

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 7
5534644

BETWEEN STEVEN JAMES GIBBS
 Applicant

A N D THE VICE-CHANCELLOR OF
 LINCOLN UNIVERSITY
 Respondent

Member of Authority: Helen Doyle

Representatives: Tim Twomey, Counsel for the Applicant
 Raewyn Gibson, Advocate for the Respondent

Investigation Meeting: 23 January 2014 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 28 January 2015

DETERMINATION OF THE AUTHORITY

- A On the basis of the signed written undertaking as to damages provided by Dr Gibbs and pending the determination of this proceeding or earlier order of the Authority, I order that Dr Gibbs be reinstated to his former position of Senior Lecturer in Animal Science at Lincoln University from 16 February 2015.**
- B Dr Gibbs is to be responsive and communicative with the Dean of the Agricultural and Life Sciences Faculty and the Human Resources Department during the period of the interim order. Lincoln University may apply to the Authority to vary or cancel the interim order if there are concerns about this.**
- C The parties are directed to mediation.**

- D A telephone conference is to be scheduled to discuss arrangements for a substantive investigation tentatively scheduled for 21 and 22 April 2015.**
- E Costs are reserved until after the substantive investigation and final determination.**

Employment relationship problem

[1] This is an application by Steven Gibbs for interim reinstatement to his position as Senior Lecturer in Animal Science at Lincoln University.

[2] Dr Gibbs was employed by the Vice-Chancellor of Lincoln University (LU) from 2004-2006 as a post-doctoral fellow and from 2006 as a senior lecturer in animal science. Dr Gibbs has 20 years' previous experience as a veterinarian.

[3] At the material time, Dr Gibbs taught five animal science subjects in animal health, two in animal nutrition and one in beef science. He also taught and examined the advanced final level ruminant nutrition and conducted research.

[4] The letter appointing Dr Gibbs to the position of senior lecturer at LU dated 24 April 2006 provided that if he chose not to join the union, he would have an individual employment agreement based on the terms and conditions of employment in the current academic staff collective employment agreement. Dr Gibbs chose not to join the union and therefore his terms and conditions were based on the LU academic staff collective agreement.

[5] On 5 September 2014, following consultation and a selection process, Dr Gibbs was provided with a letter containing formal notice in accordance with clause 40 of the academic staff collective agreement of three months' notice of the termination of his employment by reason of redundancy. A personal grievance was raised on 3 December 2014 following legal advice. The date of termination of Dr Gibbs' employment was 5 December 2014.

[6] Dr Gibbs says that the termination of his employment was unjustified and he wants to be reinstated on an interim basis to his position until his personal grievance

for unjustified dismissal can be heard by the Authority. He has provided a signed undertaking as to damages.

[7] LU opposes the application for interim reinstatement. It says that the termination of Dr Gibbs' employment is justified on the basis of a genuine redundancy selection affecting his position and that there was a robust and transparent consultation and selection process in reaching the decision that his position was surplus. LU says that its actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances with which it was dealing.

[8] The parties have not been to mediation but their representatives understand that the Authority will address mediation in this determination. Substantive investigation meeting dates will be available in April 2015.

[9] The Authority dealt with this matter on the basis of untested affidavit evidence and submissions.

The issues

[10] An injunction involves the exercise of discretion. The answer to it is not in the application of a rigid formula but there are some broad inquiries that the Authority should make. These are as follows:

- Does Dr Gibbs have an arguable case of unjustified dismissal and, if found after substantive investigation to have been unjustifiably dismissed, an arguable case for permanent reinstatement – s.125 of the Employment Relations Act 2000 (the Act);
- Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Dr Gibbs and LU will incur as a result of the interim injunction being granted or not;
- Is there an adequate alternative remedy available;
- Finally, the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Background

[11] I set out the relevant background against which the tests are to be applied. This background is derived largely from the documents. At this interim stage I am not required to determine any disputes that may be apparent from the affidavit evidence.

[12] In 2013, LU conducted a review of its academic degree and major programmes and courses. The review was called the Qualifications Reform Review. At the time that review was undertaken, staff were advised that the purpose of the qualifications reform was not to reduce staffing but rather the focus was on the curriculum. The Agriculture and Life Sciences Faculty (AGLS Faculty) where Dr Gibbs worked in the animal science department had a net deletion of nine animal science courses following the review. Due to the reduction in the number of animal science courses taught in the AGLS Faculty it was considered there was a need for a change proposal.

