Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 208/10
5125838

	BETWEEN	VERNON ANDREWS Applicant
	A N D	THE UNIVERSITY OF CANTERBURY First Respondent
		THE ASSOCIATION OF UNIVERSITY STAFF OF NEW ZEALAND (INCORPORATED) Second Respondent

Member of Authority:	Helen Doyle
Representatives:	Jeff Goldstein, Counsel for Applicant Bridget Smith, Counsel for First Respondent Simon Meikle, Counsel for Second Respondent
Investigation Meeting:	4 and 5 May 2010 at Christchurch
Submissions Received:	5 and 24 May 2010 from Applicant 5 and 28 May 2010 from First Respondent 5 and 28 May 2010 from Second Respondent
Date of Determination:	16 November 2010

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication the names of those other than Vernon Andrews referred to in handwritten notes produced by the second respondent under Clause 10(1) of Schedule 2 of the Employment Relations Act 2000. I also prohibit from

publication except to the extent it has been referred to in this determination the settlement agreement entered into between Dr Andrews and the University.

Employment Relationship Problem

[2] Vernon Andrews commenced employment with the University of Canterbury ("the University") on 13 September 1996 as a Lecturer in American Studies in the Department of American Studies. At the material time the Authority is required to consider in the first half of 2008, Dr Andrews was a Senior Lecturer in the American Studies Programme of the School of Culture, Literature and Society.

[3] In January 2008 the University undertook a review of the organisational structure of the College of Arts that included the American Studies Programme. The University provided a proposal titled *Change Proposal – College of Art January 2008* to potentially affected employees and the Association of University Staff of New Zealand Incorporated ("the Union"). The union is now known as the Tertiary Education Union of New Zealand Incorporated. The University proposed, amongst other matters, the disestablishment of the America Studies Programme and the 7.5 full-time equivalent positions (FTE positions) in the Programme.

[4] There was a consultation period between February 2008 and 14 March 2008 in relation to the proposed restructuring involving meeting with the affected employees and other parties to obtain their feedback. A review panel was established to review the responses from those affected employees to the change proposals.

[5] The review panel considered the employees' submissions on the change proposals and the University decided to amend the change proposal and retain the American Studies Programme but reduce the number of FTE positions in the Programme from 7.5 to 3 – Draft Implementation Plan released 15 April 2008. A selection process was to follow if the proposal was implemented to determine which employees would be selected for redundancy.

[6] At the time of the release of the Draft Implementation Plan the American Studies Programme had 7 full time or 1 FTE positions and one part time staff member or 0.5 FTE position.

[7] There was an opportunity outside of the selection process to negotiate voluntary redundancy or other alternatives. Dr Andrews, a union member was

represented from in or about early March 2008 by Suzanne McNabb, Union Organiser. Dr Andrews and Ms McNabb commenced discussions in or about early March 2008 with the human resource staff to discuss alternatives to Dr Andrews applying for a full-time position in the American Studies Programme. The matters discussed at an early stage as confirmed by the notes taken by Ms McNabb and produced on behalf of the union involved a part-time position and study/sabbatical leave. Ms McNabb was overseas at the time of the Authority investigation meeting and was therefore unavailable to give evidence. No privilege was claimed in terms of the notes produced by the union or the human resource staff with respect to those discussions.

[8] Dr Andrews had at least one conversation in May 2008 with Maureen Montgomery, who at that time was both the Head of the School of Culture, Literature and Society and the National President of the Union about his plans. Dr Montgomery was also a potentially affected employee within the American Studies Programme.

[9] Dr Andrews says that as a result of one or more conversations with Dr Montgomery, he was told that there would not be a 0.5 position in the American Studies Programme which was the position he wanted in the new structure. Dr Andrews says that in reliance on his conversation with Dr Montgomery he then started negotiations for voluntary redundancy. It was a requirement of the University that any settlement it entered into with respect to voluntary redundancy had to be finalised before the final implementation plan was released on 29 May 2008 so that the University knew final staff numbers for available positions.

[10] On 28 May 2008 Dr Andrews entered into a full and final settlement with the University under s.149 of the Employment Relations Act 2000 which was signed by a mediator from the Department of Labour. The settlement agreement provided that Dr Andrews' employment was to be terminated on 31 December 2008 and that he would be paid redundancy compensation and a further payment on top of that negotiated over and above the redundancy entitlement.

