IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 676
3200639

	BETWEEN	TERTIARY EDUCATION UNION Applicant
	AND	VICE CHANCELLOR AUCKLAND UNIVERSITY OF TECHNOLOGY Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell KC and Peter Cranney, counsel for Applicant
	Paul Wicks KC and Bridget Smith, counsel for Respondent
Investigation meeting:	15 December 2022
Determination:	19 December 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Tertiary Education Union – Te Hautū Kahurangi o Aotearoa – (TEU) was granted by the Authority a priority hearing of an application for compliance orders. These are sought against the Vice Chancellor Auckland University of Technology (AUT).

[2] TEU and AUT are parties to a collective employment agreement (the CEA) covering academic and associated staff members. Part 10 of the CEA, which provides

for organisational change, sets out what is to happen when such change results in a surplus staffing situation.

[3] Part 10 allows several options. They include severance and voluntary severance, but with the rider that severance is to be avoided where possible.

[4] From the beginning of September 2022, the university embarked on achieving organisational change. This was considered necessary because of the impact the Covid Pandemic had on revenue from international students and funding from central government. By reducing staff numbers, AUT aimed to lower its costs by $21M or more.

[5] AUT concluded that the necessary changes would result in a surplus of staff.

[6] The scale is unprecedented for AUT. As well as academic staff who are members of the TEU and represented by their union in this application, many others are affected or likely to be. In total, some 170 academic staff positions were regarded as affected. After AUT offered academic staff the opportunity to apply for voluntary severance 90 were selected, leaving 80 positions to be disestablished.

[7] On 1 December 2022 the university notified affected academic staff of the termination of their employment by severance from 1 February 2023.

[8] The staff cuts are wide and deep. Academic staff are often highly qualified in their field and over time they have accumulated considerable skills and experience to enable appointment to the positions held. In some cases, the opportunities severed staff have for re-employment in Auckland or even in New Zealand will be limited by the specialist nature of the teaching and research they have been employed in, and by the relatively small number of tertiary institutions in New Zealand with positions similar to those the staff had with AUT.

[9] Reorganisation has caused consternation and anxiety among affected academic staff. As well as having vocation and income affected, some may have to relocate their homes and families to another part of New Zealand, or even another country. Some may have to change occupation altogether.

The issues between TEU and AUT

[10] TEU's application for compliance orders is based on a claim by the union that provisions in Part 10 relating to surplus staffing, have not been observed by AUT in the way the parties intended under the CEA.

[11] In particular, TEU contends that AUT has, (i) not determined specific positions which it had identified as surplus and, (ii) not called for voluntary severance of the employees potentially affected (once specific positions have been identified).

[12] Relevant to issue (i), clause 10.3.2(b) of the CEA requires AUT, after consultation with TEU, to determine the process and/or criteria for deciding the 'specific positions' to be declared surplus.

[13] Relevant to issue (ii) clause 10.3.3, the next provision after clause 10.3.2(b), is expressed in its introductory words to apply 'once specific positions have been identified as surplus'. Clause 10.3.3(i), requires AUT to call for voluntary severance from the employees potentially affected.

[14] AUT contends that the requirements of clauses 10.3.2 and 10.3.3 have been met.

Criteria for determining specific positions

[15] A third issue raised by TEU is in relation to the criteria for determining which specific positions were to be declared surplus. After hearing submissions, it did not seem to the Authority this was an issue required to be addressed by the remedy of compliance sought in this application.

[16] The 'utilisation' criteria developed by AUT, and the way it may have been applied to individual employees, in principle is reviewable under the personal grievance remedy. Although TEU does not accept the utilisation criteria as appropriate for addressing the surplus staffing situation, the evidence before the Authority did not indicate any failure by AUT to consult TEU before the criteria was determined, or any developmental failure, so that a compliance order should be considered.

[17] The relevant provision of Part 10 – clause 10.3.2 (a) – indicates that AUT has a wide discretion in determining the criteria to be applied when identifying specific

positions to be declared surplus to requirements. Consultation with TEU is an express requirement, but at the same time the law is clear that to discharge a requirement to consult, the agreement of the consulted party does not need to be obtained.

What is a 'specific position'

[18] TEU and AUT have different views as to the meaning of this term where used in Part 10 of the CEA.

[19] As a general observation, the CEA, because of the nature of it and in common with all CEAs, is fundamentally about the terms and conditions under which employees are to work for an employer. It is a person-centric contract.

[20] 'Employee' appears throughout Part 10, whose opening words at clause 10.1.1 refer to

> …… the potential impact of significant organisational change in the work lives of Employees……

Part 10 is a scheme

[21] In examining Part 10, the Authority accepts that its provisions are designed as a scheme intended to be a sequence of essential steps to be taken when organisational change occurs.

[22] This was the determination given in 2016 by the Authority in a dispute (also between AUT and TEU)[1]. The Authority found[2]; … 'part 10 sets out a sequential flow of events'.

[23] Part 10 does not expressly define the term 'specific position'.

[24] From clause 10.3.2(b) of Part 10, it is clear to the Authority that specific positions become identifiable once criteria for that purpose have been determined and applied.

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[1] [2016] NZERA Auckland 65, Member Campbell
[2] Para [24]

[25] AUT contends that specific positions were identified on 22 November 2022, when academic staff were notified of roles, by reference to the ranks of Lecturer, Senior Lecturer, Associate Professor and Professor, together with the numbers of each role across four particular faculties.

[26] AUT submits ‘specific positions’ is a more general term than personal roles and it is sufficient to identify the positions by faculty and rank.

[27] The Authority does not agree and concludes that an essential component for identifying ‘specific positions’ is the employee, being the person or individual who is the current position holder, or present appointee to a position. That detail is part of the specificity required in identifying positions.

[28] The Authority finds that the scheme and purpose of Part 10, viewed in conjunction with the statutory requirements of good faith in the employment relationship, and particularly the requirements to be responsive and communicative, and to impart information, requires that employees affected or potentially affected should be told who they are as soon as possible, whenever Part 10 is invoked. Specific positions should not be identified as empty or bare of a person occupying them.

[29] Moving with the sequential flow of Part 10, it is at clause 10.3.2(b) where positions are to be identified by names of employees holding them.

[30] The Authority agrees with TEU that potentially affected staff are not the people selected for redundancy but are staff who hold positions that could be determined surplus. That occurs when the selection criteria have been established and are applied, which is the sequential step to be taken to identify ‘specific positions’.

[31] The Authority finds AUT breached the CEA in this regard.

Calls for voluntary severance

[32] The impact of severance on employees may possibly be lessened where the option of voluntary severance is available and is accepted by AUT.

[33] Once staff were found by AUT to be in selected positions, those potentially affected should have been given the opportunity of applying for voluntary severance,

as required by clause 10.3.3(i) of the CEA. Instead, the opportunity was offered before the selected positions had been identified, or before individual staff knew they had been selected.

[34] The first call to employees potentially affected was made on 18 November 2022. It was to all members of the academic workforce whose positions had been indicated as within the scope of proposed staffing changes.

[35] The Authority finds that when the first call was made specific positions had not been identified with reference to the name of any staff member holding a particular position.

[36] Second and third calls were made on 22 and 23 November. Specific positions had not been identified at the time of the 22 November call. On 23 November the call was made to named employees whose positions had been identified as potentially surplus to requirements.

[37] The first two calls were responded to by 76 employees in total, with 56 being accepted for voluntary severance. A further 24 applications were received from 23 November 2022. All were accepted.

[38] A total of 80 voluntary severance applications were accepted. AUT's evidence was that this meant that notice had to be given to 90 employees rather than 170, the intended number of staff to be reduced.

[39] The evidence of Mr Sean Williams, AUT's Director of Employment Relations, was that in deciding whether to apply or not for voluntary severance it should not have made any difference to employees whether they knew their position could be potentially affected or not. That may be true in some cases and not in others, but in any event does not match the way the CEA intended calls for voluntary severance to be made.

[40] The Authority upholds the claim of TEU that the calls for voluntary severance were not made as intended and required under Part 10. There was a breach of the CEA by AUT in this regard.

[41] Evidence showing that the breach had a material effect on the outcome of any of the 1 December severance letters being sent, is not required and may not be able to

be obtained after the event. The fact is that in a matter of critical importance, especially to the employees who received the 1 December letter, provisions of the CEA had not been observed as AUT and TEU had agreed they would be to achieve the objectives they wanted.

[42] The Authority finds it is necessary and just that AUT should be asked to go back and follow the CEA correctly.

Orders

[43] The Authority has upheld the TEU in its claim that the CEA was breached. In principle therefore a compliance order may be given under s 137 of the Employment Relations Act 2000 (ER Act).

[44] The Authority accepts that staff notified of severance on 1 December will not be severed until a two-month notice period has expired early next year on 1 February 2023. While the staff remain employed, Part 10 is still capable of being applied without having to attempt to recall severed staff to employment.

[45] AUT can in principle now be ordered to identify specified positions before offering the opportunity of voluntary severance. This will require a suspension or withdrawal of the notice given to staff on 1 December.

[46] The Authority does not accept that this will be impracticable or pointless or too difficult. What may be difficult is trying to work backwards to estimate the effect AUT's breach may have had on the identification of the academic staff who received the 1 December severance letter.

Compliance is a discretionary remedy

[47] The severance of their employment is a situation of the highest concern to academic staff under the CEA who, it may be assumed, wish to see that its provisions are observed in the way AUT and TEU intended when they agreed on Part 10. Any clause in a CEA that may be applied to end employment is a key provision and should be complied with in the way the parties intended.

[48] The parties may also be assumed to have constructed Part 10 in the way they did for good reason and to achieve a particular purpose. Implicitly, they undertook to each other that the sequence of flow in Part 10 would not be blocked or diverted.

[49] The Authority does not find there are discretionary factors which, if applied, would lead to orders being declined even although a breach has been established.

[50] The Authority does not consider third party interests are a discretionary factor in this case which could justify an established breach not being met with a compliance order. Although the utilisation criteria has been applied across the board by AUT, both to academic staff under the CEA and to staff who are not members of TEU but are under an individual employment agreement, any orders to be made by the Authority can take their force only from the provisions of the CEA and from any finding that there has been a breach of one or more of its provisions. Any orders made should not and could not bind or affect third parties from whom the Authority has not heard in this application.

[51] There are no matters of aggravation or bad faith in the way AUT has acted. AUT genuinely formed a different view from TEU as to what the provisions required of it, although not without some reservations.

[52] In the circumstances, it is fair to allow time for the parties to consider the Authority's determination and consider whether further mediation might assist or whether they are able to reach agreement on how matters may be resolved short of orders being made for compliance.

[53] I accept the submission of TEU that 3 days is an appropriate period for the parties to be given for reflection on the determination now given by the Authority. If compliance is to be ordered, the Authority accepts that the period for obeying the order should be no more than 5 days.

[54] If it becomes necessary for any reason, the parties may apply on notice to be heard urgently before the seasonal break begins after Friday 23 December. If any orders are to be made, they will be issued by that date.

Conclusion

[55] No orders will be made before Thursday 22 December 2022 by which time the Authority is to be advised by counsel for the applicant whether any are required.

Costs

[56] Costs are reserved pending final determination of the compliance application.

Alastair Dumbleton
Member of the Employment Relations Authority