[13] In March 2014, the Dean of the AGLS Faculty, Bruce McKenzie and Deputy Vice-Chancellor, Stefanie Rixecker, (DVC Rixecker) developed a change proposal for the AGLS Faculty. DVC Rixecker had delegated responsibility for overseeing other faculty change proposals as well.

[14] The proposed staff changes were contained in a memorandum dated 26 March 2014. Dr Gibbs understood that proposal 9 within the memorandum may affect him. The important part of proposal 9 was as follows:

The number of academic positions in Undergraduate Production Animal Science (teaching into some or most of ANSC213, ANSC312 and ANSC314 is reduced from three (3.0 FTE) to two (2.0 FTE).

[15] It was further stated in proposal 9 that the preliminary view was that the existing level of staffing in undergraduate production animal science exceeded requirements. The proposal had a potential impact on three positions, being the position of a FTE lecturer in animal science and two FTE senior lecturer positions in animal science. If the proposal went ahead, a selection process would be used to determine who would occupy the two ongoing academic positions.

[16] The Dean stated in his affidavit that the proposed selection pool was limited to the academic animal science staff and named those staff in para.11 of his affidavit.

He stated that in determining which of the animal science academic staff members would be involved in the proposed selection pool, he identified that it was the staff involved in livestock production teaching whose hours had most been impacted by the reduction in courses as a result of the qualifications reform. The three academic staff that Dean McKenzie identified should be in the pool were Dr Gibbs and one other senior lecturer and one lecturer. I shall refer to the other senior lecturer and the lecturer as Dr A and Dr B respectively.

[17] Dean McKenzie placed emphasis, as stated in his affidavit, on the fact that Dr Gibbs and Dr A and Dr B taught in overlapping, similar though not identical areas and that made it easier to reallocate remaining teaching duties in the event a decision was made to reduce one member of the academic staff in the animal science area.

[18] The Dean gave consideration whether the ongoing operational requirements for teaching could be filled by a mix of senior lecturers and lecturers. He concluded that it would not have been reasonable to limit the selection pool by specifying a mix of two senior lecturers or a mix of a senior lecturer and a lecturer. Therefore, the proposal was that the teaching of the academic programmes in animal science could be undertaken potentially by a senior lecturer and a lecturer.

[19] From 26 March 2014 to 2 May 2014 (subsequently extended to 9 May 2014), there was a consultation period. Dr Gibbs provided a submission which is contained in the bundle of documents annexed to the affidavit of Dean McKenzie.

[20] At the end of the consultation period, there was change to some of the proposals but not to proposal 9. This was confirmed to Dr Gibbs on 28 May 2014.

[21] On 3 or 4 June 2014 a meeting took place with Dr Gibbs and Dean McKenzie. Julie Williamson, the then Human Resource Director, also attended the meeting. This meeting and the letters that followed assume some importance in respect of assessing an arguable case. Dr Gibbs raised issues about his inclusion in the selection pool, including whether his teaching hours had been correctly recorded and whether his specialist teaching area of veterinary science was a consideration.

[22] Dr Gibbs set out in a letter suggesting this had also been discussed on 3 June dated 12 June 2014 to Dean McKenzie that 60 contact hours in ANSC 072/272 had been reclaimed by animal science but that these hours had not been included in the total tally of teaching hours put forward to justify disestablishment of positions.

Dr Gibbs wrote that he already taught several weeks into the paper and that he was the best qualified animal science member to teach the paper.

[23] Dean McKenzie in a letter dated 16 June 2014 wrote to Dr Gibbs and accepted that Dr Gibbs did teach more than the 75 hours that he had initially calculated but did not accept that he would teach as many as 107 hours. He wrote that even if he was to wholly accept Dr Gibbs view of 107 hours that would still represent a significant 24% reduction in teaching from his 2013 hours of 141. Dean McKenzie in the letter stated that he was of the view that ANSC 072/272 (Dairy) could effectively and credibly be taught by Professor Edwards with some help from others in the faculty.

[24] Dean McKenzie accepted in his letter that he had stated during the meeting that one consideration for the ongoing teaching role was the need for specialist areas but did not accept that Dr Gibbs was employed by LU to teach animal health particularly and that his job description did not support this contention. He wrote that he had reconsidered the final decision to staff the undergraduate animal science production courses with 2.0 FTE instead of the current 3.0 FTE in light of the discussions at the meeting on 3 or 4 June 2014. He went on to state that LU must restore its financial viability through cost reduction, efficiencies in delivery and withdrawing from areas with very low student numbers and that he was of the view that it is possible for LU to deliver the required undergraduate science production courses with 2.0 FTE instead of 3.0 FTE. He confirmed that proposal 9 was correct and the selection process would continue.

[25] In his first affidavit at [24] Dr Gibbs deposes that he had directly asked the Head of the Animal Science Department Professor Grant Edwards in early 2014 who would teach ANSC 072/272 in the second half of 2014 and that he [Professor Edwards] did not know but that he would teach it with Dr Gibbs continuing to teach into it until a decision was made. Dr Gibbs also deposes that he was the best qualified staff member at LU by degree, subject area expertise and industry experience to teach the entire subject. He also deposed in paragraph [26] that it was not credible that Professor Edwards would continue to teach the subject into the foreseeable future with other teaching duties and research students and an increase in administration duties.

Selection process

[26] On 30 May 2014, the Senior Human Resources Adviser, Hilary Sinclair-Hyde, provided Dr Gibbs and other individuals involved in the selection process with the process and information pack and the positions for the two ongoing lecturer/senior lecturer roles. The selection panel consisted of DVC Rixecker, Dean McKenzie and Paul Fleming, Pro Vice-Chancellor, College of Science, University of Canterbury. Ms Sinclair-Hyde supported the process in her human resource advisory role. Professor Edwards was also to have been on the selection panel but a decision was made not to include him as DVC Rixecker deposed because of some issues that had arisen between Professor Edwards and Dr Gibbs.

[27] For the selection process the applicants were required to complete and provide to the selection panel a self-assessment form, curriculum vitae and supporting documents. The self-assessment was on the basis of the selection criteria questions.

[28] The selection panel then undertook its own preliminary assessment and rated the information before providing the preliminary assessment back to the staff member. DVC Rixecker deposes in her affidavit that the scores needed to be based upon the outputs associated with the level of academic appointment and that in this instance there was one lecturer and two senior lecturers. She deposed that to ensure a fair assessment at the appropriate academic level the panel ensured the scores for each criterion aligned with the normal expectations of the position.

[29] The staff member then attended an interview with the selection panel to canvas the respective ratings against criteria. Those meetings took place on 3 July 2014. Dr Gibbs and the other candidates attended the meeting and at the conclusion the selection panel reviewed the preliminary scores against the meeting discussion and made a preliminary decision to disestablish Dr Gibbs' position.

[30] Although it was intended to advise Dr Gibbs of his selection he was unavailable and was given the preliminary decision document by Ms Sinclair-Hyde. Dr Gibbs deposes in his first affidavit to this period being the busiest in his research calendar.

[31] On 17 July 2014 Dr Gibbs emailed Ms Sinclair-Hyde and asked for the panel's written feedback to the other two applicants along with their application for the position. He deposes in his first affidavit to being in the process at this time of

finishing his written feedback to the decision. Ms Sinclair-Hyde sent an email to Dr Gibbs on 17 July 2014 advising that she would check but did not think he was entitled to the information. Dr Gibbs then sent an email that same day to Ms Sinclair-Hyde pointing out that the self-appraisal form noted that the information in the selection process may be made available to other unsuccessful individuals in the process if they request it. He also requested the *means of the panel determining the 'TOTAL Points' displayed on the returned self-appraisal form be explained in detail, in writing, please.*

[32] On 17 July 2014 Ms Sinclair-Hyde emailed Dr Gibbs all of the information requested except for the panel's explanation as DVC Rixecker was on leave.

[33] The selection panel met on 22 July 2014 for the purpose of preparing a written document explaining the means by which it reached the total points for each candidate. This was sent to Dr Gibbs on 22 July 2014 as an attachment in an email from Ms Sinclair-Hyde. In that same email Ms Sinclair-Hyde advised that the timeframe for providing feedback was extended to 4.00pm Wednesday 23 July 2014 and any meeting to provide verbal feedback would need to be within that timeframe.

[34] On that same day Ms Sinclair-Hyde sent a text message to Dr Gibbs advising that the timeframe had been further extended to 30 July 2014 at 4.00pm for him to provide feedback. At this time Dr Gibbs was in Central Otago undertaking research.

[35] Ms Sinclair-Hyde in her affidavit deposes that 30 July 2014 was a mistake and she should have put 23 July 2014 in accordance with her earlier email.

[36] On 24 July 2014 Ms Sinclair-Hyde emailed Dr Gibbs directly advising that *In the absence of any representations on your behalf in respect of their tentative selection, the selection panel have now reached a final decision to confirm your selection.*

[37] A telephone conversation took place between Dr Gibbs and Ms Sinclair-Hyde. It resulted in Ms Sinclair-Hyde checking her text message and talking to DVC Rixecker and Dean McKenzie with the extension to 30 July 2014 then being granted.

[38] Dr Gibbs then provided a lengthy document setting out his objections about his selection for redundancy on 30 July 2014.

[39] DVC Rixecker stated in her affidavit that the selection panel discussed and reviewed each criterion in light of the information but did not deem it appropriate to alter its preliminary decision.

[40] On 1 August 2014 DVC Rixecker wrote to Dr Gibbs setting out the panel's consideration of the points raised by him and advising that a final decision had been made to confirm that he had not been selected for the two ongoing roles and the position that he held is redundant.

[41] There was affidavit evidence from LU deponents that Dr Gibbs disengaged from the process of meeting to explore other options to a compulsory redundancy. Dr Gibbs did not in his second affidavit accept there was any possibility of redeployment and says that the options were limited to an early retirement package.

[42] Dr Gibbs was, as earlier set out, given formal notice of redundancy on 5 September 2014 and his final day of employment was 5 December 2014.

Arguable case for unjustified dismissal

[43] An arguable case was described in *X v Y Ltd*¹ as *...a case, with some serious or arguable, but not necessarily certain, prospects of success.*

[44] Dr Gibbs relies on five grounds that he says give rise to his personal grievance of unjustified dismissal for redundancy.

[45] The first ground is that the selection for redundancy was based on an incorrect understanding of his teaching hours and specialist teaching capacity. Dr Gibbs says that LU could not have reached a decision to select him as one of the three staff members to be made redundant.

[46] That second ground is that the categories used by LU in its selection criteria were substantially different from traditional animal science criteria and those used internationally. Dr Gibbs says that the new categories unreasonably and unfairly disadvantaged him compared with the other two candidates selected for possible redundancy.

[47] The third ground is that the selection criterion was then wrongly applied in the process.

¹ [1992] 1 ERNZ 863 at 872

[48] The fourth ground is that the assessment and ranking of staff members to attain the total points for selection for redundancy was demonstrably wrong.

[49] Finally, Dr Gibbs says that the timeframe for the process impacted on his availability to provide feedback within the time limits prescribed.

[50] Ms Gibson submits that applicant has a weak arguable case of unjustified dismissal. She submits that the disestablishment of Dr Gibbs' position was as the result of a genuine redundancy situation and that he was objectively and validly included in the selection pool. She submits that it is LU's prerogative after consultation to determine the selection criteria and scoring to be applied in the process. She submits that Dr Gibbs subjective view of the weight to be given to the selection criteria and his subjective assessment of those in the selection pool (three in total) cannot be preferred over the unanimous objective determination reached by very experienced and senior members of the selection panel in the absence particularly of improper motive and no evidence of bias.

[51] Following a substantive investigation the Authority will be required to determine on an objective basis whether LU's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances – s 103A of the Employment Relations Act 2000 (the Act). The Authority will also consider whether the good faith obligations and requirements in s 4 of the Act were complied with. The assessment at this point is whether Dr Gibbs has a case for unjustified dismissal with some serious or arguable prospect of success.

[52] I set out at the outset of considerations under this test that the final allocation of points between Dr Gibbs and Dr B was very close. Dr Gibbs scored 65.5 and Dr B 67. Dr A scored 71.5. The scores were out of a possible 85 points.

[53] From the untested affidavit evidence LU was required by virtue of financial circumstances following several years of deficits exacerbated by the earthquakes to reduce its personnel costs by \$4 million by 1 January 2015.

[54] Dr Gibbs was one of three animal science academic staff to go through a selection process to reduce staff involved in teaching animal science by one. On the untested affidavit evidence I find it is arguable whether Dr Gibbs was properly included in the selection pool. There was no conclusion reached about his exact

teaching hours and there is an argument whether adequate weight was given to his specialist teaching area.

[55] I accept Ms Gibson's submission that it is arguable that there had been a reduction in teaching hours from 2013 for Dr Gibbs of at least 24%. Against that however it is arguable whether the additional 60 hours teaching hours in 072/272 ANSC should have been included in the total teaching hour tally in animal production when the change process commenced and the subject of consultation. Ms Gibson submits that it is for the Dean to decide the allocation of teaching hours. Accepting for present purposes that is correct Dr Gibbs in his affidavit evidence states that when he talked to Professor Edwards there was no firm decision made as to who would teach the course into the second semester and if the hours were included then the basis for the decision to make an animal production staff member redundant was removed. That will have to be the subject of evidence at the substantive investigation meeting.

[56] Those who sat on the selection panel had considerable academic experience between them. It is arguable though that the absence of a panel member with specialist experience in the animal science/production department, Professor Edwards may have disadvantaged Dr Gibbs.

[57] The untested affidavit evidence supports that consultation took place about the selection criteria and scoring and Dr Gibbs did not provide feedback about it. Whilst arguable the selection criterion disadvantaged Dr Gibbs and was unfair, the absence of feedback does have to be weighed into the strength of any argument.

[58] Dr Gibbs says that the selection criterion was wrongly applied on two grounds. The first is in the research category and the second in the wider contribution to the University. It is clear from the affidavit evidence that there are firm views from LU that the criteria was applied correctly and from Dr Gibbs that it was not. I find there is an arguable case as to whether the selection criteria was correctly applied and if not whether in turn that impacted on the final scoring.

[59] I turn to the final scoring. Of the three affected individuals Dr Gibbs scored the lowest. Ms Gibson submits that the objective determination of the selection panel cannot properly be revised by the Authority to accord with Dr Gibbs subjective views. She submits that the selection panel's decision making was rational, objective and linked solely to consideration of the selection criteria.

[60] Dr Gibbs throughout the process raised his concerns about the selection criteria and the allocation of points with the panel. Dr Gibbs says in his affidavit evidence that how the points were allocated was demonstrably wrong and unfair. Mr Twomey submits that it is arguable that the point allocation was contrived to ensure that Dr B's points were higher than Dr Gibbs and arguably the 1.5 point differential cannot be justified. Further that LU did not respond or adequately respond to the information and explanation sought by Dr Gibbs about the scoring and arguably had predetermined the scoring on 24 July 2014 and therefore gave inadequate consideration with an open mind to the submissions made by Dr Gibbs after that time.

[61] There is some material available to objectively assess the scores against the relevant criteria. There are teaching evaluations, information about supervision of PHD students and information about contributions to the university. Dr Gibbs and Dr B received the same score initially of 65.5 after submitting their self-appraisal and supporting documents to the selection panel. Dr B's score then increased by a point and a half after the scheduled meeting with the panel on 3 July 2014 however Dr Gibbs scores remained unchanged notwithstanding he raised a number of challenges to the scoring. The panel's assessment will be the subject of evidence at the substantive investigation meeting. On the untested affidavit evidence and with consideration of the documents I find it is arguable that the assessment and allocation of points by the selection panel was unfair and unreasonable.

[62] There may be an arguable case about the timing of the process although it did not impress me as particularly strong at this point.

Conclusion

[63] I find in conclusion that Dr Gibbs has an arguable case of unjustified dismissal. Although some elements of the case may be more strongly arguable than others it did not on the untested affidavit evidence impress me as only a weak arguable case or a marginal one.

Arguable case for permanent reinstatement

[64] The Authority should have regard to the likelihood of permanent reinstatement as a remedy following the substantive investigation - *Madar v P & O Services Ltd*².

[65] Reinstatement is no longer a primary remedy and falls to be determined alongside other remedies under the Act. Section 125 (2) of the Act provides that the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[66] Ms Gibson submits that Dr Gibbs has not established an arguable case that permanent reinstatement is practicable or reasonable because the position Dr Gibbs held has been disestablished and there is no position into which he can be reinstated.

[67] I shall turn firstly to whether permanent reinstatement is practicable if there is no longer a position. I place some emphasis in doing so on the nature of the arguable case that I have found. The case is that Dr Gibbs says he should not have been included in the selection pool initially and, then having been so included, should not have been selected to have his position disestablished for redundancy. I am not satisfied in these circumstances that there was not an arguable case that permanent reinstatement is practicable.

[68] The other matter that Ms Gibson relies on is the concerns about a constructive relationship between Dean McKenzie and Dr Gibbs because of the behaviour during the three month notice period when Dr Gibbs disengaged and did not communicate. I accept that is of concern to LU.

[69] Objectively assessed on the untested evidence that behaviour appeared to be confined to the period shortly before and after notice was given. Dr Gibbs deposes in his second affidavit to his view of the process and a loss of confidence that LU was engaging with his written or oral submissions and that it appeared there was pre-determination about the outcome of his redundancy. Obviously whether Dr Gibbs views about that are correct will remain for substantive investigation as they are only expressed in untested affidavit evidence.

[70] The impact of selection for redundancy could be at this preliminary stage considered against Dr Gibbs belief as expressed in his first affidavit that he was by a comfortable margin the most experienced dairy animal scientist at LU and the only

² [1999] 2 ERNZ CA

member of staff by qualification and industry experience in the animal science department who can teach veterinary science, advance ruminant nutrition or advance contemporary beef industry science.

[71] Any difficulties with behaviour after advice of selection for redundancy will require further investigation as will the relationship with Dean McKenzie. The Authority will be able to investigate the extent and reasons for any disengagement at the substantive investigation meeting. Both parties to an employment relationship need to act in good faith and be responsive and communicative with each other.

[72] On the untested affidavit evidence the disengagement difficulties or relationship issues would not lead me to conclude permanent reinstatement was arguably not practicable.

[73] In terms of reasonableness I have found an arguable case which is not overall a weak or marginal one. There is no issue of contribution or performance.

Conclusion

[74] I find that there is an arguable case that permanent reinstatement would be practicable and reasonable.

Adequacy of other remedies

[75] Dr Gibbs wants to be reinstated. He describes that of utmost importance to him in his second affidavit and states that a compensatory payment will not address his grievance. He deposes his narrow field of research and his network of industry contacts having been the sole focus of his independent and postgraduate research work for twenty years for which he is recognised internationally does not transfer easily to other environments and institutions. The effect of that is that he would either have to undertake a different job without regard to what he has been doing for many years or go to another university possibly outside New Zealand. I do not find that the right to work even for a few months until the substantive investigation can proceed can be adequately compensated for by monetary remedies, such as lost wages and compensation in those circumstances. This is particularly so when I weigh up there must be some risk of the remedy of reinstatement being less available/successful the longer Dr Gibbs is away from LU.

[76] That test favours Dr Gibbs.

Balance of convenience

[77] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not.

[78] I accept that there will be inconvenience to LU if Dr Gibbs is reinstated because LU says it has no operational requirement for Dr Gibbs to carry out any teaching against a background of changes made to restore financial viability. Some accommodation will have to be made for Dr Gibbs and there is a possibility that other lecturers, Dr A and Dr B who have done nothing wrong except been selected following a change process will have their teaching hours reduced. For a short time that may cause uncertainty and disruption.

[79] Against that Dr Gibbs deposes in his affidavit that with his qualifications and experience he can teach a number of courses at short notice and I take that this may include other courses not taught by Dr A and Dr B. Further he says that he has a significant body of LU work from his research to be published which he could work on.

[80] Ms Gibson submits that as Dr Gibbs employment has been terminated he does not have any current work in research which relies upon his being an employee at LU and it is not realistic to expect that research arrangements can be entered into and fulfilled within a brief interim order period.

[81] I accept that there are some difficulties for LU. Dr Gibbs has stated in his affidavit evidence that he will be able to undertake some work and fit in at short notice to teaching commitments without the need for significant preparation because of his experience.

[82] Ms Gibson also submits that there are not the *immediacy issues* found in interim applications. Dr Gibbs has been paid considerable holiday pay entitlements and LU was asked to retain his redundancy compensation of approximately \$62,000 but is happy to release that. There is not Ms Gibson submits any reputational damage that may arise in the interim to Dr Gibbs.

[83] I accept there are no pressing financial issues but in terms of reputational issues it is Dr Gibbs' position that he should not have been selected for redundancy.

[84] Ms Gibson then submits that there was delay in raising a personal grievance until approximately three months after Dr Gibbs was provided with notice. This, she submits, impacted upon and disadvantaged other staff that had been advised of their 2015 teaching requirements. I accept that Dr Gibbs could have legally challenged his selection for redundancy earlier and before his employment had ended. He certainly had strongly challenged directly to the selection panel both his inclusion in the pool for selection and then his selection on many occasions throughout the process. It was well known to LU that he was unhappy with the situation. From an objective assessment of his first affidavit he seemed to remain hopeful perhaps unrealistically so, even after being given his notice that his employment would not be terminated.

[85] Whilst I accept that delay is a consideration I do balance that LU knew Dr Gibbs challenged many aspects of the process and decisions. It was not a case where he was silent throughout and LU was completely unaware of any concerns until they were raised as a personal grievance and reinstatement sought as a remedy. From the untested affidavit evidence I am not satisfied the delay was deliberate.

[86] Ms Gibson says that Dr Gibbs failed to engage in discussion about possible redeployment or alternatives to redundancy. Dr Gibbs in his second affidavit says that he did meet with Dean McKenzie and there was no discussion of redeployment/retraining but only a *special* retirement package which was more lucrative than the redundancy package. Dr Gibbs states in his second affidavit that as a senior and specialised veterinarian and ruminant scientist he knew there was no retraining or redeployment available for him at LU. I cannot conclude even on the untested evidence with any confidence that discussions had the potential to avoid this application or indeed redundancy. There was no redeployment opportunity identified by LU. There is an issue remaining I accept of a failure to engage and concerns about a constructive relationship with Dean McKenzie but that can be dealt with in any interim orders made.

[87] I have found that there is an arguable case for unjustified dismissal. Although there are no immediate financial issues for Dr Gibbs that has to be balanced with the right to work and the finding that such a right could not be adequately compensated by a monetary award. There is also the feature in this case that the scoring between

Dr Gibbs and Dr B was extremely close and there are broad grounds of challenge to the process and selection. When I weigh all the matters I find the balance of convenience favour Dr Gibbs.

Overall Justice

[88] Often there is a weighing of the strengths and weakness of the respective cases when the Authority stands back and considers where the overall justice lies. I am reluctant to do that in this case beyond my already concluded view that the arguable case did not impress me as weak or marginal. There will be the need for a careful assessment of the evidence in this case and as Ms Gibson submits the interim application is not the time when that sort of assessment can be easily undertaken.

[89] I do take into account that LU is protected in the event Dr Gibbs is not ultimately successful and it suffers damage as a result of an interim order as it is holding his redundancy compensation.

[90] I have found therefore an arguable case both for unjustified dismissal and permanent reinstatement.

[91] I find that the overall justice of the case requires an interim injunction be granted.

[92] I will give the parties some time to make the necessary arrangements and will make the order effective from 16 February 2015.

Orders

[93] I make the following orders with respect to interim relief

- a. On the basis of the signed written undertaking as to damages provided by Dr Gibbs and pending the determination of this proceeding or earlier order of the Authority, I order that Dr Gibbs be reinstated to his former position of Senior Lecturer in Animal Science at Lincoln University from 16 February 2015.
- b. Dr Gibbs is to be responsive and communicative with the Dean of the Agricultural and Life Sciences Faculty and the Human Resources Department during the period of the interim order. Lincoln University

may apply to the Authority to vary or cancel the interim order if there are concerns about this.

Direction to mediation

[94] The parties are directed to attend mediation.

Further steps

[95] A telephone conference is to be arranged to discuss timetabling for the substantive investigation tentatively scheduled for 21 and 22 April 2015.

Costs

[96] I reserve the issue of costs until after the substantive investigation and final determination.

Helen Doyle
Member of the Employment Relations Authority