[11] The University then released the final implementation plan on 29 May 2008. The final implementation plan set out the new structure of the College of Arts. In the American Studies Programme the five FTE positions remaining as at that date were to be reduced to three positions by 1 January 2009. The five remaining employees in the America Studies Programme were to be involved in a selection process based on merit

to determine which employees would be selected to remain in the American Studies Programme.

[12] After a preliminary decision was made identifying three staff preferred for selection, the Union threatened to file for injunctive relief in respect of the selection pool process. A substantive claim had already been lodged by the union with respect to the process

[13] Negotiations and mediation then took place between the University and the affected employees. On 4 September 2008 a confidential settlement was reached that included, amongst other matters, the number of FTE positions in the American Studies Programme being increased from three to four.

[14] The University agreed to the Union's proposal that the newly created FTE position could be shared between two employees on a part-time basis from 1 January 2009. There were therefore no redundancies by virtue of the selection process in the American Studies Programme.

[15] On becoming aware of this, Dr Andrews approached the University and advised that he considered Dr Montgomery's advice following the conversation in May 2008 that there would be no 0.5 positions in the America Studies Programme to be misleading. He asked the University to reopen the settlement agreement and enter into further negotiations with him. The University were not prepared to do this, relying on the full and final nature of the settlement agreement.

[16] Dr Andrews' employment relationship problem against the University is:

- That the University breached its good faith obligations to him and misled and/or deceived him.
- That the University breached the terms of Dr Andrews's employment agreement to act as a good employer.
- That there was misleading and deceptive conduct on the part of the University that amounts to a breach of s.9 of the Fair Trading Act 1986.
- In the event that the claims in terms of good faith and failure to act as a good employee and a breach of s.9 of the Fair Trading Act 1986 are

not upheld, then Dr Andrews says he entered into the record of settlement with the University as a result of a unilateral mistake under the Contractual Mistakes Act.

[17] Dr Andrews's employment relationship problem against the Union is:

- That the Union breached its good faith obligations to him and misled or deceived him.

- That the misleading and deceptive conduct amounts to a breach of s.9 of the Fair Trading Act 1986.

[18] The claim in the amended statement of problem that the first and second respondents breached s.12 of the Fair Trading Act 1986 was withdrawn and the claim that the applicant agreed to terminate his employment against the Union due a mistake within the Contractual Mistakes Act 1977 was also withdrawn.

[19] Dr Andrews wants, by way of remedy, against the University and the Union; general, special and exemplary damages for the alleged breaches and an order that a penalty be payable for the breach of good faith obligations.

[20] The University says in response that Dr Montgomery was not its representative or its agent when she talked to Dr Andrews and further that the settlement agreement precludes Dr Andrews from bringing any claims against the University. Notwithstanding that view, it also denies that it breached its good faith obligations or its obligations to act as a good employer in its dealings with Dr Andrews. The University denies that it breached s.9 of the Fair Trading Act 1986 and denies that the employment was terminated by mistake and that the applicant entered into a full and final settlement with the University under a mistake within the meaning of the Contractual Mistakes Act 1977.

[21] The Union does not accept that Dr Montgomery's represented the union when she had her discussions with Dr Andrews. Further, the Union says that Dr Montgomery did not provide any incorrect information to Dr Andrews and did not mislead him or deceive him. The union says that Dr Montgomery told Dr Andrews the truth as she believed it to be. It further denies breaching its obligations of good faith and s.9 of the Fair Trading Act 2000.

The issues

[22] The Authority needs to determine the following issues:

- What was said by Dr Montgomery to Dr Andrews in May 2008?
- What happened afterwards?
- Was Dr Montgomery representing or the agent of the University and/or the Union at the time that she spoke to Dr Andrews?
- If Dr Montgomery was not a representative or agent of the University and/or the Union then her statements cannot be attributable to either the first and second respondents and the claim against the University and/or the Union must fail.
- If Dr Montgomery was a representative or an agent of the University in her conversation with Dr Andrews, does the settlement agreement entered into under s.149 of the Employment Relations Act 2000 operate as a bar to any claim in respect of the representation made by Dr Montgomery about .5 positions in the new structure?
- If the answer to that question is no and Dr Montgomery was representing the University, did the University:
    - Breach good faith obligations;
    - Breach its obligations to be a good employer;
    - Breach s.9 of the Fair Trading Act 1986?
- In the event that these claims do not succeed then was Dr Andrews operating under a unilateral mistake when he entered into the settlement agreement?
- If Dr Montgomery was representing or acting as an agent for the Union in her conversations with Dr Andrews, then did the Union –
    - Breach good faith obligations to Dr Andrews;

- Breach s.9 of the Fair Trading Act 1986?

What was said by Dr Montgomery to Dr Andrews in May 2008?

[23] Dr Andrews says that there were two conversations with Dr Montgomery that he can recall about the 0.5 FTE issue. Dr Montgomery could only recall one such conversation in May 2008 in Dr Andrews's office.

[24] The first discussion that Dr Andrews and his partner Hildres Diaz gave evidence about was at the University Staff Club on 8 or 9 May 2008. Dr Andrews said that Dr Montgomery approached him while he was with his partner inquiring what his decision was going to be. Dr Andrews said that he advised Dr Montgomery he was applying for a 0.5 position, she responded, *ain't going to happen.* Ms Diaz recalls Dr Montgomery had a *sarcastic grin on her face at the time.*

[25] Dr Montgomery said the only discussion in the Staff Club took place after 28 May 2008 when the deadline for applying for voluntary severance had passed. Dr Montgomery said she asked Dr Andrews whether he had made a decision about voluntary severance.

[26] There may well have been a question directed by Dr Montgomery to Dr Andrews in the Staff Club before 28 May 2008 about his future intentions. I am not satisfied that Dr Montgomery would have used the words *ain't going to happen* in terms of a 0.5 position. The evidence about this exchange was limited, without real context and in the circumstances I place limited weight on it.

[27] In any event, the main conversation on which nearly all of Dr Andrews' claims are based occurred in mid to late May. Neither Dr Andrews nor Dr Montgomery were able to put an exact date on the discussion. Dr Andrews narrows it down to between 9 to 22 May 2008. Dr Montgomery said, if pushed, she would put the time of the conversation as mid May because she did not think it just prior to the release of the final implementation plan on 29 May 2008.

[28] Dr Andrews and Dr Montgomery agree the discussion lasted 10 to 20 minutes. Although their recollections as to the conversation are different it is agreed, although the exact words used are in dispute, that Dr Montgomery told Dr Andrews there were not going to be 0.5 positions in the new structure of the American Studies Programme. That is the statement that, in the main, is relied upon.

[29] Dr Andrews' written evidence about what occurred was expanded on in his written evidence in reply. He said in his written statement of evidence that Dr Montgomery eased into his office when he was sitting on the sofa marking papers and asked him what he was going to do. He recalls her shutting the door and sitting down and that he felt nervous. Dr Andrews recalls during the conversation there was a discussion about the Budget, the Pro Vice Chancellor Ken Strongman's desire to save money, the position description attached to the draft implementation plan that provided 0.5 to 1 FTE, and Dr Montgomery's confidence herself in getting re-hired.

[30] Dr Andrews recalls her saying that there were no 0.5 positions available *it is not going to happen*. Dr Andrews recalled in his evidence in reply that Dr Montgomery had used the words *on good authority*. Dr Andrews said in his written original brief of evidence that he took Maureen's words to heart and began the *agonising process* of negotiating his severance.

[31] Dr Montgomery in her evidence said that she approached Dr Andrews in his office as a concerned colleague. She said that she thought she would check in on him and see how he was going and conversation started with her asking him how he was. Contrary to Dr Andrews' evidence she said she did not close the door and remained standing. Dr Montgomery did not accept that she asked about Dr Andrews plans but that he advised her that he was considering applying for a 0.5 position. Dr Montgomery said she responded that she did not understand that there were any 0.5 positions available and that he could only apply for his current standing. Dr Montgomery said that was her genuine belief at that time and further in her oral evidence that she knew there had been some confusion about positions elsewhere where a person holding a 0.5 position wanted to apply for a 1 FTE. She recalled the discussion about the 0.5 position towards the beginning of the conversation and did not accept that she told Dr Andrews she *had it on good authority*. Dr Montgomery said that she advised Dr Andrews to check with the union or human resources. Dr Montgomery strongly rejected advising Dr Andrews she was confident about retaining her role. She said she was conscious throughout the discussion with Dr Andrews that it was not for her to give advice to him about applying for a position or taking voluntary redundancy.

[32] Dr Andrews' evidence is that the statement about the .5 position was absolute and categorical whereas Dr Montgomery said she conveyed that there were no half-time positions as an understanding and her belief.

[33] Alison Boon, who was the Human Resource Adviser at the time of the restructuring, confirmed in her evidence that the University at that time did not intend to have any part-time academic roles in the restructured America Studies Programme. That was because on 22 May 2008 the 0.5 FTE employee had negotiated an exit package. Ms Boon's evidence was that the only reason a 0.5 position may potentially have occurred in the Programme at that time was if the 0.5 FTE remained and was successful in the selection process. It is clear from an email dated 1 May 2008 from Dr Andrews to a friend from another University, Jennifer Frost, that Dr Andrews knew the person at 0.5 in the Programme had made a decision to leave and he also knew at that time that another employee in the programme had decided to transfer to another department – see applicant's document 24. Dr Andrews knew at the date of the conversation with Dr Montgomery given the above departures that there were six positions being reduced to three positions in the Programme.

[34] A dispute that requires resolution is whether Dr Montgomery advised Dr Andrews to check with the University Human Resources or the Union. Dr Andrews denies that Dr Montgomery ever told him to check her advice because he says this would have been inconsistent with her categorical statement that there would be no 0.5 positions.

[35] I have assessed the likelihood of such a statement against the background where Dr Montgomery said that she was aware of the potential for conflict of interest during the restructuring and took the step of removing herself from the Arts Future Governance Group (AFGG) in September 2007 when the AFGG decided that American Studies was not core to the BA degree. Dr Montgomery attended no further meetings held by AFGG after 24 September 2007. When the public announcement was made to disestablish the American Studies Programme at the end of January 2008, Dr Montgomery stood down as the Head of School until the end of the consultation period on 14 March 2008.

[36] The Authority heard from Ms Cornelia Sears, a colleague of Dr Andrews at the material time who was successful after the threatened injunction and mediation in job sharing the additional full-time position in the American Studies Programme.

Both Dr Andrews and Ms Sears said that notwithstanding Dr Montgomery stood down as Head of School, in reality nothing changed.

[37] I am satisfied though that those in the American Studies Programme knew Patrick Evans, who was summonsed by Dr Andrews, was Acting Head of School during this period. Mr Evans said in his evidence that for that period if anything involved America Studies then that was *his bag*. Ms Sears raised an issue regarding a conflict of interest with Ms Montgomery at the time that there was the restructuring. Whilst acknowledging that evidence I am satisfied that Dr Montgomery recognised the potential for a conflict of interest in the steps she took.

[38] Dr Montgomery said that she was clear that it was not her role to offer advice or influence Dr Andrews' decision about his future employment. I am not satisfied from the evidence relating to the discussion that there was any direct discussion about what Dr Andrews should do in the future, aside from the statement that there would not be 0.5 positions in the new structure. I am further satisfied that she was aware and mindful that she should not influence or advise others in decisions of their future.

[39] Whilst accepting that in all likelihood Dr Montgomery presented confidently with her information about the 0.5 positions, I think it more likely than not that Dr Montgomery did advise Dr Andrews to check her information. I am strengthened in that view by Dr Andrews' written and oral evidence that he questioned and debated with her about the 0.5 positions and put forward the position description indicating the roles in the Programme ranging from 0.5 to 1 STE. My view is that in those circumstances it is inherently more likely that Dr Montgomery would make that statement that Dr Andrews should check. Dr Montgomery knew that Dr Andrews was represented, or at least had been represented by Ms McNabb in discussions to date. I am not satisfied that Dr Montgomery said that she had it on good authority that there would no be any 0.5 positions. There was nothing particularly private or confidential about the discussion and I am not satisfied that Dr Montgomery shut the door to Dr Andrews office.

[40] In conclusion, therefore, I find that Dr Montgomery confidently advised Dr Andrews that it was her understanding there would not be a 0.5 position in the America Studies Programme. I am not satisfied that she referred to having obtained this information *on good authority*. I have found that in all likelihood she did advise Dr Andrews to check this information with the Union or human resources. I do not

find that Dr Montgomery made any statement in relation to what Dr Andrews should do aside from the statement relating to 0.5 positions.

What happened after the conversation?

[41] Dr Andrews was clearly dismayed to hear after he entered into his settlement agreement with the University that two people would be hired at 0.5 to fill an extra 1.0 position. He said at that stage he reflected on his discussion with Dr Montgomery and what was said. Dr Andrews' relationship with Dr Montgomery had been reasonably strained prior to the conversation taking place in May 2008. It is clear from correspondence from Dr Andrews' at the time to his union and Mr Strongman that he viewed the purpose of Dr Montgomery's discussion as being to remove him from the pool of competitors for the three positions at the American Studies Programme.

[42] The timeframe within which Dr Andrews had to make a decision as to whether to take voluntary redundancy was before the final implementation plan was released on 29 May 2008.

[43] It is clear from the union notes taken by Ms McNabb and not disputed in any significant way by Dr Andrews that he had turned his mind to voluntary severance on 30 April 2008 when there is reference to one third to a half of his salary in terms of any payment. The only mention thereafter recorded in the notes about a part-time role is on 5 May 2008 when the University offer is conveyed by Ms McNabb to Dr Andrews. The notes reflect Dr Andrews questioning *if part/time position what will be study leave equivalent*. The notes then record *it didn't matter at the moment*. A counter offer was then put by Dr Andrews on 16 May 2008 with a note to check that *the offer would not be withdrawn if we come back to it*. On 22 May 2008 the university accepted the counter offer and Ms McNabb asked that the University draw up a draft document with the proposed settlement.

[44] On 27 May 2008 before the full and final settlement agreement was signed, an email was sent to Union members, including Dr Montgomery and Dr Andrews, setting out questions raised by Union members that required answers about the restructuring. Dr Andrews recalls receiving the email and probably having it with him when he attended a union meeting on that day.

[45] Two questions in particular are relevant to the 0.5 position. They are questions 3 and 4. Question 3 refers to the academic position description stating *this may be a full time or part time continuing position (0.5 to 1.0 FTE)*. The answer was that this reflected the fact there were staff within the Programme on different FTEs and that the University was working to the principle that staff who worked less than 1.0 FTE will not be disadvantaged due to their part-time status. It was also made clear that staff who are successful in the selection process would be confirmed in a position in accordance with their current FTE.

[46] Questions 3 and 4 make it clear that if a staff member wished to vary their hours or other aspects of terms and conditions, that matter would be dealt with outside of the selection pool process and human resource advice should be sought.

[47] Ms Boon confirmed in her evidence that if Dr Andrews wanted to apply for a 0.5 position he would have needed to obtain approval to formally reduce his hours prior to the release of the final implementation plan and the commencement of the selection process. Ms Boon said there would still have been an over-staffing situation even if Dr Andrews had negotiated a reduction in his hours and a selection pool process would still have been necessary. Ms Boon confirmed that Dr Andrews had never made a formal application with respect to varying his position to part-time.

[48] There a risk if Dr Andrews had successfully negotiated a reduction of hours to 0.5 and had not been successful as part of the selection pool process then he would have been paid out any redundancy entitlement on the basis of his 0.5 FTE and not a 1.0 FTE. Ms Boon in fact went further and said that given a proposal by Dr Andrews to reduce to 0.5 FTE would not have solved the problem of overstaffing, there was no guarantee that such a proposal would have been successful.

Was Dr Montgomery the representative/agent of the University and/or the Union at the time she spoke to Dr Andrews in May 2008?

The University

[49] Mr Goldstein in his submissions says that Dr Montgomery as Head of School and President of the Union at the time of the conversation, had apparent or ostensible authority to act as representative/agent of both the University and the Union.

[50] Mr Goldstein refers to *Bowstead & Reynolds on Agency* (2006) at Article 72

> *Every act done by an agent in the course of his employment on behalf of his principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority.*

[51] Mr Goldstein also refers to the judgment of *Clark v. Nelson Marlborough District Health Board* [2002] 2 ERNZ 483 at 502 where the then Chief Judge Goddard referred to his earlier judgment in *NZ Building Trades Union v. Ebert Bros Construction Ltd* [1981] 3 ERNZ 1004 in which he had set out the following principles:

> *1. The burden of proving the existence of an agency, where this is in dispute, lies on the person alleging its existence.*
>
> *2. Ostensible or apparent authority arises where the principal by words or conduct has represented that the agent has the requisite actual authority.*
>
> *3. The normal case would be of an apparent general authority consisting of the principal placing the agent in a position which, in the outside world, would generally be regarded as carrying authority to enter into transactions of the kind in question.*
>
> *4. Alternatively there may have been a history or course of conduct of the agent dealing with a third party and the principal honouring the resulting transaction.*
>
> *5. However, if the third party knows that the agent's authority is limited, ostensible authority cannot arise no matter how general the authority to act may be in other matters.*

[52] The decision maker on behalf of the University in respect to the restructuring was the Pro Vice Chancellor Ken Strongman. Dr Andrews acknowledged in his evidence that he knew this. The AFGG had provided advice on the change proposal and the human resources advisers provided advice to potentially affected employees either directly or through the Union.

[53] Dr Montgomery in her role as Head of School did have authority to represent the University in a number of matters. I accept that the University did not hold her out as having actual authority in the restructuring or the decision making, because Dr Montgomery was also an affected employee along with the other employees in the American Studies Programme.

[54] I do not find that it would appear to the outside world that Dr Montgomery as an affected employee would be regarded as having authority in relation to the restructuring so as to make the University liable for anything she said to another employee about the restructuring.

[55] In the event that I am wrong in that conclusion, I shall go on to consider whether the record of settlement acts as a bar to Dr Andrews' claim.

The Union

[56] Nanette Cormack is the Deputy Secretary of the Tertiary Education Union, formerly the Association of University Staff of New Zealand Incorporated. Her evidence was that Dr Montgomery did not represent the Union in her dealings with Dr Andrews. Ms Cormack said that as National President, Dr Montgomery would not be involved in workplace negotiations and that it was Union Organiser Ms McNabb who represented Dr Andrews. For completeness another union organiser Gabrielle Moore gave Dr Andrews the settlement agreement for signing although that appeared to be the extent of her involvement.

[57] As President of the Union Dr Montgomery had actual authority to make representations on the Union's behalf that would bind the Union. In this particular situation where Dr Montgomery was having a discussion with another affected employee I find it would have appeared to the outside world that Dr Montgomery did have in her role as President of the Union authority to make representations on the Union's behalf.

[58] I find in conclusion that Dr Montgomery as President of the Union in making that statement to Dr Andrews was doing so with the apparent/ostensible authority of the Union.

Does the settlement agreement entered into under s.149 of the Employment Relations Act 2000 with the University operate as a bar to any claim against the University?

[59] Mr Goldstein submits that the record of settlement does not prevent Dr Andrews from bringing proceedings with respect to matters not within the contemplation of the parties at the time of settlement. He relies in making that submission on the Employment Court judgment in *Rickards v. Ruapehu District Council* [2003] ERNZ 400.

[60] In that case a mediated settlement was entered into under the Employment Contracts Act 1991 between Mrs Rickards and the Council. The issue in the case before Judge Travis was whether the new claim, a dispute about the proper rate of annual salary, had in fact been a dispute between the parties during the period leading up to the signing of the settlement agreement. Judge Travis could not find any reference to the claim preceding the signing of the settlement agreement. Judge Travis held that the principles to be applied were those set out in *Bank of Credit & Commerce International SA v. Ali* [2002] 1 AC 251 and *Marlow v. Yorkshire NZ Ltd* [2001] ERNZ 206.

[61] Lord Bingham in *BCCI* stated –

> *But a long and in my view statutory line of authority shows that, in the absence of clear language, the Court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware …*

[62] Ms Smith submits that all three cases are distinguishable to that of Dr Andrews because the four claims before the Authority are not unrelated to those which were the subject of the matters leading to the settlement agreement.

[63] The settlement agreement that Dr Andrews signed sets out the background to the settlement including that the University has commenced a restructuring and that as a result of this the parties have entered into discussion relating to the termination of Dr Andrews employment with the University by way of voluntary severance. The settlement agreement is expressed to be *a full and final settlement of all employment matters between the parties up to and including termination of Vernon's employment*.

[64] In *Rickards* the new claim was not one that Judge Travis found had previously been contemplated by the parties. In *Marlow* the new claim was a health and safety issue that had never been contemplated by either party where the settlement had been a redundancy issue. *BCCI* also concerned a redundancy issue. It was found in circumstances where there was a claim for *sigma damages* that the employee was without knowledge of the banks insolvency and nefarious practices and that on a fair construction of the settlement document it could not be concluded that the parties intended the release of rights and claims that they could never have had in contemplation.

[65] Dr Andrews entered into a settlement for voluntary severance outside of the selection process for three positions in the Programme. I accept Ms Smith's description of this as an alternative to his taking his chances in the selection pool with the risk of redundancy. The issue of a part-time role had been part of the discussions leading up to the settlement with the human resource advisors as had study and sabbatical leave. At a point in time, most likely 30 April 2008, Dr Andrews turned the discussions to what he could receive if he voluntarily severed his relationship with the University at the end of 2008.

[66] I find that Dr Andrews claims currently before the Authority were matters that were within the contemplation of the parties leading up to settlement because they were related to the restructuring and Dr Andrews decision as to whether he participated in the selection process or entered into a settlement agreement for voluntary redundancy.

[67] In conclusion, Dr Andrews' claim against the University cannot succeed because Dr Montgomery was neither a representative nor an agent of the University when she made the statement to him about the 0.5 positions, and, in the event that that was in fact not the case, Dr Andrews is statute barred from pursuing a claim by virtue of a settlement agreement he entered into under s.149 of the Employment Relations Act 2000.

[68] For completeness in terms of the claim of mistake I am quite satisfied that Ms Boon on behalf of the University had no knowledge at the time of entering into the settlement agreement of the conversation Dr Andrews had had with Dr Montgomery.

[69] I now turn to the remaining claims against the Union.

Was there a breach of good faith by the Union?

[70] Section 4 of the Employment Relations Act 2000 provides that the parties to an employment relationship are to deal with each other in good faith and must not either directly or indirectly do anything to mislead or deceive the other or anything that is likely to mislead or deceive the other. Subsection (2) confirms that an employment relationship exists between a Union and a member of the Union.

[71] Dr Andrews claims that Dr Montgomery did not deal with him in good faith and misled and/or deceived him by telling him there would be no 0.5 positions in the

restructure. Dr Andrews submits that this led to him making the decision to take voluntary severance.

[72] The meaning of the words *misleading or deceiving* can be ascertained by virtue of cases under the Fair Trading Act 1986 and the equivalent provisions of the Australian Trade Practices Act 1974.

[73] Both Mr Goldstein and Mr Meikle refer to the Court of Appeal judgment in *AMP Finance NZ Ltd v. Heaven* [1997] 8 TCLR and the test comprising three limbs set out:

> *1. That the conduct was capable of being misleading; and*
>
> *2. That the conduct did in fact mislead; and*
>
> *3. That it was reasonable to have been misled.*

[74] The Supreme Court decision of *Red Eagle v. Ellis*[2010] NZSC 20, [2010] 2 NZLR 492 considered the test in *Heaven* and preferred a different approach that clearly differentiated between a breach of s.9 and the remedies provision in s.43 in the Fair Trading Act 1986.

[75] The test preferred by the Supreme Court was whether the conduct, examined objectively, has the capacity to mislead or deceive a hypothetical reasonable person in the claimants situation at para. 28. An objective examination of the conduct needs to consider context, including the characteristics of the person said to be affected. The conduct in this case to be considered is the statement that there would be no 0.5 positions in the American Studies Programme. To the extent that as submitted by Mr Goldstein it was conduct encouraging Dr Andrews to take a different course I simply record that I have not found that there was any statement made by Dr Montgomery about what Dr Andrews should do. Whether it did actually mislead Dr Andrews and encouraged him to take a different course falls to be considered under the other limbs of the test in *Heaven* that the Supreme Court considered were more appropriately considered in term of remedies.

[76] Dr Andrews and Dr Montgomery are both intelligent people. They had been at the time of the May 2008 conversation colleagues for a considerable period of time and both had a keen interest in the future of the American Studies Programme. Their own relationship though had not been without its difficulties.

[77] Dr Montgomery said her statement to Dr Andrews was based on a belief that the remaining six staff in American Studies were competing for 3 x 1 FTE positions. She said that this was based on the fact that none of the affected employees in American Studies held 0.5 roles but full time roles. I accept that because Dr Andrews had knowledge at 1 May 2008 that the 0.5 employee intended negotiating an exit in all likelihood Dr Montgomery knew this as well.

[78] The other matter that Dr Montgomery said she took into account was her understanding that applicants had to apply at their current fractional FTE level so a full time employee had to apply for a full time position. Dr Montgomery was aware that there had been some difficulty in another area of the University with a person holding a 0.5 FTE wanting to apply for a 1.0 FTE role. That there was some confusion is supported by the question and answer sheet put out by the union by email dated 27 May 2008. Mr Goldstein submits that the April 2008 Implementation Plan does not mention 3 x 1FTE were available but rather 3 x FTE and the position descriptions showed 0.5 – 1.0 FTE so that Dr Montgomery's belief could not be reasonable.

[79] I find that objectively assessed there was a reasonable basis for Dr Montgomery to have an opinion that there would not be a 0.5 position in the new American Studies structure at the time of her conversation with Dr Andrews. No other full time employee had committed to changing to a 0.5 position and it was known by Dr Andrews from 1 May 2008 that the one 0.5 employee intended to leave. There was a risk to another employee in changing terms and conditions to a part time role outside of the process because if not selected they may only receive redundancy as a 0.5 employee. The University confirmed that it did not in fact intend to have a 0.5 position in American Studies at that time. The Final Implementation Plan released on 29 May 2008 was clearer that there were to be three 1 FTE employees to be appointed and indeed three were selected on a preliminary basis.

[80] I have also found it likely that Dr Montgomery did encourage Dr Andrews to check her understanding that there would be no 0.5 positions. Dr Andrews was represented at that time.

[81] I find in terms of considering the conduct and where it was capable of misleading, that Dr Montgomery held a reasonable belief that there would be no 0.5 position in the new structure of the America Studies Programme and there was a

reasonable basis for that belief. I do not find that Dr Montgomery could have foreseen at the time that she had the conversation with Dr Andrews that a new position would in fact be created some few months later that was shared by two part-timers in the Programme. The fact that the positions were later created does not mean that Dr Montgomery's statement at the time was misleading because it was an opinion reasonably held - *Stevens v Premium Real Estate Ltd* (2006) 8 NZCPR 38.

[82] I do not find there to have been misleading or deceptive conduct on the part of Dr Montgomery. I find therefore no breach of good faith on the part of the Union.

[83] In conclusion, therefore, I do not find a breach of good faith on the part of Union.

Did the Union breach s.9 of the Fair Trading Act 1986?

[84] There are issues as to whether the Authority has the jurisdiction to consider a claim under s.9 of the Fair Trading Act – *Manchester Property Care Ltd v. O'Connor (No.2)* 2 ERNZ 305. There is further an issue as to whether a Union is *in trade* within the meaning of that section.

[85] Nevertheless, I conclude that the conduct by Dr Montgomery in undertaking her discussion with Dr Andrews was not conduct that was capable of being misleading and deceptive. There was a reasonable belief for Dr Montgomery to have had the view that she had that there would be no 0.5 positions in the new structure. That was also the intention of the University and the situation that subsequently developed could not have been anticipated by Dr Montgomery at the time of that conversation. This is supported by the preliminary selection of three 1 FTE employees.

[86] In the event that the Authority has jurisdiction to consider a claim under s.9 of the Fair Trading Act 1986 and that the Union is *in trade*, I do not find there to have been misleading and deceptive conduct in terms of that section.

[87] The claims against the University and the Union do not succeed.

Costs

[88] I reserve the issue of costs.

[89] The University and the Union have until 8 December 2010 to lodge and serve submissions as to costs and Dr Andrews has until 26 January 2011 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority