Massey's decision. She notified Dr Lark that the position of Senior Lecturer on the Wellington Campus would be disestablished with three months' notice, starting that day, 27 February 2019. Professor Mills said the options for surplus staffing situations contained in Part 8 of the CA were now applicable. She noted, however:

As there are no available positions the same, or very nearly the same, as your current position within the School on the Wellington Campus, reconfirmation under section 8.5.4 of your employment agreement is not an option available to you.

[13] Dr Lark's employment ended on 24 May 2019 and she raised a personal grievance on 12 April 2019.

[14] The parties have attended mediation but have not been able to resolve the matter.

The collective agreement

[15] Dr Lark was a member of the TEU and employed on the terms of the Massey University Collective Employment Agreement (the CA).¹ Part 8 of the CA provides the applicable restructuring/redundancy provisions, parts of which are replicated below:

8.5 Options

When a surplus staffing situation exists, the Employer will consult with the affected employee(s), and the employee's Union (or other authorised representative) if the employee so wishes, on which of the following options may apply, and how it will be applied. The aim of this consultation is to endeavour to reach agreement.

8.5.1 (not applicable)

¹

1 July 2017 to 30 June 2019.

8.5.2 Managed attrition

The Employer may operate a policy of managed attrition either within a particular affected work situation or across the wider organisation. The intention of managed attrition is to minimise the number of employees affected by change. The parties recognise that managed attrition itself can have an effect on employees and their ability to meet university objectives. The policy will be regularly reviewed by the Employer to address organisational and operational issues.

8.5.3 Reconfirmation/redeployment

The employer may either reconfirm the employee in the same or similar position, or redeploy the employee to an alternative position to which s/he is suitable. This may include placement to a suitable position in an existing agency or in a new structure or agency established as part of the restructuring.

8.5.4 Reconfirmation

8.5.4.1 The criteria for reconfirmation shall be as follows:

- (a) The new job (description) is the same (or very nearly the same) as what the employee currently does; and
- (b) The salary and the full time equivalency (FTE) for the new position is the same; and
- (c) The new position has terms and conditions of employment (and including career prospects) which are no less favourable;

8.5.4.2 Where the employee's position is to be transferred into a new structure and/or the above criteria is met, and where there is only one employee who is a clear candidate for that position, then that employee is to be confirmed in it.

8.5.4.3 In situations where there is more than one affected candidate, the employer will consult with the potential candidates to reach agreement on which of the following options will apply:

- (a) If there is a clear preference among potential candidates to use other options under this Agreement, they may present a proposal to the employer setting out which candidate(s) would transfer into the new positions as they are proposed by the employer. The employer's agreement to such a proposal may be reasonably withheld where the proposal would prevent the employer retaining a viable skill and experience base within the new structure. Where the employer does not agree to the proposal, the reasons why the proposal would prevent the retention of a viable skill and experience base within the new structure will be provided to the potential candidates in writing, and they shall have an opportunity to

respond, and have their responses considered, before a final decision on the proposal is made; or

- (b) The position will be advertised among the affected employees, with appointment made as normal University appointment procedures.

8.5.4.4 For those employees who meet the criteria and do not wish to be reconfirmed the only option available will be resignation.

8.5.4.5 Where the employee's position is to be transferred to another campus and meets the criteria for reconfirmation as set out in 8.5.4.1, the position shall be offered as a reconfirmation under the provisions set out in 8.5.4.2 and 8.5.4.3 (whichever applies). The staff member may, in reconfirmation on transfer circumstances only, elect not to be reconfirmed and remain eligible to access the remaining provisions in Part 8 of this Agreement including redundancy. This provision will not apply in the case of a transfer between the Turitea and Hokowhitu sites within the Manawatu campus.

8.5.4.6 Where the employee accepts the offer of a reconfirmation on transfer, assistance with transfer, and the employee would incur extra travel costs as a result, expenses shall be provided in accordance with Appendix B.

...

The Authority's investigation

[16] I have not set out a record of all the evidence received nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of Dr Lark's claims in accordance with s 174E of the Act.

[17] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[18] The issues for determination are:

- (a) Whether the reconfirmation provisions of the CA were applicable to Dr Lark;
- (b) Whether Dr Lark's dismissal was unjustifiable;
- (c) If so, what remedies should apply.

Do the reconfirmation provisions apply?

[19] The Supreme Court in *Affco New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Incorporated*² confirmed that the essential approach to the interpretation of employment contracts is that which it described in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.³

[20] The Supreme Court also recently observed that:

Contractual interpretation invites a common sense approach to the task of assessing what the parties intended by the words, objectively assessed.⁴

[21] Submissions made on behalf of each of the parties brought different interpretations as to the applicability of the reconfirmation provisions of the CA to Dr Lark’s situation. Mr Cranney submitted on Dr Lark’s behalf that, although the CA distinguished between academic and general staff, it had no campus-specific provisions. It specifically provided, however, for rules, regulations, policies and procedures that applied pan-university.

[22] In Mr Cranney’s submission the focus of the restructuring/redundancy provisions was the University, not the campus. In his analysis of those provisions, Mr Cranney highlighted that clause 8.5.2, which referred to managed attrition, emphasised the pan-university approach and clause 8.5.3 made clear that there was no geographical limitation on reconfirmation in a “same or similar position”.

[23] With clause 8.5.4.1, Mr Cranney observed that the three criteria identified for reconfirmation in that clause contained no hint of any exclusion of positions in other campuses. He submitted that, if the three criteria were met, an employee must either accept reconfirmation or resign, but noted that there was an important exception to that rule. This was that if the position was on another campus it could be declined.

² [2017] NZSC 135.

³ [2014] NZSC 147 at [60].

⁴ *127 Hobson Street Limited v Honey Bees Preschool Limited* [2020] NZSC 53 at [94].

[24] Mr Cranney submitted this emphasised that employees were entitled to be offered reconfirmation on another campus and to transfer thereto. The inclusion of clause 8.5.4.6, which expressly provided for transfer expenses to those reconfirmed in a position at another campus, provided further support in his submission for Dr Lark's eligibility under the CA to enter the reconfirmation process.

[25] Mr Kynaston, for Massey, submitted that Dr Lark did not meet the criteria for reconfirmation, as set out in clause 8.5.4.1 of the CA. Firstly, Dr Lark's job description specified the Wellington campus as her place of work, whereas the Manawatu positions and job description required the employees to work on the Manawatu campus.

[26] In Mr Kynaston's submission, that was an important and substantial difference. He noted it was well established that location was a defining element of the job and that Dr Lark's job was to lecture on the Wellington campus. He further submitted the Manawatu positions belonged to other employees and Massey could not lawfully have taken one of those away to give to Dr Lark. Massey's view was that it was neither obliged, nor permitted, to include Dr Lark in the reconfirmation process.

[27] The Manawatu positions were in a different (and distant) city and therefore not the same as, or similar to, Dr Lark's position. The third criterion of reconfirmation required the new position to have terms and conditions of employment (including career prospects) that were no less favourable. In Mr Kynaston's submission it could not be said that relocating her position from Wellington to Manawatu would be "no less favourable" to Dr Lark. Mr Kynaston, citing *Waikato District Health Board v Archibald*,⁵ which in turn cited *Carter Holt Harvey Ltd v Wallis*⁶ stated that the test was an objective one:

Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment? Each case is fact dependent. That means that only limited assistance can be gained from reference to earlier cases.

[28] Mr Kynaston observed Dr Lark had lived and worked in Wellington for over ten years and that the Wellington and Manawatu campuses were over two hours' drive from one another, which would entail a daily commute of over four hours for the return trip. He submitted that, while Dr Lark may have chosen instead to relocate, or to commute on a

⁵ [2017] NZEmpC 132 at [39].

⁶ [1998] 3 ERNZ 984, 995.

weekly or other basis, the outcome, viewed objectively, was less favourable than continuing to live and work in Wellington.

[29] I accept that submission. Regardless of whether or not Dr Lark was prepared to commute or relocate, on an objective view it could not be said that the terms and conditions of the new positions on the Massey Manawatu campus were no less favourable than those Dr Lark enjoyed in her position on the Wellington campus where no such significant commute or relocation was involved.

[30] I have considered, but reject, the submission made on behalf of Dr Lark regarding the relevance of clause 8.5.4.5. That clause provides that an employee may reject reconfirmation where her/his position is being transferred to another campus without forfeiting eligibility for the other restructuring/redundancy provisions of the CA. I do not find that clause relevant to Dr Lark as her position was not transferred to the Manawatu campus: it was disestablished when Massey closed the School on the Wellington campus.

[31] The wording of clause 8.5.4.1 of the CA makes clear that all three of the specified criteria must be met for reconfirmation to apply. The “and” at the end of subclauses (a) and (b) permits no other interpretation. Dr Lark considered that she met all three criteria. In Massey’s view she failed to meet two of the three criteria.

[32] After considering the evidence and the submissions of the parties, I find Massey was justified in concluding that Dr Lark was not eligible for reconfirmation to one of the four positions available on the Manawatu campus. While Mr Cranney’s submissions on the pan-University approach were initially appealing, I find that Dr Lark does not meet all three of the required criteria for reconfirmation specified in clause 8.5.4.1. That being so, the reconfirmation provisions were not available to her in relation to the new positions on the Manawatu campus.

[33] It was not disputed by Dr Lark that there were no positions available for reconfirmation on the Wellington campus. Accordingly, I find the termination of Dr Lark’s employment for redundancy was justified.

Summary

[34] Massey was correct in concluding Dr Lark did not meet the criteria for reconfirmation specified in the CA. Her claim to have been unjustifiably dismissed fails.

Costs

[35] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority